IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA J.A., MZIRAY, J.A. And WAMBALI, J.A.)

CIVIL APPEAL NO. 37 OF 2017

DISTRICT EXECUTIVE DIRECTOR

KILWA DISTRICT COUNCIL.....APPELLANT

VERSUS

BOGETA ENGEERING LIMITED .....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Mtwara)

(Twaib, J.)

Dated the 10th day of June, 2016

In

Civil Case No. 4 of 2011

RULING OF THE COURT

11th & 25th February, 2019

WAMBALI, J.A:.

The respondent sued the appellant in Civil Case No. 4 of 2011 before the High Court of Tanzania at Mtwara in which she prayed for declaration to the effect that the contract for construction of abattoir at Kilwa Masoko which was entered between them had been breached by the appellant. As a result, she prayed to be awarded damages and interests for delayed payments.

The High Court (Twaib, J) heard the evidence of the parties and in the end judgment was entered for the respondent. The decision of the High Court prompted the appellant to lodge the present appeal to express her dissatisfaction. The appeal comprises six grounds of appeal. However, for the reason which will be apparent shortly, we do not deem appropriate, for the purpose of our ruling to reproduce them herein below.

It is noted that after being served with the record and memorandum of appeal, the respondent through the services of Mr. Francis Stolla, learned advocate lodged a notice of preliminary objection on 19/10/2016 under Rule 107(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) contesting the competency of the appeal.

The incompetence of the appeal is expressed in the following grounds;

> *"1. it is time barred thus in contravention of rule 90(1) and (2) of the Tanzania Court of Appeal Rules, 2009 as;*
>
> *(a) The Memorandum and Record of Appeal were lodged on 10th June, 2016 being after the period of 113 days from the date of lodging*

the Notice of Appeal, that was on the 18th February,2016.

(b) *The records of appeal lack a written application for the copy of proceedings in the High Court;*

(c) *No proof of service to the Respondent of the appellant's written application for the copy of proceedings.*

2. *The Memorandum and the Record of Appeal were served to the Respondent out of time without seeking and obtaining an order for extension of time, thus in contravention of rule 97(1) of the Tanzania Court of Appeal Rules, 2009. The Memorandum and Record of Appeal, after being lodged on the 10th June 2016, were served to the respondent on the 9th July,2016 the period that is outside 7 days prescribed by rule 97(1).*

3. *The Notice of Appeal was wrongly lodged in the Court of Appeal instead of being lodged with the Registrar of the High Court thus in contravention of the provision of Rule 83(1) of the Tanzania Court of Appeal Rules,2009.*

4. *The Notice of Appeal was served to the Respondent out of time and no extension of time was sought*

and obtained, thus in contravention of rule 84(1) of the Tanzania Court of Appeal Rules, 2009;

That the Notice of Appeal that is alleged to have been lodged on the 18th February 2016 was served to the Respondent on the 30th May 2016 being more than 14 days required by the rule".

This ruling therefore, intends to determine the notice of preliminary objection on the competence of the appeal as raised by the respondent.

At the hearing, Mr. Godfrey Jaffary Baraza, District Council Solicitor represented the appellant while Mr. Fransis Stolla, learned advocate represented the respondent.

Submitting on the preliminary objection in respect of ground one, Mr. Stolla argued that although the notice of appeal was lodged on 18/2/2016, the memorandum of appeal and record of appeal were lodged on 10/6/2016. He emphasized that that being the case, the appeal was therefore lodged after 113 days which is beyond the period of sixty days prescribed by Rule 90(1) of the Rules.

He further submitted that the appellant could only have validly lodged the appeal after the expiry of sixty days if she could have written a letter applying to be supplied with copy of proceedings from the High

Court within thirty days of the date of decision against which it is desired to appeal. However, there is no evidence that the appellant applied for the proceedings and a copy of that letter served on the respondent, Mr. Stolla insisted. Despite conceding that the record of appeal contain a certificate of delay issued by the Deputy Registrar of the High Court at Mtwara, excluding the period between 10/2/2016 to 14/4/2016, Mr. Stolla maintained that the same is invalid. He explained that the certificate of delay was issued without the letter from the appellant applying for the said proceedings.

In the event, Mr. Stolla submitted that the appellant cannot rely on the exemption provided under Rule 90(1) of the Rules because there is no evidence of written application for the copy of the proceedings to the Registrar of the High Court. He added that the appellant did not also comply with the provision of Rule 90(2) as no service of the letter was done to the respondent. Based on his submission, he asked the Court to find that the appeal was lodged out of the sixty days prescribed by the law and therefore it is incompetent and thus liable to be struck out with costs.

In his response, Mr. Baraza did not dispute the fact that the judgment of the High Court was delivered on 10/2/2016 and that the

notice of appeal was lodged on 18/6/2016. He also conceded that the record of appeal does not contain the letter applying for copy of proceedings to the Registrar of the High Court, but maintained that the same was written and delivered to the Registrar. Mr. Baraza therefore firmly defended the certificate of delay issued by the Registrar because the appellant was supplied with the relevant documents on 14/4/2016 after she had applied for the same on 18/2/2016. When he was pressed by the Court to explain why the certificate of delay concerned only the preparation and supply of the decree and not other proceedings, he stated that earlier on the documents which were supplied to the appellant on 29/3/2016 contained a defective decree which was returned to the Registrar for rectification. He thus urged us to overrule this preliminary objection.

In a turn of event, Mr. Baraza submitted that should the Court find that the appellant did not comply with the provision of Rule 90(1) and (2) of the Rules, the overriding objective principle introduced in the Appellate Jurisdiction Act, Cap 141 (the AJA) by the Written Laws (Miscellaneous Amendments) (No.3) Act,2018, should be applied to ensure that the appeal is heard on merit. He thus prayed that the objection of the respondent on this ground be overruled with costs.

Having heard the rival submissions of the counsel on this ground of objection, we think it is important to emphasize that any appeal lodged before the Court must comply with the period of limitation provided under the provisions of Rule 90(1). Moreover, the intended appellant must also comply with Rule 90(2) where he applies to the Registrar of the High Court to be supplied with a copy of proceedings.

We therefore think that in order to appreciate our reasons which will follow on the determination of this ground of objection, it is appropriate for us to reproduce the provision of Rule 90(1) and (2) of the Rules hereunder;

> *"90(1) subject to 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 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 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".

A reading of the above quoted provision, leaves us in no hesitation to state that an appellant must lodge his appeal within sixty days from the date when the notice of appeal was lodged. The only exception to this requirement is where he has not obtained a copy of the proceedings from the High Court and has applied for the same within thirty days of the date of the decision against which it is desired to appeal. Moreover, the Registrar of the High Court must have issued the certificate of delay indicating the number of days that were required or used to prepare and deliver that copy to the appellant in order to entitle him to the exclusion of those days in computing time within which the appeal has to be lodged.

However, what is more important is that the appellant cannot be entitled to rely on the exception to the proviso to sub-rule (1) of Rule 90

unless he has made the application in writing and served the same upon the respondent.

In the instant appeal, we have no doubt, as per the submissions of the counsel for the parties and the record of appeal, that there is no evidence that the appellant applied to the Registrar of the High Court in writing to be supplied with a copy of the proceedings and copied and served the relevant letter to the respondent.

Although Mr. Baraza stated from the Bar that the appellant wrote the said letter to the Registrar and that it was difficult to serve it on the respondent, our close scrutiny of the original case file does not bear witness to his submission.

What is in the record of appeal and the original record is the purported certificate of delay issued by the Deputy Registrar Incharge at Mtwara, excluding the days from 10/2/2016 to 14/4/2016 alleged to have been used to prepare and deliver the copy of the "decree" to the appellant.

The question we ask ourselves at this juncture, is whether the said certificate of delay is valid. We do not think so. First, we have not found any evidence to show the written application that was relied upon

by the Deputy Registrar Incharge to issue the certificate of delay indicating that the appellant applied to be supplied with a copy of the proceedings or decree. Second, the purported certificate of delay concerns the number of days used to prepare and supply only the decree to the appellant. Yet, there is no evidence that the appellant wrote a letter to the Registrar to be supplied with the decree only without the proceeding as indicated in the certificate of delay. For the purpose of clarity, let us reproduce the relevant part of the purported certificate of delay hereunder;

"CERTIFICATE OF DELAY

This is to certify that the period between 10th February, 2016 when the appellant applied for copy of Decree order to 14th April, 2016 when the same were supplied to the appellant be excluded in computation, as such time was spent by the Court to prepare the decree.

Given under my Hand and the Seal of the Court this 14th day of April,2016.

Sgd. H.S. MUSHI

Deputy Registrar Incharge

Mtwara"

Third, the purported certificate of delay show that the appellant applied to be supplied with the decree on 10/2/2016. We think this cannot be

correct even where it is taken that apart from applying for a copy of a decree, the appellant also applied for the copy of the proceedings on the same date. This is so because, the appellant could not have applied to be supplied with a copy of proceedings or decree on 10/2/2016 before she lodged the notice of appeal on 18/2/2016. The Provision of Rule 90(1) of the Rules requires the intended appellant to write to the Registrar applying for a copy of the proceedings for the purpose of appeal within thirty days from the date when the notice of appeal is lodged.

We wish to emphasis that in his submission, Mr. Baraza, with respect, did not say anything concerning this deficiency on the date when the appellant applied for a copy of the proceedings which is indicated in the purported certificate of delay.

In the circumstance, we think that the purported certificate of delay cannot be valid. We hold this view because as we have explained above, there is no evidence of any letter to the Registrar of the High Court in which the appellant applied to be supplied with either the proceedings or the rectification of a decree as claimed by Mr. Baraza.

In the event, we find that the certificate of delay is invalid and cannot entitle the appellant to rely on the provision of Rule 90(1) of the

Rules to escape the time limit of sixty days within which the appellant was supposed to lodge the appeal after the decision of the High Court that was delivered on 10/2/2016 as submitted by Mr. Stolla. Thus, in the absence of sufficient explanation by the appellant to justify the delay, we hold that she was supposed to file her appeal within sixty days from the date of judgment of the High Court, that is, 10/2/2016. Therefore, the appeal which was filed on 10/6/2016 was out of time for 113 days.

It follows that, the Court cannot entertain the appeal which has been lodged out of time while no extension of time has been sought and granted to the appellant.

The Court has emphasized the importance of adhering to the mandatory provision of Rule 90 (1) and (2) of the Rules in a number of its decisions including; **Mkombozi Center for Street Children**; **The East African Law Society Legal and Human Rights Centers v. The Hon Attorney General**, Civil Appeal No. 30 of 2014; **Richard Kwayu v. Robert Bulili** Civil Appeal No. 9 of 2012; **Victoria Mbowe v. Christopher Shafurael Mbowe & another,** Civil Appeal No. 115 of 2012; and **Universal Electronic and Hardware Tanzania Limited v. Strabag International GmbH (Tanzania Branch)**, Civil Appeal No. 104 of 2015 (all unreported). For the purpose of emphasis, we wish to

quote what the Court stated in **Victoria Mbowe** (Supra) concerning the importance of adhering to Rule 90(1) and (2) of the Rules and the consequence that follows in default;

> *"We have found nothing in the record showing or suggesting that the appellant ever applied for the copy of the proceedings within the time and in a manner provided under Rule 90(1) of the Rules. Similarly, Rule 90(2) lays down that an appellant cannot rely on exception clause in Rule 90(1) unless his application for a copy is in writing and served on the respondent. Again there is nothing in the record upon which compliance with the provisions of the said Rule 90(2) of the Rules could be ascertained;*
>
> *The Court then concluded that-*
>
> *"...we are settled in our mind that the present purported appeal which was instituted on 11/12/2012 in violation of Rule 90(1) of the Rules is, unarguably, time berried".*

Similarly, in emphasizing the issue of when can a certificate of delay be relied upon by the Court to exclude a number of days for purpose of computing the limitation period, the Court stated as follows in **Ms. Universal Electronics**(supra);

"We on our part are inclined to agree with Mr. Sinare that the appeal is incompetent. According to Rule 90 (2) of Tanzania Court of Appeal Rules, 2009 (the Court Rules), Mr. Stolla cannot rely on the certificate of the Registrar of the High Court in computing the time in the absence of the letter to the Registrar requesting for a copy of the proceeding. Given the circumstances the appeal is hereby struck out for being incompetent".

Given the circumstances obtaining in this appeal therefore, we are settled that the appeal before us is incompetent for being time barred.

On the other hand, before we make the final order, we wish to state that we have taken note of the prayer by Mr. Baraza that if we find, as we have found, that the appeal is time berried, we should invoke the overriding objective principle contained in the provisions of section 3A (1) and (2) of the AJA to allow the appeal to be heard on merits. We are also aware that Mr. Stolla did not make any comment on this prayer.

On our part, we think that in the circumstances of this appeal in which the issue of limitation touches on the jurisdiction of the Court, insisting on the compliance of the mandatory requirement of lodging an appeal within the prescribed time goes in tandem with facilitating the just determination of the matter before us in accordance with the law.

The Court cannot have jurisdiction to entertain an appeal which is time barred and no extension of time has been sought and granted. We think the issue of time limit is not a technicality which goes against the just determination of the case or undermines the application of the overriding objective principle contained in sections 3A (1) and (2) and 3B(1)(a) of Act No. 8 of 2018.

In this regard, we agree with what the Court stated in **1. Mondorosi Village Council, 2. Sukenya Village Council 3. Soitsambu Village Council v. 1. Tanzania Breweries Limited 2. Tanzania Conservation Limited 3. Ngorongoro District Council 4. Commissioner for Lands 5. The Attorney General**, Civil Appeal No. 66 of 2017 (unreported) that the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case. (See also **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (unreported).

In the present appeal, we think we cannot overlook the fact that the appeal before the Court is time barred and give it artificial life against the requirement of the law.

From the foregoing, we think this ground of preliminary objection, suffices to dispose of our determination on the competence of the appeal. We thus think we need not determine the remaining grounds on the notice on preliminary objection.

In the event, we sustain the preliminary objection on the first ground. Accordingly, we strike out the appeal with costs for being time barred.

DATED at **MTWARA** this 20th day of February, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL