IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 390 OF 2019

ELIZABETH JEROME MMASSY ..... APPELLANT

VERSUS

1. **EDWARD JEROME MMASSY**
2. **LIGHTNESS JEROME MMASSY**
3. **FRANK JEROME MMASSY**
4. **ROGERS JEROME MMASSY** ..... **RESPONDENTS**
5. **CELINA JEROME MMASSY**
6. **REGINA JEROME MMASSY**
7. **ODILIA JEROMEMMASSY**

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Masoud, J)

dated the 6th day of August, 2018
in
Misc. Probate and Administration Cause No. 70 of 2017

RULING OF THE COURT

17th & 28th February, 2020.

MZIRAY, J.A.:

The appellant Elizabeth Jerome Mmassy and the five respondents are in Court on a battle centred on the administration and distribution of the estate of the late Jerome Adabu Mmassy. On that battle, a Misc. Probate and Administration Cause No. 70 of 2017 was filed in the High Court of Tanzania (Tanga Registry) wherein on 6/8/2018, Masoud, J. revoked the appointment

of the appellant as the administrator and substituted thereof with one Thomas Adabu Mmassy, the deceased young brother, as the administrator of the estates of the deceased Jerome Adabu Mmassy.

When the appeal was called on for hearing on 19/2/2020, the Court decided, as a matter of practice, to proceed first with the hearing of the Preliminary Objection which had earlier been filed by the respondent on 27/1/2020. The said preliminary objection is of two limbs, couched in the following terms:

> *"1.* ***The appeal is hopelessy time barred. Grounds of this preliminary objection.***
>
> *(a) Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009.*
>
> *(b)* ***Njake Enterprises Limited v. Blue Rock Ltd and another,*** *Civil Appeal No. 69 of 2017 (Court of Appeal of Tanzania).*
>
> *2.* ***The record of appeal is defective for containing pleadings and documents which were not part of the Misc. Probate and Administration Cause No. 70 of 2017.***
>
> ***Grounds of this preliminary Objection***

(a) *Rule 96 (1) of the Tanzania Court of Appeal Rules, 2009.*

(b) ***Ismail Rashid v Mariam Msati,*** *Civil Appeal No. 75 of 2015 (unreported)."*

At the hearing, Mrs. Elizabeth Minde, learned advocate appeared for the appellant, whereas Mr. Egbert Colonel Mujungu, learned advocate, represented the respondents.

Submitting on the first limb of the preliminary objection, Mr. Mujungu, while referring to the proviso in Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009, as amended, (the Rules), argued that the appeal before us is out of time as the same was supposed to be filed within a period of 60 days from the date of the notice of appeal. To demonstrate that the appeal was out of time, he submitted that the impugned decision was given on 6/8/2018 and the notice of appeal was lodged on 14/8/2018 and the letter applying for proceedings and judgment was received by the Registrar on 23/8/2019 almost one year and 17 days from the date when the notice of appeal was lodged. That letter was supposed to be written within a period of 30 days as per the proviso in Rule 90 (1), he argued.

The learned counsel referred us to the certificate of delay at page 322 of the record of appeal, which shows that the Deputy Registrar excluded the days from 23/8/2019 up to 16/10/2019. According to him the appellant did not explain what step(s) she took from the date of the notice to 23/8/2018 so as to entitle her to benefit from the proviso to Rule 90(1). It is his contention that as the letter was filed beyond 30 days, it is taken that the appellant did not have a valid certificate of delay which excluded the alleged days. To support his proposition he cited our decision **in Njake Enterprises Limited v. Blue Rock Ltd and Another,** Civil Appeal No. 69 of 2017 (unreported).

On the second limb of the preliminary objection, Mr. Mujungu took us to page 14 – 19 and then to page 244 of the record of appeal and submitted that the record is defective for containing pleadings and documents which are not part of the record in Probate Cause No. 70 of 2017. He argued that the alleged documents did not fall squarely within the list of documents required in a record of appeal under Rule 96 (1). He asked the Court to consider these documents as irrelevant and exclude them from the record.

On the basis of the two points raised, the learned counsel prayed for the appeal to be struck out with costs.

In reply, Mrs. Minde submitted that Rule 90 (1) (a) (b) and (c) of the Rules imposes three conditions, which are: one, there should be a memorandum of appeal; two, the record of appeal and three; security for costs. She expressed her doubt if practically all the documents mentioned therein could be obtained and filed within a period of 60 days.

In her view, that period is insufficient. She said that a party has to seek leave to appeal first before obtaining the proceedings and judgment sought to be challenged. In her reasoning, the judgment cannot be complete without the requisite leave to appeal from the High Court. In elaboration she submitted that leave is part and parcel of the judgment to be appealed against. She distinguished the case of **Njake Enterprises** (supra) from the instant case by arguing that the scenarios in the two cases are distinct. She maintained that the certificate of delay issued was proper, hence this appeal is lodged within time.

