

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

(CORAM: MKUYE, J.A., WAMBALI, J.A. And KOROSSO, J.A.)

CIVIL APPEAL NO. 349 OF 2019

NYANZA ROAD WORKS LTD.....APPELLANT

VERSUS

HUSSEIN BAHAJI.....RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania at
Dodoma)**

(Kalombola, J.)

Dated the 25th day of May, 2013

in

DC. Civil Appeal No. 13 of 2013

RULING OF THE COURT

21st September, & 7th October, 2020

MKUYE, J.A.:

The appellant, NYANZA ROAD WORKS LTD, has lodged an appeal to this Court challenging the decision of the High Court of Tanzania at Dodoma in DC. Civil Appeal No. 13 of 2013 (Kalombola, J.) dated 25/5/2017. The proceedings which gave rise to this appeal were instituted in the District Court of Dodoma at Dodoma on 2/10/2012 by the respondent, one, HUSSEIN ALLY BAHAJI against the appellant (a legal person). It was contended that sometimes on 23/6/2012, while the appellant's company was in the construction of a road within Barabara ya

Nane area, one of its motor vehicles did cut electricity wires supplying electricity in that area which led to a power cut affecting the respondent's home. The respondent reported the incident to TANESCO and they managed to repair the damage and reconnect the electricity to the respondent's home. Upon re-connection of the electricity the respondent exercised some due diligence to check on the welfare of the electrical appliances in his home whereupon he realized that one of his TV set was damaged. According to the respondent, he attributed such damage to the abrupt disconnection of electricity occasioned by the appellant's actions.

Thereafter, the respondent issued a demand letter to the appellant requiring her to compensate his TV set and a sum of Tshs. 50,000,000/= as damages for inconvenience and agony caused to him but the appellant did not comply. This led the respondent to commence a civil suit in the District Court of Dodoma at Dodoma vide Civil Case No. 47 of 2012. Upon a full trial, the trial court found in favour of the respondent and awarded him general damages of Tshs. 10,000,000/= and a sum of Tshs. 1,815,000/= as specific damages for the TV set which was damaged.

Aggrieved, the appellant appealed to the High Court of Tanzania at Dodoma whereby the decision of the trial court was upheld save for the reduction of the amount of general damages to Tshs. 5,000,000/= on account that Tshs. 10,000,000/= awarded by the trial court was on the high side.

Still aggrieved, the appellant has preferred this appeal on two grounds of appeal which for a reason to be apparent shortly, we shall not reproduce them.

When the appeal was called on for hearing, the appellant had the services of Mr. Fred Peter Kalonga, learned counsel; whereas the respondent enjoyed the services of Ms. Sophia George Gabriel also learned counsel.

From the outset, Mr. Kalonga sought to bring to the attention of the Court a matter he discovered in the course of preparation for hearing concerning the propriety of the appeal in that the same was time barred. He elaborated that, the decision sought to be appealed against was delivered on 25/5/2017. They lodged a notice of appeal on 22/6/2017. He then took us to page 144 of the record of appeal contending that they filed

an application for leave to appeal to this Court which was granted on 6/5/2019 and applied for the copy of proceedings on 7/5/2019 one day after the grant of application for leave to appeal to this Court as shown at pages 149 to 150 of the record of appeal. He said, the certificate of delay found at page 1 of the record of appeal is a product of their letter applying for the documents on 7/5/2019.

In this regard, Mr. Kalonga was of the view that this contravened the provisions of Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which requires the application for a copy of proceedings to be made within thirty (30) days of the decision sought to be appealed from. The learned counsel submitted further that even the appeal which was premised on an invalid certificate of delay is time barred and thus incompetent before the Court. He implored the Court to strike it out with no order as to costs.

In response, Ms. Gabriel did not contest to what Mr. Kalonga submitted in Court. She, however, pressed for costs contending that she had prepared herself for hearing of the appeal.

The issue for this Courts' determination is whether the appeal is time barred.

Rule 90 (1) of the Rules gives guidance on the institution of appeals of civil nature. The said Rule provides as hereunder:

*"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 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).....N/A

(3) The appellant shall not rely on the exception to subrule (1) unless his application for the copy was in writing and a copy of it was served on the respondent.”

[Emphasis added]

From the above cited provision, some points emerge. **One**, an appeal is mandatorily required to be instituted within sixty days of the date when the notice of appeal was lodged. **Two**, in order for the appellant to benefit from the exclusion of time spent in preparation and delivery of documents, two things must happen. Firstly, the appellant must apply for a copy of the proceedings in the High Court within thirty days of the date of the decision against which it is desired to appeal. Secondly, the application for the copy of proceedings must be in writing and a copy of it must have been served on the respondent. This means that, ordinarily, the appeal in this case ought to have been filed within 60 days from the date of notice of appeal. The letter applying for copy of proceedings should have been filed within thirty (30) days from the date of decision sought to be challenged; and the copy of the application letter should have been served on the respondent.

In the matter at hand, the judgment of the High Court which is sought to be impugned was delivered on 25/5/2017. The notice of appeal was lodged on 22/6/2017 which was well within time. It appears that from there, the appellant was engaged in an application seeking for leave to appeal to this Court which was granted on 6/5/2019 as shown at page 144 of the record of appeal. It was after the grant of the leave to appeal, when on 7/5/2019 the appellant applied to be furnished with certified copies of judgment, decree, proceedings and exhibits as shown at page 149 of the record of appeal. Thereafter the appellant was issued with certificate of delay as shown at page 1 of the record of appeal excluding the days from 7/5/2019 when they applied for the documents to 5/9/2019 as being days used for preparation and delivery of the said documents to the appellant. They lodged the memorandum of appeal together with the record of appeal on 5/9/2019.

However, looking at provisions of Rule 90 (1) of the Rules we have cited earlier on, it is vivid that the application to be supplied copies of proceedings, judgments decree and exhibits was made far beyond the period of thirty days prescribed in that subrule. According to the law such

application ought to have been made by 24/6/2017 from the date of judgment or when the judgment was delivered. Instead it was lodged after about two years from the delivery of the said decision. The purported certificate of delay excludes days from when application for documents was lodged on 7/5/2019 to 5/9/2019 which is almost a period of only four months. It does not reckon from the date when the decision was delivered. It is obvious that, the appellant having made the application to be supplied with copy of proceedings beyond the prescribed time limit of thirty days from date of decision, she cannot rely on a certificate of delay issued by the Registrar of the High Court purporting to exclude time to enable the appellant lodge her appeal out of time.

But again, it is noteworthy that in order for a certificate of delay to be beneficial to the appellant, she had to comply with the requirement under Rule 90 (3) of the Rules requiring the letter applying application for proceedings to be served on the respondent. In this case, much as the Registrar of the High Court issued the certificate of delay, it is not borne in the record of appeal if the letter applying for proceedings, judgment and decree was served on the respondent as required by that subrule. We say

so because, the letter found at page 149 of the record of appeal does not show any endorsement from the respondent that they were indeed duly served with the same. This also fortifies the shortfall in relying on the said certificate of delay.

In the case **Victoria Mbowe v. Christopher Shafurael Mbowe and Another**, Civil Appeal No. 115 of 2012 (unreported), when this Court was confronted with a similar situation, it stated as follows:

"... Similarly, Rule 90 (2) [Now 90 (3)] lays it down that an appellant cannot rely on the 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."

Even in the matter at hand, assuming the letter was written within the required time, as the appellant failed to serve on the respondent the application in writing, she cannot rely on the exception under the proviso to Rule 90 (1) of the Rules.

That said and done, we agree with the concession by Mr. Kalonga that the appeal is time barred and, hence, incompetent before the Court. In the event, we hereby strike it out for being incompetent with no order as to costs.

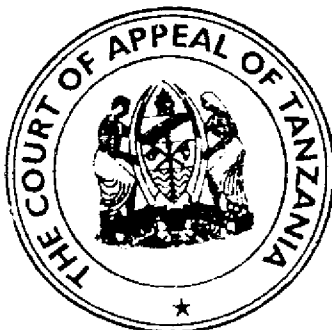
DATED at DAR ES SALAAM this 5th day of October, 2020.

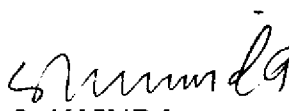
R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Ruling delivered this 7th day of October, 2020 in the presence of Mr. Fred Kalonga learned counsel for the Appellant and Ms. Nyanjiga Nyabukika learned counsel for the respondent both linked to the court through video conference from Dodoma High Court is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL