

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

**(CORAM: MMILLA, J.A., MWANGESI, J.A. And SEHEL, J.A.)**

**CIVIL APPEAL NO. 5 OF 2018**

**DIRECTOR GENERAL, REGIONAL  
MANAGER (IRINGA) NSSF ..... APPELLANT**

**VERSUS**

**MACHUMU MKAMA ..... RESPONDENT**

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

**(Aboud, J.)**

**dated the 31<sup>st</sup> day of July, 2015**

**in**

**Revision. No. 38 of 2014**

**RULING OF THE COURT**

24<sup>th</sup> February & 13<sup>th</sup> March, 2020

**SEHEL, J.A.:**

The appellant, Director General, Regional Manager (Iringa) of the National Social Security Fund (NSSF) lodged an appeal to this Court against the decision of the High Court (Labour Division) at Dar es Salaam in Revision No. 38 of 2014. In its decision delivered on 31<sup>st</sup> day of July, 2015, the High Court confirmed the findings of the Commission for Mediation and Arbitration (CMA) in Dispute No. CMA/108/73 that the termination of the respondent was substantively unfair. It thus, varied the CMA's order of

reinstatement by ordering reinstatement and payment of the respondent's remuneration from the date of his termination to the date of reinstatement.

The appellant in this appeal has advanced four grounds which for a reason to be apparent shortly we do not intend to reproduce them.

The respondent after being served with the appeal and pursuant to Rule 107 of the Court of Appeal Rules of 2009 (the Rules) filed two notices of the preliminary objections. The initial notice filed on 5<sup>th</sup> day of February, 2018 comprised of two points of law; namely:-

- 1. The Certificate of delay appearing at page 98 of the record of appeal is invalid in that it is incompetent, incorrect, improper, and erroneously certified consequently the appeal is time barred and liable to be dismissed with costs.*
- 2. The appeal is incompetent as the record of appeal has omitted to include full proceedings and documentary exhibits in the record of appeal in violation of Rule 96(1)(c),(d),(f),(g), and (k), of the Tanzania Court Appeal Rules, 2009 (the Rules) which have not been excluded in terms of Rule 93(3) of the Court of Appeal Rules, 2009.*

The second notice of the preliminary objection filed on 12<sup>th</sup> day February, 2019 has one point of law that;

*"The Notice of Appeal filed in this Court is invalid for having been lodged pursuant to an order of the High Court Labour Division arising from an incompetent appeal."*

At the hearing of the appeal, Mr. Yussuf Sheikh and Elisaria Jastiel Mosha, learned advocates, appeared to represent the applicant and the respondent, respectively.

As the practice of the Court, the preliminary objections have to be disposed first before going into determination of the merit of the appeal, we thus allowed Mr. Mosha to address us, first.

Mr. Mosha in his submission consolidated the first point of law appearing in the notice of the preliminary objection filed on 5<sup>th</sup> day of February 2020 with the point of law appearing on the second notice of the preliminary objection filed on 12<sup>th</sup> day of February 2020. The second preliminary objection, he abandoned it.

Briefly, the submission of Mr. Moshia was to the effect that the certificate of delay appearing at page 98 of the record is invalid, incorrect and has errors that cannot be used to entitle the appellant to benefit from the exclusion of the period of waiting to be supplied with the proceedings from the High Court as per Rule 90 (1) of the Rules. It was his submission that since there is no valid certificate of delay, the appeal is time barred. He therefore prayed for the appeal to be struck out. To cement his argument Mr. Moshia relied on the cases of **Security Group (T) v. Huruma Kimambo**, Civil Appeal No. 181 of 2018 and **Greven Ngomuo v. Isaya Swai**, Civil Appeal No. 149 of 2016 (both unreported).

On his part, Mr. Sheikh readily conceded to the preliminary objections that the appeal is time barred since there is no valid certificate of delay.

We, on our part, fully subscribe to both parties' submission that the certificate of delay issued on 8<sup>th</sup> day of December, 2017 by the Deputy Registrar of the High Court is defective. We say so for the following reasons:

**First**, it is apparent on the record of appeal at pages 92, 93, and 94 that both notice of appeal and a letter requesting for copies of

proceedings, judgment and decree were filed on 10<sup>th</sup> day of August, 2017 after the appellant was granted an extension of time to lodge notice of appeal out of time. In terms of the exception provided under the proviso to Rule 90 (1) of the Rules, the appellant was required to write a letter requesting to be supplied with the copy of the proceedings to the Registrar of the High Court within thirty days counted from the date when the intended impugned decision was made. That Rule reads as follows:-

*"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 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.”*

In the instant appeal, the intended impugned decision appearing from pages 61 to 75 of the record of appeal was delivered on 31<sup>st</sup> day of July, 2017, whereas the letter was written on 9<sup>th</sup> day of August, 2017 and received by the court on 10<sup>th</sup> day of August, 2017. Counting from 31<sup>st</sup> day of July, 2017 to 10<sup>th</sup> day of August, 2017 it is over a period of 89 days. It follows then that the letter of 10<sup>th</sup> August, 2017 is in total contravention of the dictates of the provisions of Rule 90 (1) of the Rules. That letter was beyond thirty days prescribed by Rule 90 (1) of the Rules. As correctly observed by Mr. Mosha, that the date which the Deputy Registrar certified was erroneous since the letter requesting for proceedings, judgment and decree was written after a lapse of 89 days from the date when the judgment of the intended impugned decision was made. Consequently, the Deputy Registrar erroneously referred in the certificate of delay a letter that did not comply with the provisions of Rule 90 (1) of the Rules as it was written beyond the period of thirty days from the date of the intended impugned decision. That invalid letter referred in the certificate of delay invalidates the certificate itself as such the certificate of delay becomes

useless on the part of the appellant. It cannot use it to benefit from the exception stipulated under the proviso to Rule 90 (1) of the Rules.

Second, ailment which undermines the certificate of delay is a period used in preparing the documents. The Deputy Registrar certified that the period from 10<sup>th</sup> August, 2017 up to 5<sup>th</sup> day of December, 2017 was used in preparing and supplying the document. For clarity, we find it prudent to reproduce part of the certificate of delay as follows:-

***"CERTIFICATE OF DELAY UNDER RULE 90 (1) OF  
THE TANZANIA COURT OF APPEAL RULES, 2009***

*This is to certify that the period from 10<sup>th</sup> day of August, 2017 when the applicant filed a Notice of Appeal and applied for copies of ruling, proceedings and drawn order; to 05<sup>th</sup> day of December, 2017 when the said ruling, proceedings and drawn order were supplied to the applicant are to be excluded, for such days were required for the preparation and delivery of the said requisite papers, that is, ruling, proceedings and drawn order.*

*Given under my hand and the seal of the Court this 08<sup>th</sup> day of December, 2017.*

*Signed*

*DEPUTY REGISTRAR IN-CHARGE"*

Reading the above certificate of delay, suggests that the records were supplied to the appellant on 5<sup>th</sup> day of December 2017. However, in the record of appeal, there is a letter dated 4<sup>th</sup> day of September, 2017 notifying the counsel for appellant that the documents requested were ready for collection. This means that the process for preparing the requested documents was completed by 4<sup>th</sup> day of September, 2017 and not 5<sup>th</sup> December, 2017 as certified by the Deputy Registrar. In the case of **Andrew Mseul and 5 Others v. The National Ranching Company and Another**, Civil Appeal No. 205 of 2016 (unreported) we emphasized 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."*



Of course, we are mindful that the letter dated 4<sup>th</sup> day of September, 2017 does not indicate when the appellant's counsel received it but also we fail to find any document in the record of appeal showing the date when the appellant received the requested document apart from the statement contained in the certificate of delay.

That apart and assuming that the letter did not reach to the appellant in time, still the certificate of delay has another shortfall. And this is the third reason that makes us to invalidate the certificate of delay.

**Thirdly**, the documents supplied to the applicant are not the ones requested by the appellant. The certificate of delay shows that the appellant was supplied with "the ruling, proceedings and drawn order". Where, as it appears in the record of appeal, the appellant in its letter dated 9<sup>th</sup> day of August, 2017 requested for "copies of the proceedings, judgment and decree." As it is, the certificate of delay does not include copies of the judgment and decree. It is not known where and when did the appellant get hold of them for their inclusion in the record of appeal as they are in the record. The omission to include the documents which the appellant requested for in the certificate of delay, that is non inclusion of the judgment and decree, renders the certificate incomplete and incorrect.

That defect invalidates the certificate of delay. In the case of the **Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Ltd**, Civil Appeal No. 16 of 2004 (unreported) we reiterated that:-

*"...A certificate under Rule 83(1) (now it is Rule 90 (1) of the Rules) of the Court Rules (1979) is a vital document in the process of instituting an appeal. It comes, into play after the normal period of sixty days for filing an appeal has expired. We are of the view that there must be strict compliance with the Rule. **The Registrar had not supplied the appellant with the documents requested for, thus rendering the certificate incorrect...** The certificate was false and this fountain of justice cannot overlook such an error..." [Emphasis provided].*

In the instant appeal we reiterate that position and add that the Deputy Registrar must always make sure that he/she supplies the intended appellant with the necessary documents as requested and not otherwise.

In sum, from the foregoing, the certificate of delay appearing at page 98 of the record of appeal is invalid. We have on several occasions held that where there is no valid certificate of delay, the appellant cannot benefit from the exception provided under the proviso to Rule 90 (1) of the Rules, that is, the exclusion of time taken to obtain a copy of the proceedings in the High Court which the appellant had asked to be supplied with in order to facilitate the lodgment of the appeal (see **Ali Chamani v. Karagwe District Council and Another**, Civil Appeal No. 75 of 2012; **Shafee Taheri v. Mohamed Enterprises (T) Ltd**, Civil Appeal No. 86 of 2015; and **Ramadhani Maabadi and Another v. Maka Serafini**, Civil Application No. 12 of 2015 (All unreported)).

In the present appeal since there is no valid certificate of delay according to Rule 90 (1) of the Rules, the time to file an appeal starts to run from the date of lodging notice of appeal. The notice of appeal was lodged on 10<sup>th</sup> day of August, 2017 after leave was granted and the appeal was filed on 9<sup>th</sup> day of January, 2018. The appeal was lodged after the expiration of 149 days from the date when the notice of appeal was lodged which is beyond 60 days prescribed by Rule 90 (1) of the Rules. The appeal is therefore time barred.

In the end all above considered, we uphold the preliminary objection and strike out the appeal. This being a labour dispute, we make no order for costs.

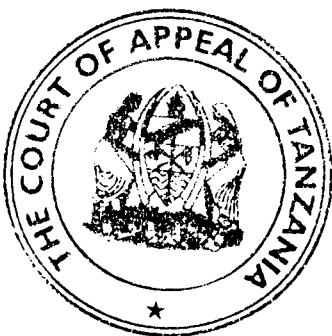
**DATED at DAR ES SALAAM** this 9<sup>th</sup> day of March, 2020.

B. M. MMILLA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

The Ruling delivered this 13<sup>th</sup> day of March, 2020 in the presence of Ms. Lisa Godfrey Mollel, holding brief of Mr. Yusuf Sheikh Counsel for the Appellant and Mr. Machumu Mkama for the Respondent is hereby certified as a true copy of the original.



  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**