

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)**

**CIVIL APPEAL NO. 56 OF 2015**

**ALISEO PETER NDITI ----- APPELLANT**

**VERSUS**

**KCB BANK TANZANIA LTD ----- RESPONDENT**

**(Appeal from the ruling of the High court of Tanzania at Dar es Salaam  
Commercial Division)**

**(Nchimbi, J.)**

**Dated the 7<sup>th</sup> day of January, 2015**

**In**

**Commercial Case No. 41 of 2015**

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**RULING OF THE COURT**

**9<sup>th</sup> Feb & 27<sup>th</sup> Mar. 2018**

**MWANGESI, J.A.:**

The appellant herein was the defendant in Commercial Case No. 41 of 2013 wherein, a summary suit in terms of Order XXXV of the Civil Procedure Code Act, Cap 33 R.E 2002 (**the Civil Code**), was preferred against him by the respondent. On his part, he challenged the said suit by way of a preliminary objection on the ground that, the suit was sub-judice. The preliminary objection was however overruled and dismissed, in a ruling that was handed down on the 7<sup>th</sup> day of January, 2015, which is the subject of this appeal. The appellant was aggrieved by the ruling of the

Court and preferred this appeal, which is constituted of four grounds. His appeal has however, been greeted with a preliminary objection, which was lodged on the 22<sup>nd</sup> day of January, 2018, premised on the grounds that:

- (a) That the appeal has been filed out of the sixty days specified under Rule 90 (1) and (2) of the Court of Appeal Rules, 2009, Government Notice No. 368 of 2009, because the letter by the applicant to the District Registrar applying for copies of ruling, order and proceedings was not served unto the respondent as required by law.*
- (b) That the instant appeal is barred by section 5 (1) (d) of the Appellate Jurisdiction Act, Cap 141 RE 2002, because the ruling sought to be appealed against is an interlocutory decision/order.*

When the appeal was called on for hearing on the 9<sup>th</sup> February, 2018, the appellant did enter appearance in person legally unrepresented and hence, fended for himself, whereas, the respondent had the services of Mr. Elisa Msuya learned counsel. As it is the usual practice of the Court, the preliminary objection had to be tackled first before we could indulge in dealing with the main application.

In amplification of the preliminary objection, the learned counsel for the respondent sought leave of the Court to adopt the contents of the written submission which he had earlier on filed on the 25<sup>th</sup> January, 2018, under Rule 4 (2) of the Court of Appeal Rules, 2009 (the Rules), and had nothing to add.

In response to the preliminary objection that has been raised, the applicant contended that the preliminary objection is unfounded for the reason that, the respondent was served with a copy of the letter which he wrote to the District Registrar, applying to be supplied with certified copies of the ruling and proceedings for appeal purposes. He argued further that, the service was made through one Mfinanga. Even when prompted by the Court that, the letter dated the 08<sup>th</sup> January, 2015, which he wrote to the District Registrar applying for the copies of certified ruling and proceedings of the case, he did not indicate that it was to be copied to the respondent, the appellant still maintained that, such omission notwithstanding, he was certain that, service of the letter to the respondent was made, even though he had no evidence to corroborate his contention.

What stands for our deliberation is whether or not the appeal by the appellant is properly placed before the Court. The provision of Rule 90 (1) and (2) of the Rules under which the preliminary objection by the respondent has been pegged, bears the following wording that is:

*(1) "Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within thirty days of the date of 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 the 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 was served on the respondent.***

[Emphasis supplied]

As it can apparently be noted from the wording in the above quoted provision of law, the bolded words have imposed a mandatory obligation on the part of the appellant with the use of the word "*shall*" that, he has to ensure that, the application which he makes to the District Registrar applying for copies of judgment/ruling, decree/order and the proceedings in preparation for lodgment of an appeal, the same has to be served to the respondent. Or-else, the appellant is expected to lodge his appeal within a period of sixty days from the date of delivery of the decision sought to be impugned.

In the instant matter, the notice of appeal by the appellant to challenge the decision of the High Court was lodged on the 9<sup>th</sup> January, 2015, while the appeal was lodged on the 5<sup>th</sup> May 2015 that is, after the elapse of about 116 days. This period was by very far beyond the period of sixty days stipulated under Rule 90 (1) of **the Rules**. The appellant could only be spared if he complied with the requirement provided under Rule 90 (2) of **the Rules**, of having served the respondent with his letter, which he

wrote to the Deputy Registrar applying for copies of the requisite documents

Even though the appellant in the current appeal claimed to have complied with the requirement under Rule 90 (2), he failed to tender any evidence to establish so. What is obvious however, is the fact that in the letter which the appellant wrote to the Deputy Registrar asking for certified copies of the judgment and proceedings, he never indicated that it was to be copied to the respondent. In the circumstances, we are left to understand and believe that, the letter was not served as contended by the respondent. As such, the appellant cannot avail himself with the protection articulated under sub-rule (2) of Rule 90 of the Rules, and computation of limitation in lodging the appeal has to commence from the date when the ruling was delivered. The same makes the appeal to have been lodged beyond the period prescribed by the law by about fifty - six days.

A similar scenario did arise in the case of **Mrs. Kamiz Abdullah M. D. Kermal Versus the Registrar of Buildings and Miss Hawa Bayona** [1998] TLR 199, the holding of the Court was that:

*"An appeal must be instituted within sixty days of the date when the notice of appeal was lodged. The time required for the preparation and delivery of a copy of proceedings in the High Court shall be excluded in computing the time within which an appeal to the Court of Appeal is to be instituted if an application for that copy has been made within thirty days of the decision of the appeal, such time has been certified by the Registrar of the High Court as having been required for the preparation and delivery of the copy of proceedings and the application for that copy was in writing and a copy thereof was sent to the other party."*

Similar stance was taken in the unreported cases of **David Mwakikunga Versus I.D.M Mzumbe**, Civil Reference No. 3 of 1998 and **Grace Frank Ngowi Vs Doctor Frank Israel Ngowi**, Civil Appeal No. 9 of 1984. In the same vein, we find merit in the first ground of the preliminary objection taken by the respondent and we hereby sustain it. And, so far as the first ground of the preliminary objection has sufficed to

dispose of the appeal, we find the need to dwell on the second ground of the preliminary objection unnecessary. The appeal is thus found to be time barred and we hereby strike it out. We order the respondent to have its costs.

Order accordingly.

**DATED** at **DAR ES SALAAM** this 21<sup>st</sup> day of March, 2018.

K. M. MUSSA  
**JUSTICE OF APPEAL**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

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

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

  
E.Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**