IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MKUYE, J.A. LEVIRA, J.A.)

CIVIL APPEAL NO. 54 OF 2016

PUMA ENERGY TANZANIA LIMITED .....APPELLANT

VERSUS

DIAMOND TRUST BANK TANZANIA LTD.....RESPONDENT

(Appeal from the Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Songoro, J.)

Dated 29th day of April, 2015
in
Commercial Case No. 39 of 2014

RULING OF THE COURT

28th April & 27 May, 2020

MKUYE, J.A.:

The appellant, Puma Energy Tanzania Limited, (the supplier) entered into a commercial supply agreement with one, Parsley Limited, a buyer, (a third party who is not a party to this appeal) for which the appellant was to supply the said buyer fuel products as outlined in the agreement. According to the agreement, the said buyer was required to present to the

supplier bank guarantee(s) and she presented the respondent guarantor, who purportedly undertook to pay the supplier the amounts as per the agreement. In order to satisfy herself on the genuiness of the bank guarantee(s), the supplier made inquiries with the respondent who allegedly acknowledged and confirmed the same to be correct.

It is also noteworthy that in terms of the said agreement the respondent was to make payments within 30 days from the date when the supplier raised invoice. However, it turned out that when some invoices became due for payment and were presented to the buyer to arrange for payment she failed to do so. As it were, the appellant proceeded against the respondent to recover the money owed by the buyer, the third party. However, it was at that time when the appellant was informed by the respondent that the said bank guarantees were a result of forgery and, therefore, non-existent. The appellant then filed a suit in the High Court (Commercial Division) against the respondent.

When the suit was called on before that court for hearing on 29/4/2015, the appellant was represented by Advocate Herin Manento who prayed for an adjournment because the counsel (Mr. Ngalo) who had the conduct of the case was appearing before a panel of three judges of the

High Court, but the trial judge did not agree with the prayer. The counsel unrelenting again prayed for an adjournment in order to prepare for the attendance of witnesses but still the trial judge maintained his stance and thus proceeded to dismiss the suit for want of prosecution under Order XVII rule 3 of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC). The appellant being aggrieved with the dismissal of her suit has now appealed to this Court on six (6) grounds of appeal challenging the impugned decision.

However, before the hearing of appeal, the respondent, through the services of D. Kesaria of Kesaria & Company Advocates, lodged a notice of preliminary objection on two points of law as follows:

1. *That the Memorandum of Appeal was lodged after expiry of the prescribed sixty days from the date when the notice of appeal was lodged in contravention of Rule 90 (1) (a) and (b) of the Tanzania Court Appeal Rules, 2009.*

2. *That the certificate of delay contained in the record of appeal is erroneous and invalid and therefore cannot be reckoned for the purpose of excluding time under the saving provisions of Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009.*

When the appeal was called on for hearing, the appellant was represented by Mr. Sinare Zaharan learned counsel; whereas the respondent was represented by Mr. Dilip Kesaria, also learned counsel.

Submitting in support of the preliminary objection, Mr. Kesaria took off by contending that in terms of Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the appeal is supposed to be filed within sixty days from the date the notice of appeal was lodged. However, where there is a written application for a copy of proceedings made within thirty days and served to the respondent, the time required for the preparation and delivery of the copy of proceedings, as may be certified by the Registrar, is excluded. In the matter at hand, he said, the letter requesting for copy of proceedings was written on 13/5/2015, which was within 30 days and was received by the Registrar and copied to the respondent on the same date. Thereafter, there were three other follow up letters and on 3/2/2016 the Registrar wrote a letter which was received by the appellant's advocate on the same date informing him that the proceedings were ready for collection. It was his argument that, that was the time when the exclusion stopped running.

Mr. Kesaria went on to submit that, despite such information the appellants' advocate did not collect it until on 19/2/2016. Thereafter he wrote a letter to the Registrar (which was misleading) requesting for a certificate of delay excluding the period between 13/5/2015 to 19/2/2016 as being required for preparation of documents. This, he said, misled the Registrar as shown at page 103 of the record of appeal as he issued a certificate of delay excluding the period from 13/5/2015 to 19/2/2016 instead of 13/5/2015 to 3/2/2016 when the appellant's advocate was informed that the documents were ready for collection. He submitted further that the exclusion of the period from 13/5/2015 to 19/2/2016, rendered the certificate of delay to be defective. To support his argument, he referred us to the cases of **National Social Security Fund v. New Kilimanjaro Bazaar Ltd,** TLR 160 at pg. 166, **Kantibhai Patel v. Dahyabhai Mistry**, [2005] TLR [2005] 237 at pg. 438 (i) and (iii); and **Godfrey Nzowa v. Seleman Kova and Another**, Civil Appeal No. 3 of 2015 (unreported).

It was Mr. Kesaria's further argument that since the appellant was notified that the documents were ready for collection on 3/2/2016 and this

appeal was filed on 19/4/2016, it means that it was delayed for 15 days as it ought to have been lodged by 4/4/2016.

Mr. Kesaria, submitted further that the institution of the appeal within the period of 60 days is a jurisdictional issue/mandatory requirement which cannot be salvaged by the overriding objective principle introduced by the Written Laws (Miscellaneous Amendments) (No. 3) of 2018 (Act No. 18 of 2018). To fortify his argument he referred us to the cases of **Mandorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017; **Martin D. Kumalija and 117 Others v. Iron and Steel Limited**, Civil Application No. 70/18 of 2018; and **SGS Societe Generale De Surveillance SA and Another v. VIP Engineering and Marketing Limited and Another**, Civil Appeal No. 124 of 2017 (all unreported) in which the Court, basically, emphasized that the introduction of overriding objective principle was not meant to allow the parties to circumvent the mandatory rules of the Court or turn blind to the mandatory provisions of the procedural law which go or have the effect of going to the foundation of the case.

At any rate, he said, even if the Court decides to allow the appellant to rectify the certificate of delay by inserting the correct date of 3/2/2016

still the appeal would be time barred. He, thus, invited the Court to find that the appeal is out of time and strike it out with costs.

In his response, Mr. Zahran prefaced by stating that the preliminary objection has no merit. Though he agreed with Mr. Kesaria on the time within which the appeal is required to be filed, he argued that, the time which is required to be excluded by the Registrar is time necessary for preparation of the documents and delivery of the same to the appellant after payment of the court fees. In this regard, he was of the view that, the complaint by the respondent that the Registrar ought to exclude the period from 13/5/2015 to 3/2/2016 was not proper because that was the date when the counsel for the appellant was notified that the documents were ready for collection but were not delivered which in fact depended on the payment of the court fees. He added that, incidentally, there is nowhere in the Rules where it is specifically stated when the fees are to be paid; and that, since the Registrar could deliver the documents when court fees are paid, it was proper for the Registrar to exclude the period from 13/5/2015 to 19/2/2016.

Mr. Zaharan went on to argue that the cases cited by the respondent were distinguishable because in **National Social Security Fund's** (supra)

the certificate of delay was found to be defective for having included the date when the appellant obtained the copy of proceedings without paying court fees; in the case of **Kantibhai Patels'** (supra), the Court found the certificate of delay to be defective for being issued even before the copy of proceedings was ready for collection; and in **Godfrey Nzowa's** case (supra) the certificate of delay was held to be defective for referring a different date from the one indicated in the letter applying for the documents.

With regard to the invocation of overriding objective principle, he agreed that, it cannot be applied blindly in disregard to the mandatory provisions on procedure. Nevertheless, he cited the case of **Ms Universal Electronics & Hardware (Tanzania) Limited v. Strabag International GmbH (Tanzania Brach)** Civil Appeal No. 122 of 2017 (unreported) where the Court applied the overriding objective principle and allowed the appellant to file a supplementary record of appeal with a rectified certificate of delay under Rule 96 (7) of the Rules as amended in 2019 and urged the Court that should it find the certificate of delay defective, it should allow the appellant to file a supplementary record of appeal to rectify the defect. He also cited the case of **M/S Flycatcher**

Safaris Ltd v. Hon. Minister for Lands amd Human Settlements Development and Another, Civil Appeal No. 142 of 2017 (unreported) in which the Court allowed to rectify the certificate of delay because the Registrar indicated a different date which did not involve the appellant. Further to that the case of **Mohamed Suleiman Mohamed v. Ame Salum Mohamed,** Civil Appeal No 142 of 2017 (unreported) was cited in which the overriding objective principle in terms of section 3A (1) and (2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 as amended by Act No 8 of 2018 was applied to save the incompetent appeal because of a defective decree and missing documents by striking it out with a leave to refile the proper record.

Consequently, he stressed that the certificate of delay was not defective and urged the Court to overrule the preliminary objection with costs. Alternatively, he prayed to the Court to allow the appellant to amend the record of appeal if the certificate of delay is found to be defective.

In rejoinder, Mr. Kesaria submitted that as to when the period of exclusion ends depends on the interpretation of the law. However, he wondered what would happen if the appellant gets the information that the

documents are ready for collection and stays for days, months or even years without collecting them.

As to the cited cases, he argued that they are distinguishable as in the case of **Ms Universal Electronics & Hardware (Tanzania) Limited** (supra) the anomaly was raised by the Court unlike in this case where the respondent raised it. In **M/S Flycatcher Safaris Ltd's** case (supra), the defect in the certificate of delay was found to have been committed by the Registrar unlike in this case where the Registrar was misled; and in **Mohamed Suleiman Mohamed**'s case (supra) the decree was missing in the record of appeal. In this regard, Mr. Kesaria stressed that the overriding objective principle cannot be used to legalize the appeal which is time barred.

We have anxiously examined the record of appeal and dispassionately considered the rival submissions from either side. Our starting point would be restating what the law provides in relation to the institution of the appeal and certificate of delay. Rule 90 (1) of the Rules stipulates:

> *"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 sixty 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]

Our understanding of the above cited provision is that the appellant is required to file his appeal within sixty days from the time he has filed a notice of appeal. However, where he has applied for the copy of proceedings from the Registrar within thirty days of the date of decision in writing and served the copy thereof to the respondent, the Registrar may issue a certificate of delay excluding the period or number of the days which were required for the preparation and delivery of the said copy of the proceeding. This stance has been stated by this Court in numerous

decisions. Just to mention a few, they include the cases which were rightly cited by Mr. Kesaria such as **National Social Security Fund's** case (supra); **Kantibhai Patel's** case (supra); and **Geofrey Nzowa's** case (supra). For instance, in the case of **Kantibhai Patel** (supra) the Court stated as follows:

> *"A proper certificate under Rule 83 (1) of the Rules of the Court [Now 90(1) of the Rules] is one issued after the preparation and delivery of a copy of proceedings to the appellant and the certificate contained in the Record of Appeal was improper; it might have been inadvertent error and no mischief was involved but the error rendered the certificate of delay invalid. An error in a certificate is not a technicality which can be glossed over; it goes to the root of document."*

In this case, as was rightly submitted by Mr. Kesaria, the decision sought to be impugned was handed down on 29/4/2015. The appellant lodged a notice of appeal together with a letter applying for documents on 13/5/2015 as shown at page 94 and 95 of the record of appeal. She also made several reminders for the supply of documents as shown at pages 97– 99 of the record of appeal. On 3/2/2016 she received a letter from the Registrar informing her that the documents she had applied for were ready

for collection. In the said letter it is endorsed to have been received by the appellant's advocate Messrs. Ngalo & Co. Advocate on same date which is 3/2/2016. The certificate of delay shows that the Registrar excluded the period from 13/5/2015 to 19/5/2016 being the period taken for the preparation and delivery of the proceedings, judgment and decree to the appellant of which the appellant in his both written and oral submission maintained it to be the proper period to be excluded and as result the certificate of delay was quite proper.

However, on our part we are certain that the certificate of delay is defective. This is so because the record of appeal bears out that the appellant was on 3/2/2016, notified that the documents were ready for collection. This means that the clock stopped running on that date. But the appellant went to collect the same on 19/2/2016 on the pretext that the same could not have been delivered without payment of the court's fee. Unfortunately, we find such interpretation to be ridiculous/absurd. We say it is absurd because, we wonder as Mr. Kesaria wondered, what would happen if the appellant, despite being notified of the redness of the document for collection, he stays for some days, months or even years without collecting them. We ask ourselves, when therefore, will the time

stop running? It means time would have to stop running at whatever time the appellant feels like or decides to collect them which we think that was not the intention of the legislation.

We agree with Mr. Kesaria that, this is rather a matter of interpretation of the law. When this Court was confronted with a scenario relating the interpretation of the law in the case of Barnabas **Msari Nyamonge v. Assistant Registrar of Titles and Another**, Civil Appeal No. 176 of 2018 (unreported), it refused to take the interpretation of the law that would lead to absurdity. In that case the issue was whether the revisional proceedings and order of 29/7/2015 against the decision of the primary court appointing the adminstratrix of the estate of the deceased person on 8/4/2014 was within time in terms of section 22(4) of the Magistrates Courts' Act, Cap 11 RE 2002 (the MCA) requiring such proceedings to be lodged within twelve months. Both the district court and the High Court held that the revisional proceedings before the district court were not time barred because the statement of the assets and liabilities/ inventory had not been filed yet.

On further appeal before this Court, same issue arose and it was argued for the appellant that the revisional order by the district court was

made out of time and that the interpretation of section 22(4) of the MCA by the High Court to the effect that the limitation of time started to run from the date of filing of an inventory led to an absurdity. On the other hand it was argued that the matter before the district court was not time barred because the inventory had been yet to be filed and, hence, the interpretation by the High Court was quite proper. The Court discussed the scenario and stated among others as follows:

> *"...If anything, we think the interpretation of the provision under discussion suggested and taken by the High Court would lead to absurd result."*

The Court went on to state as follows:

> *"In the case at hand, giving a plain meaning interpretation of the words "termination of such proceedings in the primary court" we do not think the legislature intended to peg the limitation period after an inventory is filed. That meaning, as Mr. Machibya rightly observed, would lead to absurdity... That is to say, as already stated, the interpretation of section 22 (4) of the Magistrates Courts' Act as suggested and applied by the High Court leads to an absurd result, which, in our considered view, was not the intention of the legislature. The said absurdity we have in mind here, is best demonstrated by the conduct of the 2nd*

respondent in the matter at hand. She was appointed administratrix of the estates of the late Kannah Jambo Awadhi in 2006. The law under rule 10 (1) of the Primary Courts (Administration of Estates) Rules – GN No. 49 0f 1971 obligated her to file a statement of assets and liabilities and accounts of the estate within four months...

That was not done for eight good years at the time the late Hassan Jambo Awadhi complained to the Primary Court for her nonperformance. This demonstrates our sentiments that pegging the twelve months limitation prescribed by section 22 (4) of the Magistrates' Courts Act would bring absurd results. By the term absurdity here, as stated in the persuasive decisions in the neighboring jurisdiction of ***Republic v. Kenya Anti-Corruption Commission and Others Ex parte Okoth****, [2006] E.A. 275, we simply mean contrary to the sense or reason."*

We, indeed, associate ourselves to the above cited case. In the matter at hand, it is undisputed that the appellant through her advocate was informed by the Registrar that the documents were ready for collection vide a letter dated 3/2/2016. In the said letter it is endorsed to have been received on the same date of 3/2/2016 by Messrs Ngalo and Advocates. The appellant maintains both in her written and oral submission by Mr. Zahran that the certificate of delay was valid as the date 19/2/2016

indicated in it being the date of delivery of the documents was proper because the provision reads that:

> *"... 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****."*

He also added that the documents could not be delivered without payment of the Court's fees.

We think, such interpretation leads to absurdity. This is so because, it is the appellant who would **one,** decide whether to collect the documents or not; **two,** if he decides to collect, when to go and collect such documents which can be after days, months and even years. This is not a proper interpretation of the law. In our view, the appellant after having been informed by the Registrar that the requested documents were ready for collection on 3/2/2016, that was the date when the said documents were ready for delivery as well. It was then the duty of the appellant to collect them as soon as practicable. This is the reason why, we think, the certificate of delay issued should have reflected the exclusion of the period from 13/5/2015 when the appellant applied for copies of proceedings to

collection. Hence, we agree with Mr. Kesaria that the certificate of delay is fatally defective and cannot be used to salvage the appeal. It renders the appeal time barred.

We are alive of the overriding objective principle promulgated by Act No. 8 of 2018 which is geared towards deciding the cases justly. We have considered the decision in **Ms Universal Electronics & Hardware (Tanzania) Limited** (supra) in which the same was applied to allow the appellant to file a supplementary record of appeal with a rectified certificate of delay but we are of the view that it is distinguishable to this case because in that case the issue was prompted by the Court and the prayer for filing a supplementary record of appeal with the valid certificate of delay was not objected by the other party. In this case the defect was raised by the respondent and has objected to such similar prayer. Also we have considered the cases of **M/S Flycatcher Safaris Ltd's** case (supra); and **Mohamed Suleiman Mohamed**'s case (supra) and we agree with Mr Kesaria that they are distinguishable because in the former case the defect in the certificate of delay was committed by the Registrar unlike in this case where the appellant also contributed in the Registrar's issuance of a defective certificate of delay; and in the latter case the appeal was found

to be incompetent due to the defective decree and incomplete record of appeal.

Besides that, we have taken into account the stance we took in **Mandorosi Village Council and 2 Others** (supra), **Martin D. Kumalija and 117 Others** (supra); and **SGS Societe Generale De Suvellance SA and Another** (supra). For instance in **Martin D. Kumalija's** case (supra) we categorically stated that:

> *"Finally, we wish to comment on Seka's plea that the overriding objective principle be applied to save the notice of appeal. We are aware that the Court is enjoined by the provisions of section 3A and 3B of the Appellate Jurisdiction Act, Cap 141 R.E. 2018 introduced recently vide the Written Laws (Miscellaneous Amendment (No. 3) Act (No. 8 of 2018) to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes.* ***While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court.*** *We are loath to accept Mr. Seka's prayer because doing so would bless the respondent's inaction and render superfluous the rules of the Court that the respondent thrashed so brazenly."* [Emphasis added]

Even in the matter at hand, we think, as was rightly submitted by Mr. Kesaria, we cannot invoke such provisions of the law in order to circumvent the mandatory provisions of the law requiring the appeal to be lodged within time. Otherwise, allowing such proposition would lead to blessing an appeal which is time barred which would render the Rules of the Court meaningless.

That said and done, we sustain the preliminary objection and strike out the appeal for being incompetent with costs

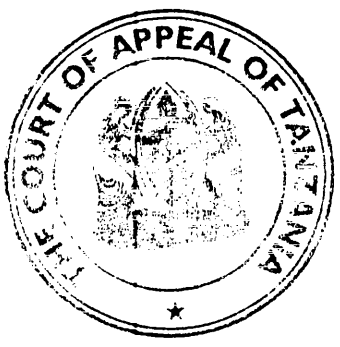
DATED at **DAR ES SALAAM** 22nd day of May, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 27th day of May, 2020 in the presence of Mr. Zaharan Sinare learned counsel for the appellant and Ms. Lilian Kabagile, learned counsel for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL