

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

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

CIVIL APPEAL NO. 20 OF 2019

1. ROSEMARY BIRIA }
2. JOSEPH ELIEZAAPPELLANTS

VERSUS

TATU JUMA MOHAMEDRESPONDENT

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

(Mansoor, J.)

dated the 27th day of July, 2017

in

Land Case Appeal No. 56 of 2017

RULING OF THE COURT

14th & 16th September, 2020

MKUYE, J.A.:

In this appeal, the appellants ROSEMARY BIRIA and JOSEPH ELIEZA (the appellants) are appealing against the decision of the High Court of Tanzania at Dodoma in Land Appeal No. 56 of 2017 (Mansoor, J.) dated 27th July, 2017.

Originally, the parties to this appeal were involved on a legal wrangle over ownership of a piece of land located at Mvumi Makulu Village. The respondent, TATU JUMA MOHAMED, sued the appellants in the Ward Tribunal for Mvumi Ward over that disputed piece of land which she claimed to have inherited from her late mother and she emerged a winner. The appellants being aggrieved, appealed to the

District Land and Housing Tribunal (DLHT) for Dodoma through Land Appeal No. 25 of 2016 but the same was dismissed with costs. As they were dissatisfied by the DLHT's decision, they appealed to the High Court where again their appeal failed. Still undaunted, the appellants have come to this Court for the third chance.

It is also noteworthy that, since this is a third appeal having been originated from the Ward Tribunal, the appellants sought for a certificate on point(s) of law and the High Court vide Misc. Land Application No. 121 of 2017 certified two points of law being fit for determination by this Court. However, the appellants for unknown reasons have fronted seven grounds of appeal which for a reason to be apparent shortly we need not reproduce them.

When the appeal was called on for hearing, the appellants were represented by Mr. Fred Peter Kalonga learned counsel while the respondent did not enter appearance though the notice of hearing indicated that she was duly served on 2/9/2020. On this premise, Mr. Kalonga prayed and we granted him leave to proceed *ex parte* in terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

At the outset the Court wished to satisfy itself on the propriety of the appeal, regard being whether or otherwise the same was lodged

within the prescribed time. We, thus, invited the learned counsel for the appellant to address us on the issue.

Mr. Kalonga, in the first place explained the sequence of events from when the decision sought to be impugned was delivered to the time the appeal was lodged. He said, after the judgment was handed down on 27/7/2017, the appellants lodged the notice of appeal on 9/8/2017. Then, they applied for a certificate on points of law which was granted on 23/8/2018; and that they filed the appeal on 10/10/2018.

Upon being prompted by the Court as to when the appeal ought to have been lodged, he said it was supposed to be lodged by 26/9/2017. However, the learned counsel was also quick to state that as the appellants failed to apply for the documents necessary for the preparation of the appeal and serve the letter applying for the same to the respondent, they cannot benefit from the exclusion of number of days requisite for obtaining the documents for the appeal purposes. In this regard, he was of a firm view that the appeal was time barred liable to be struck out.

The law governing institution of appeals is Rule 90 of the Rules. Sub rule (1) of the said Rule provides for the time frame for instituting civil appeals 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 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. "[Emphasis added]

In the matter at hand, the appellants lodged their notice of appeal on 9/8/2017 after the decision sought to be impugned was delivered on 27/7/2017. They filed the memorandum of appeal on 10/10/2018. Our reading of Rule 90(1) of the Rules cited above shows that the appellants were required to institute their intended appeal within 60 days of the date of lodgement of the notice of appeal. In other words, they ought to have instituted it by lodging the memorandum of appeal by 8/10/2017

when counting the days from when the notice of appeal was lodged and not on 26/9/2017 as was suggested by Mr. Kalonga. This means that by lodging the memorandum of appeal on 10/10/2018, the same was lodged after almost a year had lapsed from the lodgment of the notice of appeal.

Further to that, though the appellants lodged their notice of appeal on 9/8/2017, there is nowhere in the record of appeal showing that there was a letter applying or requesting for certified copies of proceedings, judgment and the decree for appeal purpose. Neither is there any certificate of delay issued by the Registrar of the High Court excluding the number of days which the appellants might have spent in waiting to be supplied with the documents necessary for the appeal as provided for in the proviso to sub-rule (1) of Rule 90 of the Rules. This also implies that nothing in that regard was served to the respondent as per the dictates of sub-rule (2) of that Rule.

Including the said letter in the record of appeal, in our view, was necessary in the circumstances of case of this nature because it could have enabled the Court to see whether the appellants were entitled to rely on the provisions of Rule 90(1) of the Rules or not.

As it is, we agree with Mr. Kalonga that the appellants cannot benefit from the exclusion of number of days used in preparation of such documents under Rule 90(1) of the Rules, since they did not apply for copies of proceedings, judgment and decree including serving the letter of application to the respondent. In support of this position, we associate ourselves with decision in the case of **Mary Agness Mpelumbe (As the administratrix of the estate of Isaya S. Mpelumbe, the deceased) v. Shekha Nasser Hamada**, Civil Appeal No. 85 of 2017 (unreported) in which this Court, after having been confronted with akin scenario whereby the letter applying for the documents was not included in the record of appeal, it stated as follows:

"In the absence of that letter, therefore, the appellant cannot benefit from the exception provided under Rule 90(1) of the Rules because there would be no basis for excluding the period of delay from the date of expiry of 60 days of the notice of appeal to the date of institution of the present appeal".

But again, where there is no letter applying for the necessary documents for appeal purpose, then the appeal should have been lodged within 60 days from the date the notice of appeal was filed, otherwise the appeal lodged after the expiry of that period would be

time barred. This was amplified in the case of **Victoria Mbowe v. Christopher Shafurael Mbowe & Another**, Civil Appeal No 115 of 2012 (unreported) where the Court stated as follows:-

*"As matters stand, we are in agreement with Ms Muganyizi **that in the absence of a letter applying for the copy of proceedings, the appellant was supposed to institute her appeal within sixty days reckoned from 7/12/2010 when she lodged her notice of appeal.** Thus, 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 barred".*

[Emphasis added]

In the matter at hand, the learned counsel for the appellants conceded that they failed to apply for copies of proceedings, judgment and decree including serving the letter applying for the said documents to the respondent. This being the case, the appellants ought to have filed their appeal within sixty days of the date when the notice of appeal was filed. This means that by filing it on 10/10/2019, the appeal was not filed within the time prescribed under Rule 90(1)

appellants that the appeal is time barred.

This being the case, we find that the appeal is incompetent before the Court with only one option of being struck out.

In the event, we hereby accordingly strike out the appeal for being incompetent. As the issue was raised by the Court, we do not make any order as to costs.


DATED at **DODOMA** this 16th 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 16th day of September, 2020 in the presence of Mr. Fred Peter Kalonga, learned counsel for the Appellants and in the absence of the Respondent is hereby certified as a true copy of the original

The seal of the Court of Appeal of Tanzania is circular, featuring a central emblem with a scale of justice and a book, surrounded by the text "THE COURT OF APPEAL OF TANZANIA".
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL