

**IN THE COURT OF APPEAL OF TANZANIA**

**AT BUKOBA**

**(CORAM: MUGASHA, J.A., KOROSSO, J.A And KIHWELO, J.A.)**

**CIVIL APPEAL NO. 17 OF 2020**

**JOSEPHAT MWEMEZI BAKUZA.....APPELLANT**

**VERSUS**

**WINFRIDA MKONO ..... 1<sup>ST</sup> RESPONDENT**

**LEORNARD MUJAKI.....2<sup>ND</sup> RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Tanzania,  
(District Registry)**

**at Bukoba**

**(Khaday, J.)**

**dated the 10<sup>th</sup> day of November, 2015**

**in**

**Land Case Appeal No. 13 of 2013**

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**RULING OF THE COURT**

26<sup>th</sup> & 29<sup>th</sup> November, 2021

**MUGASHA, J.A.:**

In the District Land and Housing Tribunal (DLHT) of Bukoba, the appellant filed a claim against the respondents seeking to be declared a lawful owner of land (suit premises) located at Nshambya FFU Katubi area within the municipality of Bukoba. The appellant averred that way back on 5/2/1992 he purchased from the 2<sup>nd</sup> respondent the suit premises which had eucalyptus trees and it was surveyed and

subdivided in two plots. However, the 1<sup>st</sup> respondent encroached on the suit premises, began to till it and subsequently uprooted the eucalyptus trees. The appellant claimed among other things the following reliefs: **One**, that he be declared a lawful owner of the suit premises; **two**, be paid compensation; and **three**, that the 1<sup>st</sup> respondent be permanently restrained to trespass into the suit premises. The appellant was unsuccessful as the DLHT dismissed his claim having declared the 1<sup>st</sup> respondent as the lawful owner of the suit premises.

Aggrieved, the appellant filed an appeal to the High Court which was as well, dismissed. Undaunted, the appellant has come to this Court seeking to impugn the decision of the High Court vide a Memorandum of Appeal fronting four grounds of complaint. However, due to what will be apparent in due course, we shall not reproduce those grounds. The appeal was greeted by a preliminary objection to the effect that it is not competent on account of the following:

*"1. This appeal is incompetent for failure by the appellant to lodge a supplementary record of appeal within 60 days in view of the order of the Court dated 11/8/2021".*

At the hearing, in appearance was learned advocate Aaron Kabunga for the appellant and learned advocate Joseph Bitakwate for the respondents.

On taking the floor, Mr. Bitakwate submitted that, as the appellant did not file supplementary record of appeal so as to include a valid certificate of delay pursuant to the Court order which granted a 60 days' period while the appellant has not demonstrated to have made a follow up to the Registrar in order to be availed with a valid certificate. In this regard, he argued that the appeal is incompetent for being time barred and it deserves to be struck out. To bolster his argument, he cited to us the cases of **BLUE PEARL HOTEL & APPARTMENTS VS UBUNGO PLAZA LIMITED**, Civil Appeal No. 78 of 2017 (unreported).

The preliminary objection was resisted by Mr. Kabunga. He urged the Court to consider that, the appellant could not comply with the Court order as he is yet to be supplied with a valid Certificate of Delay by the Registrar regardless of making a written request to the Registrar in a letter dated 6/9/2021. He added that, apart from the September letter addressed to the Registrar, he in vain regularly followed up the matter at the offices of the Registrar. In the premises, Mr. Kabunga

sought the indulgence of the Court to adjourn the hearing of the appeal so as to enable the appellant to seek and obtain extension of time to lodge the respective supplementary record of appeal. He thus pleaded with the Court not to strike out the appeal. When probed by the Court on the restriction imposed by Rule 96 (8) of the Tanzania Court of Appeal Rules, 2009 (the Rules), which in case of failure to comply with the order granted under Rule 96 (7) of the Rules, bars the grant of second chance to lodge supplementary record, he was of the view that what obtains in this application was not envisaged under the said Rule. Commenting on decided cases relied upon by the respondents' counsel, Mr. Kabunga urged the Court not to consider them as they are distinguishable from what obtains in the present matter. Thus, he urged us to overrule the preliminary objection.

In a brief rejoinder, Mr. Bitakwate reiterated his earlier submission and urged the Court to strike out the time barred appeal.

Having carefully considered the submissions of learned counsel for the parties and the record before us, it is not in dispute that pursuant to the Court order dated 11/8/2021, the appellant was granted leave to file supplementary record of appeal in order to include a valid certificate

of delay within 60 days. It is also not in dispute that to date, the appellant has not filed the respective supplementary record so as to remedy the defective one at page 212 of the record of appeal which refers to the letter which was not written by the appellant's counsel when he sought to be supplied with certified proceedings, impugned judgment and decree. At this juncture we asked ourselves if the present appeal is properly before the Court which is the gist of the preliminary point of objection raised by the respondents and whether the reasons given by the appellant's counsel, suffice to sustain this appeal.

As earlier stated, while the appellant's counsel sought the indulgence of the Court to have the hearing of the appeal adjourned so that he obtains enlargement of time to file the valid certificate of delay, this was opposed by the respondent's counsel who maintained that in the absence of the valid certificate of delay, the appeal is rendered incompetent. The Court was confronted with akin situation in the case of **BLUE PEARL HOTEL & APPARTMENT VS UBUNGO PLAZA LIMITED** (supra). In the said case, the appellant had failed to comply with the order in terms of Rule 96 (7) of the Rules which had directed lodgment of supplementary record of appeal within twenty-one days

and instead, filed the same after seven months. The appellant's advocate came with an excuse that, he could not comply with the Court order because the Registrar did not supply the documents on time and as such, urged the Court to find that the supplementary record was lodged in time. In declining the invitation, the Court held:

*"Unfortunately, the appellant did not comply with that order within the prescribed period as alluded to above. Thus, in terms of Rule 96(8) of the Rules, as the appellant failed to lodge the supplementary record of appeal within the prescribed period the Court cannot grant him another opportunity to cure the incompleteness of the record of appeal."*

In the case of **BERNADO GINDO AND OTHERS VS TOL GASES LIMITED**, Civil Appeal No128 of 2016 unreported, the Court had the occasion to interpret words "*a similar application on the same matter*" used in Rule 96 (7) of the Rules and observed as follows:

*"...the phrase "a similar application on the same matter" simply refers to the application for leave to file supplementary record of appeal which was granted pursuant to sub rule (7) of rule 96 of the Rules on the very same matter.*

*In other words, the rule precludes a party who had been granted leave to file supplementary record of appeal to be entertained again on a similar or like application.”*

[ See also **SUMRY HIGH CLASS LIMITED AND ANOTHER VS MUSSA SHAIBU MSANGI**, Civil Appeal No. 14 of 2015, **JUMA MARUMBO, MAULID FUNDI, AISHA SARIKO, ASHA MUHAGAMA AND 99 OTHERS VS REGIONAL COMMISSIONER DAR-ES-SALAAM REGION AND TWO OTHERS**, Civil Appeal No. 73 of 2016 and **PUMA ENERGY TANZANIA LIMITED VS RUBY ROADWAYS (T) LTD**, Civil Appeal No. 3 of 2018 (all unreported). In the latter case, the Court had the occasion to consider a situation of the appellant who fails to utilize the remedy or leave to file missing records pursuant to rule 96 (7) of the Rules. The Court observed that: -

*It is for this reason, Rule 96(8) was added to preclude the Court from entertaining further applications meant to cure like defects in the record of appeal. The bottom line in our view is that defects in the record of appeal attributed to the omission of essential documents required under Rule 96(1) or (2) of the Rules can only be cured once in terms of Rule 96(7) of the*

*Rules.... In our view, Rule 96(8) couched in mandatory terms, serves as a tool to check sloppiness amongst litigants which, if not controlled may militate against the very spirit behind the overriding objective..."*

In the present appeal, we have gathered that, after the delivery of the Court Order, it took almost a month for the appellant's counsel to write to the Registrar to be supplied with the valid certificate of delay. Thereafter, the appellant did not bother to make a follow up and instead, waited for the hearing date to inform the Court that he is yet to be supplied with the certificate of delay. All we can say is that, we were not at all impressed by the assertions made by the appellant's counsel on the follow up as the same lack proof being mere statements from the bar. That said, in the first place, since the period ordered by the Court to file the supplementary record to include the certificate of delay had expired, it was not open for the Registrar to avail the Certificate of Delay. We say so because when the appeal is before the Court, the Registrar is not permitted to enlarge time to do any act in relation thereof as he/she is not vested with the requisite mandate to do so. We are fortified in that regard because, before the appeal is lodged in Court the Registrar's mandate to exclude the period in the



certificate of delay is as prescribed under Rule 90 (1) of the Rules which stipulates 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**".*

[Emphasis supplied]

In the circumstances, the appellant cannot remedy the limitation of time after the appeal has been called for hearing. Finally, in order to achieve

substantive justice in adjudication before the Court, Rule 96 (7) came into scene as overriding objective principle in order to inject oxygen to breathe life on what would otherwise be incompetent appeals on account of omitted documents. Therefore, as we said in the case of **PUMA ENERGY** (supra) since rule 96 (8) was added as safety valve to preclude the Court from entertaining further applications meant to cure like defects in the record of appeal, such defects can only be cured once, or else Rule 96 (8) would be abused by the litigants who are sloppy and not serious in ensuring timely disposal of the disputes. We think, the appellant herein falls in the latter category having not complied with the Court order and as such, we decline Mr. Kabunga's invitation to adjourn the hearing of the appeal so as to enable the appellant to apply for extension of time to lodge the supplementary record as to do otherwise is to condone delay in the disposal of cases which is not compatible with our vision which is geared at timely and accessible justice to all. This we cannot allow.

All said and done, on account of failure to lodge a valid certificate of delay within time ordered by the Court, the appellant is not entitled to benefit from exclusion as stipulated under Rule 90 (1) of the Rules. In the circumstances since this appeal ought to have been filed within

60 days from the date of filing the notice of appeal dated 16/11/2015, it is time barred having been filed on 10/7/2020 that is 60 months from the date of lodging the notice of appeal. We thus uphold the preliminary objection and strike out the appeal for being time barred with costs.

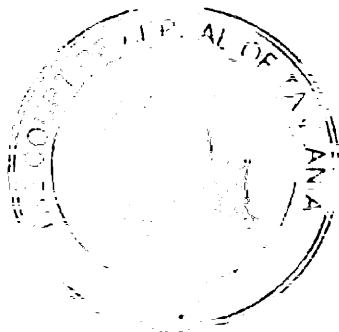
**DATED** at **BUKOBA** this 26<sup>th</sup> day of November, 2021.

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

W. B. KOROSSO  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

The ruling delivered this 29<sup>th</sup> day of November, 2021 in the presence of appellant in person and both respondents and Mr. Joseph Bitakwate, learned advocate for the respondents is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**