

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: LUANDA, J.A., MMILLA, J.A. And NDIKA, J.A.)**

**CIVIL APPEAL NO. 59 OF 2016**

**SALU NSULUJA ..... APPELLANT**

**VERSUS**

- 1. ATTORNEY GENERAL**
- 2. MINISTRY OF NATURAL RESOURCES ..... RESPONDENTS  
AND TOURISM**
- 3. ILETH S. MAWALLA**

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

**(Sambo, J.)**

**dated the 28<sup>th</sup> day of October, 2014**

**in**

**Civil Case No. 5 of 2013**

**-----**

**RULING OF THE COURT**

6<sup>th</sup> & 12<sup>th</sup> February, 2018

**NDIKA, J.A.:**

Salu Nsuluja, the appellant herein, lost an action that he instituted before the High Court sitting at Sumbawanga against the Attorney General, the Ministry of Natural Resources and Tourism and Ileth S. Mawalla (the first, second and third respondents respectively) for a variety of reliefs. The essence of the appellant's action was to challenge the confiscation of 85 head of cattle by the second respondent that were subsequently sold

to the third respondent. Aggrieved by the dismissal of his suit in its entirety with costs, the appellant has lodged this appeal.

At the hearing of the appeal, the Court had to deal with a preliminary objection raised by the third respondent vide a notice lodged on 29<sup>th</sup> January 2018. The objection contains three grounds as follows:

- "1. *That this appeal is incompetent before this Court as the notice of appeal is not substantially in conformity with Form D of the First Schedule hence it contravenes Rule 83 (6) of the Tanzania Court of Appeal Rules, 2009.*
2. *That this appeal is in contravention of Rule 96 (1) (c), (d), (g), (h) and (k) of the Tanzania Court of Appeal Rules, 2009 as the record of appeal does not contain any documents related to application for leave in Misc. Civil Application No. 1 of 2015.*
3. *That this appeal is hopelessly time-barred as the certificate of delay dated 22<sup>nd</sup> December 2015 was improperly procured and/or is defective."*

Before us, Mr. Kasaizi Andrew Kasaizi, learned counsel, appeared for the appellant; while Mr. Prosper Rwegerera, assisted by Ms Andikaro Msabila, learned Principal State Attorneys, represented the first and second respondents; and Mr. Mathias Budodi, learned advocate, appeared for the third respondent.

In his submissions in support of the preliminary objection, Mr. Budodi canvassed the second and third points of objection having abandoned the first point. On the second point, he argued, in effect, that the appeal was incompetent for contravening Rule 96 (1) (g), (h) and (k) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), which prescribes the contents of the record of appeal as follows:

*"96.-(1) For the purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3), contain copies of the following documents-*

*(a) – (f) [Omitted]*

*(g) the judgment or ruling;*

*(h) the decree or order;*

*(i) – (j) [Omitted]*

*(k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant,*

*save that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any of their parts that are not relevant to the matters in controversy on the appeal."*

Relying on the Court's decision in **Kasanzu Lusulula (Administrator of the Estate of the late Lusulula Hubigi) v. Lugito Bulayi**, Civil Appeal No. 26 of 2015 (unreported), Mr. Budodi submitted that it was settled that a record of appeal that violates Rule 96 (1) of the Rules by omitting any of the prescribed documents is defective and that an appeal lodged by a defective record is itself incompetent. As to what was amiss with the appellant's record of appeal, Mr. Budodi contended that the record omitted all documents in respect of an application for leave that the appellant instituted before the High Court (i.e., Miscellaneous Civil Application No. 1 of 2015) in connection with the suit now the subject of this appeal. He enumerated the missing documents as the chambers summons and its accompanying affidavit, counter affidavit, ruling and drawn order. That ailment, he contended, rendered the record incomplete and, accordingly, the appeal was incompetent and liable to be struck out.

On the third and final point of objection, Mr. Budodi argued that the appeal is time-barred and, therefore, liable to be struck out. He reasoned that the appellant, having duly lodged his notice of appeal on 6<sup>th</sup> November 2014, was not entitled to rely upon the exemption of time as certified by the Registrar under Rule 90 (1) of the Rules because he did not satisfy the requirements of Rule 90 (1) and (2) of the Rules. He explained that

although the appellant duly requested for a copy of proceedings from the High Court vide letter dated 28<sup>th</sup> October 2014 (at page 169 of the record of appeal), the said letter was not copied and served upon the respondents contrary to the requirement under Rule 90 (2) of the Rules. It was, therefore, his view that in the circumstances the appellant was not entitled to be issued with a certificate of delay by the Registrar and that the purported certificate of delay dated 22<sup>nd</sup> December, 2015 (at page 170 of the record) was invalid as it was improperly procured and issued. In the end of it all, Mr. Budodi contended, the appeal, lodged by the appellant on 22<sup>nd</sup> December, 2015 to challenge the High Court's decision dated 28<sup>th</sup> October, 2014, ought to have been lodged within sixty days of the lodgement of the notice of appeal in terms of Rule 90 (1) of the Rules. On that basis, he prayed that the appeal be struck out with costs for being time-barred.

Mr. Rwegerera supported the third respondent's view on the two points of objection. In addition, he invited the Court to consider its decision in **African Barrick Gold Mine PLC v. Commissioner General (TRA)**, Civil Appeal No. 77 of 2016 (unreported) on the position that an omission from the record of appeal of any core or primary documents offends the

mandatory provisions of Rule 96 (1) of the Rules rendering the appeal concerned incompetent.

Replying, Mr. Kasaizi conceded that the record of appeal omitted the documents in respect of Miscellaneous Civil Application No. 1 of 2015. Nonetheless, he was of the view that the said documents were not necessary to the determination of the matters in controversy on the appeal. He attempted to distinguish the decisions in **Kasanzu Lusalula** (supra) and **African Barrick** (supra) from the instant matter on the contention that the two cases concerned the omission of core or necessary documents. As regards the third point of objection, the learned Advocate argued that the appeal was lodged in time on the strength of a valid certificate of delay. He claimed that the written request to the High Court for a copy of proceedings complied with Rule 90 (1) and (2) of the Rules as it was made on 28<sup>th</sup> October 2018 within thirty days of the date of the decision and that it was actually served upon the respondents. When he was pressed by the Court to show if the copy of the said letter at page 169 of the record of appeal indicated that it was copied and served on the respondents as required, he conceded that, rather unfortunately, it did not indicate that fact.

In a brief rejoinder, Mr. Budodi argued that the appellant had no discretion to pick and choose from the documents in respect of the suit the subject of this appeal. All documents, he insisted, ought to have been included in the record. On the certificate of delay, he maintained that it was invalid because there was no proof that the written request for a copy of proceedings was copied and served upon the respondents.

Having dispassionately considered the learned rival submissions on the preliminary objection, we think, for the reasons that we shall assign, that this matter can be conveniently disposed of upon the determination of the third point of preliminary objection.

The institution of civil appeals to this Court is governed by Rule 90 (1) and (2) of the Rules, which provides as follows:

*"(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***

*(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.*

(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.*** “[Emphasis added]

Briefly, the provisions of sub-rule (1) above mandatorily require a civil appeal to be instituted by lodging a record of appeal as well as a memorandum of appeal within sixty days of filing of the notice of appeal. That requirement is subject to the proviso for exemption of time requisite for seeking and obtaining from the High Court a copy of the proceedings in that Court as may be certified by the Registrar where an application for such copy is made within thirty days of the delivery of the decision sought to be challenged. Furthermore, the entitlement to exemption is further conditioned under sub-rule (2) of Rule 90 above that the application for the copy of proceedings must be in writing and that a copy of it must have been served on the respondent.



In **D.P. Valambia v. Transport Equipment Ltd** [1992] TLR 246, this Court, citing Rule 83 (2) of the Tanzania Court of Appeal Rules, 1979 ("the Old Rules") which is similar to the current Rule 90 (2) of the Rules, held, at page 256, that:

*"Since also on my finding, the **respondents did not send to the applicant a copy of their letter in which they for a copy of the proceedings, as required by Rule 83 (1)**, they are not covered by the exception in sub-rule (1) and that therefore **the Registrar issued them with a certificate of delay under sub-rule (1) while labouring under a mistake of fact**. Consequently, the period available to the respondents in which to institute the appeal was sixty days."* [Emphasis added]

We have made bold the text above to emphasise the position that failure to copy and serve upon the respondent the written request for a copy of proceedings disentitles the appellant from relying upon the exemption under Rule 90 (1) and that any certificate of delay purportedly issued to grant an exemption in the circumstances would be invalid. Consequently, the period available to the respondents in which to institute the appeal would remain sixty days. See also: **Institute of Development Management, Mzumbe v. David Mwakikunga** [1999] TLR 97; **Minister for Labour and Youth Development and Another v.**

**Gaspar Swai and 67 Others** [2003] TLR 239; and **Simon Lanya v. The Permanent Secretary, Ministry of Public Safety and Security and 3 Others**, Civil Appeal No. 40 of 2010 (unreported).

In applying the above position of the law to the instant matter, we, at first, examined the appellant's written request for a copy of proceedings (located at page 169 of the record of appeal). As rightly submitted by Mr. Budodi, it is evident that although the appellant duly applied for a copy of the proceedings from the High Court on 28<sup>th</sup> October 2014, which was the same day the impugned judgment was delivered, the said letter contains no proof that it was copied and served on the respondents. It is significant that Mr. Kasaizi conceded that much after being probed by the Court. By failing to copy and serve the letter on the respondents, the appellant was plainly non-compliant with requirement of sub-rule (2) of Rule 90 of the Rules, meaning that he was not entitled to rely upon the exemption under sub-rule (1). It follows therefore that the purported certificate of delay he sought to rely upon was mistakenly handed out by the Registrar and that it was invalid. That being the position, the appellant ought to have instituted his appeal within sixty days from 6<sup>th</sup> November 2014 when he lodged his notice of appeal in terms of Rule 90 (1) of the Rules. Since the present appeal was lodged on 22<sup>nd</sup> December 2015, well beyond the sixty

days' limitation period, we are constrained to agree with Mr. Budodi that the appeal is time-barred.

In view of the foregoing, we sustain the preliminary objection on the third point. As this outcome is sufficient to dispose of this matter, we find no need to deal with the second point of preliminary objection. Accordingly, we strike out the appeal with costs for being time-barred.

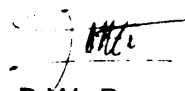
**DATED** at **MBEYA** this 10<sup>th</sup> day of February, 2018.

B.M. LUANDA  
**JUSTICE OF APPEAL**

B.M. MMILLA  
**JUSTICE OF APPEAL**

G.A.M. NDIKA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original



P.W. Bampikya  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**