**IN THE COURT OF APPEAL OF TANZANIA**
**AT ARUSHA**

**(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)**

**CIVIL APPEAL NO. 258 OF 2018**

**MRS. CECILIA JUSTINE TEMBA ..... APPELLANT**

**VERSUS**

1. **THE NATIONAL HOUSING CORPORATION**
2. **M/S YONO AUCTION MART AND CO. LIMITED**
3. **THOBIAS LOISHIYE LAIZER**

**..... RESPONDENTS**

**(Appeal from decision of the High Court of Tanzania at Arusha)**

**(Nchimbi, J.)**

**dated the 5h day of December, 2014**
**in**
**Land Case No. 8 of 2005**

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## RULING OF THE COURT

17th & 25th February, 2021

**MWARIJA, J.A.:**

In this appeal the appellant, Mrs. Cecilia Justine Temba is challenging the decision of the High Court of Tanzania (Nchimbi, J) dated 5/12/2014 arising from Land Case No. 8 of 2005 (the suit). The appellant filed the suit against the respondents, National Housing Corporation, M/S Yono Auction Mart & Co. Ltd and Thobias Loishiye Laizer (the 1st – 3rd respondents, respectively). The suit followed the dispute which arose from tenancy agreement between the appellant and the 1st respondent

over house No. W.47, Ngarenaro area within Arusha Municipality (the suit premises).

The appellant claimed that, while the tenancy agreement was still in force, the 1st respondent sold by auction, through the 2nd respondent, the suit property to the 3rd respondent. She thus claimed for, *inter alia*, a declaratory order that she was the lawful tenant who had been duly paying rent, an order that she was entitled to be paid by the 1st respondent TZS 895,000.00 spent by her in repairing the suit premises and an order requiring the 3rd respondent to give vacant possession on the ground that the auction at which he purchased the suit premises was illegally conducted.

The respondents disputed the claims raised in the suit. On its part, the 1st respondent raised a counterclaim seeking *inter alia* an order directing the appellant to pay to it an amount of TZS 529,970.00 being arrears of rent and mesne profits.

The suit proceeded to trial and at the end, upon evaluation of the evidence adduced and tendered by the parties, the learned trial Judge found that the appellant had failed to prove her case and thus dismissed the suit with costs. On the other hand, he found that the 1st respondent had proved its counterclaim and therefore awarded it the claimed arrears

of rent of TZS 501,400.00 and mesne profit of TZS 574,670.00 with interest. He also awarded the respondents the costs of the suit. The appellant was aggrieved by the decision of the High Court hence this appeal which was instituted on 17/7/2018.

When the appeal was called on for hearing on 17/2/2021, the appellant was represented by Mr. John Materu, learned counsel while the 1st respondent was represented by Mr. Deodatus Nyoni, learned Principal State Attorney assisted by Mr. Aloyce Sekule, also learned Principal State Attorney, Mr. Mkama Musalama and Ms. Glory Isangya, learned State Attorneys. The 3rd respondent had the services of Mr. Elvaison Maro, learned counsel while the 2nd respondent appeared through its Zonal Manager, Mr. Fred Lihinda.

Since, by a notice filed on 11/2/2021, the learned counsel for 3rd respondent had raised a preliminary objection challenging the competence of the appeal, we had to start to hear the parties on that objection. In his preliminary objection, Mr. Maro has raised the following two grounds:

(a) *That, the certificate of delay at page 314 of the record of appeal is incorrect and incompetent in the following manner:-*

*(i) It purports to count days required for preparation of the appeal documents from the date of the*

*appellant's letter applying for the appeal documents instead of counting from when the letter applying for appeal documents was lodged in court, contrary to rule 90 (1) of the Court Rules.*

*(ii) That the purported certificate of delay is incompetent in that it does not indicate that the aggregate number of 1252 days should be excluded for the purpose of computation of time for purpose of lodging the appeal contrary to Rule 90 (1) of the Court Rules.*

*(b) That the record of appeal is incomplete in that:-*

*(i) It does not contain exhibit P-8 produced in court on 5/8/2008 (page 162 of the record of appeal) contrary to Rule 96 (1) (f) of the Court Rules.*

*(ii) It does not contain exhibit ID-1 (for identification) produced in court on 20/02/2010 (See page 180 of the record of appeal), contrary to Rule 96 (1) (f) of the Court Rules.*

Submitting in support of ground (a) of the objection, Mr. Maro argued that the certificate of delay (the certificate) issued by the Registrar of the High Court (the Registrar) is defective on account first, that the Registrar computed erroneously the period required for preparation of the certified copies of proceedings, judgment, decree and other relevant documents (the appeal documents) by the appellant to enable her prepare and file the appeal.

It was Mr. Maro's contention that instead of computing the excludable period from the date of lodgement in court of the appellant's letter of application for the appeal documents (the letter), the Registrar reckoned that period from the date on which the letter was written. Relying on the proviso to Rule 90 (1) of the Rules, the learned counsel submitted that the certificate is, for that reason, defective because it shows that the period which was required for preparation of the appeal documents was 1252 days instead of 1,245 days. He went on to argue that, in the circumstance, the period between 12/12/2014 and 18/2/2014 was not required for preparation and delivery of the appeal documents. Secondly, the learned counsel argued that, apart from the error in the computation of the requisite period, the certificate does not exclude that time. He thus submitted that the two irregularities render the certificate defective.

With regard to ground (b) of the preliminary objection, the 3rd respondent's counsel argued that the documents tendered at the trial and admitted as exhibits P8 and D1 have not been included in the record of appeal contrary to the requirement of Rule 96 (1) (f) of the Rules. For that reason, Mr. Maro went on to argue, the record is incomplete.

Mr. Nyoni supported the arguments made by Mr. Maro. He stressed the arguments made in respect of ground (a) of the preliminary objection

by relying on the case of **Theobald P. Michael v. Project Manager, CHICO**, Civil Appeal No. 67/4 of 2018 (unreported) cited by the counsel for the appellant in his list of authorities. On his part, the 2nd respondent's representative did not have any submission to make.

Responding to the submissions made in support of ground (a) of the preliminary objection, Mr. Materu did not dispute that in computing the time which was required for preparation of the appeal documents, time was reckoned from the date of the letter, not the date on which the same was lodged in the High Court. He argued however, that the computation which was made before introduction of Form L by Rule 90 (2) of the Rules, was properly done because, it is the date of the letter which determines the day on which the request for appeal documents was made. He cited the case of **Theobald P. Michael** (supra) to support his argument.

With regard to the case of **M/S Flycatcher Safaris Ltd v. Hon. Minister for Lands and Human Settlements Development & Another**, Civil Appeal No. 142 of 2017 (unreported), which Mr. Maro had attached to his notice of preliminary objection, Mr. Materu argued that the same is distinguishable because in that case, apart from the omission to state the number of the excluded days, the certificate had the defect of stating an incorrect date of the letter of request for appeal documents.

On the arguments made in support of ground (b) of the preliminary objection, Mr. Materu submitted that, whereas inclusion of exhibit P8 in the record of appeal was excluded by the Registrar as shown on page 137 of the record of appeal, exhibit ID1 was included vide a *"NOTICE TO INCLUDE DOCUMENTS OMITTED FROM THE RECORD OF APPEAL"* That notice is shown to have been made under Rule 96 (6) of the Rules. By those arguments, Mr. Materu urged us to overrule the preliminary objection.

In rejoinder, Mr. Maro maintained that the irregularities raised in the preliminary objection are substantial. On the contention that the certificate complied with Form L as regards the requirement of indicating in the certificate, the date on which the appeal documents were requested, he argued that the wording of Rule 90 (1) remained as it was in the Tanzania Court of Appeal Rules, 1979 and also despite various amendments to the Rules including introduction of that Form.

Submitting further, the 3rd respondent's counsel argued that the **M/S Flycatcher Safari's Ltd case** (supra) was decided when Form L had already been introduced and the interpretation made therein is that computation should be reckoned from the date of lodgement of a letter of request for appeal documents. On the incompleteness of the record, Mr. Maro argued that, although there is in the record of appeal, the

Registrar's letter showing that he excluded exhibit P8 from being included in the record, the appellant's letter of application for exclusion of that document indicates that it was written after the request had been granted. For that reason, Mr. Maro argued, that the Registrar's decision to exclude the exhibit was invalid. On exhibit D1, the learned counsel argued that the same has not been included in the record of appeal because what was lodged in Court is merely a notice to include the document and no more.

Having considered the respective submissions made by learned counsel for the parties, we wish to consider first, ground (b) of the preliminary objection. To begin with, the contention that the record is incomplete for the appellant's failure to include exhibit P8 is in our view incorrect. We are satisfied that following the appellant's application, the document was excluded by the Registrar in the exercise of the powers conferred in him by Rule 96 (3) of the Rules. We are, with respect, unable to agree with Mr. Maro's argument that the Registrar's decision is invalid because the appellant's letter of application for exclusion of that document is dated 5/7/2018 while the Registrar's letter granting the application shows that it was written on 16/5/2018, before the application to that effect was made. Having considered the contents of the letter, we are satisfied that the same was inadvertently dated. We hold that view because the Registrar's letter was written in response to the appellant's

letter Ref. No. MCA/JFM/19/2018 dated 5/7/2018 in which the appellant applied to the Registrar to exclude exhibit P8 from the record of appeal. We therefore, do not find merit in the contention by the counsel for the 3rd respondent that the decision of the Registrar is invalid.

As for exhibit D1, we agree with Mr. Maro that the same has not been properly included in the record of appeal. This is because, what is in the record is merely a notice to include that document. Although before its amendment by GN No. 344 of 2019, Rule 96 (6) of the Rules allowed an appellant to include an omitted document in the record of appeal within 14 days of lodgement of an appeal without the leave of the Court, the procedure is not by filing a notice to do so but to submit the document for filing in the record of appeal. With respect therefore, we find that, from the procedure which was adopted by the appellant's counsel, the document is not properly included in the record of appeal. In the circumstances, we agree with Mr. Maro that the omission renders the record of appeal incomplete.

Now on ground (a) of the preliminary objection. It is not disputed that in computing the requisite period, the Registrar reckoned that time from the date on which the appellant wrote a letter requesting for appeal documents, that is; on 11/12/2014. The Registrar's computation is that the period from 11/12/2014 to 15/5/2018 was required for preparation

and delivery of the appeal documents, an aggregate of 1,252 days. Had the computation been reckoned from 18/12/2014 when the appellant's letter was received by the High Court, the certificate should have shown that the required period was 1,245 days. In the circumstances, the appellant obtained an advantage of 4 days, that is, between 11/12/2014 and 18/12/2014 (excluding the date of the letter and 18/12/2014, the date of lodgement thereof.)

The first issue which arises in this ground therefore, is whether in computing the requisite period, time should have been reckoned from the date of the appellant's letter or the date of its lodgement. To start with, we respectfully agree with Mr. Maro that the wording of the applicable provision, Rule 90 (1) of the Rules which was Rule 83 (1) of the repealed Tanzania Court of Appeal Rules, 1979 has remained the same. This has been so despite all the amendments made to the Rules.

Obviously therefore, as argued by Mr. Maro, even if Form L would have been in place at the time when the certificate was issued, the position could not have changed because the Form interpretes the proviso to Rule 90 (1) of the Rules which in substance, its wording has consistently remained the same. The provision states 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 quintupiicate;*

*(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."*

*[Emphasis added]*

In our considered view, the highlighted words *"where an application for a copy of the proceedings in the High Court has been made"* used in that proviso to Rule 90 (1) of the Rules, which has been reproduced above, clearly shows that for the time to start to be counted, an application must have been lodged in the High Court. We are unable to anticipate a situation where an application can be made without being lodged in court. In the circumstances, we are certain that to hold otherwise would amount to defeating the purpose of setting the timelines to the appeals process.

In that respect, we do not agree with Mr. Materu's interpretation of our previous decision in the case of **Theobard P. Michael** (supra), that computation of the requisite period for preparation and delivery of appeal documents should be reckoned from the date shown in the appellant's letter regardless of the date of lodgement of that letter in the High Court. Reading of that decision as a whole shows that the computation should be reckoned from the date of the appellant's application, meaning that such a letter must have been received by the High Court. The answer to the issue is therefore that, computation is reckoned from the date of lodgement of the letter; that is to say, when the appellant's request has been received by the High Court.

The second issue is whether the omission to exclude the computed period renders the certificate defective. We need not be detained much in answering this issue. Since the purpose of the proviso to Rule 90 (1) of the Rules is to exclude, from the prescribed time for filing an appeal, the period used to prepare and deliver to the intended appellant, the appeal documents, it is imperative that the certificate must exclude such computed period. From the wording of that provision it is a requirement that the certificate must exclude that time. The relevant part of the proviso to that Rule states that:

*". . .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 . . . ."*

*[Emphasis added]*

As stated above, Form L interpretes rule 90 (1) of the Rules, the wording of which has all along been the same from the time of 1979 Rules. One of the information which must be stated is the number of the days which should be excluded in computing the time for lodging an appeal in the Court. The omission to exclude the days which the Registrar had computed as having been spent in the preparation of the appeal documents therefore, is an irregularity which renders the certificate defective.

Having determined the two issues in the manner stated above, our next task is to determine the way forward. Being alive to the current position, that the defects are curable, Mr. Maro urged us to order that the same be rectified, failure of which the appeal which is incompetent should be struck out. We respectfully agree with him. We have considered first, that the defect in the certificate was occasioned by the Registrar and secondly, that in terms of Rule 96 (7) of the Rules the Court may, on its own motion or upon an application, grant leave to the appellant to lodge a supplementary record of appeal consisting of the omitted document.

In the circumstances, the appellant is ordered to file in Court, within a period of thirty (30) days from the date of delivery of this ruling, a properly drawn certificate of delay and a supplementary record of appeal containing exhibit D1 which was omitted from the record of appeal.

Costs to abide the outcome of the appeal.

**DATED** at **ARUSHA** this 24th day of February, 2021.

A. G. MWARIJA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Ruling delivered this 25th day of February, 2021 in the presence of Mr. Mitego Methusela, learned counsel for the Appellant and Mr. Peter Musetti, learned Senior State Attorney for the 1st Respondent, Mr. Nyalu Valentine, learned counsel holding brief for Mr. Fred Lihinda – Zonal Manager for the 2nd Respondent and also holding brief for Mr. Elvaison Maro, learned counsel for the 3rd Respondent is hereby certified as a true copy of the original.

H. P. NDESAMBURO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**