

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MKUYE, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)**

**CIVIL APPEAL NO. 29 OF 2019**

**CRDB BANK PLC ..... APPELLANT**

**VERSUS**

**1. TRUE COLOUR LTD } ..... RESPONDENTS**  
**2. JAMES VICENT MGAYA }**

**(Appeal from the judgment of the High Court of Tanzania  
at Mwanza)**

**(Gwae, J.)**

**dated the 11<sup>th</sup> day of September, 2018**

**in**

**Land Case No. 53 of 2017**

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**RULING OF THE COURT**

27<sup>th</sup> April, & 7<sup>th</sup> May, 2021

**MKUYE, J.A.:**

This appeal arises from the judgment and decree of the High Court of Tanzania at Mwanza dated 14/9/2018 in Land Case No. 53 of 2017. In that case, the 1<sup>st</sup> respondent sued the appellant (former 1<sup>st</sup> defendant), the former 2<sup>nd</sup> defendant who is not a party to this appeal and the 2<sup>nd</sup> respondent (former 3<sup>rd</sup> defendant) in which she prayed for the following reliefs:

- a) "Nullification of the sale of the suit premises  
made by the 1<sup>st</sup> defendant in favour of the 3<sup>rd</sup>*

*defendant. Alternatively, the plaintiff (the 1<sup>st</sup> respondent herein) is no longer indebted to the appellant as the auctioned/sold securities had same and equal value compared to the amount of Tshs. 1,907,315.20.*

*b) Costs of the suit.*

*c) Any relief(s) the honourable deems fit to grant.”*

Then the appellant, former 2<sup>nd</sup> defendant and 2<sup>nd</sup> respondent herein were served with summons to appear and file their respective Written Statements of Defence (WSD) within 21 days as per Order VIII of the Civil Procedure Code but only the 2<sup>nd</sup> respondent filed his WSD. For unknown reasons the appellant and former 2<sup>nd</sup> defendant did not file their respective WSDs within the required period and on realizing that, they applied for leave to file their WSDs after expiration of the prescribed time.

Since the application was lodged 21 days after expiration of the allowable time for the defendants to file their WSDs, the trial court declined to grant the leave sought. Hence, hearing of the matter proceeded in the absence of the appellant and the former 2<sup>nd</sup> defendant. It is on record that on 23/9/2013 the appellant extended loan facility of

Tshs. 289,627,000.00 to the 1<sup>st</sup> respondent. Later, the said loan was restructured and on 28/2/2017 the 1<sup>st</sup> respondent's liability to the appellant reached Tshs. 1,907,040,315.20. The first respondent mortgaged his landed property under Certificate of Title Nos. 28415 LR Mwanza and 28419 LR Mwanza as security. The 1<sup>st</sup> respondent defaulted payment of the outstanding amount. As a result, the appellant sold the said mortgaged property to the 2<sup>nd</sup> respondent.

Upon completion of the trial, the trial court found that the appellant having exercised her right of sale of mortgaged property, the 1<sup>st</sup> respondent could not be liable to effect any further payment to her. The trial court further ordered the 2<sup>nd</sup> respondent to effect payment of the remaining balance of the purchase price as by that time it was yet to be paid.

Aggrieved, the appellant has now appealed to this Court on four grounds of appeal. However, for reasons to become apparent in due course, we do not intend to reproduce them.

Before the commencement of the hearing of the appeal, the 1<sup>st</sup> respondent raised two notices of preliminary objection (PO), one lodged

on 1/ 4/2021 and the other one on 21/4/2021. On the other hand, the 2<sup>nd</sup> respondent also lodged a notice of PO on 23/4/2021.

The first set of the notice of PO is to the effect that:

*1) The appeal is an abuse of the court process/misconceived as was lodged without a resolution of the appellant Bank as required under Rule 30 (3) of the Tanzania Court of Appeal Rules, 2009.*

*Alternatively,*

*2) That the appeal is premature as the relevant ex parte judgment is not appealable in law.*

*3) That the appeal is incompetent as there is no joint notice of appeal lodged against the respondents as named in the record and memorandum of appeal.*

*4) That the certificate of delay is erroneous for indicating two dates to wit; on 26/9/2018 when the notice of appeal was lodged and 5/10/2018 when the documents were requested by the appellant as the starting point for calculating the number of days to be excluded.*

In relation to the second notice of PO, it is to the effect that:

*"The certificate of delay is defective and erroneous as it indicates both dates to wit; on 26.09.2018 when the Notice of Appeal was filed and on 05.10.2018 when the documents were requested for by the appellant as a starting point for purpose of counting number of days to be excluded contrary to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2019 and more so, the certificate of delay does not indicate the total number of days excluded as required in Form L in the First Schedule to the Tanzania Court of Appeal Rules, 2019."*

The third set of Preliminary Objection lodged by the 2<sup>nd</sup> respondent is to the effect that:

*1) That the appeal against the 2<sup>nd</sup> respondent is time barred since the Certificate of Delay shows only one respondent who is the 1<sup>st</sup> respondent hence the number of days purported to be excluded do not include the days for appeal against the 2<sup>nd</sup> respondent.*

*Alternatively, the Certificate of Delay is defective and erroneous for failure to disclose the number of days excluded contrary to requirements of*

*Form L in the 1<sup>st</sup> Schedule to the Tanzania Court of Appeal Rules, 2019.*

*Moreover, the Certificate of Delay is defective and erroneous as it points out two dates i.e. 26/9/2018 when the notice of appeal was filed and 5/10/2019 when the documents were requested for by the appellant as the commencement dates for counting the number of days to be exclude contrary to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2019.*

*2) That the appeal is incompetent for containing an improper Notice of Appeal in the sense that while the Memorandum and the Record of Appeal show the appeal is against two respondents, the Notice of Appeal is against one Respondent.*

When the appeal was called for hearing, the appellant was represented by Mr. Silwani Galati Mwantembe learned advocate; whereas the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Mr. Constantine Mutalemwa and Mr. Fabian Mayenga learned advocates respectively.

The learned counsel submitted at length on all points of PO raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and we are grateful for their industry in the field. However, we have found it appropriate to deal with the point

of objection on the defective certificate of delay raised by both respondents because, we think, it can conveniently dispose of the matter without necessarily canvassing on the remaining points of objection.

Submitting in support of the said point of objection, Mr. Mutalemwa invited the Court to strike out the appeal with costs for being time barred. He explained that the certificate of delay found at page 140 of the record of appeal is defective for; **one**, showing two dates 26/9/2018 when the appellant filed a notice of appeal and 5/10 2018 when the appellant applied for documents necessary for the preparation of the record of appeal as starting date for exclusion of number of days and 23/11/2018 when the appellant was supplied with the necessary documents as the last day for exclusion. **Two**, that the certificate of delay does not show the number of days excluded as required by Form No. L in the First Schedule to the Tanzania Court of Appeal Rules, 2019 (the Rules). It was his argument that, if the certificate of delay is defective, it cannot be relied upon by the appellant to exclude days in filing the appeal under Rule 90 (1) of the Rules.

Mr. Mutalemwa went on to submit that, this is not a matter of technicality which can be glossed over as it goes to the root of the matter. He referred us to the case of **Mwalimu Amina Hamisi v. National Examination Council of (T) and 4 Others**, Civil Appeal No. 20 of 2015 (unreported) pg 13-14 and a very recently decided case of **Livingstone Enock and 3 Others v. Serge Smolonogov and Another**, Civil Appeal No 33 of 2019 (unreported) in which we struck out the appeal on account of the defectiveness of the certificate of delay. He said, ordinarily, the appellant was required to file an appeal within sixty (60) days from 26/9/2018 when the notice of appeal was filed, which is 25/11/2018 and not on 18/1/2019, the date when this appeal was filed. Alternatively, he argued, if the appellant applies for the copies of proceedings, judgment and decree (documents) within 30 days from the decision, the copy of which must be served on the respondent, the number of days from that date to the date when the appellant is notified that the documents are ready for collection are excluded. He contended that, since the certificate of delay is defective, it renders the appeal to be time barred. He then prayed for the appeal to be struck out with costs.



Mr. Mayenga, basically subscribed to what was submitted by Mr. Mutalemwa on the defectiveness of the certificate of delay. Like the learned counsel for that 1<sup>st</sup> respondent, while relying on the case of **Livingstone Enock** (supra), he implored the Court to strike out the appeal with costs.

In reply, Mr. Mwantembe readily conceded that the certificate of delay indicated two dates, that is, the date of filing the notice of appeal and the date of applying for the documents for appeal purpose. He also conceded that the same does not show the aggregate number of days excluded. However, he contended that Rule 90 (1) does not require of a specific number of days to be indicated but it requires exclusion of time which was correctly complied with. He argued that, as the appellant applied for documents on 5/10/2018, within 30 days of the judgment, and was supplied with the documents on 23/11/2018, then the certificate of delay met the conditions under Rule 90(1) of the Rules. It was his further argument that, the case of **Mwalimu Amina Hamisi** (supra) was distinguishable as the certificate of delay in that case was mentioning the date of application for documents which did not tally with relevant dates and excluded a number of days which were not

subject to exclusion as per the Rule. He also argued that the case of **Livingstone Enock** (supra) was distinguishable on the same ground.

He stressed that as the appellant applied for documents on 5/10/2018 which was within time and was supplied with the said documents on 23/11/2018, then the certificate of delay was in compliance with Rule 90 (1) of the Rules. Mr. Mwantembe further submitted that the case of **Onaukiro Anandumi Ulomi v. Standard Chartered Bank and 3 Others**, Civil Appeal No. 140 of 2016 (unreported) was also distinguishable as the certificate of delay indicated number of days (86 days) without showing how the figure was arrived at.

Mr. Mwantembe argued further that, although the certificate of delay indicated the date of notice of appeal, the anomaly was not fatal and he urged us to interpret the law by looking at its circumstances with a view to dispensing justice as per section 3A of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA).

He added that, should the Court find that the certificate of delay is defective, it should apply the principle taken in the case of **MS. Flycatcher Safaris Ltd v. Hon. Minister for Lands and Human**

**Settlements and Another**, Civil Appeal No. 142 of 2013 (unreported) and allow the appellant to obtain the proper certificate of delay to enable the appeal proceed on merit.

In rejoinder, Mr. Mutalemwa stressed that an error in the certificate of delay is not a technicality which can be glossed over. It goes to the root of matter. He equally stressed that Rule 90 (1) of the Rules should be read together with Form L in the 1<sup>st</sup> Schedule to the Rules.

As regards Mr. Mwantembe's prayer that he be allowed to bring a proper certificate of delay as held in the case of **M/S Flycatcher Safaris Ltd** case (supra), he urged the Court to stick to the recent decision in **Livingstone Enock's** case (supra) where the Court had struck out the appeal for being time barred on account of a defective certificate of delay.

Having considered the submissions from either side, we think, the issue for this Court's determination is whether the certificate of delay is defective, and if the answer is in the affirmative, what is the effect and its way forward.

Rule 90 (1) of the Rules governs issuance of certificate of delay. Essentially, it requires the appellant to lodge his appeal within sixty (60)

days from the filing of the notice of appeal. However, the said Rule provides for an exception to a person who fails to do so if he was unable to obtain the copies of proceedings within time, only if, he applied for such proceedings within thirty days from the date of judgment and a copy of such application was served to the respondent within the same period. If the appellant has done so, the same Rule requires the Registrar of the High Court to issue a certificate of delay excluding a number of days which were used for preparation of the copies of proceedings applied for by the appellant in the computation of time within which the appeal is to be lodged. On top of that, Form L of the 1<sup>st</sup> Schedule to the Rules which is made under Rule 90 (2) of the Rules elaborates the particulars to be filled in it including the aggregate number of days which are being excluded.

Times without number, this Court has underscored compliance with this mandatory requirement, failure of which would render the certificate of delay defective with the effect of striking out the appeal for being time barred. This position has been taken in numerous decisions of this Court. Among those cases are **Khantibhai M. Patel v. Dahyabhai F. Ministry** [2003] TLR 437; **Omary Shaban S. Nyambu v. The Permanent Secretary Ministry of Defence and 2 Others,**

Civil Appeal No. 105 of 2015 (unreported), **Meneja Mkuu, Zanzibar Resort Limited v. Ali Said Paramana**, Civil Appeal No. 263 of 2017 (unreported); and **Mwalimu Amina Hamisi** (supra). For instance, in the latter case of **Mwalimu Amina Hamisi** (supra) where the Court struck out the appeal because of an invalid certificate of delay, it was stated as hereunder: -

*"...an error in the certificate of delay being linked to time of limitation in lodging an appeal, is a mandatory requirement on the procedural law which goes to the very foundation of the appeal and it touches on the jurisdiction of this Court to entertain and determine the appeal. As such the same cannot be a technicality envisaged under article 107A (2) of the Constitution."*

In the same case when the Court was required to consider invoking the overriding principle introduced in sections 3A and 3B of the AJA, it went on to say that:

*"... we associate ourselves with what this Court had stated in **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 and **Njake Enterprises Limited v. Blue Rock Limited &***

*Another, Civil Appeal No. 69 of 2017 (both unreported) that the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case.”*

On the other hand, we are mindful of the other decisions in which the Court has taken the position that, a defective certificate of delay may be rectified in the wake of the principle of overriding objective introduced through Written Laws (Miscellaneous Amendment (No. 3) Act, 2018 (Act No. 8 of 2018) so as to achieve substantive justice as per section 3A of the AJA and Rule 2 of the Rules. While invoking the said provisions of the law, the Court has refrained from striking out appeals which would have been so struck out for being time barred due to defective certificates of delay. Instead, it allowed the respective appellants to go and obtain valid certificates in order to enable the appeals to proceed. Some of such cases include **MS. Universal Electronics and Hardware (T) Limited v. Strabag International Gmbtt (Tanzania Branch)**, Civil Appeal No. 122 of 2017; **Abdulrahman Mohamed Ally v. TATA Africa Holding (T) Limited**, Civil Appeal No. 58 of 2017; **M/S Flycatcher Safaris Ltd** (supra) and the recently decided case of **Geita Gold Mining Ltd v. Jumanne**

**Mtafuni**, Civil Appeal No. 30 of 2019 (unreported). For instance, in the case of **Ms. Flycatcher Safari's** case (supra), the Court stated that: -

*"... In terms of Rule 4 (2) (a) and (b) of the Rules, we accede to the prayer of the appellant to seek a rectification of the certificate of delay to make it to be in conformity with the requirement of the law and in accordance with the relevant materials which were placed before the Registrar of the High Court. Consequently, we order that a rectified version of the certificate of delay, if secured, be lodged in the form of a supplementary record of appeal within thirty days from the date of delivery of this Ruling".*

Also, in the case of **Geita Gold Mining Ltd** (supra) we stated as follows:

*"In view of the above guiding authorities, we think the appellant still has room to benefit the exclusion of time provided for under rule 90 (1) of the Rules in terms of sections 3A, 3B and rule 2 of, respectively, the AJA and the Rules...In the circumstances, we find ourselves constrained to allow Mr. Mwantembe's uncontested prayer so as to inject oxygen to the appeal which would otherwise have been struck out on account of the defective or invalid certificate of delay. This*

*position we have taken, we respectfully think, and as stated above, will augur well with the overriding objective in the resolution of disputes which is provided under sections 3A, 3B and Rule 2 of, respectively, the AJA and the Rules.*

In the appeal at hand, it is apparent from the record of appeal that the judgment sought to be appealed against was handed down on 11/9/2018. The notice of appeal was lodged on 26/9/2018 and the letter applying for the copies of proceedings judgment and decree was filed on 5/10/2018 which was within the time prescribed by the law.

The Registrar wrote to the appellant informing her of the redness of the documents for collection on 23/11/2018. The certificate of delay found at page 140 of the record of appeal purports to exclude the time from 26/9/2018 and 5/10/2018 to 23/11/2018 being the time required for the preparation of the copies of proceedings for appeal purposes. It reckons two dates as the starting day to be excluded. Also, it does not show the aggregate number of days which are excluded. This was not proper as the law does not provide so. Mentioning two dates creates a confusion as to the date when the time starts to be excluded and the confusion is enhanced due to the fact that the aggregate number of days excluded is not indicated.



It is obvious that the certificate of delay is defective for three reasons. **One**, it reckons two dates, to wit, the date of filing the notice of appeal and the date of application of the copies of proceedings from when the time starts to be excluded contrary to the requirement of the law. **Two**, it does not indicate the aggregate number of days to be excluded from computation of time for purposes of appeal as required by Rule 90 (1) of the Rules read together with Form L in the Schedule thereto. **Three**, it reckons the date of the supply of the documents to the appellant as the last date in the computation of the time to be excluded instead of the date of notification that the documents are ready for collection.

Although Mr. Mwantembe contended that it is not a requirement under Rule 90 (1) of the Rules for the aggregate number of days to be indicated in the certificate of delay, we think, such contention is unfortunate. This may have been caused by the fact that the learned advocate has read Rule 90 (1) of the Rules in isolation of sub rule (2) of the same Rule together with Form L of the 1<sup>st</sup> Schedule to the Rules which specifically provides for the same. Form L which governs the information to be filled in the certificate of delay was introduced through GN. No. 362 of 2017 meaning the same ought to be complied with at

the time when the certificate of delay was issued. So, we are of the view that, had the learned counsel read the entire provision, he could not have come up with such a proposition. In this regard, we wish to remind officers of the Court to read the law in its completeness and not in piecemeals.

All in all, as we have stated earlier on, ordinarily a defective certificate of delay has the effect of rendering an appeal time barred. The issue of time limitation is not a technicality which can be glossed over as it goes to the foundation of the matter (See **Mondorosi Village's** case (supra)).

However, we have examined both schools of thought on the issue of the way forward in a situation where the certificate of delay is defective. Of course, in the case of **Livingstone Enock** (supra) which Mr. Mutalemwa forcefully urged the Court to take side, we struck out the appeal on the basis of a defective certificate of delay. In a way he is right in the sense that where there are conflicting decisions the practice has been to follow the more recent conflicting decision (See **Geita Gold Mining Ltd** (supra) when we cited with approval the case of **Arcopar (O.M.) S.A v. Herbert Marwa and Family & 3 Others**, Civil Application No. 94 of 2013 (unreported)). Nonetheless,

we think, the case of **Livingstone Enock** (supra) is distinguishable to the instant case for three reasons. One, in that case the certificate of delay reckoned the date of the letter which even the judgment was not yet to be delivered. Two, the counsel for the respondent had raised a preliminary objection to that effect. Three, the appellant conceded to the defect raised in the PO and urged the Court to strike out the appeal for the reason that the certificate of delay was defective. This is not the situation in this case. In the certificate of delay under discussion, two dates are indicated as starting point in exclusion of the days. Two, it does not indicate the aggregate number of days to be excluded; and three, it reckons the last date when the documents were supplied instead of when the appellant was notified that the documents were ready for collection. Guided by the case of **Ms Flycatcher Safaris Ltd** (supra) and **Geita Gold Mining Ltd** (supra) we are of the view that the overriding objective principle can be invoked in the circumstances of the case and in the interest of justice.

In the end, we agree with the prayer by the learned advocate for the appellant to invoke section 3A of the AJA read together with rule 2 of the Rules and allow the appellant to go back to the trial court and

obtain a valid certificate of delay from the Registrar of the High Court. We further order that the valid certificate of delay should be lodged in Court within thirty (30) days from the date of delivery of this Ruling. Meanwhile, we adjourn the hearing of this matter to the date to be fixed by the Registrar.

**DATED** at **MWANZA** this 6<sup>th</sup> day of May, 2021.

R. K. MKUYE  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

This ruling delivered this 7<sup>th</sup> day of May, 2021 in the presence of Mr. Gwakisa Gervas, the learned counsel for the Appellant and Mr. Constantine Mutalemwa, the learned counsel for the 1<sup>st</sup> Respondent and also holding brief of Mr. Fabian Mayenga, the learned counsel for the 2<sup>nd</sup> Respondent, is hereby certified as a true copy of original.

