IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MKUYE, J.A. And WAMBALI, J.A.)

CIVIL APPEAL NO. 26 OF 2019

1. **ARBOGAST ARSTIDES**
2. **HELLO PETER**
3. **JOHN ONESMO**
4. **GRACE DANIEL.....APPELLANTS**

VERSUS

ST. JOHN UNIVERSITY OF TANZANIA.....RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Dodoma)

(Hon. A. Mohamed, J.)

dated the 15th day of March, 2018

in

Miscellaneous Cause No. 17 of 2016

RULING OF THE COURT

14th & 15th September, 2020.

JUMA, C.J.:

This appeal arises from the decision of the High Court at Dodoma dated 15/03/2018 which dismissed the appellants' application for prerogative orders of *certiorari* and mandamus.

The appellants, ARBOGAST ARSTIDES, HELLO PETER, JOHN ONESMO and GRACE DANIEL, were third year Bachelor of Science Degree

(Education) students at the respondent ST. JOHN'S UNIVERSITY OF TANZANIA at Dodoma. It appears that on 4th August 2015, they sat for a final examination in Statistical Mechanics, a course which for examination purposes was coded as PHY 311. When the results came out in September 2015, the appellants had passed. However, their celebration did not last long. By a letter dated 12th November 2015, the appellants' results were nullified over alleged examination irregularities. They were directed to retake the exam, which they did on 30th November 2015.

But when the results from retaken examination came out, the first appellant (ARBOGAST ARSTIDES) and the third appellant (JOHN ONESMO) were discontinued from studies. In their pleadings, they also complained that their letter to the University Senate Chairman seeking for reasons behind their discontinuation received no response. Their further efforts, to resolve this dispute by engaging both the Dean of Faculty of Natural and Applied Sciences and Deputy Vice Chancellor (Academic) of the respondent also proved futile. In so far as the appellants were concerned, they had exhausted remedies within the respondent university system before they

opted to apply for prerogative orders of *Certiorari* and Mandamus in the High Court.

In a counter affidavit which the learned Advocate, Ally Mussa Nkhangaa, affirmed on behalf of respondent, he averred that the appellants were not condemned unheard since the Committee that probed examination irregularities was not a disciplinary committee and was hence not obliged to give its report back to the students. The learned Advocate further denied that there were any letters that were sent to respondent or were there further negotiations between the officers of the respondent, university and the appellants. He put the appellants to strict proof that they had exhausted all remedies available within the university system as they had alleged.

On 19 April 2016 the appellants filed Chamber Summons in the High Court at Dodoma under Section 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap 310 R.E. 2002]; Rule 8(1), (a) (b), (2), (3), (5) of the Law Reform (Fatal Accidents And Miscellaneous Provisions) (Judicial Review Procedure And Fees) Rules, 2014, GN NO. 324 OF 2014. The appellants sought the prerogative orders of *Certiorari* and

Mandamus to issue against the decision of the respondent which nullified their examination results in Statistical Mechanics (PHY 311) which prevented the appellants from graduating.

At the hearing of this appeal on 14/09/2020, learned counsel Mr. Fred Peter Kalonga appeared for the appellants; while learned counsel Mr. Ally Nkhangaa appeared for the respondent.

Before we invited Mr. Kalonga to make his oral submissions, Mr. Nkhangaa rose to inform us that he had a preliminary issue of law impacting on the competence of this appeal which he wanted us to address first. According to the learned counsel, the record of appeal is incomplete because the pleadings and also the Ruling which dismissed the appellants' application for judicial review were not included. Failure to include these documents, he submitted, contravened para (c) and (g) of Rule 96 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He added that there are several decisions of this Court which affirmatively restate that any appeal which fails to include these documents render such an appeal incompetent and should be struck out.

Before he could sit down, we asked him to confirm to us whether this appeal was filed within sixty (60) days of 12/04/2018 which is the date when the notice of appeal was lodged as Rule 90 (1) of the Rules stipulated. After perusing the record and counting the number of days between 12/04/2018, when the appellants lodged their notice of appeal, and 10/10/2019 when they finally filed their memorandum and record of appeal; he conceded that indeed this appeal was filed out of time, it is incompetent and should be struck out.

In his reply, Mr. Kalonga, initially stuck in the argument that this appeal was filed within time because the appellants spent considerable number of days applying for leave to appeal to this Court under section 5(1)(c) of the Appellate Jurisdiction Act Cap 141 (the AJA). He reckoned that since the Ruling of the High Court granting them leave to appeal to this Court was delivered on 13/08/2018, the appellants were within the sixty-days when they filed their appeal on 10/10/2018.

Yet, when we pressed him to explain why, he did not follow the procedure for obtaining a Certificate of Delay under Rule 90 of the Rules which would have enabled him to lodge his appeal beyond the sixty days of

filing of notice of appeal; he relented to concede that this appeal was filed out of the prescribed period and should be struck out. We further prodded him to explain whether decisions of the High Court in judicial review proceedings under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 require prior leave of the High Court in order to appeal to this Court. He replied that he was not sure, but he expressed his desire to know what guidance we can provide.

The learned counsel for the respondent had nothing to add in rejoinder. But he, too, was not sure whether leave to appeal to this Court was necessary before the appellants could file this appeal.

From submissions of the learned counsel for parties we shall not venture inside the record of appeal to determine which documents should have been included in terms of Rule 96(1) (c) and (g) of the Rules, but were not. Our decision will instead turn on the more pertinent question whether this appeal was filed within the sixty days prescribed by Rule 90 of the Rules. On this, both learned counsel are correctly at one that, this appeal was filed out of time and without any certificate of delay issued by

the Registrar of the High Court excluding such time required for the preparation of the record of appeal, this appeal is incompetently before us.

It is clear to us that Rule 90 (1) of the Rules; mandatorily require civil appeals to the Court to be instituted by lodging memorandum and record of appeals within sixty days of the date when the notice of appeal was lodged. This Rule also provides for strict conditions when such appeals may be instituted outside the prescribed period of sixty days after filing of notice of appeal. The applicable Rule 90(1) states:

> *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 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.*** [Emphasis Added].

With due respect, Mr. Kalonga, who is a counsel practicing in this Court, did not impress us that he knew anything about the strict timelines prescribed by Rule 90(1) and (2) of the Rules within which civil appeals are lodged in this Court. This explains why he failed to appreciate the significance of the duty of appellants, within thirty days of the date of the delivery of the Ruling dismissing their application for prerogative orders of certiorari and mandamus, to lodge their application to the Registrar of the High Court, to be supplied with a copy of the proceedings, Judgment and Decree of the High Court subject of their intended appeal to this Court. It seems to us, by failing to apply for these copies from the Registrar, the Registrar of the High Court could not furnish the appellants with a Certificate of Delay to certify the number of days the appellants waited to

be supplied with the copy of proceedings, Judgment and Decree of the High Court. Without such Certificate of Delay the appellants cannot be allowed to lodge their record and memorandum of appeal on 10/10/2018 which is far beyond the sixty days after they had filed their notice of appeal.

We must also point out that the so many days, which Mr. Kalonga wasted, while applying for leave to appeal to this Court, did not suspend the counting of the period of sixty days prescribed by Rule 90(1) of the Rules. The period was wasted because jurisprudence of the Court is settled that no leave to appeal to this Court is required against the decision of the High Court in exercise of its prerogative powers under Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310. This jurisprudence was reiterated in **ATTORNEY GENERAL & MINISTER FOR FOREIGN AFFAIRS V. VALERIAN BAMANYA t/a TANZANIA ASSOCIATED MECHANDISE**, CIVIL APPEAL NO. 79 OF 2005 (unreported) where, after the High Court had determined the application for orders of certiorari and mandamus in favour of the respondent, the appellants lodged an appeal without seeking prior leave of the High Court.

Ms. Rwechungura, learned counsel appearing for the respondent raised a preliminary objection to the effect that the appeal was incompetent because no leave had been applied for and obtained as required by section 5 (1) (c) of the AJA. After reiterating its earlier position in **THE ATTORNEY GENERAL V. PHILEMON NDESAMBURO,** CIVIL APPEAL NO. 14 OF 1998 (unreported), to the effect that the right of appeal to the Court of Appeal is not granted by the AJA alone, but that there are other laws providing for such right of appeal, the Court stated that section 17(5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act makes it clear that no leave is required before lodging an appeal to the Court of Appeal. Subsection (5) of section 17 which gives the High Court power to issue Orders of mandamus, prohibition and certiorari also provides for the automatic right of appeal, in the following way:

> *"(5) Any person aggrieved by an order made under this section may appeal therefrom to the Court of Appeal."*

In the upshot of reasons stated above, we strike out this appeal for being time barred. We in the circumstances make no order for costs.

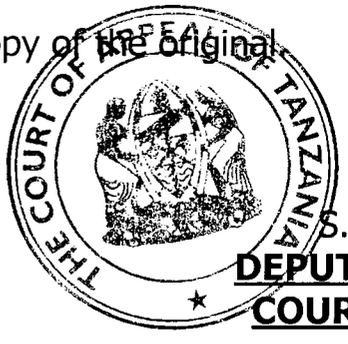
DATED at **DODOMA** this 15th day of September, 2020.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Ruling delivered this 15th day of September, 2020 in the presence of Mr. Fred Peter Kalonga, learned counsel for the Appellants and Mr. Ally Nkhangaa, learned counsel for the Respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL