

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

**(CORAM: MUGASHA, J.A., GALEBA, J.A., And FIKIRINI, J.A.)**

**CIVIL PPEAL NO. 214 OF 2020**

- 1. ELLY MWAMBUNGU.....1<sup>ST</sup> APPELLANT**  
**2. HAWA A. KASANGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

- 1. TANZANIA BUILDINGS AGENCY..... 1<sup>ST</sup> RESPONDENT**  
**2. RUNGWE DISTRICT COUNCIL.....2<sup>ND</sup> RESPONDENT**  
**3. THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

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

**(Utamwa, J**

**dated the 31<sup>st</sup> day of July, 2013**

**in**

**Land Case No. 7 of 2013**

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**RULING OF THE COURT**

22<sup>nd</sup> & 24<sup>th</sup> September, 2021

**MUGASHA, J.A. :**

Elly Mwambungu and Hawa Kasanga, unsuccessfully sued the respondents claiming to be rightful owners of residential quarters No. 21 C and 21 D situated in Tukuyu Town where they resided until 2013 when they were forcefully evicted by the 2<sup>nd</sup> respondent from the said houses. It was alleged by the appellants, being employees in the civil service, the houses in

question were allocated to them during the pendency of their employment and subsequently purchased the houses in question from the Government vide the sale agreements between them and the 1<sup>st</sup> respondent. However, the sale agreements were rescinded, the houses were transferred to the 2<sup>nd</sup> respondent and later the appellants were forcefully evicted by the 2<sup>nd</sup> respondent who had conspired with 1<sup>st</sup> respondent. The said houses were allocated to other people who are not subject of the appeal. Alleging to have been subjected to suffering, disgrace and agony, the appellants prayed to be declared as rightful owners, vacant possession, permanent injunction, general damages and refund of TZS. 500,000/= to recover household items.

After a full trial the suit was dismissed by the learned trial Judge hence the present appeal. However, on account of what will become apparent shortly, we shall not reproduce the grounds of appeal. Before the commencement of the hearing we had to deal with the preliminary objection based on points of law challenging the competence of the appeal in respect of the following grounds:

1. The appeal is untenable in law for the appellants' failure to serve the notice of appeal in 14 days as

required by Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009.

2. The appellants' appeal is time barred and thus offending the mandatory provisions of Rule 90 (1) (3) of the Tanzania Court of Appeal Rules, 2009.

Before us, Mr. Justinian Mushokorwa, learned counsel represented the appellants whereas the respondents had the services of it Mr. David Kakwaya, learned Principal State Attorney assisted by Ms. Lilian Machage and Mr. Joseph Tibaijuka, both learned State Attorneys.

In his focused submission, addressing the first preliminary point of objection Mr. Kakwaya pointed out that, the appellants' notice of appeal found at page 220 of the record of appeal was not served to the respondents. He contended this to offend the provisions of Rule 84 (1) of the Rules, which mandatorily requires the notice to be served on the adverse party not later than 14 days after filing it. He argued that the omission renders the appeal not competent and it deserves to be struck out. To support his propositions, he cited to us the cases of **BONIFACE ANYISILE MWABUKUSI VS ATUPELE FREDY MWAKIBETE AND 2 OTHERS**, Civil Appeal No. 46 of 2021 and **NATIONAL BANK OF COMMERCE LIMITED AND STEVEN**

**R.K SHILETWA VS BALLAST CONSTRUCTION COMPANY LIMITED,**

Civil Appeal No. 72 of 2017 (both unreported).

On the second point of objection, Mr. Kakwaya submitted that, the appeal is time barred as it was filed beyond 60 days from the date of filing the notice of appeal. He contended this to have been occasioned by appellants' failure to serve on the respondents the letter to be supplied with the copies of certified proceedings and impugned judgment which is in violation of Rule 90 (3) of the Rules. In this regard, he argued that the appellants cannot rely on the exclusion period stipulated under Rule 90(1) of the Rules. To bolster his argument, the learned Principal State Attorney referred us to the cases of **AUGUSTINO MKALIMOTO (As Administrator of Estate of the Late MLAMSITEMBO MKALIMOTO) VS VILLAGE SCHOOLS OF TANZANIA AND 2 OTHERS**, Civil Appeal No. 154 of 2019 and **FILON FELICIAN KWESIGA VS BOARD OF TRUSTEES OF NSSF**, Civil Appeal No. 136 of 2020 (both unreported).

Ultimately, Mr. Kakwaya urged the Court to sustain the preliminary points of objection and strike out the appeal on account of being incompetent.

On the other hand, Mr. Mushokorwa opposed the preliminary objection and urged the Court not to strike out the appeal and instead, invoke Rule 96 (7) of the Rules and allow the appellants to file supplementary record of appeal so as to include the respective notice of appeal and letter to be supplied with certified copies which have been served to the respondents. He concluded his brief submission by urging the Court not to dismiss the appeal because he has the evidence that the documents in question were served on the respondents.

Having considered the rival submissions of the learned counsel from either side, the issue for our determination is whether the appeal is competent.

The period within which a notice of appeal must be served to the respondent is regulated by Rule 84 (1) of the Rules which stipulates as follows:

*“84 – (1) An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an **ex parte** application, direct that service need not be effected on any person*

*who took no part in the proceedings in the High Court”.*

In terms of the cited rule, an intending appellant is obliged to serve the notice of appeal on the respondent not later than fourteen (14) days after lodging it. The essence or rather purposes of the respective service is to make the respondent aware that an appeal is being preferred so that he/she can make requisite preparations. Failure to effect service within prescribed time has adverse effects as it leads to the striking out of an appeal based on such notice unless an extension of time to effect service is sought and obtained. In the matter under scrutiny, the notice of appeal indicates, the copies thereof were intended to be served on the respondents. However, there is no such indication and Mr. Mushokorwa’s assertion that the notice was served on the respondents is not supported by the record of appeal. In this regard, in absence of rubber stamp or signatures of the respondents or their advocate, we are satisfied that the respondents were not served with the notice of appeal. This renders the appeal not competent. See – **WILFRED LWAKATARE VS HAMISI KAGASHEKI AND ANOTHER**, Civil Appeal No. 118 of 2011 (unreported) and **NATIONAL BANK OF**

**COMMERCE LIMITED AND STEVEN R.K SHILETWA VS BALLAST  
CONSTRUCTION COMPANY LIMITED (supra).**

Pertaining to the second preliminary point of objection, the competence of the appeal is faulted on account of the appellants' omission to serve on the respondents the letter to be supplied with certified proceedings, decree and impugned judgment. Rule 90 (1) and (3) of the Rules stipulate 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*

*(2) not applicable*

*(3) An appellant shall not be entitled to rely on the exception to subrule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent."*

The cited provision imposes mandatory requirements on the obligation of the appellant to serve on the respondent the letter to be supplied with the requisite documents. In the present case it is glaring that the letter in question found at page 224 of the record of appeal, was not served on the respondents. Therefore, Mr. Mushokorwa's allegation that the respondents were served is entirely not backed by the record in the absence of their signatures or stamp of the offices of the respondents or their advocate so as to acknowledge receipt. The omission is in violation of Rule 90 (3) of the Rules and it disentitles the appellants to rely on the exclusion period to be certified in the certificate of delay stipulated under the proviso to Rule 90 (1) of the Rules. In this regard, it was incumbent on the appellant to file an appeal within 60 days from the date of lodging the notice of appeal. As the



notice of appeal was filed on 20/8/2019 and the appeal filed 8 months later on 20/4/2020, the appeal is time barred.

Mr. Mushokorwa's was of the view that the omission to serve the notice and the letter in question can be remedied and as such, invited us to invoke Rule 96 (7) of the Rules which stipulates as follows:

*"Where the case is called for hearing, the Court is of opinion that the 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."*

Apparently, the said rule can only be invoked where any of the documents referred to under Rule 96 (1) and (2) are omitted from the record of appeal. This is not the case here because both the notice of appeal and the letter to be supplied with the proceedings are in the record of appeal but were not served on the respondents. In this regard, we decline Mr. Mushokorwa's invitation to invoke Rule 96 (7) of the Rules and with respect, we find that it has been cited out of context.

All said and done we find the preliminary points of objection merited and agree with Mr. Kakwaya that the said omissions render the appeal not competent and it is hereby struck out with costs. It is so ordered.

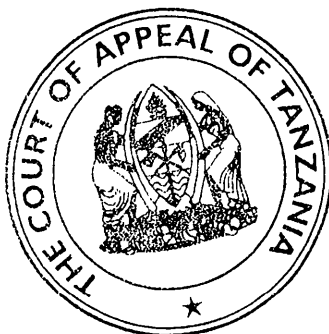
**DATED** at **MBEYA** this 23<sup>rd</sup> day of September, 2021.

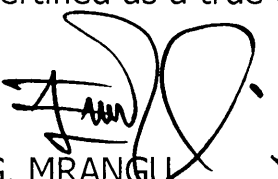
S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

This Ruling delivered this 24<sup>th</sup> day of September, 2021 in the presence of Mr. Justinian Mushokorwa, learned counsel for the Appellants and Mr. Fortunatus Mwandu, learned State Attorney for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents/Republic, is hereby certified as a true copy of the original.



  
E. G. MRANGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**