

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And MAIGE., J.A.)

CIVIL APPEAL NO. 125 OF 2021

BRITAM INSURANCE TANZANIA LIMITED APPELLANT

VERSUS

EZEKIEL KINGONGOGO 1ST RESPONDENT

SIMON OSIAH MWAMBIGIJA 2ND RESPONDENT

**(Appeal from the decision of the High Court of Tanzania (District Registry) at
Dar es Salaam)**

(Kulita, J.)

Dated the 20th day of September, 2019

in

Civil Appeal No. 251 of 2017

.....

RULING OF THE COURT

27th September & 12th October, 2021

LEVIRA, J.A.:

The appellant was not satisfied with the decision of the High Court of Tanzania (Kulita, J.) in Civil Appeal No. 251 of 2017 delivered on 20th September, 2019 and thus has instituted this appeal with the view to challenge the same. In the High Court, the appellant had lodged an appeal against the decision of Kisutu Resident Magistrates' Court (the trial Court) in which decision the appellant was ordered to pay the 1st respondent TZS 10,101,300/= as specific damages arising from the motor vehicle accident among other reliefs. On appeal, the High Court reduced the special

damages awarded by the trial court to TZS 8,451,300/= and other reliefs were maintained. The appellant was aggrieved and hence the current appeal.

Briefly, the background of this matter is that, before the trial Court, the 1st respondent had sued the 2nd respondent as the first defendant and the appellant as the 2nd defendant following a motor vehicle accident he encountered. The appellant had insured the motor vehicle which was driven by Simon Osiah Mwambigija (the second respondent). Since the appellant was an insurer, it was ordered by the trial court to indemnify the 1st respondent at the tune of TZS 10,101,300/= as special damages arising from the accident as intimated above. Aggrieved, on the first appeal to the High Court, the appellant challenged the amount of special damages awarded claiming the same to be on the higher side. Having considered the appellant's complaint and the arguments by parties, the High Court partly agreed with the appellant and reduced the amount which was awarded. Other complaints were dismissed for lacking in merit as shown above. Still discontented, the appellant has knocked the doors of this Court armed with six grounds of appeal. However, considering the fact that the 1st Respondent has filed a notice of preliminary objection, practice dictates that it should be determined first before proceeding with the appeal on merit. The preliminary objection is predicated on the following grounds: -

1. *The Memorandum of Appeal filed by the Appellant is time barred and thus in contravention of Rule 90 (1) of the Court of Appeal Rules, 2009.*
2. *That the appellant is in contravention of Rule 97 (1) of the Court of Appeal Rules 2009 by failing to serve the 1st Respondent with the Memorandum and Record of Appeal within time limit.*

At the hearing of the appeal, the appellant was represented by Mr. Mudhihir Athuman Magee, learned advocate, whereas the 1st respondent had the services of Ms. Joyce Sojo and Mr. Elisa Mndeme, both learned advocates. The 2nd respondent did not enter appearance despite being duly served with the notice of hearing. Therefore, hearing of the preliminary objection proceeded *ex parte* against him in terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Submitting on the 1st ground of the preliminary objection, Ms. Sojo stated that the appeal has been filed out of time thus contravening Rule 90 (1) of the Rules which requires the appeal to be filed within 60 days of the date of lodging the notice of appeal. According to her, the appellant filed the notice of appeal on 3rd October, 2019 and the appeal on 16th April, 2021 after lapse of one year and six months. She went on stating that at page 293 of the record of appeal, the appellant has attached an invalid certificate

of delay. The contention as regards the invalidity of the said certificate is based on the information contained in the letter from the Deputy Registrar of the High Court to Legal Assistance to Victims of Accidents of 4th June, 2021 found in the last two pages of the supplementary record of appeal; which letter she said, states categorically that the certificate of delay attached in the record of appeal is invalid. Ms. Sojo contended further that the attached certificate exempts one and a half years while the valid certificate as per Registrar's letter, exempts only twenty-two days. She urged us to take judicial notice of the said 'valid certificate of delay' in terms of section 59 (1) (a) of the Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act).

Ms. Sojo explained that according to the Registrar's letter, two certificates of delay were issued due to the fact that, the first one contained some errors and thus the Registrar had to issue another certificate to correct the errors. The appellant was directed to return to the Registrar the initial certificate which contained errors for it to be substituted with another certificate. Upon compliance with that order and having retrieved the initially issued certificate, the Registrar issued the appellant with a new certificate of delay. However, she said, the appellant has opted to attach the erroneously issued certificate in the record of appeal. As a result, it is as good as there is no certificate of delay in the record of appeal because that

certificate cannot be used to compute the number of days within which this appeal was to be filed.

It was Ms. Sojo's further argument that this appeal was filed on 16th April, 2021, almost more than six weeks from the date of issuing the new certificate and thus, had it been that the appellant had any doubt about that certificate of delay would have inquired from the Registrar, but that was not the case. Impliedly, the appellant consented to be issued with a new certificate which he ought to have attached in the record of appeal, she insisted. In the circumstances, she urged us to deem the certificate of delay attached by the appellant no certificate at all and that the appeal was filed out of time.

Arguing the second preliminary objection, Ms. Sojo contended that the appellant contravened Rule 97 (1) of the Rules by failure to serve the 1st respondent with the memorandum of appeal and the record of appeal within seven days after lodging them. To clarify, she stated that the memorandum of appeal and record of appeal were filed on 16th April, 2021 and the 1st respondent was served on 7th June, 2021 after lapse of 53 days of filing them. However, she left it to the Court to decide on this ground as may deem fit.

In reply Mr. Magee stated that the appeal is not time barred as contended by Ms. Sojo. He went on to clarify that the appellant was served with the certificate of delay attached to the original record of appeal at page 293 of the record, a fact which is not disputed by the counsel for the 1st respondent. The only contention, he said, is whether the said certificate is invalid. According to him, the question as to whether or not the said certificate is invalid, is a matter of fact which requires evidence and thus it diminishes the preliminary objection as the same cannot be raised if it based on a fact or evidence.

Referring to the letter of the Registrar relied upon by Ms. Sojo, Mr. Magee submitted that, the letter itself tends to call for evidence because the Registrar stated therein that, only 22 days are to be excluded basing on assertion that the documents were ready for collection on 9th April, 2020 but that date needs to be proved. He argued, if indeed those documents were ready for collection on that date, why then the Registrar did not notify the appellant to collect them?

According to him, the letter of notification from the Registrar referred to by Ms. Sojo which came with the new certificate of delay on 21st March, 2021 stated in the last paragraph that, the documents were ready for collection since 9th April, 2020 but the Registrar did not discharge his

obligation under Rule 90 (5) of the Rules to notify the appellant. This omission by the Court, he said, cannot be the reason for punishing the appellant who performed her obligation under Rule 90 of the Rules to make several follow ups to collect the said documents as evidenced by the Registrar's letter referred to by Ms. Sojo with no response. If at all the documents were ready for collection on the date mentioned in the letter, why then the Registrar did not inform the appellant? He questioned. In the circumstances, he argued that since the certificate of delay is attached to the original record of appeal, the appeal cannot be said to be time barred.

In conclusion, Mr. Magee reiterated his stance that whether the certificate of delay is invalid or otherwise is a matter of fact which is supposed to be proved either orally or by certificate. In the premises, he prayed for the first preliminary objection to be dismissed with costs for want of merit.

As regards the second preliminary objection, Mr. Magee stated that the same is also based on facts which requires proof. However, he said that there is no proof before the Court to show when the 1st respondent was served. As such, he said, any move to bring evidence on date of service diminishes the preliminary objection; hence, the preliminary objection is misconceived. He thus prayed for the same to be dismissed with costs.

Ms. Sojo made a brief rejoinder as she stated that it is the Registrar who certifies time to be exempted and thus if there was any question as regards the validity of the certificate, the counsel for the appellant should have asked the Registrar for clarification. She urged the Court to take judicial notice of the subsequent certificate of delay. Proof of validity or otherwise of the certificate according to her, is to be done by the Registrar not the Court, she insisted.

She also stated that the 1st respondent was served with the record of appeal on 7th June, 2021 after lapse of 56 days but she again left it to the Court to decide.

While responding on the question posed by the Court on her, Ms. Sojo acknowledged that there is no letter from the Registrar indicating that the appellant was informed that the documents were ready for collection on 9th April, 2020.

Having carefully considered the grounds of objection, the record of appeal and rival arguments by counsel for the parties, the first and foremost issue calling for our determination is whether the points raised by the 1st respondent are worthy to be termed as preliminary points of objection?

It is settled position that preliminary objection must be on pure points of law which have the effect of finally determining the matter without evidential proof – see **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1 EA 696 and **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasar**, Civil Application No. 33 of 2012 (unreported).

The 1st respondent's counsel contended that this appeal was filed out of time basing her argument on the certificate of delay which was issued allegedly after the initial certificate was retrieved from the appellant and destroyed by the Registrar. This contention was vehemently opposed by the counsel for the appellant who maintained that the initial certificate is valid. Mr. Magee argued that determination of the invalidity or other wise of the certificate of delay requires evidence and for that matter the ground raised by the counsel for the respondents is not justified to be a point of preliminary objection.

Rule 90 (1) of the Rules requires appeal to be lodged in the appropriate registry within 60 days of the date when the notice of appeal was lodged. In the current appeal there is no dispute that the notice of appeal was lodged on 3rd October, 2019 and therefore, the appeal was

supposed to be lodged on or before 3rd December, 2019. However, the same was lodged on 16th April, 2021.

The proviso to Rule 90 (1) of the Rules empowers the Registrar to exclude time spent by the appellant in applying for necessary documents for appeal until such time when he was notified that they are ready for collection, as shall be indicated in the certificate of delay. Parties to this appeal are not in dispute that the appellant applied and upon being supplied with relevant copies, he was also issued with certificate of delay found at page 293 of the record of appeal which is the center of contention in the preliminary objection raised by the 1st respondent. In the said certificate days excluded by the Deputy Registrar of the High Court are from 26th September, 2019 to 23rd March, 2021; which means, by filing the appeal on 16th April, 2021 the appellant acted within time. However, Ms. Sojo came up with a different version when she referred us to a supplementary record of appeal she filed, in which another certificate of delay is attached in respect of the same matter which excludes days from 19th March, 2020 to 9th April, 2020 a date which is said to be a day when the appellant was notified that the documents were ready for collection. According to her, the initial certificate erroneously excluded number of days which were not supposed to be excluded. Upon her complaint to the Deputy Registrar, the letter of the Registrar of 4th June, 2021 attached to the

supplementary record of appeal rectified the error and informed the parties to that effect.

Admittedly, the first point of preliminary objection appears to be a point of law as it touches on competence of the appeal thus affecting jurisdiction of the Court to entertain this matter. However, having heard the rival arguments on the gist of the preliminary objection, we agree with Mr. Magee that determination of the same requires evidence. We find so because in order to determine whether or not the appeal is time barred, we have to consider the certificate of delay. The questions that follow are which one between the two certificates we should rely on and why two certificates were issued in respect of the same matter. If we rely on the second certificate which Ms. Sojo is saying is the valid one read together with the Registrar's letter, the question will be whether the appellant was notified that the documents requested for appeal purposes were ready for collection on 9th April, 2020, as the said letter is not specific that the appellant was informed that the documents were ready for collection on that date.

On his part, Mr. Magee stated that the appellant made several follow ups but he was not informed that the said documents were ready for collection, a fact which was not opposed by Ms. Sojo as both counsel were

at one that there was no proof to that effect. Rule 90 (5) of the Rules requires the Registrar to inform the appellant to collect the requested copy of proceedings within 90 days from the date the appellant requested for such copy. However, in the current matter the Registrar did not effectively discharge his obligation. In the circumstance it cannot be said with certainty that the appeal is time barred by relying on the second certificate of delay which its validity is as well questionable in a sense that, it requires evidence to prove it. Having so observed, it is our considered opinion that since this matter requires proof it can be raised at the appropriate opportune time. We agree with Mr. Magee and find that the preliminary objection raised basing on second certificate of delay cannot stand unless evidence is produced to substantiate its validity and hence it is not worthy the name and in normal circumstances, Ms. Sojo could not raise a preliminary objection on documents she filed in Court.

In the event, we hereby overrule the first ground raised as point of preliminary objection.

As regards the second ground of the preliminary objection, we do not intend to spend much time because the same, just like the first ground, it requires evidence to prove service of memorandum of appeal and the record of appeal on the 1st respondent contrary to the cherished principle

that, a preliminary objection must be on pure point of law. Therefore, we agree with Mr. Magee that this is not a ground of preliminary objection and the same is also overruled.

In the upshot, we hereby overrule both grounds of preliminary objection raised by the counsel for the 1st respondent with costs.

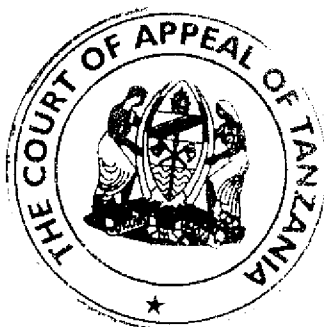
DATED at DAR ES SALAAM this 7th day of October, 2021.


J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 12th day of October, 2021 in the presence of Mr. Osca Msechu, counsel for the Appellant and Ms. Joyce Sojo, counsel for the 1st Respondent counsel for the Respondent and 2nd Respondent absent is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL