

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CIVIL APPEAL NO. 203 OF 2016

FAUZIA JAMAL MOHAMED..... APPELLANT

VERSUS

LILIAN ONAEL KILEO.....RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
(Commercial Division) at Dar es Salaam)**

(Mwambegele, J)

**dated the 18th day of February, 2016
in
Commercial Case No. 135 of 2013**

RULING OF THE COURT

25th March & 6th April, 2020

KEREFU, J.A.:

This is an appeal from the judgment and decree of the High Court of Tanzania, (Commercial Division) at Dar es Salaam in Commercial Case No. 135 of 2013. In that decision, the High Court (Mwambegele, J. as he then was) upheld the respondent's claim against the appellant with respect to the breach of agreement executed between the parties on 30th January, 2013 and awarded her TZS. 160,000,000.00 being balance due on the said agreement, TZS. 10,000,000.00 as general damages, interests and costs of the case. Aggrieved, the appellant on 23rd February, 2016 wrote to the

Registrar requesting to be supplied with copies of the proceedings, judgement and decree of the impugned decision and on 24th February, 2016 she lodged a notice of appeal. Again, after a lapse of about seven (7) months, the appellant on 21st September, 2016 wrote another letter to the Registrar, this time requesting to be supplied with the ruling and order delivered on 12th August, 2014 (Nyangarika, J) in respect of the Misc. Commercial Application No. 70 of 2013. On 6th December, 2016 the Registrar issued a certificate of delay exempting days from 24th February, 2016 to 18th October, 2016 as the period used to prepare the said documents. Thus, the appellant lodged this appeal on 19th December, 2016 containing six (6) grounds of complaint. However, for reasons to be apparent in due course, we will not reproduce the said grounds herein.

The appeal was confronted with a notice of preliminary objection comprised of three points to the effect that:-

- 1) The appeal is time barred;*
- 2) The record of appeal is incomplete; and*
- 3) The record of appeal has been drawn by unauthorized entity.*

At the hearing of the appeal, the appellant was represented by Ms. Rita Odunga Chihoma, learned counsel, whereas the respondent had the services of Mr. Edward Peter Chuwa, also learned counsel.

As the practice of the Court demands, the preliminary objection has to be disposed first before determination of the appeal on merit. Having that in mind, we invited the counsel for the parties to address us on the preliminary objection raised by the respondent.

Mr. Chuwa commenced his submission by praying for leave of the Court, which we granted, for him to abandon the second and third points of objection and argue only on the first point.

Arguing in support of the first point of objection, Mr. Chuwa submitted that, pursuant to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Registrar is empowered to exclude, in the certificate of delay, the time from when the appellant requested for copies of proceedings, judgment and decree till when they become ready for collection. He said, unfortunately, in the case at hand, the certificate of delay is defective because it refers to 24th February, 2016 when the appellant lodged the notice of appeal, instead of 23rd February, 2016 which is the date of the appellant's letter. Mr. Chuwa added that, the record of

appeal contains two more letters by the appellant addressed to the Registrar dated 22nd February, 2016 and 21st September, 2016, respectively, but the same were not served to the respondent as required by Rule 90(4) of the Rules. He further argued that there is no letter dated 24th February, 2016 in the record of appeal. According to him, the certificate referred to a non-existent letter.

However, upon being probed by the Court on the date when the appellant's letter dated 23rd February, 2016 was lodged in the High Court and received by the Registrar, Mr. Chuwa, though, conceded that the said letter was lodged and received by the Registrar on 24th February, 2016, still maintained his stance that the certificate of delay referred to a non-existent date.

Mr. Chuwa submitted further that the certificate of delay is defective for indicating that the appellant was supplied with the copies of the judgment and decree on 18th October, 2016 while in her letter dated 21st September, 2016, the appellant acknowledged that she had already received the said documents. It was his argument that since by September 2016 the appellant had already received the said documents, it was wrong for the certificate of delay to exempt the period from 24th February, 2016

to October, 2016. He further contended that the defects found in the certificate of delay cannot be cured by the overriding objective principle as the same is not designed to disregard the mandatory provisions of the procedural law which go to the foundation of the case. To bolster his stance, he cited cases of **Njake Enterprises Limited v. Blue Rock Limited and Rock and Venture Company Limited**, Civil Appeal No. 69 of 2017, **Mondorosi Village Council and 2 Others v. Tanzania Breweries and 4 Others**, Civil Appeal No. 66 of 2017 and **District Executive, Kilwa District Court v. Bogeta Engineering Ltd**, Civil Appeal No. 37 of 2017 (all unreported). He then argued that, since the certificate of delay was prepared contrary to Rule 90 (1) and (2) of the Rules, the same is defective and the appellant cannot benefit from the excluded period and thus the appeal is time barred for being lodged after a lapse of 176 days. Based on his argument, he urged us to sustain the preliminary objection and strike out the appeal with costs.

In response, Ms. Chihoma resisted the preliminary objection and disputed what was submitted by Mr. Chuwa by arguing that the certificate of delay found at page 366 is valid as it was prepared in accordance with Rule 90 (1) and (2) of the Rules. She said, the impugned decision was

delivered on 18th February 2016 and the notice of appeal was lodged on 24th February, 2016 well within time. As regards the appellant's letter requesting for the copies of proceedings, Ms. Chihoma argued that the relevant letter in relation to the lodging of this appeal is the one dated 23rd February, 2016, lodged in the High Court on 24th February, 2016 and served to the respondent on 26th February, 2016. As for the other two letters dated 22nd February, 2016 and 21st September, 2016, Ms. Chihoma argued that they had nothing to do with the lodging of this appeal. She thus submitted that there is no error in the certificate of delay because according to her, the lodgment date of the appellant's letter i.e 24th February, 2016 is the correct date to be reflected in the certificate. As such, Ms. Chihoma discounted all cases cited by Mr. Chuwa by arguing that they are distinguishable and not applicable in this case because they are based on the issue of non-existent date, while in this case the date indicated is the correct date. In the event, she urged us to overrule the preliminary objection with costs for being devoid of merit. To support her preposition she cited to us cases of **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 and **NIC Bank Tanzania**

Limited v. Hirji Abdallah Kapikulila, Civil Application No. 561/16 of 2018 (both unreported).

In rejoinder, Mr. Chuwa reiterated what he submitted earlier and added that, apart from the earlier noted defects, the title to the certificate of delay contains erroneous information that the appeal was against Commercial Case No. 135 of 2013 together with Misc. Commercial Application No. 70 of 2013, while in actual fact the appeal is only against the Commercial Case No. 135 of 2013. He thus insisted that the preliminary objection be sustained and the appeal struck out with costs.

Having considered arguments for and against the preliminary objection advanced by the learned counsel for the parties, the issue for our determination is whether the defect(s) in the certificate of delay invalidate it, hence rendering the appeal incompetent. A certificate of delay is governed by Rule 90 (1) and (3) as amended by GN. No. 344 of 2019. Prior to the said amendments, the same was Rule 90 (1) and (2) as cited by the counsel for the parties herein. The said Rule provides that:-

*"Rule 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 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 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.**"*

(3) An appellant shall not be entitled to rely on the exception to sub-rule (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 Rule it is clear that the appellant was required to lodge her appeal within sixty (60) days from the date when the notice of appeal was lodged. The only exception to this requirement is where she was not able to obtain a copy of the proceedings from the High Court and has applied for the same in writing within thirty (30) days from the date of the decision against which it is desired to appeal. Under the same Rule the Registrar of the High Court is equally required to issue a certificate of delay indicating the number of days used to prepare and deliver copies of the

said documents to the appellant in order to entitle him/her to the exclusion of those days in computing time within which the appeal has to be lodged.

This Court in several occasions has interpreted the above Rule and emphasized on the importance of adhering to the mandatory requirement therein. Some of these decisions have been cited to us by Mr. Chuwa, but we wish to add on the list few more, such as **Khantibhai M. Patel v. Dahyabhai F. Minstry** [2003] TLR 437 and **Omary Shabani S. Nyambu v. The Permanent Secretary Ministry of Defence and 2 Others**, Civil Appeal No.105 of 2015 (unreported). Specifically, in **Khantibhai M. Patel** (supra) this Court held *inter alia* that:-

"A proper certificate under rule 83(1) of the Rules of the Court is one issued after the preparation and delivery of a copy of the proceedings to the appeilant and the certificate contained in the record of appeal was improper; it might have been an inadvertent error and no mischief was involved but the error rendered the certificate invalid. An error in a certificate is not a technicality which can be glossed over; it goes to the root of the document". [Emphasis supplied].

