IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 105 OF 2015

OMARY SHABANI NYAMBU.....APPELLANT

VERSUS

1. PERMANENT SECRETARY MINISTRY OF DEFENCE
2. CHIEF OF THE DEFENCE FORCE } **.....RESPONDEFNTS**
3. HONOURABLE ATTORNEY GENERAL

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

(Lila, Mziray, Kaduri, JJJ.)

dated the 6th day of May, 2015

in

Misc. Civil Case No. 15 of 2013

RULING OF THE COURT

16th & 23rd February, 2018

MKUYE, J.A:

In the High Court, the appellant had lodged a petition titled Miscellaneous Civil Cause No. 15 of 2013 contending that his basic human rights were violated. He moved the Court under the provisions of Articled 13(1), (4) (5), (6) (a), 18 (c) 22(1) and (2) of the Constitution of the United Republic of Tanzania, 1977 together with the Basic Rights and Duties Enforcement Act, Cap 3, R.E 2002 for orders that:

1) That the Hon Court be pleased to declare unconstitutional; the acts of the Respondents hereby by denying access to information relating to the reason for termination of employment of the applicant with the Tanzania Peoples Defence Force (TPDF).
2) That the Honourable Court be please to declare Unconstitutional the acts if the 1st and 3rd respondents by denying the applicant herein the right to access justice.
3) That the costs of this application be provided for by the Respondents.

The petition was greeted with a preliminary objection the notice of which was filed by the respondents to the effect that:

1) The petition before this Honourable Court is bad in law for contravening section 6(e) of the Basic Right and Duties Enforcement, Act, Cap 3 R.E. 2002.
2) That the petition is bad in law for contravening section 2 of the Basic Rights and Duties Enforcement Act.

The Preliminary Objection was argued by way of written submissions as per the order scheduled by the High Court on and it delivered its her ruling by (Hon. Mziray, J.) on 6/5/2015 whereby the petition was struck out with costs on major reason that the appellant did not first exhaust other remedies before filing the petition.

Aggrieved, the appellant has preferred this appeal against the said Ruling while fronting 3 main grounds to the effect that:

1) That the trial court erred in law by striking out the petition on grounds that the appellant did not exhaust other available remedies.
2) That the trial court erred in law and fact by not exercising its powers under the Basic Rights and Duties Enforcement Act, Cap 3 R.E. 2002.
3) That the trial Court erred in law and fact by failure to adequately analyze the contents of the Affidavit and the Petition when making a decision.

The appeal was also greeted by a point of preliminary objection on the ground that the provision of Rule 106 (1) of the Tanzania Court of Appeal were not complied with by the appellant.

When the appeal was called on for hearing Mr. Mohamed Tibenyendera, learned advocate appeared for the appellant; whereas all the respondents enjoyed the services of Mr. Mark Mlwambo assisted by Ms. Sylvia Matiku, both Principal State Attorneys.

From the outset Mr. Mlwambo rose to inform the Court of their intention to abandon the preliminary objection they had filed on 12/2/2012 to enable the appeal to proceed on its merits. We granted leave and marked the same withdrawn.

Before commencing hearing of the appeal the Court wished to satisfy itself on two issues, one, whether appeal was properly before the Court because though the record of appeal shows the matter was before a panel of three judges the Ruling drawn order thereof were signed by a single judge. On the 2nd issue the Court wished to satisfy itself on the propriety of the Certificate of delay.

Mr. Tibanyendera submitted that thought initially they similar problem the Ruling and drawn order thereof were proper as per Rule (2) of the Basic

Rights and Duties Enforcement (Practice and Procedure Rules, 2014 (GN No. 304 of 2014). However, following a dialogue with the Court and upon reflection he conceded to the point raised by the Court that the Ruling was not competent.

As regards the certificate of delay, he readily conceded that it was not valid it referred to a period between two dates i.e 2/6/2015 when the appellant lodge a notice of appeal; and 3/6/2015 when the appellant applied for copies of proceedings and a date of unknown month of 2015 when he was supplied with papers which is to be excluded for being required for preparation and delivery of papers applied for. In that regard, Mr. Tibanyendera argued that the certificate does not quality to exclude the time and hence it renders the appeal incompetent. He therefore prayed to the Court to strike out the appeal.

On his part, Mr. Mlwambo readily conceded what Mr. Tibanyendera submitted and argued the Court to strike out the appeal. He did not press for costs.

We propose to begin with the second issue of the certificate of delay since if has the effect of disposing off the matter without necessarily dealing with the first issued.

The issue relating to issuance of a certificate of delay is governed by Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It empowers the Registrar of the High Court when computing the time of sixty days within which the appeal is to be instituted, to excluded the days required for preparation and delivery of copies of proceedings which are necessary for the preparation of the intended appeal provided the appellant applied for such copies in writing within thirty days and served such application on the respondent. The said Rule stipulates:

> *" 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 within*
>
> *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 delivered of that copy to the appellant.

(2) An appellant shall not be entitled to rely in 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]

In this case it was submitted that the certificate of delay was problematic as it did not indicate the exactly time it intended to be excluded because there are shown two dates from when time is to be excluded, the month of the day when copies were delivered is not shown. For clarity we reproduced part of the certificate at issue:

" *(Certificate of Delay) under Rule 90(1) of the Court of Appeal Rules) This (sic) to certify that, a period from 2nd day of June, 2015 when the Appellate lodge (sic) Notice of Appeal and 3rd day of June, 2015 when the appellant applied for the copies of proceedings, Ruling and Drawn order to* ***23rd day of 2015 when the Appellant were supplied with the papers*** *is to be exclude for such days were required for the preparation and delivery of he said requisite papers to the appellant.*

Given under my hand and the seal of the Court this 07th day of August 2015."

We agree with Mr. Tibenyendera who is supported by Mr. Mlwambo that the certificate of delay is problematic and invalid. We are of the firm view that it is invalid because one, it reckons the time to be excluded from two dates which are 2nd day of June, 2015 when appellant lodged a notice of appeal; and 3rd day of June, 2015 when the appellant applied for copies of proceedings. However, the law requires only the date when the appellant applied for copies of proceeding. Therefore inclusion of the date when notice of appeal was lodged was not proper as it is not a requirement of the law. **Two**, the month on which the appellant was supplied with the copies of proceedings was 2015.

It is only shown 23rd day of (?) not shown. This makes it difficult to known the exactly period when the appellant was supplied with such proceedings and enable the Court establish if the appeal was filed within time or not.

In the case of **National Security Fund V New Kilimanjaro Bazaar Limited (2005) TLR 160** this court pg 166 stated:

> " *A certificate of delay under Rule 83(1) (now 90(1)) of the Court Rules is a vital document in the process of instituting an appeal. It comes into play after the*

normal period of sixth days for filing an appeal has expired. We are of the view that there must be strict compliance with the rule."

As it is, we do not know as to when exactly the appellant was supplied with the copy of proceedings he had requested on 3/6/2015.

But gain, in the case of **Kantibhai M. Patel V Dahyabhai Mistry (2003) TLR 437 at pg 443** the Court states as follows:

"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 not 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."

Having given much thought on the circumstances of this case we are satisfied that the purported certificate of delay is invalid. It does not quality to entitle the appellant to rely upon it in order to exclude the time in computing the tie within which the appeal ought to be lodged in Court by reckoning it from the date when application for copies of proceedings was made. Even if we take it that the appellant applied for copies of proceedings

on 3/6/2015 and he filed an appeal in 1/9/2015 since we do not know the month on which he was supplied with copies of proceedings we are not able to say the appeal was within time.

Given the circumstances we are of the settled view that the appeal was filed out of time. The appeal which was accompanied with an invalid certificate of delay is incompetent before the Court. Consequently we strike it out. We do not make any order as to costs since the issued was raised by the Court. We also wish to state here that we did not belabor to deal with the first issued because doing so would serve as a mere academic exercises.

DATED at **DAR ES SALAAM** this 24th day of February, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL