IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

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

CIVIL APPEAL NO. 263 OF 2017

MENEJA MKUU
ZANZIBAR RESORT LIMITED.....APPELLANT

VERSUS

ALI SAID PARAMANA.....RESPONDENT

(Appeal from the judgment of the High Court of Zanzibar at Vuga)

(Sepetu, J.)

dated the 3rd day of December, 2015
in
Civil Case No. 13 of 2013

.....

RULING OF THE COURT

11th December, 2018 & 14th February, 2019

MKUYE, J.A.:

This is a first appeal emanating from the judgment and decree of the High Court of Zanzibar at Vuga (Sepetu, J.) dated 3rd day of December, 2015 in Civil Case No. 13 of 2013.

The dispute between the parties was based on the claim that Meneja Mkuu Zanzibar Resort Ltd (appellant's) employees

defamed Al. Said Paramana (the respondent) in that he had poisoned one of his counterpart employee. The respondent, therefore, sued the appellant for defamation and claimed for a compensation of a sum of Tshs. 55,000,000/= for defamation; Tshs. 10,000,000/= for disturbance; and costs for the suit. The appellant, on the other hand, in her written statement defence denied the respondent's claim while alleging that he had not uttered any defamatory statements against the respondent.

Upon a full trial the trial judge entered judgment in favour of the respondent and awarded him Tshs. 55,000,000/= as compensation for defamation; Tshs 10,000,000/= for disturbance; and costs for the trial. Aggrieved by the High Court's decision, the appellant has preferred this appeal on the grounds that:

> *"(1) The trial Court erred in law and fact by deciding that the defendant defamed the plaintiff without fulfilling the ingredients of defamation.*

(2) *The trial Court erred in law and fact by entering judgment against the defendant basing on the alleged defamatory statement without assigning reason thereof, while such statement has been proved by the Court to be made by Mr. Franco, a third person, which act has injured the interest of the appellant.*

(3) *The Court erred in law by giving decision relying on hearsay evidence adduced by PW3 which contravenes with the evidence adduced in its totality.*

(4) *The trial court erred in law by delivering the judgment which lacks the essential ingredients such as proper analysis of evidence and reasons for that decision."*

Upon being served with the record of appeal, on 30th November, 2018 the respondent filed a notice of preliminary objection on points of law as follows:-

"(1) *The appeal is time barred by failure of the appellant to lodge her appeal within sixty (60) days from the date upon receiving the High Court copies of proceedings of the decision appealed for, contrary to Rule 90(1) of the Court of Appeal Rules, 2009.*

(2) *The appeal is incompetent for the certificate of delay attached at page 158 of the record of appeal was erroneously certified by the Registrar.*

(3) *The appeal is incompetent because no leave was obtained to institute the appeal out of time contrary to Rule 10 of the Court of Appeal Rules, 2009.*

(4) *The appeal is incompetent for the appellant's failure to serve her written submission to the Respondent, contrary to Rule 106 (7) of the Court of Appeal Rules, 2009."*

When the appeal was called on for hearing on the 1st December, 2018, the appellant was represented by Mr. Suleiman Salim Abdulla, learned counsel; whereas the respondent was advocated by Mr. Isaack Msengi learned counsel.

When he was given the floor to elaborate his points of preliminary objection, Mr. Msengi submitted that the appeal was time barred since it was filed after 60 days from the date when the appellant was supplied with the copies of proceedings, judgment and decree (documents). He clarified that, though the documents were supplied to the appellant on 14th March, 2017, the appeal was filed on 13th October, 2017 which was 7 months after receiving such documents. He referred us to the case of **Mwanaasha Seheye v. Tanzania Posts Corporation**, Civil Appeal No. 37 of 2003 (unreported) in which the Court stressed that an appeal must be instituted within sixty days of the date when the notice of appeal was lodged, unless an exception applies.

Mr. Msengi further argued that, the certificate of delay at page 138 of the record of appeal is defective for depicting a wrong position. He said, it excludes 656 days from 18th December, 2015 when the notice of appeal and letter applying for documents were lodged to 3rd October, 2017 when she was allegedly served with the documents while the documents she had applied for, were already furnished to her since 14th March, 2017. He was of the view that this contravened the provisions of the proviso to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Mr. Msengi went further to argue that, the appellant failed to serve the respondent the written submission which was contrary to Rule 106(7) of the Rules. For those anomalies, he argued that the appeal is incompetent and prayed to the Court to strike it out with costs.

On his part, Mr. Abdulla did not heed to the anomalies pointed out by Mr. Msengi. He adamantly argued that the appeal was filed within time because it was filed after being issued with a certificate of delay in accordance with Rule 90 (1)

of the Rules. He said, the Rule excluded a number of days from when the appellant applied for documents to the date he was supplied with them. Upon prompting by the Court as to when he was supplied with the documents he had applied for, Mr. Abdulla made a very interesting argument that, though the copies of proceedings, judgment and decree were supplied to the appellant on 14th March, 2017, he was issued with the certificate of delay on 3rd October, 2017 after being supplied with all documents required by Rule 96(1) of the Rules. He said, in such a situation the appellant need not apply for extension of time because he was not late.

As to the issue of failure to serve the written submission to the respondent, the learned counsel for the appellant said, he effected service by post to Advocate Mussa Shaali who initially represented the respondent as per Rule 22 (8) of the Rules. At the end, he implored the Court to overrule the preliminary objection with costs.

In rejoinder, Mr. Mseng insisted that the appeal was time barred. As to the service of written submission, he wondered as to why the learned counsel for the appellant had to serve the respondent by post instead of physical service since he knew where his office was situated. He reiterated to the Court to strike out the appeal with costs.

The main issue for determination by this Court is whether or not the appeal is competent.

Our perusal of the record of appeal has revealed that after the judgment was delivered on 3rd December, 2015, the appellant lodged her notice of appeal on 18th December, 2015 together with a letter applying for certified copies of proceedings, judgment and decree as shown at page 159 of the record of appeal. However, as is vividly shown at pages 64, 71 and 72 of the record of appeal and readily conceded by Mr. Abdulla, the appellant was supplied with copies of proceedings, judgment and decree on 14th March, 2017. Mr. Abdulla admitted to have filed the appeal on 13th October, 2017 though he was availed with the documents on 14th March, 2017

because he was yet to get other documents required under Rule 96(1) of the Rules. That said, this is why even the certificate of delay issued, excluded the period between 18th December, 2015 to 3rd October, 2017.

Rule 90 (1) of the Rules which deals with institution of appeals provides as follows:-

> *"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 with:*
>
> *(a) a memorandum of appeal in quintuplicate;*
>
> *(b) the record of appeal in quintuplicate;*
>
> *(c) security for costs of appeal:*
>
> *Save that* ***where an application 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 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]

The above cited Rule requires among other things the appeal to be instituted within 60 days after the notice of appeal is lodged. Also, according to the proviso thereto, the party is

required to apply for copy of proceedings within thirty days from when the decision sought to be appealed against is delivered. The Registrar of the High Court is also required to issue a certificate excluding **the number of days required for the preparation and delivery of documents applied by the appellant.** Sub rule (2) of the said Rule adds two conditions for one to benefit from this Rule in that the application for the supply of documents must be in writing and be copied to the respondent. The question that follows is when can the certificate of delay be issued by the Registrar of the High Court?

This Court while interpreting Rule 90(1) of the Rules in the case of **Yazidi Kassim t/a Yazidi Auto Electric Repairs v. The Hon. Attorney General,** Civil Appeal No. 215 of 2017 (unreported), quoting with approval the case of **Andrew Mseul and 5 Others v. The National Ranching Company Ltd and Another,** Civil Appeal No. 205 of 2016 (unreported) observed as follows:-

> *"A valid certificate of delay is one* ***issued after the preparation and delivery of***

the requested copy of the proceedings of the High Court. *That necessarily presupposes that the* ***Registrar would certify and exclude such days from the date when the proceedings were requested to the day when the same were delivered."***
[Emphasis added.]

In this case, the appellant as per the application letter at page 159 of the record of appeal applied for certified copies of proceedings, judgment and decree for appeal purposes on 18th December, 2015. As shown at pages 64, 71 and 72 of the record of appeal and readily conceded by the appellant, she was supplied with the said copies of proceedings, judgment and decree on 14th March, 2017 following their request. Unfortunately, the Registrar did not issue a certificate of delay after the preparation and delivery of the same as required by the proviso to Rule 90(1) of the Rules. He issued it on 10th October, 2017 as shown at page 158 of the record of appeal.

For clarity, we find it prudent to reproduce part of the certificate of delay as follows:

> *"CERTIFICATE OF DELAY*
> *(Under Rule 90(1) of the Tanzania Court of Appeal Rules, 2009)*
> *This is to certify that* ***the period between 18th day of December, 2015 to 3rd October, 2017 which is 656 days, that is from the day the defendant's advocate filed a notice of appeal and applied for certified true copies of the proceedings, judgment and decree to the date he was supplied with them, are excluded from the days required for the preparation of the memorandum of appeal*** *to the Court of Appeal of Tanzania."*
> *[Emphasis added]*

Looking at the above certificate of delay, there is no doubt that it excludes 656 days from 18th December, 2015 to 3rd October, 2017 being the number of days required for preparation and the

supply proceedings, judgment and decree. The counsel for the appellant justified the delay in issuing the certificate of delay in that he was yet to get all the documents in compliance with Rule 96(1) of the Rules. However, with respect, we do not agree with him. This is so because, Rule 96(1) of the Rules in particular, lists the type of documents required to be included in the record of appeal. In other words, it does not provide for the documents required for appeal purposes. On the other hand, the provisions of the proviso to Rule 90(1) of the Rules which is a specific provision dealing with institution of appeals requires exclusion of the number of days required for the preparation and delivery of proceedings. We are of the view that, those other documents referred to by the appellant are not within the ambit of the documents specified under Rule 90(1) of the Rules which are relevant for the institution and determination of the appeal. Otherwise, Rule 90(1) would have been subjected to Rule 96(1) of the Rules. At any rate, even if the appellant was waiting for those documents, she did not explain their relevance for the institution and the determination of the appeal.

But again, we wish to emphasize that, in order for a certificate of delay to be valid it has to take into account, among other things, the exact number of days to be excluded from the date the proceedings are requested to the date when they are delivered to the appellant.-(See **Yazidi Kassim t/a Yazadi Auto Electric Repairs v. The Attorney General,** Civil Appeal No. 215 of 2017 (unreported).

In the matter under consideration, the documents were applied for on 18th December, 2015. They were supplied to the appellant on 14th March, 2017. No certificate for delay was issued after the documents were supplied to the appellant on 14th March, 2017. It came to be issued on 3rd October, 2017 when the appellant was purportedly supplied with the documents. We think, the Deputy Registrar misdirected himself in issuing the certificate of delay on 3rd October, 2017 for the documents which were already delivered to the appellant since 14th March, 2017. As it is, the certificate of delay which was issued long after the delivery of documents to the appellant on

14th March, 2017 does not take into account the exact number of days which were required for preparation and supply of the documents to the appellant.-(See **Yazidi Kassim's** case (supra)). This contravened the provisions of Rule 90(1) of the Rules which specifically require the number of days to be excluded to be those from the date the copy of proceedings, judgment and decree were applied for, to the date when they are delivered to the appellant which was 14th March, 2017.

We, are therefore, in agreement with Mr. Msengi that the certificate of delay is defective for having not depicted the true period from when the appellant was supplied with the documents she had applied for on 18th December, 2015. As it is, it cannot be relied upon so as to benefit the appellant in terms of the proviso to Rule 90 (1) and (2) of the Rules in excluding the time within which the appeal ought to have been filed in Court - (See **Omary Shabani S. Nyambu v. The Permanent Secretary Ministry of Defence and 2 Others**), Civil Appeal No. 105 of 2015 (unreported).

We also agree with Mr. Msengi that under those circumstances, the appeal is incompetent for having been filed out of time. In the event, we sustain the 1st and 2nd points of preliminary objection and hereby strike out the appeal with costs.

We should point out here that we need not venture to consider the last point of preliminary objection as the 1st and 2nd points are sufficient to dispose of the whole matter.

It is so ordered.

DATED at **DAR ES SALAAM** this 31st day of January, 2019.

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.

THE COURT OF APPEAL OF TANZANIA

Y. KAYANGE
DEPUTY REGISTRAR
HIGH COURT