In response to the second ground of objection, she submitted that this appeal has its genesis in Probate Cause No. 3 of 2013, so there is no harm to incorporate the record of the original case which in her view is the source of this appeal. In addition, she submitted that the inclusion of those

documents in the record of appeal did not prejudice the respondent and above all, such documents may assist the Court in arriving at its just decision.

In conclusion she submitted that the raised preliminary objection has no substance, hence it should not be upheld.

In a short rejoinder, Mr. Mujungu reiterated what he submitted in chief and completely disagreed with the assertion that leave to appeal is part of an impugned judgment. He insisted that the appeal is time barred and that is was important to attach the documents which were pleaded and not other documents which were not relevant to the appeal.

Having heard the rival arguments from either side, the only issue for determination is whether the appeal is time barred. The main contentious issue is, when does time start to run. It is clear that where a party desires to appeal, the procedure requires that the intended appellant to lodge a notice of appeal within a period of 30 days of the impugned decision. Thereafter an appellant is mandatorily required to lodge an appeal within 60 days of the lodging of the notice of appeal. However, an appellant may be exempted of some days excluded by a certificate of delay by the Registrar. That exemption will only be available to an appellant if the letter applying

for proceedings and judgment was lodged within 30 days of the impugned decision in terms of the provision to Rule 90 (1). For ease of reference we quote Rule 90 (1) of the Rules, which provides;

> *"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]

The above position of the law was stressed in the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387 where it was held that;

> *"There must be a time limit within which the appellant is to serve the respondent with a copy of the letter to the Registrar. We think that the period of 30 days within which the appellant is required under rule 83 (1) to apply to the Registrar for a copy of the proceedings should be construed to be co-extensive with the period within which the appellant has to send a copy of that letter to the respondent."*

As per the record of appeal, the impugned decision was delivered on 6/8/2018 and the appellant lodged the notice of appeal on 14/8/2018, which means that the notice of appeal was lodged in time, however, the letter requesting for the certified copies of proceedings and judgment was filed on 23/8/2019, almost 382 days from the date when the impugned Ruling was pronounced. There is no doubt that the letter lodged contravened the above aforementioned Rule. In **Mwanaasha Seheye v. Tanzania Ports Corporation**, Civil Appeal No. 37 of 2003 (unreported), we held that;

"An appeal must be instituted within 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."

In order therefore for an appellant to benefit with the certificate of delay, he/she must lodge the letter requesting for copies of proceedings and judgment to the Registrar and the same has to be served upon the respondent. In the instant case, as rightly submitted by Mr. Mujungu, the certificate of delay failed to exclude the days from the time the judgment was delivered i.e. on 6/8/2018 to the date of applying for the copies of the proceedings and judgment, which was almost 382 days, hence the appeal was hopelessly out of time. As observed in the case of **Njake Enterprises** (supra);

"Having found that there was no valid certificate of delay, the appellant cannot benefit from the exclusion of time in which it was supposed to file its appeal. Since this appeal was filed on 5/12/2016, a period of 596 days after the notice of appeal was filed, this beyond

the prescribed period of sixty (60) days, the same is time barred."

The impression we get from the argument of Mrs. Minde is that the appellant can lodge the letter only after the application for leave to appeal to the Court of Appeal has been granted. With unfeigned respect to Mrs. Minde, that is not the correct position of the law. It is, with due respect, a misconception. Equally, we don't agree with her that leave to appeal form part of an impugned judgment. In **Richard Mchau v. Shabir F. Abdulhussein,** Civil Application No. 87 of 2008 which was quoted with approval in the case of **Geofrey Kabaka v. Farida Hamza (Administratrix of the estate of the late Hamza Adam,** Civil Appeal No. 28 of 2019 (unreported) it was stated that;

". . . much as we may agree that endeavors by an appellant to seek leave to appeal to this Court constitutes one of the essential steps towards prosecution of an intended appeal, we are certain that the efforts by the respondent were efforts in futility having not fully complied with the letter of rule 3 (1) and (2) of the Old Rules beforehand."

For the reasons stated above, we think we will end our discussion here, as this point of preliminary objection is sufficient to dispose of this appeal. We find that the appeal before us is hopelessly out of time. The consequences which follow is to strike out this appeal, as we hereby do, with costs.

DATED at **TANGA** this 28th day of February, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 28th day of February, 2020 in the presence of Mr. Longnas Jerome Mmassi, son of the appellant and Mr. Atranus Method, counsel holding brief for Mr. Egbert Colonel, learned counsel for the Respondents is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL