IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 188 OF 2016

MOHAMED ALI MOHAMED ..... APPELLANT

VERSUS

AJUZA SHABAN MZEE (Administratrix of the late FATUMA KIBWANA) ..... RESPONDENT

[Appeal from the Judgment and decree of the High Court of Tanzania (Land Division), at Dar es Salaam]

(Longway, J.)

dated the 8th day of September, 2008
in
Land Case No. 170 of 2005

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RULING OF THE COURT

9th & 25th June, 2020

MWAMBEGELE, J.A.:

Against this appeal filed by Mohamed Ali Mohamed, the respondent, Ajuza Shaban Mzee; administratrix of the late Fatuma Kibwana, through her advocate Mr. Wilson Edward Ogunde, on 30.11.2016, lodged a Notice of Preliminary Objection predicated on rule 107 of the Tanzania Court of Appeal Rules (hereinafter referred to as the Rules). The Preliminary Objection comprises the following three points:

(a) That, the appeal is time-barred;

(b) That, the appeal is incompetent as the judgment which appears at pages 164-174 of the record does not bear a date when it was pronounced contrary to Order XX rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2002; and

(c) That, the appeal is incompetent as the Decree which appears at pages 175-176 of the record does not bear a date on which judgment was pronounced contrary to Order XX rule 7 of the Civil Procedure Code, Cap. 33 R.E. 2002.

However, in the written submissions filed by the appellant's advocate in support of the appeal, the respondent's counsel opted to drop point (b) above thereby remaining with points (a) and (c). We shall, in this ruling, for easy reference, be referring to the remaining points of objection in their original order of points (a) and (c).

When the appeal was called on for hearing on 09.06.2020, both parties were represented. While the appellant was represented by Mr. Rosan Mbwambo, learned advocate, the respondent had the services of Mr. Wilson Ogunde, also learned advocate. Guided by the practice founded upon prudence in this jurisdiction, we decided to hear the two preliminary points of objection first before going into the hearing of the appeal on its merits.

However, before we could give the floor to Mr. Ogunde for the respondent to front his arguments in support of the preliminary objection, Mr. Mbwambo rose to intimate to the Court that he was conceding to the first and third points of the preliminary objection. Supporting his concession, he clarified on the first point that the appeal was time-barred because the certificate of delay which excluded the days for calculating the period of limitation was invalid thereby being incapable of excluding the days it purported to.

He also agreed with the point under arm (c) of the preliminary objection that the judgment and decree did not bear the same date thereby offending against the provisions of Order XX rule 3 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2019 (hereinafter referred to as the CPC). He clarified that even though the judgment was signed by the trial judge on 08.09.2008, the same was pronounced to the parties on 12.09.2008. The decree thus ought to have shown the date of pronouncement of the judgment; that is, 12.09.2008 instead of the date on which it was signed by the trial judge; that is, 08.09.2008.

However, after the concession and elaborations, the learned counsel was quick to tell the Court that he did not agree with the prayer by the respondent's counsel that the appeal be struck out for having found the

two points of the preliminary objection meritorious. Instead, Mr. Mbwambo asked the Court to allow the appellant go and rectify the ailment and file a supplementary record of appeal which will consist of the properly drafted certificate of delay and a properly extracted and drawn decree. The learned counsel told the Court that the course has been the practice of the Court in the jurisdiction after the inception of the overriding objective principle in our laws in the recent past. To buttress this point, the learned counsel referred us to our decision in **Mediterranean Shipping Company (T) Limited v. Africa Limited**, Civil Appeal No. 165 of 2017 (unreported) in which, having found that the relevant certificate of delay was invalid, we allowed the appellant to go and rectify it and file a supplementary record of appeal with the appropriate documents.

In response, Mr. Ogunde for the respondent did not have any qualms with the concession to the two points of objection under arms (a) and (c) of the preliminary objection. However, the learned counsel had a strenuous objection to the prayer for allowing the appellant to go and amend the ailment. He had earlier on filed written submissions in support of the objection which he sought to adopt as part of his oral arguments. It was his contention that the appellant, having conceded to the preliminary objection in limbs (a) and (c) of the preliminary objection, the Court had no

other option but to strike out the incompetent appeal. He clarified that the concession in arm (a) had the effect of making the appeal time-barred liable to be struck out. Likewise, the concession with respect to arm (c) of the preliminary objection had the effect of making the record of appeal incomplete and, consequently, making the appeal incompetent prone to be struck out. For these propositions, the learned counsel cited to us our decisions in **Njake Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017 – [2018] TZCA 304 at www.tanzlii.org and **Onaukiro Anandumi Ulomi v. Standard Oil Company Limited & 3 others**, Civil Appeal No. 140 of 2016 - [2018] TZCA 194 at www.tanzlii.org. Mr. Ogunde added that in our decision in **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2018 - [2020] TZCA 186 at www.tanzlii.org, at pp. 5-7, the Court refused an application for leave to amend.

When probed by the Court on whether the provisions of rule 96 (7) of the Rules were in place when the **Njake Enterprises Limited** and **Onaukiro Anandumi Ulomi** cases were decided, Mr. Ogunde responded negatively but was quick to state that **Njake Enterprises Limited** made reference to the overriding objective in reaching the decision that the appeal should be struck out. With regard to a defective certificate of delay

and the consequences thereof, the learned counsel referred us to **District Executive Officer, Kilwa District Council v. Bogeta Engineering Limited**, Civil Appeal No. 37 of 2017 – [2019] TZCA 24 at www.tanzlii.org in which we struck out the appeal for being time barred on account of a defective certificate of delay. He added that the appellant cannot escape blame under the pretext that the mistake is the Deputy Registrar's in that the learned advocate for the appellant ought to have checked the record before he certified it as correct.

On the strength of the above, Mr. Ogunde beseeched us to strike out the appeal with costs after the concession by the advocate for the appellant.

Mr. Mbwambo, in rejoinder, rebutted that the **Puma Energy** case did not say that the Court should refuse the filing of a supplementary record of appeal but that the appellant had exhausted that opportunity and was prohibited to come again for the same prayer as per rule 96 (8) of the Rules. With regard to **Njake Enterprises Limited**, Mr. Mbwambo submitted that it was decided before the inception of rule 96 (7) of the Rules. It is therefore inapplicable in this application, he submitted. The **District Executive Officer, Kilwa District Council** case is equally distinguishable, he submitted, because there, unlike here, the Court found

out that there was no letter to the High Court applying for the documents for appeal purposes. Regarding costs, Mr. Mbwambo urged the Court not to punish the appellant for the mistakes of the Deputy Registrar who prepared the invalid certificate of delay.

We have considered the arguments by the learned counsel for the parties. The learned counsel are at one that the certificate of delay is invalid and, therefore, cannot be used to exclude the days it purports to. Equally undisputed, is the unadorned fact that the dates in the judgment and its contiguous decree do not tally. The record of appeal bears out at p. 174 that the judgment was signed by the trial judge on 08.09.2008 but was pronounced to the parties on 12.09.2008 by Ms. G. K. Mwakipesile, Acting Registrar of the Land Division of the High Court (as she then was) as appearing at p. 137 of the record. That the ailment offends against rule 7 of Order XX of the CPC, is also undisputed by the learned counsel for both parties. What the learned advocates for the parties have locked jaws on is the way forward. While Mr. Mbwambo for the appellant prays that the appellant should be allowed to file a supplementary record with a rectified certificate of delay and decree, Mr. Ogunde for the respondent fervently objects. It is his prayer that the appeal be struck out for being time-barred and incompetent on account of an incomplete record.

We wish to start our determination of the two preliminary points of objection by a statement that with the oxygen principle in our midst, we are most of the time very loath to terminate an appeal or application without determining it on its merits. In line with this, we therefore have been allowing parties to rectify certificates of delay so as to give oxygen to the case so that it is not struck out and leave the dispute between the parties unsettled but determined on its merits. We have done so in a number of cases including the order we made in **Mediterranean Shipping Company (T) Limited** (supra), the case referred to us by Mr. Mbwambo for the appellant. Other decisions falling in this basket are **Abdurahaman Mohamed Ally v. TATA Africa Holding (T) Limited**, Civil Appeal No. 58 of 2017, **M/S Universal Electronics and Hardware (T) Limited v. Strabag International Gmbh (Tanzania Branch)**, Civil Appeal No. 122 of 2017 and **Salhina Mfaume & 7 Others v. Tanzania Breweries Co. Limited**, Civil Appeal No. 111 of 2017 (all unreported). In **Mediterranean Shipping Company (T) Limited** (supra), for instance, we were faced with a situation where a certificate of delay was invalid and relied on our previous decisions in **Abdurahaman Mohamed Ally** (supra) and **Salhina Mfaume & 7 others** (supra) and allowed the appellant to go back to the High Court and seek and obtain a valid certificate of delay. In

Mediterranean Shipping Company (T) Limited (supra), referring to an invalid certificate of delay and the application of the oxygen principle, we reproduced the following excerpt from the order we made in **Abdurahaman Mohamed Ally**:

> *"However, given the fact that the mistake was made by the Court and although on his part, the appellant's counsel had the duty of ensuring that a properly drawn certificate was sought and included in the record of appeal, going by the spirit of overriding objective, we allow the prayer made by the appellant's counsel."*

In that case, we were also categorical that **Mondorosi Village Council** (supra) was distinguishable and we think the same is the position here. In **Mondorosi Village Council** (supra), unlike here, the omission was failure by the appellant to include in the record of appeal a letter applying for the copy of proceedings. We thereafter proceeded to allow the appellant to go and obtain a properly drawn certificate of delay and file a supplementary record of appeal.

Likewise we agree with the appellant's advocate that the **Puma Energy** case is also distinguishable because, there, unlike here, the appellant had already used the opportunity to file a supplementary record

of appeal under the rule 96 (7) of the Rules and the Court ruled that having exhausted that opportunity, the appellant was barred by rule 96 (8) of the Rules to bring another prayer under rule 96 (7) of the Rules.

With respect to the **District Executive Officer, Kilwa District Council** case, Mr. Mbwambo submitted that it was decided prior to the enactment of rule 96 (7) of the Rules. We are prepared to go along with him on this argument. The provisions of rule 96 (7) were added to the Rules vide the Court of Appeal (amendment) Rules, 2019 – GN No. 344 of 2019 which came into force on 26.04.20019; the date of its publication. The **District Executive Officer, Kilwa District Council** (supra) case is dated 20.02.2019 and delivered to the parties on 15.04.2019. It is therefore unblemished that when **District Executive Officer, Kilwa District Council** (supra) decided, the provisions of rule 96 (7) of the Rules were not in place. If the appeal would have been decided after the inception of rule 96 (7), we are certain in our mind that the Court would not have decided the way it did.

In populating the principle of legal certainty and the fear of offending against it, we will hold the same position in this appeal; that is, to allow the appellant go back to the High Court and obtain a valid certificate of delay as we did in the cases cited above. We also will allow the appellant to go

and obtain a judgment and decree whose dates will tally in compliance with Order XX rules (3) and (7) of the CPC.

In the upshot, we sustain the two preliminary points of objection but, instead of striking out the appeal, we add oxygen to the matter by allowing the appellant to go and seek and obtain a valid certificate of delay and a properly extracted decree which will tally with the dates on which the judgment was pronounced to the parties. Costs in this application shall abide by the outcome of the appeal.

DATED at **DAR ES SALAAM** this 23rd day of June, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 25th day of June, 2020 in the presence of Mr. Herry Kauki, learned counsel for the Appellant and holding brief of Mr. Wilson Ogunde, learned counsel for the Respondent is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL