

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

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

CIVIL APPEAL NO. 69 OF 2017

NJAKE ENTERPRISES LIMITED.....APPELLANT

VERSUS

BLUE ROCK LIMITED.....1ST RESPONDENT
ROCK AND VENTURE COMPANY LIMITED2ND RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Arusha**

(Mwaimu, J)

dated 9th day of March, 2015

in

Land Case No. 21 of 2007

RULING OF THE COURT

27th November & 4th December, 2018

KWARIKO, J.A.:

Upon being aggrieved by the decision of the High Court (Mwaimu, J.) in Land Case No. 21 of 2007, the appellant filed this appeal on the 05th day of December, 2016. However, on the 27th of February, 2017 through the services of Crest Attorneys, the respondents lodged in Court a notice of preliminary objection on a single point of law thus;

*"That, the appeal is incompetent and bad in law
for being time barred".*

When the appeal was called on for hearing, the appellant was represented by Mr. Boniface Joseph, learned advocate, while the respondent enjoyed the services of Mr. Mpaya Kamara and Ms Neema Mtayangulwa, learned advocates.

As the rule of practice demands, the Court entertained the preliminary objection first. Mr. Kamara contended, firstly, that the appeal was filed out of time because it contravened Rule 90 (1) (2) of the Court of Appeal Rules, 2009 (the Rules). He argued that, whereas the impugned decision was given on 9/3/2015, the appellant lodged his notice of appeal on 18/3/2015. He went on to state that, under the law, the appeal ought to have been filed within sixty (60) days, that is by 18/5/2015. Though, he argued, the certificate of delay issued to exclude the days used to obtain copies of judgment, decree and proceedings by the appellant mentions 12/3/2015 as the date on which the appellant applied for those copies; the letter was not served to the respondents. Instead, he said, they were served with the appellant's letter dated 17/3/2015. For that reason Mr. Kamara argued that the appellant was not entitled to exclusion of days in

terms of Rule 90 (2) of the Rules. Hence, when the appeal was filed on 05/12/2015, it was out of time. To cement his argument, he cited the decision of this Court in **MICHAEL LALA v. TAJIRI NJADU**, Civil Appeal No. 68 of 2015 (unreported).

Secondly, Mr. Kamara argued that the certificate of delay was defective because it mentions the letter of application for the copies of impugned decision to be 12/3/2015; whereas the letter which was served to the respondents for that purpose bears the date 17/3/2015. He further contended that, the days allegedly excluded in the certificate could not add up in respect of both dates. He referred us to the case of **GODFREY NZOWA v. SELEMANI KOVA**, Civil Appeal No. 3 of 2015 (unreported) to the effect that the mentioned errors vitiated the certificate of delay. He finally urged us to strike out the appeal for being time barred.

In response to the foregoing, Mr. Joseph conceded to the anomalies pertaining to the certificate of delay. However, he was quick to argue that the error is not fatal because the certificate makes reference to the case number of the impugned decision. He argued further that, the omission is only a slip of the pen or typographical error which does not go to the root

of the case. He made reference to that effect, to the decision of this Court in **GODBLESS JONATHAN LEMA v. MUSA HAMISI MKANGA**, Civil Appeal No. 47 of 2012 (unreported).

Mr. Joseph also argued that, it was the fault of the Registrar who mentioned a different date in relation to the letter which was filed by the appellant; hence the blame ought to squarely fall upon him for failure to cross check the documents before issuing them to the parties. Thus, the parties should not be blamed for the fault they did not commit. To this end he referred us to the case of **21st CENTURY FOOD & PACKAGE LIMITED v. TANZANIA SUGAR PRODUCERS ASSOCIATION & OTHERS** [2005] T.L.R 1 which interpreted Rule 15 of the Court of Appeal Rules, 1979 (now Rule 18 of the Rules). He thus urged the Court to order amendment of the record of appeal as was decided in **LEMA's** case (supra). In the alternative Mr. Joseph argued that the respondents were obliged to lodge supplementary record of appeal to rectify the said errors in accordance with Rule 99 of the Rules.

Mr. Joseph distinguished the case of **MICHAEL LALA** (supra) in that it related to failure to serve to the respondent a copy of the letter applying

for the copy of the impugned proceedings. To wind- up, Mr. Joseph urged us to observe the overriding objective principle. This objective is enshrined in the amendment made to section 3 of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (the Act), by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, which enjoins the courts to do away with technicalities and instead should determine cases justly. That, because the error was not the appellant's making, it deserves to be allowed to amend the record of appeal in terms of Rule 111 of the Rules. He added that the appellant could not effect the amendment before filing the appeal because the defect had not been detected. Mr. Joseph concluded by praying to be exempted from paying costs in case the appeal is found incompetent.

In his rejoinder submission, Mr. Kamara submitted that, the appellant's counsel did not respond to the issue of errors in respect of the number of days excluded by the Registrar. The learned counsel submitted further that, the Registrar should not be blamed for the error, because he did not appear before the Court to explain why he wrote 12/3/2015 instead of 17/3/2015. That, in this case it was the appellant who was supposed to

inspect the documents before he filed them in Court as required under Rule 96 (5) of the Rules. Mr. Kamara stressed that the appellant's counsel has no cause to shift the blame while he had actually certified that the record of appeal was correct.

Additionally, Mr. Kamara referred the Court to the case of **KHANTIBHAI M. PATEL v. DAHYABHAI F. MISTRY** [2003] T.L.R 437 which held that, one part of a certificate of delay cannot be said to be correct and another part invalid. He distinguished the case of **GODBLESS JONATHAN LEMA** (supra) for the reason that it related to a defective decree whereas the instant case is in relation to the incorrect certificate of delay. He argued that, the case of **GODFREY NZOWA** (supra) is applicable because the same was decided much later after the case of **GODBLESS JONATHAN LEMA** (supra).

Further, Mr. Kamara contended that Rule 99 of the Rules is not applicable in this case because the respondents did not file a cross-appeal or any pleading so as to be required to file a supplementary record of appeal. Further that, the mistake can only be held to be a typing error upon a proof from the Registrar or the typist. It should not be by a word of

mouth from an advocate. Mr. Kamara responded also to the issue of the overriding objective which has been introduced to the Act. He was of the contention that, the bill which introduced the amendment to the Act was clear that the principle has no intention of undermining mandatory procedural laws. Finally, he argued that the respondents are entitled to costs because the appellant ought to have verified the documents before they filed them in Court and before the objection was filed.

Having summarized the learned advocates' contending submissions; the issue for decision is whether the preliminary objection has merit.

The Court record shows that, after the impugned decision was given on 9/3/2015, the appellant who was aggrieved by that decision lodged a notice of appeal on 18/3/2015. In terms of Rule 90 (1) of the Rules the appellant was supposed to file his appeal within sixty (60) days from that date. Rule 90 (1) provides that;

"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”.

Pursuant to the cited law, the appellant was issued with a certificate of delay excluding the days spent in awaiting for the copy of the proceedings of the High Court. However, it is not disputed that the certificate mentions 12/3/2015 as the date on which the appellant applied to be supplied with a copy of the proceedings of the High Court. This was different from 17/3/2015, the date appearing in the appellant’s letter. This letter was the one served to the respondents as required under Rule 90 (2) of the Rules. Therefore, the certificate is based on a non-existent letter, thus rendering it defective.

Mr. Joseph was emphatic that the defect was just a slip of the pen or typographical error which does not go into the root of the document. This Court agrees with Mr. Kamara that, the defect rendered the certificate of delay fatally defective. This is so because one portion of the certificate cannot be said to be correct and another incorrect. In the case of **KHANTIBHAI M. PATEL** (supra), this Court held inter alia that;

"A proper certificate under rule 83 (1) of the Rules of the Court is one issued after the preparation and delivery of a copy of the proceedings to the appellant and the certificate contained in the Record of Appeal was improper; it might have been an inadvertent error and no mischief was involved but the error rendered the certificate invalid. An error in a certificate is not a technicality which can be glossed over; it goes to the root of the document".

Rule 83 (1) of the Court of Appeal Rules, 1979 referred above is now Rule 90 (1) of the Rules. There are plethora of authorities by this Court which underscored the said position of the law; few of them are; **ANTONY NGOO & ANOTHER v. KITINDA KIMARO**, Civil Appeal No. 33 of 2013 (unreported) and **GODFREY NZOWA v. SELEMAN KOVA & ANOTHER**

(supra). The Court agrees with Mr. Kamara that, in order to determine whether or not the error was a mere slip of the pen or typographical error there should be proof from the Registrar who issued the certificate or the person who typed it. The assertion cannot just come from the advocate representing a party.

Further, in a bid to exonerate the appellant from the blame for the defect, Mr. Joseph placed responsibility to the Registrar who prepared and issued the certificate to the appellant without ensuring its correctness. We are in full agreement with Mr. Kamara that, the appellant was duty bound to inspect the documents before he filed them in court. That is why the law obliges the appellant to file a certificate of correctness of the record of appeal. This is according to Rule 96 (5) of the Rules. In the case of **ANTONY NGOO** (supra), the Court said thus;

"Had the learned counsel taken time to verify on the correctness of the certificate of delay or any other documents for that matter before incorporating them in the record of appeal, the conspicuous defects in the certificate of delay would have been attended to before certifying on the correctness of the record, in terms of Rule 96 (5) of the Rules".

Mr. Joseph also implored the Court to observe the overriding objective principle. This principle is now enshrined in the Act. It enjoins the courts to do away with legal technicalities and decide cases justly. He therefore prayed for the Court to allow the appellant to amend the record of appeal in terms of Rule 111 of the Rules. We are further in agreement with Mr. Kamara that, the said option was available to the appellant before the preliminary objection was raised by the respondents. Also, the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said thus;

"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...."

With regard to the case of **GODBLESS JONATHAN LEMA** (supra) relied upon by Mr. Joseph, the same is distinguishable from the case at hand because, in that case the defect was on the decree and not the certificate of delay.

Mr. Joseph had argued that, the respondents ought to file supplementary record of appeal after they had found that the certificate of delay had defects. He relied on Rule 99 (1) of the Rules. The Court is in all fours with Mr. Kamara that, Rule 99 (1) is applicable to the respondent where in his or her opinion; the record of appeal is defective or insufficient in respect of his or her case. That is when he or she may lodge a supplementary record of appeal. The provision says thus;

"If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his or her case, he or she may lodge in the appropriate registry eight copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal".

Having found that there was no valid certificate of delay, the appellant cannot benefit from the exclusion of time in which it was supposed to file its appeal. Since this appeal was filed on 5/12/2016, a period of 596 days after the notice of appeal was filed, thus beyond the prescribed period of sixty (60) days, the same is time barred.

Eventually, for the stated reasons, we uphold the preliminary objection and hereby strike out the appeal. The respondents shall have their costs.

Order accordingly.

DATED at **ARUSHA** this 3rd day of December, 2018


A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original




S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL