

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MMILLA, J.A., MZIRAY, J.A., And MWANGESI, J.A.)**

**CIVIL APPEAL NO. 136 OF 2016**

**LOGOLIE LENGAISA ..... APPELLANT**

**VERSUS**

**PHILIPO LEVOOS ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania**

**at Arusha)**

**(Mwaimu, J.)**

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

**in**

**Land Appeal No. 44 of 2011**

**.....**

**RULING OF THE COURT**

**9<sup>th</sup> & 11<sup>th</sup> October, 2018**

**MWANGESI, J.A.:**

The appellant in this appeal was dissatisfied by the decision of the District Land and Housing Tribunal for the Region of Manyara at Babati, in Land Application No. 130 of 2006, which held that he had trespassed onto the farm of the respondent situated at Makiba village. His attempt to challenge the said decision in the High Court of Tanzania at Arusha, was also not successful. Still undaunted, he preferred this second appeal to the Court, premising his grievances on seven grounds namely:

- 1. That the High Court of Tanzania (Land Division) erred in law when it decided that, the mediation is not one of the procedure envisaged by law to be followed before the trial of a land matter before the district land and housing tribunal.*
- 2. That the High Court of Tanzania (Land Division) erred in law when it decided that, the plea of non est factum holds no water, hence could not operate in favour of the late Lorinyu Kisiri in the circumstances of this case.*
- 3. That the High Court of Tanzania (Land Division) erred in law when it decided that, the terms of the sale agreement which was not tendered and received by the trial tribunal, were known to the late Lorinyu Kisiri.*
- 4. That the High Court of Tanzania (Land Division) erred in law when it used the terms of the oral sale agreement which were not tendered and received by the trial tribunal to decide that, the land in dispute belonged to the respondent*
- 5. That the High Court of Tanzania (Land Division) erred in law when it decided that, the disposition of the disputed land in this appeal between the late Kisiri and the respondent was valid when the said disposition was not approved by the Natural Resources Committee of Arumeru District Council in 1992.*

*6. That the High Court of Tanzania (Land Division) erred in law when it raised suo motu the issue of long possession of the piece of land disputed in this appeal by the respondent, and decided it in favour of the respondent without giving the appellant the opportunity to be heard in this legal point.*

*7. That the High Court of Tanzania (Land Division) erred in law when it decided that the piece of land disputed in this appeal belonged to the respondent due to his long possession of the same, when the piece of land disputed in this appeal, was redeemed by the appellant in 2005.*

In compliance with the requirement under Rule 106 (1) and (8) of the Court of Appeal Rules, 2009 **(the Rules)**, the appellant and respondent did lodge their respective written submissions in support and opposition of the appeal respectively. Additionally, on the 3<sup>rd</sup> day of October, 2018, the respondent lodged a preliminary objection bearing the following wording:

*"The appeal is incompetent for being time barred for contravening the provisions of Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009."*

On the date when the appeal was called on for hearing, Dr. Ronilick Eli Kasambala Mchami, entered appearance to represent the appellant whereas, the

respondent had the services of Mr. Emmanuel Kinabo, also learned counsel. Complying with the common practice of the Court, we had to dispose of the preliminary objection first, before we could embark on the appeal. In that regard, we invited the learned counsel to address us on the preliminary objection.

In support of the preliminary objection, Mr. Kinabo, argued that the preliminary objection which has been raised, is founded on the defect on the certificate of delay, which was issued by the Deputy Registrar found at page 168 of the record of appeal. According to the certificate of delay issued by the Deputy Registrar on the 14<sup>th</sup> day of March, 2016, the learned counsel went on to argue, there were 370 days which had to be exempted in computing the limitation period, commencing from the 4<sup>th</sup> day of March, 2014, to the 14<sup>th</sup> March, 2016, when the proceedings, judgment, decree and other documents necessary for appeal purposes, were supplied to the appellant.

The learned counsel submitted further that, however, when the 370 days are counted from the 4<sup>th</sup> day of March, 2014, they end up on the 10<sup>th</sup> day of May, 2015 and thereby, leaving the days from the 11<sup>th</sup> day of March, 2015 to the 14<sup>th</sup> day of March, 2016, with no explanation. Under the circumstances, Mr. Kinabo was of the view that, the alleged certificate of delay was not speaking the truth and hence, defective.

Placing reliance on the decisions of the Court in **Exim Bank (Tanzania) Limited Vs Pendaël Joel Mollel**, Civil Appeal No. 116 of 2017 and **Godfrey Nzowa**

**Vs Selemani Kova**, Civil Appeal No. 3 of 2015 (both unreported), the learned counsel submitted that, a defective certificate is invalid and as a result, leaves the appeal to be with no certificate of delay. Under the circumstances, the computation of the limitation period has to commence from the date when the judgment intended to be impugned was delivered that is, on the 28<sup>th</sup> day of February, 2014. And once that is done, the limitation period for appealing in the matter at hand expired on the 29<sup>th</sup> April, 2014. And the fact that, this appeal was lodged on the 16<sup>th</sup> day of May, 2016, it was hopelessly time barred. He therefore, impressed us to strike it out with costs.

When prompted by the Court as to what would have been the position if the certificate of delay were to be valid, Mr. Kinabo submitted that, still the appeal would be time barred. This is so from the fact that, the appellant was supplied with the proceedings, judgment, decree and other documents necessary for lodgment of the appeal, on the 14<sup>th</sup> day of March, 2016. However, the appeal was lodged on the 16<sup>th</sup> day of May, 2016, which was after the elapse of about 62 days and hence, beyond the 60 days fixed by the law. To that end, there was no way in which the appeal could be salvaged, concluded Mr. Kinabo. He therefore, reiterated his prayer for its being struck out with costs.

In rebuttal to what was submitted by his learned friend, Dr. Mchami was of the firm view that, the appeal was timeously lodged. Responding to the defect on the certificate of delay, he argued that the same was occasioned by mere miscalculation by

the Deputy Registrar, in arriving at the number of days which had to be exempted. Relying on the decision in **Exim Bank (Tanzania) Limited Vs Pendaël Joel Mollel** (supra), at page 11 of the judgment, he argued that the anomaly was not fatal. He requested us to follow suit in what was stated in the said case, and reject the preliminary objection on that aspect.

With regard the issue raised by the Court that, what would have been the position if the certificate of delay was valid, the learned counsel was of the view that, the appeal would still be timeously lodged. This is from the fact that, the 60 days for the appellant to lodge his appeal, elapsed on the 14<sup>th</sup> day of March, 2016, which was Saturday and hence, the court was closed. As a result, the appellant had to wait for the subsequent working day, which fell on the 16<sup>th</sup> day of March, 2016, the date in which the appeal was lodged. In so asserting, Dr. Mchami sought refuge to the provisions of Rule 8 of the Court of Appeal Rules, 2009, which excludes weekends and public holidays in computing limitation period. The learned counsel concluded his submission by imploring us to dismiss the preliminary objection with costs.

The brief rejoinder by Mr. Kinabo was to the effect that, the statement by the Court at page 11 of the case of **Exim Bank** (supra) relied upon by his learned friend was not the decision of the Court but rather, a mere orbiter. And, as regards the limitation period of 60 days if the certificate were to be valid, he argued that the 60 days ended on the 13<sup>th</sup> May, 2016, which was a working day.

The thrust on us in the light of what has been submitted by the learned counsel on behalf of either side above, is whether the appeal before us is time barred. On the first limb of the time bar in the appeal as submitted by the learned counsel for the respondent, is founded on the fact that, the appellant cannot avail himself with the exemption provided by the proviso to Rule 90 (1) of **the Rules**, for the reason that, the certificate purporting to do so, is defective. Such fact was conceded by the learned counsel for the appellant that, there was miscalculation by the Deputy Registrar, on the number of days which ought to be exempted in computing the limitation period. He however, argued that the anomaly was not fatal. The question therefore, is whether the contention by the learned counsel for the appellant is merited.

In view of the litany of authorities of this Court in regard to the issue, the answer is in the negative. See: **Onaukiro Anandumi Ulomi Vs Standard Oil Company and Three Others**, Civil Appeal N. 140 of 2016, **Yazidi Kassim T/A Yazidi Auto Electric Repairs Vs the Attorney General**, Civil Appeal No. 215 of 2016 (all unreported), **Exim Bank (Tanzania) Limited Vs Pendaël Joel Mollel** (supra), and **Kandibhai M. Patel Vs Dahyabhai F. Misrry** [2003] TLR 437.

It was the holding of the Court in **Kandibhai Patel's** case (supra), a decision which was followed in **Exim Bank's** case (supra) that:

*"The very nature of anything termed a certificate, requires that it be free from error and should an error crop into it, the certificate is*

*vitiated. It cannot be used for any purpose because it is no better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over but it goes to the very root of the document. You cannot sever the erroneous part from it and expect the remaining part to be a perfect certificate; you can only amend it or replace it altogether as by law provided."*

In the same vein, the fact that the certificate under discussion contains wrong figures, it is taken to be a fake document, which is invalid and hence, cannot be used for the intended purpose. Either, we find the contention by the learned counsel for the appellant that, we have to follow suit to what was said by the Court at page 11 of the judgment in **Exim Bank's** case (supra), to be without founded basis. To be in a better position to appreciate the contention of the learned counsel, we reproduce part of the statement by Court *verbatim* that:

*"While we agree that the miscalculations of the 757 days may not necessarily make the certificate invalid, in the instant appeal, having gone through the record carefully, we have found that ..."*

We on our part, are in agreement with what was submitted by the learned counsel for the respondent that, what is contained in the statement quoted above, was mere observation in orbiter, which was not the decision of the Court and hence, cannot



in any way persuade or bind us to follow. We are settled in our mind that, the certificate which was issued by the Deputy Registrar on the 15<sup>th</sup> day of May, 2016, was defective because the figure contained therein was ambiguous and as a result, it did not serve the purpose of which, it was intended. It is thus disregarded. And once that is done, the appeal remains to be time barred because it was lodged a long time after the expiration of 60 days fixed by the law, from when the judgment was delivered. It is therefore, incompetently before the Court.

Even though the foregoing finding sufficed to dispose of the appeal, for the sake of completeness, we will as well consider the second limb of the time bar on the appeal. It was averred by Mr. Kinabo that, even if the certificate of delay could have been valid, still the appeal could be time barred, because from when the certificate of delay was issued, to when the appeal was lodged, it was beyond the 60 days fixed by the law.

Resisting the contention by his learned friend, Dr. Mchami has argued that, the sixty day ended on the 14<sup>th</sup> day of June, 2016, which was a Saturday and hence the court was closed. He had therefore to wait until on the 16<sup>th</sup> day of March, 2016, which was the following working day as directed by the provisions of Rule 8 of **the Rules**.

To begin with, we are in agreement with the learned counsel for the appellant that, in terms of the stipulation under Rule 8 (d) of **the Rules**, where the last day in

computing the limitation period expires on a day when the Court is closed, such day or days will be excluded. In its own words the provision reads thus:

*"8. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions:*

*(a) N/A*

*(b) N/A*

*(c) N/A*

*(d) Where any particular number of days is prescribed by these Rules, or is fixed by an order of the Court, in computing the same, the day from which the said period is to be reckoned shall be excluded, and, if the last day expires on a day when the Court is closed, that day and any succeeding days on which the Court remains closed shall also be excluded."*

The question that crops from the foregoing position, is whether or not the last day in computing the limitation period for the appeal at hand fell on a non-working day. According to the certificate of delay issued in the appeal at hand, the copies of proceeding, judgment, decree and other documents required for the lodgment of the appeal, were supplied to the appellant on the 14<sup>th</sup> day of March, 2016. The computation of the limitation therefore, started from the 15<sup>th</sup> March, 2016. When the

days are counted from then, the sixtieth day falls on the 13<sup>th</sup> day of May, 2016, which was a Friday. In that regard, the contention by the learned counsel for the appellant that, it was a non-working day, was not correct. The same thus defeats his argument that, he was compelled to lodge the appeal on the 16<sup>th</sup> May, 2016, which was the subsequent working day.

That said, we hold that, the appeal by the appellant is time barred. We accordingly struck out the appeal for incompetence, and award the respondent his costs.

Order accordingly.

**DATED at ARUSHA** this 11<sup>th</sup> day of October, 2018.

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

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

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

  
B. A. Mpepo  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**