

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

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And KENTE, J.A.)

CIVIL APPEAL NO. 138 OF 2020

BOARD OF TRUSTEES OF ORTHODOX CHURCHAPPELLANT

VERSUS

ROGERS MASHANDA.....1ST RESPONDENT

KARAGWE DISTRICT COUNCIL.....2ND RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Bukoba)**

(Bongole, J.)

dated the 16th December, 2016

in

Land Case No. 3 of 2011

RULING OF THE COURT

20th & 24th August, 2021

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, Land Division at Bukoba (Bongole, J) dated 16th December, 2016 in Land Case No. 3 of 2011. In that case, Rogers Mashanda, the first respondent herein sued the Board of Trustees Orthodox Church and Karagwe District Council, who are the appellant and the second respondent respectively, claiming for ownership of two pieces of land situated at Omugakorongo area in Ndama Village, Karagwe District in Kagera Region

valued at TZS 135,000,000.00. He also claimed for an order of vacant possession, payment of general damages and costs of the suit.

In their respective written statements of defence, the appellant and the second respondent disputed the first respondent's claim. However, at the end, the learned trial Judge decided the suit in favour of the first respondent.

Aggrieved, the appellant on 22nd December, 2016 lodged a notice of appeal and on 23rd December, 2016, she wrote a letter to the Registrar of the High Court requesting for certified copies of proceedings, judgment and decree in Land Case No. 3 of 2011 to process the appeal. Thereafter, on 27th December, 2016, the appellant lodged in the High Court Misc. Civil Application No. 41 of 2016 for leave to appeal. However, the said application was struck out on 13th November, 2019 for having been overtaken by events. Subsequently, on 10th January, 2020, the appellant lodged a memorandum of appeal which comprised five (5) grounds of complaint. However, for the reasons which will be apparent shortly, we do not deem appropriate, for the purpose of this ruling, to reproduce them herein.

It is on record that, after being served with the memorandum of appeal, the learned counsel for the respondents had lodged a notice of preliminary objection to the effect that: -

(1) The appeal is time barred and thus offending the mandatory provisions of Rule 90 (1) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended that –

(a) The memorandum and record of appeal were lodged on 10th January, 2020 being after the period of 3 years and 20 days from the date of lodging the notice of appeal, which was on 20th December, 2016;

(b) Though, the purported letter requesting for the copy of proceedings in the High Court was lodged on 23rd December, 2016 but in the record of appeal the appellant did not obtain and attach any certificate of delay from the Registrar as required by the proviso to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 as amended; and

(c) The appeal was filed beyond the mandatory period of 60 days from the date of filing the notice of appeal hence failure to attach in the record of appeal any certificate of delay from the Registrar renders the appeal time barred.

At the hearing of the appeal, the appellant was represented by Mr. Josephat S. Rweyemamu, learned counsel whereas the first respondent had the services of Mr. Mathias Rweyemamu, learned counsel. Mr.

Solomon Lwenge, learned Senior State Attorney and Mr. Gerald F. Njoka, learned State Attorney joined forces to represent the second respondent.

As the rule of practice demands, the preliminary objection has to be disposed of first before determination of the appeal on merit. Having that in mind, we invited the learned counsel for the parties to address us on the preliminary objections raised by the respondents.

Submitting in support of the preliminary objection, Mr. Lwenge contended that the appeal is incompetent for being time barred as it was lodged after a lapse of three (3) years and twenty (20) days from the date of lodging the notice of appeal. He clarified that, the impugned judgment sought to be challenged was delivered on 16th December, 2016, the notice of appeal was lodged on 22nd December, 2016 and the memorandum of appeal was lodged on 10th January, 2020. He contended that, the act of the appellant to lodge the appeal after a lapse of that period without a certificate of delay from the Registrar contravened the provisions of Rule 90 (1) of the Rules. He said that, under that Rule, the appellant is required to lodge the appeal within sixty (60) days from the date of lodging the notice of appeal and the only exception is where the appellant requests for

the certified copies of the proceedings and the Registrar issues a certificate of delay to exclude the time spent to prepare the said documents.

He contended that, although it is on record that on 23rd December, 2016, the appellant wrote a letter to the Registrar requesting to be provided with certified copies of proceedings, judgment and decree, it is not clear as to when she was supplied with the said documents, as there is no letter of the Registrar or even the certificate of delay to that effect. It was the argument of Mr. Lwenge that, since the appellant have not availed a certificate of delay, in terms of Rule 90 (1) of the Rules, she was required to lodge her appeal by 20th February, 2017. Based on his submission, Mr. Lwenge argued that the appeal lodged on 10th January, 2020 after lapse of three (3) years and twenty (20) days without a certificate of delay is hopelessly time barred. To bolster his proposition, Mr. Lwenge cited the case of **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004 (unreported). He then urged us to strike out the appeal with costs for being time barred.

For his part, Mr. Mathias Rweyemamu, adopted his written submission he lodged on 20th April, 2020 to form part of his oral

submission. He then associated himself with the submissions made by Mr. Lwenge and added the cases of **Fatuma Mohamed v. Chausiku Selema**, Civil Appeal No. 225 of 2017 and **Mohamed Issa Mtalamile and 3 Others v. Tanga City Council and Another**, Civil Appeal No. 200 of 2019 (both unreported). He then insisted that since the appellant had not complied with the proviso to Rule 90 (1) of the Rules and obtained a certificate of delay to exclude the time prescribed under that Rule, the appeal is time barred. On that basis, he also urged us to strike out the appeal with costs.

In his response, apart from conceding that the appellant lodged the appeal out of the prescribed time without seeking a certificate of delay, Mr. Josephat Rweyemamu blamed his learned friends for failure to appreciate that this appeal is peculiar in nature. He argued that before lodging an appeal, he was first required to seek and obtain leave from the High Court to appeal to this Court. He thus demonstrated on how he timely lodged the notice of appeal and requested for the certified documents from the Registrar for purposes of this appeal. He then proceeded to argue that the contention that an appeal must be lodged within 60 days of the notice of appeal is only relevant to appeals which do not require leave. For appeals

which lie with leave, are to be filed within 60 days from the order granting leave, he argued. According to him, the time for lodging this appeal should be reckoned from 28th November, 2019, the date when he lodged his letter dated 27th November, 2019 requesting for certified copies of the ruling and proceedings in Misc. Civil Application No. 41 of 2016.

He however submitted that, after being overwhelmed with the process of seeking leave to appeal, he inadvertently omitted to obtain the certificate for delay. He thus urged us to remedy the omission by invoking Rule 96 (7) of the Rules and grant leave for him to seek and obtain a certificate of delay from the Registrar and then lodge a supplementary record of appeal to include the said certificate in the record of appeal. As such, Mr. Josephat Rweyemamu prayed for the preliminary objection to be overruled with costs.

In a brief rejoinder, Mr. Lwenge challenged the prayer made by Mr. Josephat Rweyemamu of lodging a supplementary record under Rule 96 (7) of the Rules. It was his strong argument that, since the appeal is time barred, the said provision is inapplicable. Mr. Lwenge also challenged the submission of Mr. Josephat Rweyemamu for making reference to the letter lodged on 27th November, 2019, that the relevant letter for the purpose of

this appeal is the one lodged by the appellant on 23rd December, 2016 requesting for certified copies of the proceedings in Land Case No. 3 of 2011 the subject of this appeal. He however contended that, since Mr. Josephat Rweyemamu has conceded to the objection, the remedy is to strike out the appeal with costs.

Mr. Mathias Rweyemamu also added that, the appellant cannot rely on the said letter lodged on 27th November 2019 as the same was not served to the respondents as required by Rule 90 (3) of the Rules. He also insisted for the appeal to be struck out with costs.

On our part, having examined the record of appeal and the submissions advanced by the learned counsel for the parties for and against the preliminary objection, the main issue for our determination is whether the objection raised is meritorious.

There is no doubt that the issue raised is regulated by Rule 90 (1) of the Rules, 2009 (the Rules) which categorically 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 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."

The contents of the above provision is clear and leaves no room for the appellant's suggestion that segregates appeals into two categories. There are only two instances of reckoning the time for lodging civil appeals according to Rule 90 (1) of the Rules. These are, either from the date of the notice of appeal or from the last date appearing in the Registrar's certificate of delay.

In the instant appeal, there is no dispute that the decision sought to be challenged was handed down on 16th December, 2016 and the notice of appeal was lodged on 22nd December, 2016. It is also on record that, on 23rd December, 2016, the appellant wrote a letter to the Registrar requesting for certified copies of proceedings, judgment and decree. However, the record is silent on when exactly the documents were ready

for collection and when exactly the appellant was availed with the said documents as the Registrar's letter to that effect is not included in the record. Furthermore, there is no certificate of delay excluding the time taken to prepare those documents. As correctly argued by the learned counsel for the respondents, pursuant to Rule 90(1) of the Rules, the appeal ought to have been lodged latest by 20th February, 2017. This is so, because, in his submission, Mr. Josephat Rweyemamu had readily conceded that he does not have any certificate of delay to exclude the days spent in obtaining the certified copies of the said documents. As such, the appellant is not entitled to benefit from exclusion of days envisaged under the proviso to Rule 90 (1) of the Rules.

The above position is long settled as it has been the same even before the coming into force of the current Rules, therefore, the Mr. Josephat's suggested innovation of remedying the said omission of not accompanying this time barred appeal with a certificate of delay under Rule 96 (7) of the Rules is, with respect, without any legal basis. The following cases demonstrate the position then, in the old Rules when the current Rule 90 was Rule 83. In **East Africa Mines Limited v. Christopher Kadeo** Civil Appeal No. 53 of 2005 (unreported) the Court held that: -

*"We shall first deal with the issue whether the appeal was time barred. On this, the relevant provision is rule 83 which under sub-rule (1) provides in clear terms that an appeal shall be instituted within sixty (60) days of the date of the notice of appeal. However, there is also a proviso in the sub-rule to the effect that if the letter to the Registrar of the High Court applying for copy of the proceedings is in writing and was copied to the respondent, **the time taken for the preparation and delivery of the copy of proceedings as may be certified by the Registrar as having been necessary for the preparation of the copy of proceedings shall be excluded.**"* [Emphasis added].

The same position was restated in the case of **Mwanaasha Seheye v. Tanzania Ports Corporation**, Civil Appeal No. 37 of 2003 (unreported) where it was emphasized that an appeal must be instituted within sixty (60) days of the date of the notice of appeal, unless the exception applies.

We are mindful of the fact that, in his submission, Mr. Josephat Rweyemamu was convinced that his tireless efforts to obtain leave to appeal and obtain copies of some relevant documents in that application absolved him of the statutory requirement to appeal within sixty days. With

profound respect, that is not the correct position of the law. This Court when faced with an akin situation in the case of **Richard Mchau v. Shabir F. Abdulhussein**, Civil Application No. 87 of 2008, (unreported), stated that: -

*"However, much as we may agree that endeavours by an appellant to seek leave to appeal to this Court constitute one of the essential steps towards prosecution of an intended appeal, **we are certain that the efforts by the respondent were efforts in futility having not fully complied with...rule 83 (1) and (2) of the Old Rules beforehand.**" [Emphasis added].*

Following the above authorities, we are in agreement with the learned counsel for the respondents that, since the memorandum of appeal was lodged on 10th January, 2020 after lapse of three (3) years and twenty (20) days from the date of notice and there being no certificate of delay to exclude the days spent in obtaining copies of the certified documents, the appeal is hopelessly time barred.

In view of what we have endeavoured to discuss above, we decline the invitation extended to us by Mr. Josephat Rweyemamu to invoke the provisions of Rule 96 (7) of the Rules to grant leave and allow him to remedy a time barred appeal, as it is in violation of mandatory provisions

of Rule 90 (1) of the Rules which prescribes the time limit of lodging an appeal. To do otherwise, is in our view, to condone non-compliance with the laws which would plunge the administration of justice into chaos.

We even find that, Mr. Josephat Rweyemamu wishes to be hot and cold at the same time, because he had earlier on conceded that he had never sought and obtained a certificate of delay. This is to say, the said certificate is not in existence. It is therefore our considered view that, Mr. Josephat Rweyemamu's line of argument is an abuse of the Court processes as it seeks to slot in the record of appeal what has never been part of such record. We are fortified in that account in terms of what is prescribed as an omitted document under Rule 96 (7) of the Rules, which categorically stipulates that: -

"Where the case is called on for hearing, the Court is of 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 an informal application grant leave to the appellant to lodge a supplementary record of appeal."

Therefore, in the light of the stated position of the law, we decline to grant leave to Mr. Josephat Rweyemamu to submit a certificate of delay

which is nonexistent and, therefore had never been part of the record of appeal.

We are increasingly of the view that, non-inclusion of the certificate of delay in the record of appeal cannot be cured by the principle of overriding objective as the same cannot be blindly applied on such an omission which goes to the root of the appeal. The Court cannot have jurisdiction to entertain an appeal which is time barred and where no certificate of delay had been sought and obtained. In this regard, we are guided by our previous decisions in **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 and **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 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. In the present appeal, we think, we cannot overlook the fact that the appeal before the Court is time barred and give it artificial life against the requirement of the law. As such, we are in agreement with the submissions of the learned counsel for the respondents that the provisions of Rule 96

(7) of the Rules relied upon by Mr. Josephat Rweyemamu are not applicable in this appeal.

In the premises, we are of the settled view that the appeal before us is incompetent for being time barred. In the end, we sustain the preliminary objection raised by the respondents. Consequently, we strike out the appeal with costs for being time barred.

DATED at **BUKOB**A this 23rd day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2021 in the presence of Mr. Josephat S. Rweyemamu, learned Counsel for the Appellant, Mr. Mathias Rweyemamu, Counsel for the 1st Respondent and Mr. Solomon Lwenge, learned Senior State Attorney assisted by Mr. Gerald Njoka, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL