

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

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

**LAND APPEAL NO. 22 OF 2019**

<b>MAGE NAMGA.....</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>JOSIA MAGWIRA.....</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>JUMA SHAIBU.....</b>	<b>3<sup>RD</sup> APPELLANT</b>
<b>CHARLES MAGUNI@ MBARYO VIDEICHE.....</b>	<b>4<sup>TH</sup> APPELLANT</b>
<b>TONOO LENGATA.....</b>	<b>5<sup>TH</sup> APPELLANT</b>
<b>LUKAS NYAMAGORA .....</b>	<b>6<sup>TH</sup> APPELLANT</b>
<b>MALUGU MKONDE.....</b>	<b>7<sup>TH</sup> APPELLANT</b>
<b>JANETH SABE.....</b>	<b>8<sup>TH</sup> APPELLANT</b>
<b>EVA MATENGOO.....</b>	<b>9<sup>TH</sup> APPELLANT</b>
<b>ESAU CHIBANDA.....</b>	<b>10<sup>TH</sup> APPELLANT</b>
<b>YONA MKUNZA @ MAGODA.....</b>	<b>11<sup>TH</sup> APPELLANT</b>
<b>YAKOBO CHAVALA.....</b>	<b>12<sup>TH</sup> APPELLANT</b>

**VERSUS**

**THE GOVERNING BODY COLLEGE OF BUSINESS  
EDUCATION (CBE).....RESPONDENT**

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

**(Kalombola, J.)**

**Dated the 28<sup>th</sup> day of December, 2016**

**in**

**Land Case No. 06 of 2012**

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**RULING OF THE COURT**

21<sup>st</sup> September & 7<sup>th</sup> October, 2020

**WAMBALI, J.A.:**

The respondent, the Governing Body (sic) College of Business Education (CBE) sued the twelve appellants listed above in Land Case

No. 6 of 2012 which was instituted at the High Court of Tanzania at Dodoma. The main prayer, among others, was for a declaratory order that the respondent is the lawful owner and user of the land located at Nzuguni in Dodoma Municipality. The appellants resisted the suit as they lodged the written statement of defence and the counter claim.

The High Court heard evidence from both sides, and in the end, it decided in favour of the respondent. Aggrieved, the appellants lodged the present appeal in which they have fronted three grounds of appeal to contest the judgment and decree of the High Court. However, for the purpose of this ruling, we do not intend to reproduce herein the respective grounds of appeal. This ruling, therefore, is intended to determine the points of law which were raised by the respondent in a notice of preliminary objection lodged in Court on 16<sup>th</sup> September, 2020 in terms of Rule 107(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The respective points are as follows:

- “ i. *The Appeal is incompetent and bad in law for lack of valid Notice of Appeal; as the Notice of Appeal found in the record of this Appeal is in relation to a decision of Hon. KALOMBOLA, J. dated 28/12/2016 in Civil Case No. 33 of 2016 and not that on Hon. Kalombola, J dated 28/12/2016 in Land Case*

*No. 6 of 2012 which is mentioned in the Memorandum of Appeal together with its Judgment and Decree enclosed in the Record of Appeal contrary to Rule 83 (1) of the Tanzania Court of Appeal Rules of 2009 as amended.*

*ii. The Appeal is untenable and bad in law for being preferred out of the prescribed time of the law which is on 18<sup>th</sup> Sept, 2018, one year and eight months from 10<sup>th</sup> January, 2017 when a purported Notice of Appeal was lodged contrary to Rule 90(1) and (3) of the Tanzania Court of Appeal Rules of 2009 as amended.*

*iii. The Appeal is incompetent for having an incomplete record of Appeal contrary to Rules 96 (1) (b), (c), (j) and (k) of the Tanzania Court of Appeal Rules of 2009 as amended for lack of statement showing addresses of service, Pleadings, Notice of Appeal and Parties final submissions”.*

It is noteworthy that before the counsel for the respondent was called upon to address us on the points of the preliminary objection, Mr. Sostenes Peter Mselingwa learned counsel who appeared at the hearing of the appeal to represent the appellants rose and readily

conceded to all points of law raised by the respondent. In his brief submission he stated that there is no doubt that Civil Case No. 33 of 2016 which is indicated in the notice of appeal is wrong as the proper case against which the appellants seek to appeal is Land Case No. 6 of 2012. With regard to the second preliminary point of objection, he also conceded that upon his careful perusal of the record of appeal, there is no doubt that the appeal was lodged out of the prescribed period of sixty days as required by the provisions of Rule 90 (1) of the Rules. In addition, he conceded to the third preliminary point of objection that some documents relating to the present appeal are missing in the record of appeal contrary to the provisions of Rule 96 (b), (c), (j) and (k) of the Rules.

In the circumstances, the learned counsel for the appellants submitted that as the appeal is incompetent, the only remedy available is for the Court to strike it out. However, he prayed that as the appellants have conceded to the points of objection raised by the respondent there should be no order as to costs.

For the respondent, Ms. Grace Lupondo learned State Attorney who was assisted by Mr. Daniel Nyakiha and Ms. Neema Mwaipyana, both learned State Attorneys, did not have any objection to the concession and the submission of the learned counsel for the

appellants. Nevertheless, while Ms. Lupondo supported Mr. Mselingwa's prayer for the striking out the appeal for being incompetent, she strongly pressed for costs. To support her prayer for costs, she contended that the respondent has incurred some expenses in preparing the points of the preliminary objection and transportation of counsel from Dar es Salaam to Dodoma to attend the hearing.

In his brief rejoinder, Mr. Mselingwa reiterated his earlier prayer that parties should bear their respective costs, contending that the appellants have not wasted the energy of the respondent's counsel to argue the points of preliminary objection. Besides, he submitted, the appellants have also saved the precious time of the Court by conceding to the point of law raised by the respondent.

On our part, we deem it appropriate to preface our determination of the competence of the appeal by dealing with the defect in the notice of appeal. As rightly stated by the learned State Attorney for the respondent and as conceded by the counsel for the appellants, there is no dispute that Civil Case No. 33 of 2016 which is indicated in the notice of appeal as per the record of appeal is not the subject of the present appeal. On the contrary, as rightly stated by the respondent's counsel with regard to the first point of objection, the proper one is Land Case No. 6 of 2012.

However, having closely looked at the notice of appeal and the record of appeal, we have no hesitation to state that the reference to a wrong registration number of the proper case might have been caused by a typing error. We hold this view because the rest of the information contained in the notice of appeal, namely, the name of the trial judge, the date of delivery of the judgement, the name of the court in which the case which is sought to be challenged was lodged and determined and the names of the parties relates to Land Case No.6 of 2012. We think it is in this regard that the memorandum of appeal and other documents in the record of appeal, including the letter to the Registrar of the High Court requesting for copies of proceedings, indicate that the decision sought to be challenged is in respect of Land Case No. 6 of 2012. This fact is also acknowledged by the respondent in the statement explaining the context of the first point of the preliminary objection.

In the circumstances, while we take note of the defect, we are however, settled that in the interest of justice, such defect can be cured by amendment of the notice of appeal, in terms of Rule 111 of the Rules to reflect the proper case number. To this end, we are increasingly of the settled view that considering the fact that most of the important information in the notice of appeal relate to Land Case

No. 6 of 2012 as alluded to above, the omission to refer the correct number has not caused injustice to the respondent. The defect, therefore, cannot in the circumstances of this appeal invalidate the entire appeal.

We now turn to consider the second point of objection regarding the argument that the appeal is time barred. To this question, we entertain no doubt, as rightly submitted by the respondent's counsel and conceded by the counsel for the appellants that the appeal is hopelessly time barred. According to the record of appeal, the judgement of the High Court was delivered on 28<sup>th</sup> December, 2016 and the notice of appeal was lodged on 10<sup>th</sup> January, 2017 within the prescribed time. Unfortunately, it took the appellants almost one year and eight months to lodge the present appeal on 18<sup>th</sup> September, 2018. Therefore, there is no dispute that the appeal was lodged after the expiry of sixty days prescribed by the provisions of Rule 90 (1) of the Rules.

On the other hand, we are mindful of the fact that according to the record of appeal, on 11<sup>th</sup> June, 2018 the appellants applied to the Registrar of the High Court requesting for copies of proceedings of the High Court as required under the proviso to the provisions of Rule 90 (1) of Rules. However, we regret to state that the said letter cannot

salvage the competence of the appeal. It is instructive to emphasize that in terms of the proviso to Rule 90 (1) of the Rules, the letter requesting to be supplied with certified copies of proceedings can be validly relied upon by a respective party in explaining the period of delay, if it is written within thirty days from the date of the decision sought to be challenged on appeal. On the contrary, the appellants' letter was written almost after more than five months after the delivery of the decision of the High Court. Moreover, for that letter to be of assistance, the Registrar of the High Court must have issued to the appellants a certificate of delay certifying that the days in respect of the period of delay should be excluded in computing the period of limitation. Besides, for the appellants to have relied on that letter, the same must have been served on the respondent as required by Rule 90 (3) of the Rules. This is not the case in the present appeal. According to the record of appeal, the appellants neither copied nor served the respective letter to the respondent.

The importance of the intending appellant to adhere to the provisions of Rule 90 (1) and (3) of the Rules has been amply emphasised by the Court in several decisions including, **Richard Kwayu v. Robert Bulili**, Civil Appeal No.9 of 2012 and **Victoria Mbowe Christopher Shafurael Mbowe and Another**, Civil Appeal



No. 115 of 2012 (both unreported). In the later decision, the Court stated that: -

*"... Rule 90 (2) lays 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..."*

***(It is noted that sub rule (2) referred by the Court above is the current sub rule (3) of Rule 90 of the Rules in accordance with the amendment effected by GN.344 of 2019).***

In the present appeal, as the appellants did not fully comply with the requirements of Rule 90 (1) and (3) of the Rules, they were bound to lodge the appeal within sixty days. In the circumstances of this appeal, we entertain no doubt that the appellants cannot benefit from the exception provided under sub rule (1) of Rule 90 of the Rules as emphasized by the Court in **Mwanaasha Seheye v. Tanzania Ports Corporation**, Civil Appeal No. 37 of 2003 (unreported).

In the event, as the appeal is hopelessly time barred, we sustain the second point of preliminary objection.

Having concluded that the appeal is time barred, we do not deem it appropriate to determine the third point of preliminary objection.

In the end, we strike out the appeal with costs.

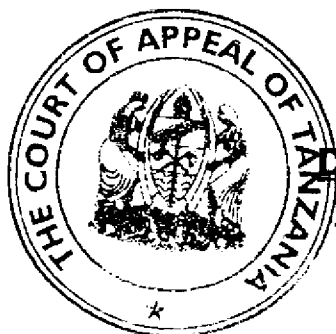
**DATED at DAR ES SALAAM** this 5<sup>th</sup> day of October, 2020.

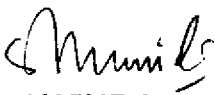
R. K. MKUYE  
**JUSTICE OF APPEAL**

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

W. B. KOROSSO  
**JUSTICE OF APPEAL**

The Ruling delivered this 7<sup>th</sup> day of October, 2020 in the presence of Ms. Nyanjiga Nyabukika holding brief for Mr. Sostenes Msalingwa, learned counsel for the appellants and Ms. Neema Mwaipyana, State Attorney for the respondent both linked 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**