

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 68 OF 2015

MICHAEL LALA.....APPELLANT

VERSUS

TAJIRI NJADU.....RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania at Dar es Salaam)**

(Teemba, J.)

dated the 12th day of December, 2014

in

Civil Case No. 200 of 2011

RULING OF THE COURT

28th August & 10th September, 2018

KWARIKO, J.A.:

The appellant filed this appeal against the decision and decree of the High Court of Tanzania at Dar es Salaam in Civil Case No. 200 of 2011 dated 12/12/2014.

When the appeal was called on for hearing on 28/8/2018 the appellant appeared in person unrepresented though he informed this Court that his advocate was indisposed that day. On the other hand Mr. Simon Gabriel Mnyele learned advocate appeared for the respondent. The

appellant informed the Court that he was not ready for the hearing for the reason that his advocate was absent. Mr. Mnyele complained that the appellant's advocate was duly served to appear that day, but he decided to abandon his client. However, Mr. Mnyele implored the Court to exercise its discretion under Rule 112 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and adjourn the hearing of the appeal.

On its part this Court did not find any justification to adjourn the hearing of the appeal. This is because the appellant's advocate was duly served on 17/7/2018 but defaulted appearance without assigning any reason. Also, the Court had wanted to satisfy itself on a legal issue concerning the appeal, which if positively considered might render the appeal incompetent; hence we found it impracticable to adjourn something that might end up being ruled incompetent.

However, before the hearing of the appeal commenced and before the Court prompted the parties on the legal issue, Mr. Mnyele rose and prayed to address on some legal issues, which coincidentally, concurred with what the Court had found earlier. The appellant did not object to the prayer. The Court granted that prayer.

Mr. Mnyele submitted that the impugned judgment was given on 12/12/2014 while the appellant filed a notice of appeal against that decision on the same day. The appellant also filed a letter requesting for a copy of proceedings on the same date but no copy was served to the respondent as required under Rule 90 (2) of the Rules. He contended that, failure to serve the said copy to the respondent rendered the certificate of delay issued to the appellant on 22/4/2015 invalid.

It was Mr. Mnyele's further contention that the appellant was supposed to file his appeal within sixty (60) days from the date the notice of appeal was filed. However, this appeal was filed on 15/6/2015 thus being out of time for 120 days. He made reference to the case of **D.P. VALAMBIA v. TRANSPORT EQUIPMENT LTD** [1992] T.L.R 246 to that effect.

Consequent to the foregoing, Mr. Mnyele prayed for dismissal of the appeal with costs so as to settle the dispute once and for all, although he said the Court would in the ordinary course of events strike it out.

On his part, the appellant being a lay person said that he did not know what was going on as he had engaged an advocate to represent him. He added that, he had no comment on what had been presented.

At this point the Court is supposed to decide whether the appeal was filed out of time.

The appellant was supposed to file his appeal within 60 days from 12/12/2014 when the notice of appeal was lodged as required under Rule 90 (1) of the Rules; it provides thus;

90.-(1) Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with –

- (a) a memorandum of appeal in quintuplicate;*
- (b) the record of appeal in quintuplicate;*
- (c) security for the costs of the appeal;*

save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be

certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.

However, pursuant to the foregoing provision the appellant had filed a letter on 12/12/2014 to be supplied with copy of the proceedings and in that respect he was issued with a certificate of delay dated 22/4/2015. As rightly argued by Mr. Mnyele, the appellant did not serve a copy of the letter to the respondent, which invalidated the certificate of delay as provided under Rule 90 (2) of the Rules which says that;

(2) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent.

This Court is in full agreement with Mr. Mnyele that, failure to serve a copy of the said letter to the respondent disentitled the appellant from exclusion of time under the certificate of delay. Hence, the appeal was filed outside the period of sixty days prescribed by the law. The appellant filed the appeal after 120 days had passed. In the case of **D. P. VALAMBIA v. TRANSPORT EQUIPMENT** [1992] T.L.R 246 cited by Mr. Mnyele, this Court held *inter alia* that;

"If the respondent does not serve upon the applicant a copy of their letter in which they apply for a copy of the proceedings as required by Rule 83 (2) they are not covered by the exception in sub-rule (1). Thus if the Registrar issued them with a certificate under sub-rule (1) of Rule 83 such certificate was issued under a mistake of fact. Consequently the period available to the respondents in which to institute the appeal was sixty days."

Rule 83 (1) & (2) referred above is of the former Tanzania Court of Appeal Rules, 1979 which is similar to Rule 90 (1) & (2) of the Rules.

Also, in another case of **MKOMBOZI CENTRE FOR STREET CHILDREN & 20 OTHERS v. THE A.G**, Civil Appeal no. 30 Of 2014 (unreported) this Court facing similar situation said thus;

"Since, the letter applying for copy of the proceedings is not shown to have been copied to the other party as per the dictates of Rule 90 (2) of the Rules, the appeal was filed outside the prescribed time of sixty days. The appellant therefore cannot benefit from the certificate of delay issued by the Registrar of the High Court."

Assuming however, that the certificate of delay was valid, the appellant could still be out of time. This is because he filed his appeal on

15/6/2015 and by excluding the period between 12/12/2014 and 14/4/2015 as per the certificate of delay, he was late for two days.

Conclusively, this appeal was filed outside the prescribed period of sixty (60) days after the notice of appeal was lodged. (See also the decision of this Court in **MWANAASHA SAHEYE v. TANZANIA POSTS CORPORATION**, Civil Appeal no. 37 of 2003 at Dar es Salaam (unreported)).

In the end we accordingly strike out the appeal with costs to the respondent.

Order accordingly.


DATED at DAR ES SALAAM this 6th day of September, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL

