**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: LILA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)**

**CIVIL APPEAL NO. 359 OF 2019**

1. **MAYIRA B. MAYIRA ..... 1ST APPELLANT**
2. **DAUDI WILLIAM ..... 2ND APPELLANT**
3. **ALATWINUSA NDEGE ..... 3RD APPELLANT**
4. **BARAKA MKWAWA ..... 4TH APPELLANT**
5. **SADICK MWASUMBI ..... 5TH APPELLANT**

**VERSUS**

**KAPUNGA RICE PROJECT ..... RESPONDENT**

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

**(Ngwembe, J.)**

**Dated the 25th day of January, 2019**
**in**
**Civil Case No. 02 of 2013**

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## RULING OF THE COURT

19th February, & 31st March, 2021

**KOROSSO, J.A.:**

By way of a representative suit, Mayira B. Mayira, Daudi William, Alatwinusa Ndege, Baraka Mkwawa and Sadick Mwasumbi, the 1st, 2nd, 3rd, 4th and 5th appellants (the plaintiffs then) sued the respondent (then the defendant) in the High Court of Tanzania at Mbeya in Civil Case No. 02 of 2013, claiming payment of Tshs. 800,248,500/= being compensation for the alleged malicious destruction of the appellants' rice. The appellants also demanded for an order for the respondent to pay interest of the principal sum at the rate of 31% per annum from the

date of filing the suit to the date of judgment; pay an interest of the decretal sum at the court's rate from the date of judgment to the date of payment in full; pay general damages amounting to Tshs. 300,000,000/= or as it may be assessed by the trial court; pay punitive damages as may be assessed by the trial court; and pay costs of the suit.

After a full trial, judgment was entered for the respondent. Dissatisfied, the appellants have come to this Court by way of this appeal. Their memorandum of appeal comprises six (6) grounds of appeal. Nonetheless, for reasons which shall soon be apparent, for purpose of this ruling we find no need to reproduce them at this juncture.

Consequent to being served with the memorandum and record of appeal, the respondent through their counsel filed a notice of preliminary objection on the 10th October, 2019 querying the competency of the appeal and praying that the appeal be struck out with costs founded on six (6) grounds. For reasons to be soon revealed, the six grounds of objection will not be reproduced.

When the appeal came for hearing, all the five appellants were present in person each person fending for oneself, unrepresented

whereas, the respondent enjoyed the services of Mr. Ladislaus Rwekaza, learned Advocate.

As is the practice of this Court, the preliminary objection had to be disposed of first and therefore this ruling determines the competence of the appeal.

With the leave of the Court, Mr. Rwekaza abandoned grounds 2, 3, 4, 5, and 6 in the notice of preliminary objections and argued ground 1 which he considered to be sufficient to dispose of the appeal. Ground 1 states as follows:

> 1. *The appeal is time barred thus in contravention of Ruie 90(1) and (2) of the Court of Appeal Rules, 2009 as,*
>
> *(a) The Memorandum and Record of Appeal were lodged on 13th day of September 2019 being after the period of 199 days from the date of lodging the Notice of Appeal, which was on the 25th day of February 2019.*
>
> *(b) That, the purported written Application for the copy of Proceedings in the High Court was lodged out of time, did not address parties and case number and was neither copied nor served to the Respondent.*

*(c) That the purported written Application for the copy of the Proceedings was not the purpose of this Appeal rather for record management.*

Mr. Rwekaza, then adopted the written submission amplifying on the preliminary objection grounds raised and then proceeded to argue ground 1 of the preliminary objection. This ground in effect alleges that the appeal is time barred since the Memorandum of Appeal filed on 13th September, 2019 filed 199 days after the filing of the Notice of Appeal filed on the 25th February, 2019 and thus in contravention of Rule 90(1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The learned counsel argued that by virtue of Rule 90(1) of the Rules, the appeal should have been instituted within sixty (60) days after filing a Notice of Appeal.

He pointed out that whereas Rule 90(1) of the Rules excludes the period during which an appellant awaits to be supplied with copies of proceedings, judgment and decree for the purpose of the intended appeal, the appellants cannot benefit from that Rule in the circumstances of this appeal. This is so he argued, **first**, the appellants did not apply in writing to the Registrar of the High Curt to be supplied with the necessary copies of the essential documents within thirty (30) days from the date of the impugned decision contrary to Rule 90(1) of

the Rules. **Second**, the appellants did not serve a copy of the letter to the Registrar on the Respondent in contravention of Rule 90(3) of the Rules.

Mr. Rwekaza argued that in the current appeal, the appellants having failed to lodge the appeal within the specified sixty days, could have been taken to have validly lodged the appeal if there was a letter written by them applying to be supplied with copies of proceedings, judgment and decree from the High Court within thirty (30) days of the date when the decision subject to the appeal was delivered, which was not the case. The learned counsel asserted that the letter found in the record of appeal which purports to request for copy of proceedings, judgment and decree of the High Court was written on the 24th April, 2019 while the relevant judgment was delivered on the 25th January, 2019 three months later, over and above the thirty days prescribed by the law.

He emphasized that apart from the said anomaly, there is also the fact that the said letter (found at page 234 of the record of appeal) was written by one Benjamin Mbilinyi, who is not amongst the selected plaintiffs (now appellants) to represent others in the said suit, and thus a stranger to the case. He argued that with the said anomalies, the said letter clearly falls short of what is envisaged under Rule 90(1) of the

Rules and thus in effect there was no written letter from the appellants requesting to be provided with essential documents for purposes of their intended appeal.

The learned counsel conceded to be aware of the certificate of delay issued by the Deputy Registrar of the High Court Mbeya Registry found at page 237 of the record of appeal excluding the period from 23rd February, 2019 to 19th August, 2019. However, he argued that the certificate of delay was invalid since it was issued without the relevant letter from the appellants seeking for copies of the essential documents for the purpose of the intended appeal. According to the learned counsel for the respondent, the copy of a letter attached to the appellant's written submission responding to the raised preliminary objection is nowhere to be found in the record of appeal and the respondent was not served with any copy of such letter.

The learned counsel for the appellant submitted further that under the circumstances, the appellants cannot rely on the exemptions under Rule 90(1) of the Rules for reasons alluded to above, including non-compliance with Rule 90(2) of the Rules for failure to serve a copy of the said letter to the respondent. He thus invited the Court to find the appeal incompetent. He relied on the decision of this Court in the case of **District Executive Director and Another vs Bogela**

**Engineering Limited**, Civil Appeal No. 57 of 2017 (unreported) to reinforce his argument on the importance of serving the respondent with a copy of the letter requesting for requisite documents to appeal and the consequence of such failure being to strike out the appeal. He contended that such failure, should be taken as an alternative to his earlier submission on the impropriety discerned in the alleged letter. The counsel thus asserted that failure to serve the respondent makes the certificate of delay incompetent since it excludes dates which should not have been excluded in the absence of the letter requesting essential documents rendering the appeal time barred.

On the part of the appellants, each of them with the leave of the Court proceeded to adopt the joint written submissions filed and sought the Court to consider the said submissions in determining the issue before the Court. Being laypersons, they had nothing in addition.

In response to the first ground of the preliminary objection in the written submissions, the appellants resisted it arguing that the contention that the appeal was time barred was misconceived, since it emanated from wrong assumptions regarding the letter that requested for copies of the proceedings and judgment for purpose of intended appeal. The appellants maintained that the said letter was duly submitted on the 23rd February, 2019 and that this is what led the

Deputy Registrar to issue the certificate of delay and excluded time from 23rd February, 2019 to the date they were notified of the delivery of the requisite documents.

The appellants disowned the letter they argued was filed by strangers to the appeal who have no locus and that the respondent's objection should not have addressed or relied on the said letter from strangers. They further argued that the fact that the said letter was not even considered by the Deputy Registrar when issuing the certificate of delay, shows that it was not relevant to the intended appeal. The appellants thus prayed the Court find the first ground of the preliminary objection without merit.

Submitting further, the appellants beseeched the Court to have regard to the provision of section 3 of the Appellate Jurisdiction Act, Chapter 141 Revised Edition 2019 (the AJA) when considering the preliminary objection raised. They argued that the said provision puts emphasis on the role of courts to dispense substantive justice instead of dwelling on technical matters. They also urged the Court to take inspiration from the decision of this Court in **Yakobo Magoiga Gichere vs Penina Joseph,** Civil Appeal No. 55 of 2017 (unreported), so that the appeal can be determined on merit especially since the instant case

has public interest in view of the circumstances and nature giving rise to the case before the High Court.

Having carefully considered the submissions before us both oral and written. The issue for our determination is whether or not the appeal is time barred by reason of failure to institute the appeal within the prescribed time under Rule 90(1) of the Rules. For ease of understanding we reproduce Rule 90(1), (2) and (3) of the Rules which read as follows:-

> *"90(1) Subject to the provisions of rule 128, an appeal shall e 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) The certificate of delay under rules 45, 45A and 90(1) shall be substantially in the Form L as specified in the First Schedule to these Rules and shall apply mutatis mutandis.*

*(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 and a copy of it was served on the Respondent."*

In the instant appeal the date of delivery of judgment sought to be challenged in the appeal was 25th January, 2019, the notice of appeal was filed on the 25th February, 2019 and the Memorandum of Appeal was filed on 13 September, 2019. In terms of Rule 90(1)(a) of the Rules, everything being equal, the Memorandum of Appeal should have been filed on or before 26th April, 2019.

The appellants argued that notwithstanding the above, the sixty days required to file the Memorandum of Appeal do not apply to the instant appeal since they had written a letter on the 23rd February, 2019 requesting for copies of judgment and proceedings in line with the proviso to Rule 90(1) of the Rules and hence the issued certificate of delay from the Deputy Registrar that excludes the period from 23rd February, 2019 up to 19th August, 2019. According to them, when this is considered then clearly, the appeal is within time, the Memorandum of Appeal having been filed on the 13th September, 2019.

We have scrutinized the record of appeal but have failed to see the letter requesting for copies of proceedings, judgment and decree alleged to have been filed on 23rd February, 2019. We are aware that the certificate of delay found on page 237 of the record of appeal makes reference to this letter, and a copy of the same is attached to the appellants written submissions. However, the alleged letter is nowhere to be found in the record of appeal and we thus agree with the learned counsel for the respondent that there is no letter from the appellants seeking for copies of proceedings, judgment and decree in the record of appeal. The only letter seeking for proceedings is found at page 253 of the record of appeal authored by Wahanga wa Mpunga, Chimala Mbarali to the Registrar, Mbeya dated 29th April, 2019. That letter was renounced by the appellants in their written submissions stating that the authors are unknown and have no locus and for that matter it has no relevance to the current appeal.

In the absence of the letter requesting for the proceedings, judgment and decree as required by Rule 90 (1) and (3) of the Rules, the appellants cannot benefit from the exception to Rule 90(1) of the Rules. Rule 90(3) of the Rules makes it mandatory for an application in written form to be served on the respondent.

According to the respondent he was not served with a copy of the said letter and the appellants were unable to confirm or give evidence on whether or not the said letter if it was there, was served on the respondent. Under the circumstances, in the absence of any evidence to the contrary, we hold that there was no written application from the appellants requesting for copies of proceedings, judgment and decree for the purposes of the intended appeal and that the respondent was not duly served with any such letter in compliance with Rules 90(1), (2) and (3) of the Rules. Consequently, the appellants cannot benefit from the exceptions therein and in fact, even the certificate of delay is defective because it relies on a letter which is not part of the record of appeal.

In **Victoria Mbowe vs Christopher Shafurael Mbowe and Another**, Civil Appeal No. 115 of 2013 (unreported), the Court had time to consider a similar situation and having found nothing on record showing that the appellant ever applied for copies of the proceedings, judgment and decree within time in a manner provided for under Rule 90(1) of the Rules and also having failed to serve the respondent meant that the appellant could not rely on the exception in the said Rule and held that the appeal was time barred. (See also **MS Universal Electronics and Hardware Tanzania Limited vs Strabag**

**International GmbH (Tanzania Branch),** Civil Appeal No. 104 of 2015 and **District Executive Director Kilwa District Council vs Bogeta Engineering Limited**, Civil Appeal No. 37 of 2017 (both unreported).

From the foregoing and in terms of Rule 90(1), (2) and (3) of the Rules, undoubtedly, the letter requesting for proceedings is an essential document in the determination of whether the appeal is within time or not. In **Mondorosi Village Council and 2 Others vs Tanzania Breweries Limited and 4 Others** (supra), we held that the said letter; *"is one of "such other documents" necessary for the determination of the appeal as provided under Rule 96(1)(k) of the Rules."* (See also **National Bank of Commerce vs Basic Element Limited**, Civil Appeal No. 70 of 2014 (unreported).

The Court has in numerous decisions, underscored the importance of complying with the mandatory provisions of Rule 90(1) and (2) of the Rules. See for instance: **Richard Kwayu vs Robert Bulili**, Civil Appeal No. 9 of 2012 (unreported); **Victoria Mbowe vs Christopher Shafurael Mbowe and Another** (supra) and **District Executive Director Kilwa District Council vs Bogeta Engineering Limited** (supra).

Before we conclude, we find it pertinent to address the prayer by the appellants that the Court should be guided by the overriding objective principle in determining the preliminary objection raised. Our response to that prayer can be found from our decisions in **Mondorosi Village Council and 2 Others vs Tanzania Breweries Limited and 4 Others** (supra) and **Njake Enterprises Limited vs Blue Rock Limited and Another,** Civil Appeal No. 69 of 2017 (unreported). In which we emphasized the fact that the overriding objective principle cannot be applied blindly and that the principle is not designed to disregard the rules of procedure couched in mandatory terms, especially those going to the foundation of the case.

The issue we have been asked to consider relates to limitation of time which touches on the jurisdiction of the Court. This being the case, non-compliance with the procedures related to limitation of time cannot be said to be technicality to be cured by the overriding objective. Where the issue is that the appeal is time barred it means that the Court cannot entertain it for lack of jurisdiction. Such an issue goes to the core of the determination of the case. For the foregoing reasons, we decline to accept the invitation to overlook such an issue of jurisdiction that the appeal is time barred. The overriding objective principle is under the circumstances inapplicable.

In the premises, we are of firm view that the appeal before us is incompetent for being time barred. In the end, the first preliminary point of objection is sustained. Consequently, we strike out the appeal with costs for being time barred.

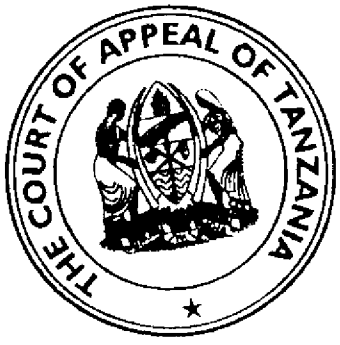
**DATED** at **DAR ES SALAAM** this 18th day of March, 2021.

S. A. LILA
**JUSTICE OF APPEAL**

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

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

The ruling delivered this 31st day of March, 2021 in the presence of appellants in person through video conferencing linked to the Court from High Court of Mbeya and Mr. Dickson Mbillu, learned counsel for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
**DEPUTY REGISTRAR**
**COURT OF APPEAL**