

**IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR**

**(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)**

**CIVIL APPEAL NO. 297 OF 2017**

**HEMED SULEIMAN HEMED** }  
**MUHAMMED SULEIMAN HEMED** } ..... **APPELLANTS**

**VERSUS**

**1. HAJJI AME JECHA**  
**2. JECHA AME JECHA**  
**3. HAMAD AME JECHA**  
**4. BI NURU AME JECHA**  
**5. MWAKITU AME JECHA**  
**6. SAADA AME JECHA**  
**7. AHMED SALEH MBAROUK**  
**8. KATIBU MTENDAJI**  
**KAMISHENI YA WAKFU** } ..... **RESPONDENTS**

**(Appeal from Judgment and Decree of the High Court of Zanzibar  
at Vuga)**

**(Issa, J.)**

**dated the 31<sup>st</sup> day of October, 2016  
in  
Civil Appeal No. 59 of 2014**

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**RULING OF THE COURT**

05<sup>th</sup> & 13<sup>th</sup> December, 2019

**MWARIJA, J.A.:**

This ruling is on the preliminary objection raised by the respondent in this appeal which arose from the decision of the High Court of Zanzibar sitting at Vuga, (Issa,J.) in Civil Appeal No. 59 of 2014 dated 31/10/2016.

In the course of hearing that appeal, the High Court exercised its revisional powers under s. 8 (1) of the High Court Act 1985 and proceeded to quash and set aside the proceedings and the ruling of the Land Tribunal for Zanzibar (the Tribunal) in Civil Case No. 70 of 2011.

In the said case, the appellants had sued the respondents seeking to be declared the lawful owners of a plot of land situated at Uzi Mchagamle in Southern Region of Unguja (the suit land). They claimed that the respondents had trespassed in the suit land.

In their written statement of defence, the respondents raised a preliminary objection contending **first**, that the suit was *res-judicata* and **secondly**, that the claim was time-barred. The learned trial Regional Magistrate of the Tribunal overruled both grounds of the preliminary objection. Dissatisfied, the appellants appealed to the High Court.

Having heard the grounds of appeal raised by the appellants, the High Court raised another ground *suo motu*; whether or not the decision of the Tribunal which dismissed the preliminary objection was appealable. Having considered the issue, the learned High Court Judge answered it in the negative and thus decided to dismiss the appeal.

Notwithstanding that decision, the learned Judge proceeded to invoke the court's revisional jurisdiction and on the basis of the arguments made by the parties on the grounds of appeal, he went on to consider whether or not the suit was *res-judicata*. He consequently found that the suit was *re-judicata* Civil Case No. 2 of 1993 of the District Court of Mweru.

The appellants were further aggrieved by the decision of the High Court and therefore preferred this appeal raising the following grounds of appeal:

- "1. That the Honourable learned Judge erred in law by invoking its revisionary (sic) power under section 8 of the High Court Act, 1985 **suo motu** after dismissing the Respondent's appeal.*
- 2. The Honourable learned Judge erred in law and fact by deciding to quash and set aside the Land Tribunal decision before Hon. Zahra H. Haji (RM) in Civil Case No. 70 of 2011 and declare the suit before the Land Tribunal is **Res-judicata**."*

At the hearing of the appeal on 5/12/2019, the appellants were represented by Mr. Masoud Hamidu Rukazibwa assisted by Mr. Jambia Said Jambia, learned advocates. On their part, the respondents were represented by Mr. Rajab Abdalla Rajab, also learned advocate.

As pointed out above, through their learned counsel, the respondents had raised a preliminary objection challenging the competence of the appeal. The objection is to the following effect:

*"That the appellants' appeal is incompetent for want of proper certificate of delay."*

Before we could embark on hearing the appeal therefore, we heard the learned counsel for the parties on the preliminary objection. Submitting in support of the objection, Mr. Rajab argued that the appeal is incompetent because the certificate of delay issued by the Registrar of the High Court (the Registrar) is defective. He contended that the certificate was not issued in conformity with Rule 90(1) of the Rules. He pointed out that, in the certificate, the Registrar was required to exclude the period from the date of lodgment of a letter requesting for a certified copy of the proceedings of the High Court that is, 14/11/2016 and the date on which the appellants were supplied with that copy, which was on 25/6/2019. In this case, he said, the Registrar excluded the period from the date of lodgment of the notice of appeal, that is; 11/11/2016 and the date of supply to the appellants, of the certified copy of the proceedings.

Relying *inter alia*, on the case of **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (unreported), Mr. Rajab prayed to the Court to strike out the appeal with costs.

In response to the submission made by the learned counsel for the respondents, Mr. Jambia did not dispute that the certificate of delay is defective in that it refers to the date of lodgment of the notice of appeal as the date from which computation of the excluded period for preparation and supply of a certified copy of the proceedings was to be based. He argued however, that the defect of basing the computation on the date of the notice of appeal instead of the date of the letter applying for certified copy of the proceedings, as required by Rule 90 (1) of the Rules, is not a fatal irregularity.

On the decision in the case of **Njake Enterprises Limited** (supra) cited by the respondents' counsel, Mr. Jambia argued that the case is distinguishable. According to him, in that case, the Registrar excluded the period required for preparation and supply of a certified copy of proceedings basing his computation on the date of a non-existent letter of application to that effect. Mr. Jambia prayed however, that in the event the Court finds

that the appeal is incompetent, then the appellants should be spared from payment of costs.

Having considered the arguments of the counsel for the parties on the preliminary objection, the issue for our determination is whether or not the defect in the certificate of delay invalidated it hence rendering the appeal incompetent. To answer the issue, we find it instructive to reproduce the substantive part of the certificate. It reads as follows:

*"This is to certify that the period between the **11<sup>th</sup> day of November, 2016** to the **25<sup>th</sup> day of June, 2019**, which is 957 days, that is from the day the appellant filed the Notice of Appeal and applied for certified true copies of the proceedings, judgment decree ruling and drawn order in the above matter to the date he was supplied with them are to be excluded from the days required for preparation of memorandum of appeal to the Court of Appeal of Tanzania."*

It is patently clear from the wording of the certificate that the same excluded a period which includes three (3) days outside the date of lodgment of the appellant's letter of application for certified copy of the proceedings of the High Court and the date of supply of the copy to them. This renders the certificate defective. Rule 90(1) of the Rules provides as follows:

*"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 is 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 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."*

In the case of **Njake Enterprises Limited** (supra) cited by the respondents' counsel, the Court had this to say on the effect of a certificate of delay which is defective for having been based on a wrong or non-existent date of the letter of application for a certified copy of proceedings.

*"... it is not disputed that the certificate mentions 12/3/2015 as the date on which the appellants applied to be supplied with a copy of the proceedings of the high court. This was different from 17/3/2015, the date appearing in the appellant's*

*letter. This letter was the one served on respondents as required under Rule 90 (2) of the Rules. Therefore, the certificate is based on a non-existent letter, thus rendering it defective."*

On the effect of such defect, the Court stated as follows:

*"Having found that there was no valid certificate of delay the appellant cannot benefit from the exclusion of time in which it was supposed to file its appeal."*

In the case at hand, the certificate is defective for having excluded the period from the date of the notice of appeal instead of the date of the letter applying for a copy of the proceedings in the High Court as required under Rule 90 (1) of the Rules. In the circumstances, the exclusion which was based on the date of a non-existent letter renders the certificate invalid. The effect is therefore, to render the appeal time-barred.

On the basis of the above stated reasons, we agree with Mr. Rajab that the defect is fatal. In the event, the appeal which is time-barred is hereby struck out.

As to costs, we have considered that, although the appellants' counsel was supposed to have exercised due diligence to seek necessary correction of the defect before he filed the appeal, the appellants should not be



condemned to costs because the error was occasioned by the Registrar. We thus order each party to bear its own costs.

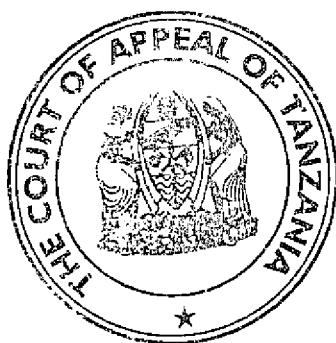
**DATED at ZANZIBAR** this 13<sup>th</sup> day of December, 2019.

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

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

The ruling delivered this 13<sup>th</sup> day of December, 2019 in the presence of Jambia S. Jambia, counsel for the Appellants while Mr. Rajab A. Rajab, counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents and in the absence of the 8<sup>th</sup> Respondent who was dully served is hereby certified as a true copy of the original.



  
A. H. Msumi  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**