

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

(CORAM: MKUYE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 127 OF 2016

TANZANIA OCCUPATIONAL HEALTH SERVICES APPELLANT

VERSUS

1. MRS. AGRIPINA BWANA

2. MR. JULIUS BWANA RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kibela J.)

dated the 5th day of November 2014

in

Civil Case No. 12 of 2008

RULING OF THE COURT

19th March & 1st April, 2021

MWANDAMBO, J.A.:

It has been compelling to dispose this appeal by this ruling on a narrow but very fundamental issue regarding its competence touching on our jurisdiction to determine the merits of it as it will become apparent shortly.

Before the High Court, sitting at Dar es Salaam, Agripina Bwana and Julius Bwana, the respondents, successfully sued Tanzania Occupational Health Services, the appellant for negligence. The appellant who was the second defendant was condemned to pay TZS

damages which aggrieved her resulting into the instant appeal instituted on 26th August, 2016.

The appeal came on for hearing on 24th November 2020 but it became apparent that the certificate of delay issued by the Deputy Registrar of the High Court (hereinafter to be referred to as the Deputy Registrar) forming part of the record of appeal was deficient by reason of erroneous exclusion of the days spent for preparation of requisite documents and delivery to the appellant for the purpose of the appeal. In the interest of justice and having in mind the provisions of rule 96(7) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Court adjourned the hearing and granted leave to the appellant to obtain a rectified certificate of delay from the Deputy Registrar and thereafter lodge a supplementary record containing a proper certificate within 30 days.

In compliance with the Court's order, M/s Ngalo & Company Advocates acting for the appellants lodged a supplementary record of appeal on 23rd December, 2020 well within the time fixed by the Court. Upon such compliance, the appeal was cause- listed for hearing on 19th March, 2021 on which date, Messrs Michael Ngalo and John Kamugisha, learned advocates appeared representing the appellant and respondents respectively. That notwithstanding, it turned out that despite the appellant

lodging the supplementary record of appeal, the certificate of delay issued by the Deputy Registrar on 23rd December, 2020, was still erroneous. That is so because, instead of excluding days for the purpose of the appeal up to 22nd June 2016 on which the appellant's advocates were notified of the availability of copies of the requested copies, the Deputy Registrar excluded the days up to 27th June 2016 when the said advocates collected the copies. It is for that reason the Court felt compelled to invite the learned advocates to address it on the propriety of the certificate of delay and its bearing on the competence of the appeal. Specifically, the Court wanted to hear from the learned advocatess whether the appeal was instituted within 60 days prescribed by rule 90 (1) of the Rules.

Like any other good and able soldier, the learned advocate for the appellant was insistent that the appeal was instituted within time after excluding the time as certified by the Deputy Registrar for the preparation of the copies of documents requested and delivery to the appellant. However, the learned advocate felt compelled to ask for more time to prepare himself with authorities before addressing the Court. As Mr. Kamugisha had no abjection and considering that the issue was raised on the spot, we granted his prayer and adjourned the hearing to 24th March 2021.

On the resumed hearing, Mr. Ngalo was remarkably candid in conceding that the certificate of delay contained in the supplementary record of appeal was indeed erroneous. Under the circumstances, the appeal which was instituted on 26th June 2016 was way beyond 60 days given the fact that his office was notified of the availability of copies of the necessary documents for the purpose of the appeal on 22nd June, 2016. With that concession, Mr. Kamugisha could not do anything better than praying for an order striking out the incompetent appeal.

We respectfully agree with the learned advocate for the appellant fully aware that time to appeal for an appellant who has complied with rule 90 (1) of the Rules is reckoned from the date he is notified that the documents requested for the purpose of the appeal are ready for collection rather than the date on which such appellant collects the documents. We take the liberty to reproduce rule 90(1) of the Rules which stipulates:

"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."

It is not in dispute in this appeal that the Deputy Registrar wrote a letter to the appellant's advocate on 2nd June 2016 but it was not until 22nd June 2016 when that letter was delivered to the said advocates. In that regard, the time which was necessary for the preparation and delivery of the documents ended on the date the advocates were notified of the readiness of the documents they had requested and not on the date they collected them as certified by the Deputy Registrar in the certificate of delay.

As matters stand now, the certificate of delay is, as it were, worthless. It serves no useful purpose to the appellant for the purpose of computing the time for instituting the appeal. We have said in numerous cases that the Deputy Registrar's certificate is not beyond question and thus the Court is entitled to disregard it for being erroneous. See for

instance: **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004 (unreported) in which the Court made reference to its earlier decision in **D.T. Dobie & Company (Tanzania) Ltd v. N.B Mwaitebele** [1992] T.L.R 152. Underscoring the importance of a certificate of delay in record of appeal, the Court stated:

"...A certificate under Rule 83 (1) of the Court Rules 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. This is a serious error. The certificate was false and this fountain of justice cannot overlook such an error in the course of advancing justice..." [At page 13, **The Board of Trustees of the National Social Security Fund's case (supra)**].

It is worth noting that rule 83(1) of the revoked Court of Appeal Rules, 1979 is in all fours with rule 90(1) of the Rules. The certificate of delay in the supplementary record of appeal is no exception in that the Deputy Registrar issued the certificate contrary to the spirit behind rule 90 (1) of the Rules. Regardless of the nature of the ailments, it is as bad

as the certificate the Court held to be invalid and worthless in the two cases referred to above.

Notwithstanding his concession, Mr. Ngalo contended that the Court has misinterpreted rule 90 (1) of the Rules by subjecting the date on which an appellant is notified by the Deputy Registrar of the availability of the copies of documents requested as the cut-off point for the purpose of computation of time for the institution of an appeal. According to Mr. Ngalo, time must be reckoned from the date the appellant collects the documents on payment of requisite fees. Construing the law that way, his client's appeal will be within time. With respect, that argument sounds attractive but untenable. In our view, accepting the construction of the rule in the manner championed by the learned advocate would lead to absurdity. Plainly, it appears to suggest that the appellant has no duty to follow up with the Deputy Registrar for collection of the documents upon being notified of their availability and instead, it is the Deputy Registrar's obligation to physically deliver the documents to the appellant.

In our view, that construction will defeat the spirit behind the rule and indeed subject the collection of the copies requested at the appellant's whims. A similar issue arose in **Paulina Samson Ndawaya**

v. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 (unreported)

and the Court stated:

*"The provision does not impose a duty on the Registrar to physically deliver the copies to the appellant who has applied for them for appeal purpose. It does not also require the Registrar to issue the Certificate only after the appellant has collected the copies upon payment of the requisite fees. If that would have been the position, then the certificate would be issued at the whims of the appellants. The procedure is that, once the copies have been prepared, the Registrar informs the appellant to collect them from the registry. The Registrar then proceeds to issue the Certificate. As for computation of time, it is from the date when the appellant becomes aware that the copies are ready for collection that the time starts to run. That position is clearly stated in the case of **Birr Company Ltd v. C-Weed Corporation**, ZNZ Civil Application No. 7 of 2003 (unreported) [at page 7]."*

We think the above will be sufficient to clear the doubts expressed by Mr. Ngalo in relation to what he claimed to be a misinterpretation of the rule.

That said, in view of our finding that the certificate of delay on the basis of which the appellant relied in instituting the appeal beyond 60 days from the date of lodging the notice of appeal, the appeal is

incompetent. It is accordingly struck out. As Mr. Kamugisha conceded that in the circumstances of the matter costs should not be awarded, we order that each party bears own costs.

It is so ordered.

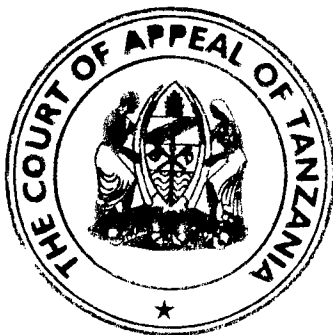
DATED at DAR-ES-SALAAM this 30th day of March, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Ruling delivered this 1st day of April, 2021 in the presence of Mr. John Kamugisha, learned counsel for the Respondents and also holding brief of Mr. Michael Ngalo, learned counsel for the Appellant, is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL