

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TANGA**

**(CORAM: MUGASHA, J.A., KOROSSO, J.A And MWANDAMBO, J.A.)**

**CIVIL APPEAL NO. 200 OF 2019**

**1. MOHAMED ISSA MTALAMILE  
2. RAMADHANI SALUM NYUNI  
3. KAPINGA MOHAMED SALEHE  
4. BONI HASSAN KAMA** } ..... **APPELLANTS**

**VERSUS**

**1. TANGA CITY COUNCIL  
2. TANGA CEMENT COMPANY LIMITED** } ..... **RESPONDENTS**

**(Appeal from the Judgement and Decree of the High Court of Tanzania  
at Tanga)**

**(Masoud, J.)**

**dated the 15<sup>th</sup> day of December, 2017**

**in**

**Land Case No. 19 of 2015**

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**RULING OF THE COURT**

28<sup>th</sup> May & 4<sup>th</sup> June, 2021

**MUGASHA, J.A.:**

In the High Court of Tanzania at Tanga, the appellants herein lodged a representative suit on behalf of 151 villagers of Pande 'B' Village claiming ownership on land measuring 371 hectares against the 2<sup>nd</sup> respondent who upon excavating soil ores containing cement minerals destroyed the appellants' land which as a result became unsuitable for agricultural activities. The appellants sought the declaratory orders among others,

being to the effect that: the appellants are the rightful owners and their livelihoods have been ruined by the forced takeover of the land by the respondents; that the 2<sup>nd</sup> respondent be declared to have degraded the disputed lands having extracted minerals and that they be ordered to rehabilitate the land in question; payment of both specific and general damages plus interest thereon and costs.

On the other hand, in their respective written statements of defence the respondents opposed the claims by the appellants. Apart from the 1<sup>st</sup> respondent stating to have conducted the valuation on the respective land for purposes of compensation, she contended that the obligation to compensate was shouldered by the 2<sup>nd</sup> respondent who paid the respective compensation. The 2<sup>nd</sup> respondent contended that after acquiring the land in question which was consented to by the village council, she paid compensation in terms of the valuation exercise which was conducted by the 1<sup>st</sup> respondent.

After a full trial, the trial court pronounced judgment against the appellants on ground that, they had failed to prove ownership. Aggrieved, the appellants have lodged the present appeal. However, for reasons to be apparent in due course, we shall not reproduce the grounds of appeal.

The appeal was confronted with two preliminary points of objection to the effect that, **One**, the appeal is accompanied by a defective certificate of delay and **two**, the appellants' letter seeking to be supplied with certified proceedings was not served on the 1<sup>st</sup> respondent.

The appellants were represented by Mr. Juma Nassoro, learned counsel whereas the 1<sup>st</sup> respondent was represented by Ms. Jenipher Kaaya, learned Senior State Attorney and Mr. Rashid Mohamed, learned State Attorney and the 2<sup>nd</sup> respondent had the services of Mr. Geoffrey Geay Paul, learned counsel.

In respect of the first ground of preliminary point of objection, following a brief dialogue with the Court on the overriding objective principle, all learned counsel agreed that a defective certificate of delay can be remedied by granting the appellants leave to file a proper certificate by way of supplementary affidavit. On account of the said development, Mr. Paul had to abandon the first limb of the preliminary objection. However, in respect of the second limb of the preliminary objection which was raised before the commencement of the hearing, both respondents' learned counsel pointed out that the 1<sup>st</sup> respondent was not served with the appellants' letter seeking to be supplied with certified copies of the proceedings, judgment and decree of the impugned decision. This was

argued to be in contravention of Rule 90 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the consequences being that the appellants cannot rely on exclusion of time prescribed under the proviso to Rule 90 (1) of the Rules which renders the appeal incompetent and it deserves to be struck out with costs.

On the other hand, Mr. Juma Nassoro opposed the preliminary point of objection arguing that, it was belatedly raised thus offending Rule 107(1) of the Rules which requires a preliminary objection to be raised three days before hearing. As such, he urged the Court to ignore the preliminary point of objection. However, apart from conceding that the appellants had overlooked to serve the respective letter on the 1<sup>st</sup> respondent, he argued that since the 2<sup>nd</sup> respondent was served with the respective letter, the appeal should not be struck out. Instead, he urged the Court to remedy the omission by invoking Rule 96 (7) of the Rules and allow the appellant to effect the service on the 1<sup>st</sup> respondent and then proceed with the hearing of the appeal.

In rejoinder, Ms. Kaaya requested the Court to entertain the preliminary point of objection because it is on a point of law. Besides, she contended that since the appellants certified the record to be correct, in the wake of the omission the appellants' counsel shares the blame. She

added, regardless of the service to the 2<sup>nd</sup> respondent, the failure to serve the letter in question to one of the respondents consequently renders the appeal incompetent and it deserves to be struck out. To support the propositions, she cited to us the order of this Court in the case of **AUGUSTINO MKALIMOTO (As Administrator of the Estate of the Late MLAMSITEMBO MKALIMOTO) VS VILLAGE SCHOOLS OF TANZANIA, MUFINDI DISTRICT COUNCIL AND LUGODALUTALI VILLAGE GOVERNMENT**, Civil Appeal No. 154 of 2019 (unreported).

Having considered the submissions of the learned counsel for either parties and the record before us, the issue for our determination is the propriety or otherwise of the present appeal. It is not in dispute that the appellants' letter to the Registrar of the High Court seeking to be supplied with the copies of proceedings, judgment and decree of the impugned decision was served on the 2<sup>nd</sup> respondent only. It was not served on the 1<sup>st</sup> respondent. However, parties locked horns on the fate of the appeal because, while the respondents' counsel urged the Court to strike out the appeal, Mr. Nassoro pleaded with the Court not to do so and instead grant leave to the appellant to cure the defect under Rule 96 (7) of the Rules and

allow the appellants to serve the letter on the 1<sup>st</sup> respondent, then proceed with the hearing of the appeal.

At the outset, we agree with Mr. Nassoro that the preliminary point of objection was not filed within time prescribed under Rule 107(1) whose intents and purposes is to prevent the opposite party from being caught unaware and as well, enabling the Court to read and understand beforehand the gist of the intended preliminary objection. In future, we urge parties to comply with the dictates of the relevant Rule in order to achieve the intended objective. However, as the consequences of non-compliance with Rule 90 (3) render the appeal time barred, this puts to question the jurisdiction of the Court to entertain and hear the appeal. This is what made us to entertain the preliminary objection in order to determine the propriety or otherwise of the appeal before us.

In terms of the proviso to Rule 90 (1) of the Rules, after filing a notice of appeal, the intending appellant shall within thirty days from the date of impugned decision, apply to be supplied with certified copies of proceedings, judgment and decree and the period of waiting to be supplied with the respective documents shall be excluded in computing the time of sixty days within which to lodge an appeal for the intending appellant. The intending appellant is entitled to exclusion of time if he/she serves on the

respondent a copy of the letter to be supplied with the documents in question as stated under sub-rule (3) which stipulates as follows:

*"An appellant shall not be entitled to rely on the exception under sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the respondent."*

In the case of **AUGUSTINO MKALIMOTO** (As Administrator of the Estate of the Late **MLAMSITEMBO MKALIMOTO**) **VS VILLAGE SCHOOLS OF TANZANIA AND TWO OTHERS** (supra), the Court was confronted with a similar scenario whereby one of the respondents was not served with the appellant's letter to be supplied with judgment, decree and proceedings in the impugned decision. The Court said:

*"In the circumstances, the computation of sixty (60) days has to commence from the date when the notice of appeal was lodged. It is on record that the notice of appeal was lodged in time as it was filed within a period of fourteen days (14) from the date when the ruling of the High Court was delivered. The notice of appeal was filed on 23<sup>rd</sup> November, 2018 while the appeal was lodged on 8<sup>th</sup> February, 2019, that is after the lapse of 76 days. Certainly, this period is way beyond the prescribed period of sixty days. We therefore entirely agree with the counsel for the respondents that the appeal is out of time. Consequently, we hereby strike it out..."*

In yet another case of **ULEDI HASSANI ABDALLAH VS MURJI HASNEIN MOHAMED AND TWO OTHERS**, Civil Appeal No. 2 of 2012 (unreported), when the appeal was called for hearing, it transpired that the respondents were not served with, among other things, a copy of the appellant's letter to the Registrar seeking to be supplied with the proceedings, judgment and decree. The respondents' counsel argued that failure to serve their clients was a breach of a mandatory requirement of the law since there was no application lodged for extension of time. The counsel for the appellants requested the Court to waive technicalities and in the interest of justice adjourn the hearing and allow him to make copies of the necessary documents which would then be served on the respondents ready to proceed with the hearing of the main appeal on the merits. He also requested the Court to invoke Rules 2 and 4 of the Rules and depart from the requirement of service of the documents in question upon the respondents. The Court held:

*"...The non-compliance with rules 90 and 97 goes to the root of the case. The respondents cannot be brought to court without proper service. Likewise, a party who is under obligation to comply with the requirement of Rules 90 and 97 cannot flout them and expect to invoke article 107 (2) (e) to resurrect/ save his/her claims, under the umbrella of*

*substantive justice or in the interest of justice. To allow this to happen, as stated earlier, will contravene article 13(6)(a) of the very Constitution.”*

In the matter before us, the appellants filed the notice of appeal of on 11/1/2018 as reflected at page 572 of the record of appeal. This was followed by the appellants' letter addressed to the Registrar Ref. LEAT/HC-T/PB2 dated 9/1/2018 lodged at the Tanga High Court Registry on 11/1/2018. In the said letter, the appellants had requested the Registrar of the High Court to supply them with certified copies of proceedings, judgment and decree of the impugned decision. The said letter was copied to the 2<sup>nd</sup> respondent's lawyer while the 1<sup>st</sup> respondent was not served. Therefore, it goes without saying that failure to serve the 1<sup>st</sup> respondent offended the provisions of Rule 90 (3) of the Rules and as such, the appellants cannot rely on the exclusion period stated under the proviso to Rule 90 (1) of the Rules. In that regard, since the notice of appeal was filed on 11/1/2018 and this appeal filed on 8/8/2018, the appeal was more than eight (8) months from the date of lodging the notice of appeal which is beyond the prescribed sixty days. This renders the appeal not competent on account of time bar. Next for consideration are the consequences.

Mr. Nassoro urged us not to strike out the appeal because one of the respondents has been served and he invited the Court to invoke Rule 96 (7) of the Rules to cure the anomaly. The said Rule stipulates as follows:

*"Where the case is called for hearing, the Court is of the opinion that document referred to in Rule 96 (1) and (2) is omitted from the record of appeal, it may on its own motion or upon informal application grant leave to the appellant to lodge a supplementary record of appeal."*

We believe the said Rule has been cited out of context because the appellants' letter which was not served on the 1<sup>st</sup> respondent is not among the documents envisaged under Rule 96 (1) of the Rules as it does not meet the threshold of being an omitted document which can be remedied by way of lodging supplementary record of appeal under Rule 96 (7) of the Rules. The problem at stake is lack of service on the 1<sup>st</sup> respondent which was a violation of a mandatory requirement of the law which goes to the root of the case. Thus, we cannot depart from the requirement of service of the letter in question on the 1<sup>st</sup> respondent in order to allow the appellants to effect service now when the appeal has already been lodged. Therefore, we decline Mr. Nassoro's invitation.

In the premises, on account of the failure to serve the 1<sup>st</sup> respondent with the letter to be supplied with certified documents from the Registrar,

the appellants cannot rely on the exclusion under the proviso to Rule 90 (1) of the Rules which renders the purported appeal time barred having been filed beyond 60 days from the date of filing the notice.

In view of what we have endeavoured to discuss, the present appeal is incompetent and we proceed to strike it out. From the circumstances surrounding the matter we make no order as to costs.

**DATED** at **TANGA** this 3<sup>rd</sup> day of **June**, 2021.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

The Ruling delivered this 4<sup>th</sup> day of June, 2021 in the presence of the Appellants present in person and Ms. Anjela Mwapachu, learned State Attorney for the 1<sup>st</sup> Respondent and Mr. Deogratius Muhagama, learned counsel for the 2<sup>nd</sup> Respondent, is hereby certified as true copy of the original.



*F. A. Mtaranja*  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**