It is noteworthy that, Rule 83 (1) of the Court of Appeal Rules, 1979 referred to above, is now Rule 90(1) of the Rules as amended by GN. No. 344 of 2019.

In the instant appeal, the impugned decision was delivered on 18th February, 2016 and on 24th February, 2016 the appellant lodged the notice of appeal. It is also on record that, in her letter dated 22nd February, 2016 with *Ref. No. MM/FJM/2016/01* shown at page 363 of the record of appeal, the appellant wrote to the Registrar requesting to be supplied with copies of proceedings, judgement and decree for appeal purposes. The said letter was properly served to the respondent on 26th February, 2016 as required by Rule 90 (2) of the Rules and in his submission, Mr. Chuwa has not denied to have received that letter.

Indeed, there are other two letters in the record of appeal dated 22nd February, 2016 and 21st September, 2016, respectively. However, after going through their contents, we are in agreement with the submission of Ms. Chihoma that, the relevant letter envisaged under Rule 90 (3) of the Rule, is the one dated 23rd February, 2016, because it is through that letter the appellant requested to be availed with copies of the said documents for appeal purposes. It is equally on record that the said letter though dated

23rd February, 2016, was delivered to the Registrar on 24th February, 2016. Thus, we are in agreement with Ms. Chihoma that, 24th February, 2016 was the correct date to be reflected in the certificate of delay, as that is the date when the said letter was delivered and received by the Registrar for purposes of preparing the requested documents.

We are however mindful of the fact that in his submission, Mr. Chuwa argued that the correct date to be reflected was 23rd February, 2016 which is the date when the appellant wrote that letter. With respect, we are unable to agree with Mr. Chuwa's contention, because in our considered view, the date when the appellant wrote his letter cannot be the date envisaged under Rule 90(1) of the Rules to compute the period used by the Registrar to prepare the documents. It is obvious that the appellant may decide to write his letter today but lodge it after a month or so. In the case of **Hemed Suleiman Hemed and Another v. Haji Ame Jecha and 7 Others**, Civil Appeal No. 297 of 2017, this Court when considering the validity of the certificate of delay on a similar matter stated at page 6 that:-

*"It is patently clear from the wording of the certificate that the same **excluded a period***

which includes three (3) days outside the date of lodgment of the appellant's letter of application for certified copy of the proceedings of the High Court and the date of supply of the copy to them. This renders the certificate defective." [Emphasis added].

Therefore, since in the case at hand the Registrar has properly inserted the date of the lodgment of the appellant's letter in court, the validity of the certificate cannot be questioned on that aspect.

The second ailment submitted by Mr. Chuwa, which undermines the validity of the certificate is the period exempted therein. Mr. Chuwa while arguing on this point referred us to the appellant's letter dated 21st September, 2016 and argued that, in that letter the appellant had clearly indicated that by September, 2016 she had already received the copies of proceedings, judgement and decree. He argued further that, despite that fact, in the said certificate, the Registrar wrongly indicated that the documents were availed to the appellant on 18th October, 2016. To appreciate the said argument, we find it prudent to reproduce the material part of the said certificate herein below:-

CERTIFICATE OF DELAY UNDER RULE 90(1) OF THE COURT OF

APPEAL

RULES GN. NO. 368 OF 2009

*This is to certify that the period from 24th February, 2016 when Marando, Mnyele & Co. Advocate for the Appellant herein filed a Notice of Appeal and applied for copies of Judgment, Proceedings and Decree to **18th October, 2016 when the said Judgment Proceedings and Decree were supplied to the Mabere Marando & Wabeya Advocates for the Appellant are to be excluded for such days were required for the preparation and delivery of the said requisite papers, i.e Judgment, Proceedings and Decree.**" [Emphasis added].*

It is clear from the wording of the above certificate that it excluded a period from 24th February, 2016 to 18th October, 2016 and wrongly indicated that the said documents were supplied to the appellant on 18th October, 2016, while in her letter dated 21st September, 2016 the appellant acknowledged to have already received the said documents. For clarity we reproduce the appellant's letter dated 21st September, 2016 herein below:-

*"Kindly refer to the above captioned matter and our letter dated 22nd February, 2016 with Ref. MM/FJM/2016/02. **By the above referred letter we requested to be supplied with copies of judgment, proceedings, exhibits, ruling***

*and extract order for appeal purposes. We acknowledge the receipt of proceedings and judgment. Unfortunately to date we have not received the ruling which was delivered on 12th August, 2014 (Nyangarika, J) and its extract order. With this letter we pray to be supplied with copy of the said ruling and extract order, and since the process has taken longer and now the **defendant is out of time to file her appeal to the Court of Appeal**, kindly furnish us with a certificate of delay deducing the time he was waiting to be provided with the said ruling and extract order from the statutory limitation period” [Emphasis added].*

Reading the contents of the certificate and the above appellant’s letter, we are in agreement with Mr. Chuwa that the certificate does not reflect the truth of the matter and the same cannot be relied upon by the appellant. We have however observed that, though the appellant acknowledged to have received those documents, she has not indicated a specific date when she received them and even the Registrar’s letter responding to her letter dated 23rd February, 2016 informing her that the said documents were ready for collection is not included in the record of appeal. It is even not certain when exactly the appellant received those documents.

By any standard, since the appellant requested for those documents in February, 2016 and was availed with the same before September 2016, it was not proper for the certificate of delay to indicate that the judgement, proceedings and decree were supplied to the appellant in October, 2016. It is equally important to note that the appellant's letter dated 21st September, 2016 was written to the Registrar after lapse of almost seven (7) months from February 2016 when the said documents were requested. In **Andrew Mseul and 5 Others v. The National Ranching Company Ltd and Another**, Civil Appeal No. 205 of 2016 (unreported) this Court considered a certificate of delay with similar defect of wrongly computing the period used to prepare the documents. It stated that:-

*"A valid certificate of delay is one issued after the preparation and delivery of the requested copy of the proceedings of the High Court. That necessarily presupposes that **the Registrar would certify and exclude such days from the date when the proceedings were requested to the day when the same were delivered**"* [Emphasis added].

On the basis of the above authority, it goes without saying that in the instant appeal the period from 24th February – 18th October, 2016 was

wrongly excluded in the said certificate of delay and it has since rendered it defective. The said certificate has as well wrongly indicated that the appeal is against the ruling issued in Misc. Commercial Application No. 70 of 2014, while in actual fact the appeal is against the judgement and decree in respect of Commercial Case No. 135 of 2013. Guided by decided cases of **Khantibhai M. Patel** (supra), **Andrew Mseul and 5 Others** (supra) and **Hemed Suleiman Hemed and Another** (supra), we are in agreement with Mr. Chuwa that the certificate of delay is fatally defective. In this regard, we reiterate what we stated in **Njake Enterprises Limited v. Blue Rock Limited and Rock and Venture Company Limited**, Civil Appeal No. 69 of 2017 at page 11-12, **Mondorosi Village Council and 2 Others v. Tanzania Breweries and 4 Others**, Civil Appeal No. 66 of 2017 (both unreported) cited to us by Mr. Chuwa where the Court emphasized that defects in the certificate of delay goes to the very foundation of the case.

In the circumstances, we are satisfied that the appellant cannot benefit from the excluded period indicated in the invalid certificate of delay. Since the appeal was lodged on 19th December, 2016 after a lapse of more than 176 days from the date of lodging the notice of appeal, beyond the

prescribed period of sixty (60) days, the same is time barred and thus incompetent. Eventually and for the foregoing reasons, the incompetent appeal is hereby struck out with costs for being time barred.

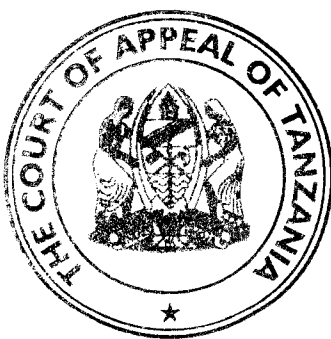
DATED at **DAR ES SALAAM** this 1st day of April, 2020.

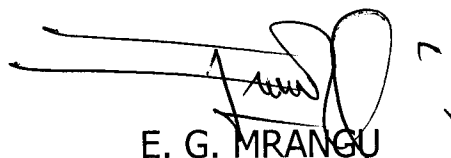
R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 6th day of April, 2020 in the presence of Mr. Shaaban Mwaita, holding brief Ms. Rita Chihoma, learned Counsel for the Appellant and Mr. Joiros Josephat, holding brief Mr. Edward Chua, learned Counsel for the Respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL