

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

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 78 OF 2017

BLUE PEARL HOTEL & APPARTMENTAPPELLANT

VERSUS

UBUNGO PLAZA LIMITEDRESPONDENT

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

(MAKARAMBA, J)

Dated the 16th day of September, 2014

in

Miscellaneous Commercial Cause No. 145 of 2014

.....

RULING OF THE COURT

25th March & 19th April, 2021

WAMBALI, J.A.:

This ruling is in respect of the preliminary point on the consequences of the appellant's failure to comply with the order of the Court dated 24th March, 2020 that directed the lodgment of a supplementary record of appeal within twenty one days.

It is not out of place to state that before the commencement of the hearing of the appeal, it was plainly noted that on 24th March, 2020, in terms of Rule 96(7) of the Tanzania Court of Appeal Rules 2009 (the Rules), on

account of the incompleteness of the record of appeal, the Court granted the appellant twenty one days within which to lodge a supplementary record of appeal containing copies of the vital documents which were missing in the record of appeal lodged in Court earlier on in respect of this appeal. According to the order of the Court, the appellant was supposed to lodge the requisite supplementary record of appeal on or by 14th April, 2020. Unfortunately, the said supplementary record of appeal was lodged in Court on 4th November, 2020, which was almost after expiry of seven months and ten days.

The major issue before us thus, is whether the supplementary record of appeal which was not lodged within the prescribed period should be part of the record of appeal. It is in this regard that we required counsel for the parties to address us on the issue.

On his part, Mr. Peter Kibatata, learned advocate who appeared for the appellant conceded that in view of the order of the Court, the supplementary record of appeal was lodged out of time. However, Mr. Kibatata put up a spirited defence contending that the delay was occasioned by the fact that the requisite documents were not supplied to the appellant by the Registrar of the High Court on time. As a result, he submitted, the appellant failed to

comply with the time limit set by the order of the Court. Nonetheless, Mr. Kibatata forcefully argued that the delay in lodging the supplementary record of appeal is mitigated by the fact that the Registrar of the High Court issued to the appellant a certificate of delay in terms of Rules, 4, 5, 45A and 90(1) of the Rules in which he excluded the total number of 211 days from 2nd April, to 27th October, 2020. In this regard, Mr. Kibatata contended that as the supplementary record of appeal was lodged in Court on 4th November, 2020, the same was within twenty one days counting from 27th October, 2020, and therefore it was consistent with the order of the Court.

In the circumstances, the learned advocate for the appellant pressed us to find that the supplementary record of appeal was lodged in time on account of the certificate of delay and he urged us to proceed to hear the appeal.

When we probed him as to whether the Registrar of the High Court has powers under the provisions of Rule 90(1) of the Rules to issue a certificate of delay directing exclusion of number of days within which a party is required by the order of the Court to perform a certain action or lodge a document in Court, Mr. Kibatata firmly submitted that the answer to the question is in the affirmative. Elaborating, Mr. Kibatata contended that

although the proviso to Rule 90(1) of the Rules does not directly indicate that a party can obtain a certificate of delay to assist him explain the period of delay to comply with the order of the Court regarding time limit, it is implied that the Registrar of the High Court has those powers especially where, like in the present matter, he was the one who was supposed to issue the documents to be lodged in Court but delayed to do so.

In the alternative, Mr. Kibatata submitted that if the Court finds that the certificate of delay cannot be applicable in the circumstances of this appeal, a resort should be made to the overriding objective principle enshrined under sections 3A and 3B of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA) to find that in the interest of justice the delay of the appellant to lodge the supplementary record of appeal was with reasonable cause. He strongly contended that the thrust of his argument is on the premises that the delay was greatly caused by the Registrar of the High Court's failure to supply the appellant with the requisite documents to be included in the supplementary record of appeal in time. He thus concluded that the failure of the appellant to comply with the order of the Court within the prescribed time was beyond his control, and this should not be allowed to defeat substantive justice. Therefore, relying on the overriding objective,

he urged us either to treat the supplementary record of appeal to have been lodge in time for the reasons stated above or adjourn the hearing of the appeal to enable the appellant to apply for extension of time to lodge the requisite record.

On the adversary side, Mr. Hangi Chang'a, learned Principal State Attorney who was assisted by Miss Ansila Makyao, learned State Attorney, strongly resisted the submission of the learned advocate for the appellant. Mr. Chang'a argued that according to the record of appeal, there is no doubt that the appellant did not comply with the order of the Court which required him to lodge a supplementary record of appeal within twenty one days from 24th March, 2020. In the circumstances, he submitted that the appellant cannot rely on the invalid certificate of delay issued by the Registrar of the High Court as he has no powers to exclude the total number of days in which the appellant delayed to comply with the order of the Court. On the contrary, he submitted, the powers of the Registrar of the High Court under the provisions of Rule 90(1) of the Rules are limited to a period where the intending appellant who has formerly applied to be supplied with the certified copy of proceedings of the High Court, delays to lodge an appeal within sixty days from the date of lodging the notice of appeal. In his view,

the powers of the Registrar of the High Court under that Rule do not apply where the proceedings are in the Court of Appeal.

On the other hand, Mr. Chang'a submitted that the overriding objective cannot be applied to aid a party who has failed to comply with the order of the Court on limitation of time as suggested by Mr. Kibatala. In the premises, the learned Principal State Attorney argued that leave to lodge the supplementary record of appeal which was granted to the appellant by the Court in terms of Rule 96(7) of the Rules was in accordance with the overriding objective introduced in the Rules after the amendment of the AJA. In his submission, the failure of the appellant to lodge the requisite supplementary record of appeal within the period directed by the Court cannot be remedied by the overriding objective enshrined in the AJA and the Rules of the Court because in terms of the provisions of Rule 96(8) of the Rules, the Court is prohibited to entertain a similar application to lodge another supplementary record of appeal.

In the end, the learned Principal State Attorney submitted that as the appellant's failure to lodge a supplementary record of appeal renders the present record of appeal incomplete for lacking some vital documents, the appeal is incompetent and should be struck out with costs.

Having heard the response of the counsel for the parties, we entertain no doubt that although the appellant was granted leave by the Court to lodge a supplementary record of appeal he did not lodge it within the period of twenty one days prescribed by the Court. We are however, mindful of the contention of the appellant that the delay is mitigated by a certificate of delay. To this end, the first issue to be determined by us in respect of this appeal is whether the certificate of delay issued by the Registrar of the High Court is valid to the extent of aiding the appellant to be entitled to the excluded number of days in computing the period of limitation.

Notably, it was spiritedly submitted by the learned advocate for the appellant to the effect that the certificate of delay is valid on the contention that the Registrar of the High Court has the power to issue it in terms of Rules 90(1), 45 and 45A of the Rules. We are also mindful of the contrary views expressed by the counsel for the respondent on this issue. In the circumstances, in order to appreciate the deliberation which will be apparent herein below, we deem it appropriate to reproduce hereunder the provisions of Rules 90(1), 45 and 45A which provide as follows: -

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 costs of the appeal,*

Save that where an application for a copy of 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 the copy to the appellant”.

Rule 45(b) *“Where an appeal lies with the leave of the Court, the application for leave shall be made in the manner prescribed in rules 49 and 50 and within fourteen days of the decision against which it is desired to appeal or, where the application for leave has been made to the High Court and refused, within fourteen days of that refusal;*

Provided that, in computing the time within which to lodge an application for leave in the Court of Appeal under paragraph (b), there shall be excluded such time as may be certified by the Registrar of the High Court

as having been required for preparation of a copy of the decision subject to the provisions of rule 49(3)".

Rule 45A (2) *In computing the time within which to lodge an application for leave under this rule, there shall be excluded such time as may be certified by the Registrar of the High Court as having been required for preparation of a copy of the decision and the order".*

Noteworthy, the provisions of Rule 90(2) of the Rules provide that: -

"The certificate of delay under rules 45, 45A and 90(1) shall be substantially in the Form L as specified in the First Schedule to these Rules and shall apply mutatis mutandis".

From the reproduced provisions of the Rules, we entertain no doubt that the Registrar of the High Court is only mandated to issue a certificate of delay in respect of an intending appellant or applicant who is entitled to exclusion of a total number of days from computation of time for lodging an appeal or applications for leave to appeal and for extension of time where it is refused by the High Court, after the expiration of sixty days or fourteen days as clearly stipulated under Rules 90 (1), 45 (b) and 45A (2) of the Rules respectively. We do not therefore, discern anything from those provisions to the effect that the Registrar of the High Court has the power to

issue a certificate of delay excluding the total number of days from computation of time where the proceedings are in the Court. It follows that the Registrar of the High Court has no powers to issue a certificate of delay to a party who has delayed to comply with the order of the Court setting time limit within which a certain action or step is supposed to be taken as firmly argued by Mr. Kibatata.

In the circumstances, we wish to emphasize that in a situation, like in the present appeal, where an appeal or application has already been lodged in this Court, the Registrar of the High Court has no direct or implied power under the provisions of the Rules of the Court to issue a certificate of delay, excluding the total number of days from computation of time where a party to an appeal or application has failed or delayed to implement the order of the Court. It is instructive to note that recently we also made similar remarks in **Hamis Mdida and Said Mbogo v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 59 of 2020 (unreported). Particularly, we emphasized that the Registrar of the High Court has no power to issue a certificate of delay covering the period in which the proceedings in respect of an appeal or application are already in the Court of Appeal.

In the present appeal, as we have alluded to above, the appellant's appeal is already in the Court since 23rd March 2017, and on 24th March, 2020 when it was called on for hearing it was confronted by an objection from the respondent on incompleteness of the record of appeal. Noteworthy, the said objection was sustained on the concession of the appellant's counsel. Nonetheless, instead of striking out the appeal, the Court invoked overriding objective, and in terms of Rule 96(7) of the Rules it granted the appellant leave to lodge the supplementary record of appeal within twenty one days. Unfortunately, the appellant did not lodge it within the prescribed time. Thus, in the present appeal, according to the record of appeal, the Registrar of the High Court issued a certificate of delay to the appellant on 7th February, 2017 in compliance of Rule 90(1) of the Rules. Therefore, the Registrar of the High Court has no further mandate under the Rules to issue another certificate of delay in respect of the same appeal. He can only amend or rectify it on account of an error occasioned by his office.

More importantly, in the present matter, regrettably, the Registrar of the High Court purported to issue another certificate of delay which is included in the supplementary record of appeal in terms of Rules 4, 5, 45A and 90(1) of the Rules. This cannot be practicable as the respective Rules

serves different purposes and therefore, a distinct certificate of delay should be issued in respect of each situation stipulated in the provisions of Rules 90(1), 45(b) and 45A (2) of the Rules.

In this regard, we do not, with respect, agree with the learned counsel for the appellant that the said certificate of delay is valid to the extent of empowering us to hold that the supplementary record of appeal was lodged within twenty one days as ordered by the Court on 24th March, 2020. On the contrary, we agree with the respondent's counsel that the certificate of delay is invalid and cannot therefore aid the appellant to mitigate the delay in complying with the order of the Court on the time limit.

The next issue for our consideration is whether we should invoke the overriding objective to find that the delay of the appellant in lodging the supplementary record of appeal was due to reasonable cause, and thus proceed with the hearing the appeal as urged by Mr. Kibatata.

In the circumstances of the matter before us, we have no hesitation to state that in view of the order of the Court, in terms of Rule 96(7) of the Rules, overriding objective was properly invoked by the Court. We hold this firm view because on that date when the appeal was called on for hearing though the record of appeal was found to be incomplete, the Court did not

strike out the appeal for being incompetent. On the contrary, being mindful of the overriding objective, the Court granted the appellant twenty one days to lodge a supplementary record of appeal. Unfortunately, the appellant did not comply with that order within the prescribed period as alluded to above. Thus, in terms of Rule 96(8) of the Rules, as the appellant failed to lodge the supplementary record of appeal within the prescribed period the Court cannot grant him another opportunity to cure the incompleteness of the record of appeal. We are settled that in the circumstances of this appeal, the appellant cannot be entitled to seek refuge by clinging more on the overriding objective of which he had already benefited, in terms of Rule 96(7) of the Rules. It is instructive to note that in **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No.3 of 2018 (unreported), the Court observed that: -

“It is for this reason, Rule 96(8) was added to preclude the Court from entertaining further applications meant to cure like defects in the record of appeal. The bottom line in our view is that defects in the record of appeal attributed to the omission of essential documents required under Rule 96(1) or (2) of the Rules can only be cured once in terms of Rule 96(7) of the Rules...In our view, Rule 96(8) couched in mandatory terms, serves as a tool

to check sloppiness amongst litigants which, if not controlled may militate against the very spirit behind the overriding objective...”

Similarly, in the present appeal, we decline the invitation by the counsel for the appellant to invoke the provisions of Rule 96(7) of the Rules to allow the appellant lodge a supplementary record of appeal out of time to cure the anomaly of missing documents. Equally important, we decline the invitation by the appellant counsel to adjourn the hearing of the appeal to enable him to apply for extension of time within which to lodge a supplementary record of appeal. Incidentally, the appellant could have taken that course of action after noting that the period of limitation set by the Court had elapsed before he lodged the supplementary record of appeal. In the present matter, therefore, the appellant cannot expect to remedy the limitation of time after the appeal has been called on for hearing.

In the event, as the supplementary record of appeal was lodged out of the prescribed time, we accordingly strike it out.

In the result, as the record of appeal in respect of Civil Appeal No.78 of 2017 is still incomplete on account of lacking essential documents

contrary to the provisions of Rule 96 (1) and (2) of the Rules, the appeal is incompetent.

Consequently, we strike out the appeal with costs for being incompetent.

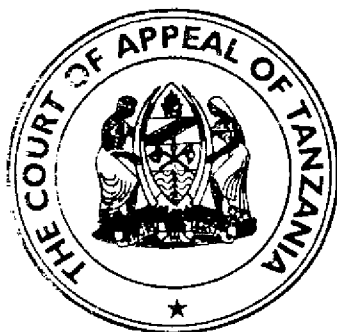
DATED at DAR ES SALAAM this 15th day of April, 2021.


S. E.A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 19th day of April, 2021 in the presence of Mr. Omary Msemu, learned counsel for the appellant and Mr. Thomas Mahushi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




F. A. M^TARANIA
DEPUTY REGISTRAR
COURT OF APPEAL