

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CIVIL APPEAL NO. 67/4 OF 2018

THEOBARD P. MICHAEL APPELLANT

VERSUS

PROJECT MANAGER CHICO RESPONDENT

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

(Kairo, J)

Dated the 11th day of August, 2017

in

(HC) Civil Appeal No. 8 of 2016

RULING OF THE COURT

3rd & 6th September, 2018

WAMBALI, J.A:

The appellant Theobard Michael was aggrieved by the judgment of the High Court at Bukoba in High Court Civil Appeal No. 8 of 2016 in which the present respondent Project Manager CHICO partly succeeded in the appeal. The present appeal therefore is against the judgment and decree of the High Court.

When the appeal was called on for hearing, the appellant had the service of Mr. Aaron Kabunga learned advocate while Ms. Aneth Lwiza appeared for the respondent.

This appeal did not proceed for hearing on merit as on 29/8/2018, the counsel for the respondent lodged a notice of preliminary objection challenging its competence.

The notice of preliminary objection had two points. However, at the hearing, Ms. Lwiza abandoned one of them and the remaining is to the following effect:

"1. The appeal is bad in law for want of proper Certificate of Delay as the certificate of Delay in the Record of Appeal at page 115 reflects parties (Appellant) who have never been in the Appeal at the High Court Civil Appeal No. 08/2016 which is sought to be appealed".

When we allowed the counsel for the respondent to submit on the preliminary objection, she argued that the certificate of delay which was issued by the Deputy Registrar of the High Court at Bukoba to the appellant which is part of the record of appeal at page 115, does not

reflect the reality of the position and status of the parties that were involved in Civil Appeal No. 08 of 2016.

Ms. Lwiza stated further that while the certificate of delay indicates that the present appellant was the appellant in Civil Appeal No. 8 of 2016, the reality is that it was the present respondent who was the appellant and the current appellant was the first respondent. She emphasized that, apart from the fact that she represented the appellant (present respondent) in the High Court, other documents including the judgment and decree which were issued before the certificate of delay was prepared bear testimony to her submission with respect to the position and status of the parties.

Moreover, Ms. Lwiza stated that even the contents of the certificate of delay do not reflect the reality as the current appellant who was the first respondent is described through his advocate as the "*advocate for the appellant*".

She therefore concluded that as the certificate of delay which was issued by the High Court was in respect of Civil Appeal No. 08 of 2016, it was supposed to indicate the position and status of the parties as they

appeared in the proceedings, judgment and decree that were issued by the same court.

She thus urged the Court to find that the certificate of delay is defective and therefore the appeal is incompetent. In the event, she prayed that the Court be pleased to strike out the appeal with costs. In support of her submission, she referred the Court to the decision of this Court in **Abdallah Mbaraka Nahdi v. Mansour Industries Ltd**, Civil Appeal No. 79 of 2017 (unreported).

In response to the submission of the counsel for the respondent, Mr. Kabunga argued that the preliminary objection is misconceived. He submitted that the certificate of delay in the record of appeal is proper as there is no format in the Court of Appeal Rules on how a certificate of delay should be structured and phrased.

He finally submitted that the certificate of delay cannot be issued to the respondent as the appellant is the aggrieved party. Even when he was reminded that the title of the court in the certificate of delay indicates the High Court and therefore parties could not have been referred differently, Mr. Kabunga was firm that the certificate of delay is correct as it is the appellant who applied to be supplied with the

documents and the certificate of delay after he lodged the notice of appeal.

Mr. Kabunga also distinguished the circumstances which necessitated the decision of the Court in **Abdallah Mbaraka Nahdi** (supra) which was relied by Ms. Lwiza and argued that its holding cannot apply in the present appeal. Finally, Mr. Kabunga urged the Court to find that the preliminary objection is devoid of substance and should be overruled with costs.

It is important to note that with the permission of the Court, Mr. Kabunga later presented a decision of this Court in **Omary Shabani S.Nyambu (as the administrator of estate of the late Iddi Mohamed (deceased) v. Capital Development Authority and two Others**, Civil Appeal No. 256 of 2017 to support his submission.

In the circumstances of this matter, we think, it is important to reproduce the provision of Rule 90(1) (2) and (4) of the Tanzania Court of Appeal Rules, 2009 as amended by GN 262 of 2017(The Rules):

"90 (1) subject to the provision of Rule 128, an appeal shall be instituted by lodging in the

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 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.

(3)N/A

(4) Subject to sub-rule (1) the Registrar shall strive to serve (sic) a copy of the proceedings is ready for the delivery within 90 days from the date the appellant requested for such copy and appellant shall take steps to collect a copy on being informed by the registrar to do so, or after the expiry of 90 days."

We entertain no doubt that a careful reading of the proviso to Rule 90(1) of the Rules, points to the fact that a certificate of delay is an important document and a weapon for an appellant who would like and expect to rely on the proviso to escape limitation of time in lodging the appeal within sixty days after the date when the notice of appeal was lodged.

In this regard, a certificate of delay must be free from errors and be consistent to what transpired at the High Court during the proceedings as far as the status and position of parties is concerned and the exact number of days which were taken to prepare the documents from the

date a party applied for a copy of the proceedings, judgment and decree up to the date of delivering the respective documents.

A certificate of delay therefore must be prepared by the Registrar after the delivery of the relevant documents to a party.

For the purpose of emphasis, we wish to refer to the holding of this Court in **Kantibhai .M.Patel v. Dahyabhai F.Mistry**(2003) TLR 437 which was referred in **Godfrey Nzowa v. Selemani Kova & Another**, Civil Appel No. 3 of 2015 (Unreported) where it stated 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."

It follows that, the Registrar of the High Court who prepares, certifies and signs the certificate of delay must ensure that it is ultimately issued to the party who intends to lodge an appeal as

required by Rule 90 (1) of the Rules free from errors. The certificate of delay so issued should also contain and reflect the correct information concerning the parties who were at the High Court and the exact number of days sought to be excluded in computing the limitation of time of sixty days from the date the notice of appeal was lodged. Equally important, a party who applies for a certificate of delay must ensure that the certificate which is delivered to him is free of errors with respect to the names and status of the parties, the number of the case or appeal, as the case may be, and the number of days that were involved to prepare the documents from the date he applied to the date of delivery.

Thus, a party who obtains a certificate of delay and finds that it is defective or insufficient in any manner, must approach the Registrar for correction or rectification of the errors as soon as practicable before including the said certificate in the record of appeal. Failure to ascertain the correctness and the authenticity of a certificate of delay by a party who obtains and uses it, leaves the Registrar blameless and exposes himself to the consequences that follow.

It is instructive to note that, this Court emphasized this matter in its decision in **African Marble Company LTD v. Tanzania Saruji Corporation** [1999] TLR 306 when it stated: -

"(i)N/A

(ii) *When a party interested thinks that a certificate given by the Registrar under Rule 83(1) of the Court of Appeal Rules 1979 is materially wrong, he should take the necessary legal steps to have it varied or discharged by the Court."*

It is noted that in that appeal the Court dealt with Rule 83(1) which is currently Rule 90(1) of the Rules.

In the present appeal, although we are live to the argument of Mr. Kabunga that there is so far no format of the certificate of delay which has been provided in the Rules, we think, that absence cannot lead us to conclude that designation of parties who were in the High Court on different position in the certificate of delay is proper. This is so because even the words in the body of the certificate of delay in the record of

appeal introduces the advocate who lodged the letter with the Registrar on 15th August, 2017 as advocate for the appellant. The certificate also indicates that the documents were delivered to the advocate for the appellant. The documents were delivered on 23rd February, 2018 and that is the date when the Registrar indicated that computation of time should start for the purpose of assessing the sixty days limitation period provided under Rules 90(1) of the Rules.

We therefore think that, as the certificate of delay bears the title of the High Court and the number of the appeal as (HC) Civil Appeal No.08/2016 the designation of the parties could not have been different from the position when the High Court decided the appeal.

In that certificate of delay, the current appellant who was the first respondent in the High Court is designated as the appellant, whereas the present respondent who was the appellant is designated as the respondent.

In our respectful opinion, we think that, the mix up in the designation of the parties and the description of the parties in the text of the certificate of delay was caused by the letter which was lodged with the Registrar on 15/8/2017 by the learned advocate for the appellant of

which we also drew his attention in the course of hearing his arguments. It is noted that it is in that letter that the learned advocate indicated the position of the parties differently and that is how they are reflected in the certificate of delay. This is despite the fact that the title of the letter was in respect of the judgment, decree and proceedings in (HC) Civil Appeal No. 8 of 2016. Infact, the title also indicated that the application was made for the purpose of lodging an appeal to the Court of Appeal. Interestingly too, in the body of the letter it is indicated that the party (appellant) had lodged the notice of intention to appeal. It is also indicated that the learned advocate signed but he did not indicate that he was the advocate for the appellant.

In this regard, we think, and we are increasingly of the view that the certificate of delay could not have designated the title of the parties different from how they appeared in (HC) Civil Appeal No. 08 of 2016. For by that time the present appellant had not complied with the requirement of lodging the appeal under Rule 90 (1)(a)(b)(c) of the Rules to qualify to be addressed as the appellant. He was still an intended appellant.

We take note of the fact that the appeal was lodged on 11/4/2018. Thus although Mr. Kabunga strongly submitted that the certificate of delay is not defective, we think, in view of what we have stated above, we have sufficiently demonstrated that the defects in the certificate of delay are apparent from the designation of the position of the parties and the contents. We are of the view that to rescue the situation the appellant could have applied to the Registrar for rectification of those defects before the appeal was lodged in the Court.

As to the consequences which should follow, we take note of Mr. Kabunga's argument that the defect in the certificate of delay cannot make this appeal incompetent to the extent of being struck out. We are similarly aware that in advancing his argument he placed his reliance in the decision of this Court in **Omary Shaban S. Nyambu (supra)** in which the Court made reference to the decision of the Court in **Gap oil (Tanzania) Limited v. The Tanzania Revenue Authority and 2 others**, Civil Appeal No. 9 of 2000(unreported). In that appeal the Court held that the misdescription of the parties was a minor defect which is curable under the slip rule because, the particular errors are not reflected in the text of the drawn order and the ruling.

However, we think that the application of the said holding is distinguishable with regards to the circumstance in the present appeal. **First**, in **Gap oil (Tanzania) Limited** (supra) one of the party was erroneously titled as “appellant” instead of applicant.” In the present matter it is the misdescription and exchange of the parties’ position and status different from how they appeared in the High Court. **Second**, we think that the slip rule which is envisaged under Rule 42 of the Rules relied by the Court in **Gap oil (Tanzania) Limited** (supra) cannot apply here as the document was issued by the High Court. Indeed, we have observed above that the appellant could have approached the Registrar for rectification of the error.

Third, unlike in **Gap oil (Tanzania) Limited** (supra) where the error was not reflected in the text, in the present appeal the reverse is the case as we have amply demonstrated above.

Fourth, unlike in **Gap oil (Tanzania) Limited** (supra), in the present appeal the error is in the certificate of delay which enables a party described therein to be eligible for exemption of the sixty days limitation period provided for lodging an appeal under Rule 90(1) of the

Rules. This is upon showing that he had not obtained the requisite documents to lodge the appeal within that period.

In the circumstances, we are of the opinion and indeed, we are satisfied that the defects in the certificate of delay in the record of appeal go to the root of the appeal.

On the other hand, we are also aware of the observation of this Court in **Omari Shabani S. Nyambu** (supra) at page 8 of the Ruling in which it was stated that it was not fatal when the title of the appeal was indicated as "Civil Appeal" instead of "Land Appeal". Nevertheless, we think, in view of what we have stated above, this observation is also distinguishable with the circumstances in the present appeal.

Furthermore, we wish to observe that, as stated by Mr. Kabunga there is currently no format on how the certificate of delay should be framed and prepared by the Registrar of the High Court. While we implore upon the authorities to take steps towards that end, in view of the apparent confusion which has been brought about by the preparation of different versions of certificates of delay issued by the Registrar, we think, for the time being, for the purpose of guidance, the certificate of delay should contain the following matters or information:

- (a) The title of the court (The High Court);
- (b) The name and position of the parties as they appear in the cases or appeal sought to be appealed against;
- (c) The title of the certificate (Certificate of delay) to be followed below by the words: (Made Under rule 90 (1) of the Tanzania Court of Appeal Rules, 2009)
- (d) The body of the Certificate showing
 - (i) The date of the letter when the proceedings, judgment and decree were applied for by a party;
 - (ii) The number of days which were spent to prepare and deliver the documents to a party which are to be exempted from the computation of time as required under Rule 90(1) of the Rules.
- (e) The date of delivery of the documents;
- (f) The date when the certificate is issued if different from the delivery date;
- (g) The signature of the Registrar; and

(h) The Court Seal.

We think this will help in ensuring that the certificate of delay issued to a party by the Registrar contain necessary information to conform to the requirement of Rule 90(1) & (4) of the Rules.

All in all, in view of what we have deliberated with regards to the defects in the certificate of delay in the present appeal, we are satisfied that the same is defective. We therefore sustain the preliminary objection by the respondent.

In the event, we strike out the appeal with costs for being incompetent. It is so ordered.


DATED at **BUKOKA** this 6th day of September, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL