IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CIVIL APPEAL NO. 89 OF 2018

UNION OF TANZANIA PRESS CLUBS..... 1ST APPELLANT
HALIHALISI PUBLISHERS LTD.....2ND APPELLANT
VERSUS
THE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA.....RESPONDENT

(Appeal from decision of the High Court of Tanzania at Mwanza)

(Bukuku, Gwae And Matupa, J.J.)

Dated the 3rd day of August, 2017
in
Misc. Civil Case No. 46 of 2017

RULING OF THE COURT

19th & 24th February, 2021.

MUGASHA, J.A.:

The appellants herein, lodged before the High Court a petition challenging the legality of a number of provisions in the Media Services Act No. 12 of 2016 (The Media Services Act) on ground that, they offend Article 18 of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). The petition was opposed by the Respondent who filed preliminary objection challenging it for not being tenable on the following points : **one,** that the High Court lacked jurisdiction to entertain the Petition; **two,** the petitioner had no legal capacity to sue; **three,** the petition is bad

in law for wrong citation of the provision of the law; **four,** the petition is bad in law for containing a defective affidavit and **five,** the petition does not disclose a legitimate claim therefore frivolous and vexatious.

The hearing of the preliminary points of objection was scheduled before De-Mello, J. who upon hearing the parties, resolved that the High Court was not vested with requisite jurisdiction to adjudicate the petition because the appellants had not yet exhausted the available remedies available under the Media Services Act.

Undaunted, the appellants unsuccessfully sought a reference before a panel of three Judges against the decision of De-Mello, J. The reference was declined on ground that, the appellants ought to have appealed against the decision of a single judge. It is against the said backdrop; the appellants have preferred an appeal to the Court fronting two grounds of complaint as follows: -

(1) That, the presiding panel of Judges erred in law and fact by ruling that the High Court had no jurisdiction to entertain the constitutional petition before.

(2) That the presiding panel of Judges erred in law and fact by ruling that the decision of High Court should be appealed and not make a reference as provided by law.

When the appeal was called for hearing, the appellants were represented by Messrs. Jeremiah Mtobesya and Edwin Alon Hans, learned counsel. The respondent had the services of Mr. Abubakar Mrisha, learned Principal State Attorney and Mr. Xavier Ndalahwa, learned State Attorney.

Before proceeding with the hearing we wanted to satisfy ourselves with the propriety or otherwise of the appeal considering that, for the purposes of pursuing an appeal, the appellants requested to be supplied with copies of certified proceedings, ruling and drawn order of the impugned decision beyond the prescribed period of thirty (30) days.

In addressing the Court, although Mr. Mtobesya, conceded that the appellant's letter seeking requisite certified documents was delayed, he submitted this was not fatal because it was a mere procedural error which can be cured and remedied by the Court by invoking the overriding objective principle which is geared at achieving the ends of substantive justice. In addition, he urged the Court to consider the following: **one,** remedy the anomaly on account of the certificate of delay which excluded the period utilised in the preparation of the proceedings before they were supplied to the appellants. **Two,** to discern from the appellants' letter dated 22/12/2017 that, the certified documents in question were requested by the appellants' way back on 6/8/2017. However, when probed by the Court if the purported

letter dated 6/8/2017 was filed at the High Court, Mr. Mtobesya conceded that it was not. Yet, he urged the court to find that the appeal is properly before the Court and that it should be heard on merits.

On the other hand, Mr. Mrisha strongly objected the course advanced by Mr. Mtobesya arguing that the delay to apply to be supplied with certified proceedings, ruling and drawn order was in contravention of Rule 90(1) of the Tanzania Court of Appeal Rules, 2009 (The Rules). That apart, he urged the Court to ignore the letter dated 6/8/2017 because neither was it filed in the High Court nor served to the respondent. He thus invited the Court to find the appeal incompetent on account of time bar as the appellant cannot rely on the exclusion period stated in the certificate of delay which does not bear the actual date when the appellants requested to be supplied with certified documents of the High Court. Finally, he implored on the Court, in the circumstances of this matter, not to invoke the overriding objective principle as that would be tantamount to condoning non-compliance with the law regulating the timelines to file an appeal to the Court. To support his argument, he referred us to the case of **MONDOROSI VILLAGE COUNCIL AND TWO OTHERS VS TANZANIA BREWERIES LIMITED AND FOUR OTHERS,** Civil Appeal No. 66 of 2017 (unreported) where the Court emphasized that the overriding Objective principle should not be blindly

invoked. He concluded by urging the Court to strike out the incompetent appeal as it is in violation of Rule 90(1) of the Rules.

In his brief rejoinder, apart from repeating what he earlier submitted he added that since the letter dated 6/8/2017 is not in the record, leave should be granted to the appellants to file it as an omitted document in terms of rule 96 (7) of the Rules.

After a careful consideration of the submission of learned counsel for the parties and the record before us, the point for determination is whether the appeal is properly before the Court. It is undisputed that it is the notice of appeal which initiates an appeal as stipulated under Rule 83 of the Rules. Then, the period in which the appeal must be filed and the attached conditions precedent are regulated by Rule 90 (1) of the Rules which stipulates as follows:

> *"90. -(1) Subject to the provisions of ruie 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."

In the case at hand, while the impugned decision was handed down on 3/8/2017, the appellants wrote a letter on 25/9/2017 to the District Registrar seeking to be supplied with copies of certified proceedings, ruling and drawn order of the impugned decision. The said appellants' letter at page 316 of the record of appeal reflects the following:

"Our Ref. No. HCA/LTR/MZA/27/2017 *25TH SEPT.2017*

DISTRICT REGISTRAR
HIGH COURT OF TANZANIA
MWANZA.

RE: APPLICATION FOR CERTIFIED COPY OF EXTRACT ORDER IN MISC CIVIL CAUSE NO. 2 OF 2017

1.UNION OF TANZANIA PRESS CLUBS
2.HALIHALISI PUBLISHERS LTD ..... *PETITIONERS*

VERSUS

THE ATTORNEY GENERAL OF THE
UNITED REPUBLIC OF TANZANIA.....RESPONDENT

Your Honour, we have received the copies of Judgment/Ruling and Proceedings on the afore mentioned case, however we have not received the certified copy of the Extract Order, in the circumstance we are requesting to be supplied with the same for appeal purpose.

We are ready to pay requisite fees (if any).

Yours Truly,

.....
Edwin Alon
For the Petitioners

C.C
Attorney General of the United
Republic of Tanzania
Mwanza Chamber."

The District Registrar acknowledged the said letter on 22/12/2017 as indicated at page 317 of the record of appeal and it is reflective of the following: -

"REF. No. Civil Cause No. 2 of 2017 *2nd December, 2017*

Hans & Co. Advocates,
Makongoro Road,
CCM Regional Building,
2nd Floor, Left Wing Room 48,
P.o. Box 5069,
Mwanza.

RE: APPLICATION FOR CERTIFIED COPIES OF PROCEEDINGS, JUDGMENT AND DECREE ORDER IN CIVIL CAUSE NO. 2 OF 2017

UNION OF TANZANIA PRESS CLUBS .....1ST APPELLANT
HALI HALISI PUBLISHERS .....2ND APPELLANT
VERSUS
THE ATTORNEY GENERAL OF THE
UNITED REPUBLIC OF TANZANIA.....RESPONDENT

Refence is made to your letter with Ref. No. HCA/LTR/MZA/27/2017 dated 25th September, 2017.
Be informed that, your application for the above mentioned document is granted and ready for collection but your required to pay Court fee to obtain the same.
Kindly be informed.
Your Sincerely.

E. G. Rujwahuka
DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MWANZA."

After the Registrar had acknowledged receipt of the appellants' letter dated 25/9/2017, yet the appellants wrote another letter to the Registrar of the High Court intimating what is reflected at page 320 of the record of appeal as follows:

Our Ref. No. HCA/LTR/MZA/26/2017 *22ND DEC. 2017*

DISTRICT REGISTRAR
HIGH COURT OF TANZANIA
MWANZA.

RE: APPLICATION FOR CERTIFIED COPY OF DELAY

1.UNION OF TANZANIA PRESS CLUBS
2.HALIHALISI PUBLISHERS } ..... *APPELLANTS*

VERSUS

THE ATTORNEY GENERAL OF THE
UNITED REPUBLIC OF TANZANIA..... RESPONDENT

Your Honour, we have filed an application for certified copies of records and ***proceedings on Misc. Civil Application No. 46/2017 in your office on 06th August 2017.*** *We received the copies of Rulings, Proceedings and Extract order on 22nd December, 2017.*

However, we have not received a certificate of delay from you good office; hence request to be supplied with the some, for appeal purpose.

We undertake to pay requisite fee is any.

Drawn and Filed by:

EDWIN ALON

HANS & CO ADVOCATES

CCM REGIONAL BUILDING

2ND FLOOR, LEFT WING

ROOM NO. 48

P.O. BOX 5069

MWANZA

0784598506

Copy to be served upon:

THE ATTORNEY GENERAL OF THE

UNITED REPUBLIC OF TANZANIA

Ultimately the District Registrar issued a certificate of delay as reflected at page 320 of the record of appeal as follows:

"IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPEAL NO. ..... OF 2017

(Appeal from the Judgment of the High Court of Tanzania Mwanza District Registry at Mwanza Madame Justice Bukuku Mr. Justice Gwae and Mr. Justice Matupa given on 3rd day of August,2017 in Miscellaneous Civil Application No. 46 of 2017)

BETWEEN
UNION OF TANZANIA PRESS CLUBS .....1ST APPELLANT
HALI HALISI PUBLISHERS .....2ND APPELLANT
AND
THE REPUBLIC .....RESPONDENT

CERTIFICATE OF DELAY

(Made under Rule 90 (1) of the Court of Appeal Rules, 2009)

This is to certify that the time from ***10th day of August, 2017*** *when the Appellant filed Notice of Appeal and on* ***10th day of August, 2017*** *applied for certified copies of Proceedings, Judgment and Decree for purpose of completion of record of Appeal to* ***22nd day of December, 2017*** *when the same were supplied to him are to be excluded from computation for the time within which the appeal is to be instituted.*

This certificate of Delay is issued on 22nd day of December, 2017

E. G. Rujwahuka
Deputy Registrar
High Court of Tanzania – Mwanza"

It is settled law that a valid certificate of delay is the one issued after the preparation and delivery of the requested copies of the proceedings, judgment/ruling and decree/drawn order of the High Court. That, entails the Registrar of the High Court certifying and excluding such days from the date when the proceedings were requested to the date when the same were delivered to the intending appellant. See – **ANDREW MSEUL AND 5 OTHERS VS THE NATIONAL RANCHING COMPANY AND ANOTHER, Civil** Appeal No. 205 of 2016 and **DIRECTOR GENERAL, REGIONAL MANAGER (IRINGA) NSSF VS MACHUMU MKAMA,** Civil Appeal No. 5 of 2018 (both unreported).

In the case at hand, since the impugned decision was delivered on 3/8/2017 and the appellants' letter dated 25/9/2017 requesting to be supplied with the certified documents was filed after 53 days and beyond

the prescribed period of thirty (30) days. It is also important to point out that, unfortunately the certificate of delay also refers to a wrong party "the Republic" instead of the Attorney General. Thus, the letter was in violation of the proviso to Rule 90 (1) of the Rules. Consequently, the District Registrar erroneously referred in the certificate of delay a letter that did not comply with Rule 90 (1) of the Rules and apparently it negates her own acknowledgement on the receipt of the appellants' letter dated 25/9/2017. Thus, the invalid letter adversely impacts on the certificate of delay which is rendered defective and inoperative as it cannot be relied by the appellants to rely on the exception stipulated under the proviso to Rule 90 (1) of the Rules.

Mr. Mtobesya also invited the Court to consider the letter purported to have been written on 6/8/2017 as indicated in their letter dated 22/12/2017 and find that the appellants had requested to be supplied with certified documents within prescribed time or else, consider the said letter to be an omitted document and grant leave to the appellants to file the same in terms of Rule 96 (7) of the Rules. We found this argument wanting because it seems Mr. Mtobesya wishes to be hot and cold at the same time because he had earlier on conceded that the said letter was not filed at the High Court and yet wants to rely on it. That apart, and as correctly submitted by Mr.

Mrisha, the respondent has not been served with the letter in question which is in violation of Rule 90 (1) of the Rules as the appellants cannot benefit on the exclusion period. Therefore, Mr. Mtobesya's line of argument is an abuse of the court process 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 intended omitted document intended under Rule 96 (7) of the Rules which categorically stipulates: -

> *"Rule 96 (7) 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 the appellants for what is not omitted in the record. Consequently, on account of the delayed request to be supplied with the copies of certified proceedings, ruling and drawn order and in the wake of a defective certificate of delay which inhibit the appellants from relying on the exclusion under Rule 90 (1) of the Rules, the period available to the appellant in which to institute an appeal was sixty (60) days from the date of filing the notice of appeal.

Another question to be addressed is whether the said anomaly can be cured and remedied by invoking the overriding objective principle embodied in the provisions of section 3A (1) of the Appellate Jurisdiction Act [CAP RE.2019] as amended by the Written Laws (Miscellaneous Amendments) (No 3) Act No. 8 of 2018 (Amending Act). It stipulates as follows: -

> *"The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of all matters governed by this Act."*

In relation to the Amending Act. No.3 of 2018, the intention of our Parliament is manifested in the respective Bill which in relation to the application of the mandatory Rules of procedure, it clearly stated the reasons and objects behind the introduction of the overriding objective principle as follows: -

> *"Sections 3A and 3B of the proposed amendments which introduce the principle of objectives of attaining substantive justice are intended to give statutory effect to Article 107A (2) (e) of the Constitution which requires the courts,* ***when applying rules of procedure that are couched in mandatory terms to actively take into account the wider interests of substantive***

> ***justice to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms, but are meant to task the Court of Appeal before striking out a matter on ground of procedural irregularity,*** *to weigh the wider interests of substantive justice and decide whether there is an alternative available instead of striking out the matter before the Court of Appeal."*
>
> *[Emphasis supplied]*

The bolded expression was emphasised by the Court in the case of **MONDOROSI VILLAGE COUNCIL AND TWO OTHERS VS TANZANIA BREWERIES LIMITED AND FOUR OTHERS** (*supra*), the Court echoed the objects and reasons observed:

> *"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very root of the foundation of the case."*

It is also important to borrow a leaf from our counterparts in Kenya where the overriding objective principle is commonly known as the oxygen

principle. In relation to mandatory rules of procedures the principle its application has been addressed as follows: -

In the case of **HUNTER TRADING COMPANY LTD VS ELF OIL KENYA LTD,** Civil Appl. No. 6 of 2010, the Court reiterated the need to guard against arbitrariness and uncertainty when applying the Oxygen principle and insisted that rules and precedents that are Oxygen compliant must be fully complied with to maintain consistency and certainty. It warned that "***if improperly invoked the O2 principle could easily become an unruly horse".*** *It is our duty to tame it by application of sound judicial principles.*

In another case of **RAMJI DEVJI VEKARIA VS JOSEPH OYULA**, Eldoret Civil Appeal (Application) No. 154 of 2010, the Court of Appeal of Kenya rejected an invitation by counsel to invoke the Oxygen principle discretion to save an incompetent appeal as follows:

> *"This is an omission that goes to the root of the Rules i.e. whether a party can file an appeal out of time and without leave of the court. To invoke the provision of Sections 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the*

Court, even when they have been violated with impunity. Sections 3A and 3B were not meant for that."

The Court of Appeal of Kenya paid homage to the said earlier cases in the case of **NICHOLAS KIPTOO ARAP KOLIL SALAT VS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 6 OTHERS** [2013] [KLR (CAK)] having said as follows:

"...It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike at, thus, enjoined to abide strictly by the Rules. Parties and lawyers ought to be reminded that bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive ***justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities."***

The bolded expression is also in our Constitution whereby under Article 107A (2) (e), the courts are enjoined to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word 'unduly' here should not be taken to mean "more than is right or reasonable; excessively or wrongfully" See –**ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL,** Civil Application No. 100 of 2004 (unreported). Moreover, in terms of Article 107B of the Constitution, in exercising the powers of dispensing justice, all courts are enjoined to observe the provisions of the Constitution and laws of the land which includes the procedural laws. In this regard, although the Court is enjoined to apply the overriding objective principle in order to achieve substantial justice, the Rules of the Court specifying the timelines are so prescribed with special and unique consideration and as such, the prescribed time limits are requirements which must be complied with.

In view of what we have endeavored to discuss, we decline to invoke the overriding objective principle to remedy a time barred appeal because it is in violation of Rule 90 (1) of the Rules which prescribes the time limit of filing an appeal. To do otherwise is to condone non-compliance with the laws which would plunge the administration of justice into chaos. Thus, since the appeal was filed beyond the prescribed period of sixty (60) days from the

date of lodging the notice of appeal, it is incompetent on account of time bar. We accordingly strike it out with costs.

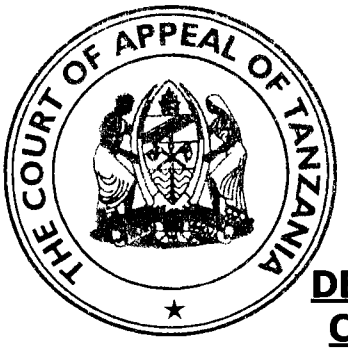
DATED at **MWANZA** this 23rd day of February, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Ruling delivered on this 24th day of February, 2021 in presence of Ms. Sabina Yongo holding brief for Mr. Jeremia Mtobesye, and Mr. Edwin Hans learned advocates for the appellants and Ms. Sabina Yongo State Attorney for the Respondent, is hereby certified as a true copy of the original



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL