

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

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 214 OF 2017

VENANCE MWAKIBINGAAPPELLANT

VERSUS

CHIEF EXECUTIVE OFFICER

TANZANIA FOREST SERVICE AGENCY1STRESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of
Tanzania at Dar es Salaam)**

(Feleshi, J.)

Dated the 24th day of June, 2016

in

Civil Case No. 88 of 2014

RULING OF THE COURT

16th July & 6th August, 2021

WAMBALI, J.A.:

Venance Mwakibinga, the appellant, sued the Chief Executive Officer Tanzania Forest Service Agency and the Attorney General, the first and second respondents respectively, in Civil Case No. 88 of 2014 before the High Court of Tanzania at Dar es Salaam District Registry. Particularly, he claimed from the respondents', payment of TZS. 39,015,000.00 being purchase price of 867 timbers which were confiscated, TZS. 768,000,000.00 being loss of profit, general damages, interest and cost of the suit. The respondents strongly disputed the appellant's claims.

At the height of the trial, the High Court (Feleshi, J. as he then was) found in favour of the respondents and dismissed the appellant's claims in their entirety. Aggrieved, the appellant has appealed to the Court, fronting two grounds of appeal. For the reason which will be apparent shortly, we do not intend to reproduce the respective grounds of appeal contained in the memorandum of appeal.

It is important to note that initially, on 14th July, 2021 when the appeal was called on for hearing in the presence of Mr. Willson Edward Ogunde, learned advocate for the appellant and Ms. Grace Lupondo assisted by Mr. Stanley Mahenge and Ms. Rose Kishamba, all learned State Attorneys for the respondents, it was categorically agreed by the Court and the parties that the certificate of delay issued by the Registrar of the High Court is defective. Particularly, the defectiveness centered on the failure to include the name of the first respondent among the parties and making reference to a wrong date on which the appellant applied to be supplied with the requisite certified copy of proceedings of the High Court.

In the circumstances, the appellant's counsel prayed to be allowed to approach the Registrar of the High Court for seeking rectification of the certificate of delay and thereafter lodge a supplementary record of appeal, in terms of Rule 96 (7) of the Tanzania Court of Appeal Rules,

2009 (the Rules) to include the missing letter dated 13th February, 2017 and the rectified certificate of delay.

The appellant's counsel prayer was strongly contested by the respondents' counsel who argued that the appeal be struck out with costs for being lodged out of time. She contended that the certificate of delay is not only defective but also invalid for containing a wrong date on which the certified copy of proceedings was applied and thus it cannot be relied upon by the appellant to support the timeliness of the appeal.

Having heard the learned counsel contending submissions on that day, we reserved our ruling to a date to be notified by the Registrar. However, in the course of preparing our ruling, we noted the existence of some important documents which have a bearing on the validity of the certificate of delay. In this regard, we were compelled to resummons the parties to appear before the Court, which they did on 16th July, 2021.

Admittedly, after perusal of the original record in Civil Case No.88 of 2014, we came across some important documents, namely, the exchequer receipts exhibiting the dates in which the appellant collected certified copies of the proceedings of the High Court. The said receipts were not in the current record of appeal. More importantly, the said documents left no doubt that the last date, that is, 28th July, 2017 which

the Registrar of the High Court indicated as the last date to be based in excluding the number of days in calculating the period of limitation in accordance with Rule 90 (1) of the Rules was erroneous.

It therefore became apparent that even if the Court would have granted the appellant leave to approach the Registrar of the High Court to rectify the defect in the certificate of delay by inserting the name of the first respondent and indicating the proper date when the appellant applied for certified copies of proceedings, that is, 14th February, 2017, when the Registrar of the High Court received the letter, still, the appeal which was lodged on 26th September, 2017 would be taken to have been lodged out of the sixty days prescribed by Rule 90 (1) of the Rules.

It is in this regard that on 16th July, 2021, upon being summoned for the hearing, Mr. Ogunde, learned advocate who appeared for the appellant readily conceded that in the light of the said documents found in the original trial court's record, the appeal is time barred. He thus conceded that the intended rectification of the certificate will not serve any useful purpose to salvage the limitation of time of the appeal. To this end, he categorically prayed that the appeal be struck out with no order as to costs. The thrust of the learned counsel prayer on waiving payment of costs was based on the contention that the Registrar of the High Court

also contributed to the invalidity of the certificate of delay rendering the appeal to be lodged out of time.

On the adversary side, Ms. Grace Lupondo assisted by Mr. Stanley Mahenge, both learned State Attorneys who appeared for the respondents, graciously welcomed the concession of the appellant's counsel that the appeal is time barred as it is supported by an invalid certificate of delay. She argued that the certificate of delay in the record of appeal purports to exclude the period of limitation beyond the number of days utilized by the appellant to obtain a copy of certified proceedings of the High Court. She thus urged the Court to strike out the appeal as prayed by the appellant's counsel. However, the learned State Attorney strongly urged the Court to award the respondents costs.

On our part, having heard the concurrent and contending submissions of the counsel for the parties concerning the fate of the appeal and costs respectively, firstly, we do not hesitate to agree with them that as the certificate of delay is invalid the same cannot be rectified to make it be relied upon in computing time. As such, the defect goes to the root of the document itself and the competence of the appeal. It is therefore not doubted that the appeal is incompetent for being lodged out of sixty days prescribed by Rule 90 (1) of the Rules.

It must be emphasized that an incurably defective certificate of delay which portrays erroneous facts on what really transpired in the course of applying and obtaining the certified copy of proceedings of the High Court cannot be relied upon to support an appeal which has been preferred after expiry of the prescribed period of limitation. Consequently, we strike out the appeal.

Secondly, having regard to the circumstances of the appeal before us in which parties duly made preparations for the hearing, we grant costs to the respondents.

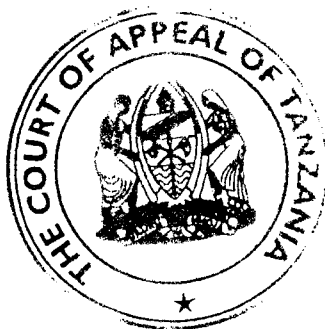
DATED at DAR ES SALAAM this 2nd day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of August, 2021 in the presence of Mr. Wilson Ogunde counsel for the appellant and Ms. Joyce Yonazi, State Attorney for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL