

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

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

**CIVIL APPEAL NO. 21 OF 2019**

**ISSA MAHAMOUD MSONGA.....APPELLANT**

**VERSUS**

**1. ZAKARIA STANSLAUS  
2. CAPITAL DEVELOPMENT AUTHORITY }.....RESPONDENTS  
3. MAHAMOUD MSONGA**

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

**(Mansoor, J.)**

**dated the 31<sup>ST</sup> day of March, 2017**

**in**

**Land Case Appeal No. 79 of 2016**

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**RULING OF THE COURT**

**15<sup>th</sup> & 18<sup>th</sup> September, 2020**

**MKUYE, J.A.:**

This is an appeal against the decision of the High Court of Tanzania at Dodoma (Mansoor, J.) in Land Case Appeal No. 79 of 2016 dated 31/3/2017. The matter originated from the District Land and Housing Tribunal (DLHT) for Dodoma where Zakaria Stanslaus (the 1<sup>st</sup> respondent) sued Issa Mahamoud Msonga (the appellant) vide Land Application No. 60 of 2010 seeking among others to be declared the lawful owner of the disputed land/house. The matter was adjudicated in his favour. That was

on 25/10/2010. He then processed transfer of the suit plot in his name by operation of the law on the basis that he was declared the lawful owner by the trial DLHT.

Later on, sometimes in 2015, the appellant also instituted another suit vide Land Application No. 171 of 2015 against the respondents herein in the same Tribunal claiming to be the legal owner of the suit plot. However, the said matter was greeted with preliminary objection on among other points that the same was *res judicata*. After hearing the said preliminary objection, the DLHT sustained it which led to an abrupt end of the matter. The appellant being aggrieved with that decision appealed to the High Court through Land Case Appeal No. 79 of 2016 but his appeal was dismissed on account that the matter in controversy in Application No. 171 of 2015 had been conclusively determined by a competent court in previous suit (Application No 60 of 2010), and hence, the appellant was barred by *res judicata* from re-litigating on the same subject matter.

Still undaunted, the appellant has preferred this appeal. In the memorandum of appeal, he has fronted five (5) grounds of appeal. On the other hand, the respondents through the services of Mr. Wasonga filed preliminary objection on five (5) points of law the notice of which was filed

on 7/5/2019. However, at the inception of hearing of the appeal, the counsel for the appellant opted to abandon four points of objection and submit on the first point which states:

*"That, the appeal was filed out of time without securing certificate of delay contrary to Rule 10(sic) of the Court of Appeal Rules, 2009 GN. No. 368 as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017 GN. No. 362".*

When the appeal was called on for hearing on 15/09/2020, the appellant was represented by Mr. Fred Peter Kalonga learned counsel; whereas the respondents enjoyed the services of Mr. Godfrey Wasonga also learned counsel.

According to the practice of this Court, where there is a notice of preliminary objection raised in an appeal or application, the Court is to hear the preliminary objection first before allowing the appeal or application to be heard on merit. We, thus, allowed the parties to address us on the said point of objection.

Submitting in support of the point of preliminary objection, Mr. Wasonga contended that the appeal was time barred since it was not instituted within sixty (60) days from the date when the notice of appeal was lodged as required by Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Elaborating on how the appeal was filed out of time, he said, the judgment sought to be appealed against was delivered on 31/3/2017, the notice of appeal was filed on 13/4/2017 and the memorandum of appeal was filed on 24/9/2018 which was a delay of about one (1) year and five (5) months. Ordinarily, he said, the appeal ought to have been filed by 13/6/2017 when the period of sixty days from the date the notice of appeal was lodged lapsed. On that account, he stressed that as the appeal is time barred it is incompetent before the Court, with the only remedy of being struck out. He did not, however, press for costs.

On his part, Mr. Kalonga readily conceded to the sole point of preliminary objection raised by the respondent. He agreed that the appeal is out of time without more.

Rule 90 (1) which is under Part V of the Rules dealing with appeals in civil matters, provides for the appeal to be instituted within sixty days of the date of the notice of appeal. However, the proviso to the said sub rule,

provides that the time spent for the preparation and delivery of the copy of proceedings to be certified by the Registrar of the High Court as such, shall be excluded only if the appellant applied in writing to the Registrar for the said copy of proceedings with the copy of such application being copied to the respondent(s) as per sub rule (3) of that Rule. For clarity, we reproduce Rule 90 (1) and (3) of the Rules as follows:

*"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) .....*
- (b) .....*
- (c) .....*

*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.***

*(3) 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]*

In this case, as was rightly argued by Mr. Wasonga and conceded by Mr. Kalonga, the impugned decision was handed down on 31/3/2017. Then the appellant lodged a notice of appeal on 13/4/2017 which was well within time. He lodged the memorandum of appeal on 24/9/2018 which by simple computation was after almost fifteen (15) months from the lodgment of the notice of appeal. However, as already alluded to earlier on the appeal ought to have been lodged within sixty (60) days from the date of lodgment of the notice of appeal which was by 12/6/2017.

Unfortunately, it is not borne in the record of appeal if the appellant did within thirty days of the date of decision apply to the Registrar for the copy of proceedings as required by Rule 90(3) of the Rules. Neither is it shown that he copied such letter to the respondents as required by sub rule (3) of Rule 90 of the Rules. Perhaps this explains

why there is no certificate of delay issued by the Registrar excluding the time which might have been used in waiting to be supplied with the copy of proceedings for appeal purposes. This was important as it could have entitled him to rely on the exception provided for in the proviso to Rule 90 (1) of the Rules and benefit from exclusion of such time required for the preparation and delivery of that copy to the appellant.

This Court when was faced with almost a similar situation in the case of **MWANAASHA SEHEYE v. TANZANIA POSTS CORPORATION**, Civil Appeal No 37 of 2003 (unreported), it stated as follows:

*"The fact of the matter is that the appellant did not within thirty (30) days of the date of the decision, 30.8.2001, apply to the Registrar for copy of the proceedings as required by Rule 83 (1) [Now Rule 90(1)]. An appeal must be instituted within sixty (60) days of the date when the notice of appeal was lodged unless the exception under sub-rule (2) applies. Secondly, he must have sent a copy of such application to the respondent. Under the*

*circumstances, the appellant was not entitled to rely on the exception (see: (CAT) Civil Appeal No. 9 of 1994, **Tanzania Harbours Authority v. Mvita Construction Company Ltd.** (unreported)."*

On our part, we subscribe to the position stated in the above cited authority as it restated the right interpretation of the law in relation to the reliance on the exception under Rule 90(1) of the Rules.

In addition, it is notable in this case that apart from there been no certificate of delay, there is no evidence of any extension of time sought and granted to enable the appellant file the appeal out of the prescribed time.

With the foregoing, we are satisfied that the instant appeal was lodged after fifteen (15) months which was far beyond the period of sixty days provided for under Rule 90 (1) of the Rules. We, therefore, agree with both counsel that in the absence of either a certificate of delay or an extension of the time granted for the appellant to file such appeal out of the prescribed time, it is inordinately time barred.



In the event, we sustain the point of preliminary objection and strike out the appeal for being incompetent before the Court with no order as to costs.

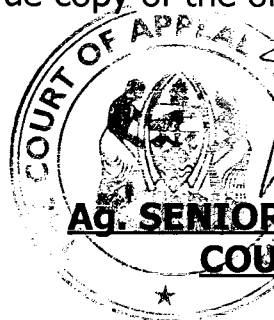
**DATED** at **DODOMA** this 17<sup>th</sup> day of September, 2020.

I. H. JUMA  
**CHIEF JUSTICE**

R. K. MKUYE  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

The Ruling delivered this 18<sup>th</sup> day of September, 2020 in the presence of Mr. Godfrey Wasonga holding brief for Fred Peter Kalonga for the Appellant and Mr. Godfrey Wasonga for the Respondents is hereby certified as a true copy of the original.

The seal of the Court of Appeal is circular, featuring a central emblem with a figure and the text 'COURT OF APPEAL' around the perimeter. A star is visible at the bottom of the seal.  
*E. K. NKYA*  
E. K. NKYA  
**Ag. SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**