

**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. 249 OF 2019

PETER SAMANYA MSACKY..... APPELLANT

VERSUS

CHIEF EXECUTIVE OFFICER AGRICULTURAL

SEED AGENCY.....1ST RESPONDENT

CHIEF SECRETARY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

**(Appeal from decision of the High Court of Tanzania (Labour Division)
at Morogoro)**

(Muruke, J.)

dated the 8th day of April, 2019

in

Misc. Application No. 5 of 2018

RULING OF THE COURT

13th September & 12th October, 2021

MWANDAMBO, J.A.:

The High Court, Labour Division, sitting at Morogoro dismissed an application for extension of time instituted by the appellant in a ruling delivered on 8/04/2020. That application was for extension of time for filing an application for judicial review in relation to the decision of H. E. the President of the United Republic of Tanzania made on 8/10/2016 dismissing the appellant's appeal against the decision of the Public Service Commission. That Commission had sustained the decision of the first

respondent; the appellant's erstwhile employer terminating his employment. Aggrieved by the ruling dismissing his application, the appellant lodged a notice of appeal on 3/05/2019 and served copies thereof on all the respondents within the prescribed time. Even though the appellant applied for copies of proceedings from the Registrar of the High Court on 6th May, 2020, he did not copy the letter to the respondents neither did he deliver copies to the respondents as required by rule 90 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Nevertheless, acting on the appellant's said letter, on 07/08/2019 the Registrar of the High Court, Labour Division issued a certificate of delay in terms of rule 90 (1) of the Rules excluding 93 days from the computation of time for instituting the appeal which, but for such execution, should have been instituted within 60 days from the date of the impugned decision. Armed with the certificate of delay, the appellant instituted his appeal on 24/09/2019.

The appeal was called on for hearing on 13/09/2021 on which date the appellant appeared in person, unrepresented, ready to prosecute his appeal whereas, Ms. Alice Mtulo, learned Senior State Attorney, assisted by Mr. Camilius Ruhinda, also learned Senior State Attorney and Ms. Joyce Senkondo, learned State Attorney teamed up to resist the appeal.

Ahead of the hearing of the appeal, we heard both the appellant and Ms. Mtulo on the competence of the appeal in view of the fact that the appellant had not delivered to the respondents copies of the letter to the Registrar of the High Court applying for copies of proceedings for the purpose of the appeal as required by rule 90 (3) of the Rules. The appellant was quick to admit that indeed he did not deliver copies of his letter to the respondents but the fact that he delivered the letter to the Registrar of the High Court who issued a certificate of delay based on that letter, the failure to deliver the copies to the respondents should not be visited on him. The appellant urged the Court to treat the failure as a minor ailment and proceed to hear the appeal on its merit.

Ms. Mtulo for her part was emphatic that in so far as the appellant did not comply with rule 90 (3) of the Rules, the appeal which was instituted beyond 60 days from the date of the impugned decision was time barred regardless of the certificate of delay. She thus urged the Court to strike out the appeal. The learned Senior State Attorney argued that non-compliance with rule 90 (3) of the Rules was not a minor omission which could be glossed over; it cannot be cured by the overriding objective as it goes to the root of the appeal.

Upon hearing arguments from the appellant and the learned Senior State Attorney, there is no dispute on the non-compliance with rule 90 (3) of the Rules; the appellant's failure to deliver copies of his letter to the respondents within 30 days from the date of the impugned decision. As the appellant did not comply with rule 90 (3) of the Rules, he ought to have instituted his appeal within 60 days from the date of the impugned decision; by 8/06/2019 the latest. This is so because he could not benefit from the exemption for the computation of the period for instituting his appeal in pursuance of rule 90 (1) of the Rules which stipulates as under:-

"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

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."

And rule 90 (3) provides: -

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

What emerges from the foregoing is that the institution of the appeal on 24/09/2019 was way beyond 60 days from 08/04/2019 the date on which the High Court delivered its ruling dismissing his application for extension of time. There is a thick wall of authorities on consequences befalling on appeals instituted beyond 60 days for failure to comply with rule 90 (3) of the Rules. For instance, in **Mondorosi Village Council & 20 Others v. Tanzania Breweries Ltd & 4 Others**, Civil Application No. 66 of 2017 (unreported), a preliminary objection was taken against the competence of the appeal instituted beyond 60 days. The record of appeal did not include a copy of a letter requesting for a certified copy of proceedings to the Registrar of the High Court. The Court found the appeal time barred and struck it out having been satisfied that there was no proof of the appellants having applied for a certified copy of proceedings and served a copy of their letter to the respondents regardless of the certificate of delay which it found to have been erroneously issued. See also our decision in **Aliseo Peter Nditi v. KCB Bank Tanzania Limited**, Civil Application No. 59 of 2015 (unreported)

whose facts are more or less similar to the facts in the instant application; no indication that the respondent was copied neither is there any proof of service of the copies of the letter on the respondents. The Court struck out the appeal instituted beyond 60 days from the date of the impugned decision. A similar consequence must befall the appellant who has indeed admitted non-compliance with rule 90 (3) of the Rules; failure to serve on the respondents copies of his letter to the Registrar of the High Court.

Before winding up this ruling, we wish to remark that we have taken into account the appellant's quest to gloss over the failure to serve copies of his letter on the respondents and proceed with the hearing of the appeal. We understood him as inviting us to invoke the overriding objective under section 3A of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA). Quite unfortunate to the appellant we cannot take that route. A similar plea was rejected in **Mondorosi Village Council** (*supra*) on facts which are similar to the instant appeal. In rejecting the plea, the Court stated emphatically that the overriding objective cannot be invoked to disregard non-compliance of the procedural rules which go to the root/foundation of the case. In doing so, the Court took into account the objects behind the enactment of section 3A of the AJA that is; the amendments were not designed to blindly disregard the rules of procedure

which are couched in mandatory terms. Indeed, the requirement to serve a copy of the letter to the respondents is couched in mandatory terms going to the competence of the appeal in case of non-compliance as it were. See also: **Puma Energy Tanzania Ltd. v. Ruby Road Ways (T) Ltd**, Civil Appeal No. 3 of 2018 (unreported).

The upshot of the foregoing is that as the appeal was instituted beyond 60 days contrary to rule 90 (1) of the Rules, it is as it were, incompetent and is hereby struck out. Given the nature of the dispute resulting into the appeal, we make no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 5th day of October, 2021.

F. L. K. WAMBALI

JUSTICE OF APPEAL

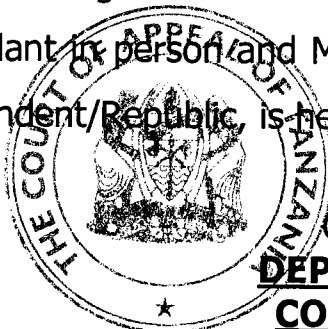
L. J. S. MWANDAMBO


JUSTICE OF APPEAL

L. L. MASHAKA

JUSTICE OF APPEAL

This Ruling delivered on 12th day of October, 2021 in the presence of the appellant ~~in person~~ and Ms. Joyce Yonaze, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL