

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPEAL NO. 56 OF 2020

(CORAM: WAMBALI, J.A., SEHEL, J.A. And KIHWELO, J.A.)

ADOLF MALEKIA SENDEU

(Holding Power of Attorney of Betty Huber

Alias **ELIZABETH HUBER SENDEU**.**APPELLANT**

VERSUS

SILVER SENDEU.....**1ST RESPONDENT**

CHARLES STANSLAUS MALLYA.....**2ND RESPONDENT**

SYLVESTER PAUL MOSHA.....**3RD RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania, Land
Division at Dar es Salaam)**

(Wambura, J.)

dated the 29th day of September 2017

in

Land Case No. 34 OF 2013

.....

RULING OF THE COURT

21st March & 5th April, 2022

KIHWELO, J.A.:

The facts of the matter leading to this appeal are not so difficult to comprehend. The appellant, sued the respondents before the High Court of Tanzania (Land Division) at Dar es Salaam in Land Case No. 34 of 2013 praying for, among other reliefs, a declaration that the appellant is a lawful owner of Plot No. 833 Block E, Mbezi Beach, Kinondoni Municipality, Dar es Salaam. Upon hearing the parties, the High Court (Wambura, J.) dismissed the suit and condemned the appellant to pay costs. The appellant was

aggrieved and on 20. 03. 2020 he lodged the present appeal through the services of IMMA Advocates. When the appeal was due for hearing, Mr. Kephas Simon Mayenje, learned advocate from Legal Link Attorneys representing the second respondent, raised a preliminary point of objection, notice of which was lodged on 16.03.2022 under Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 as amended ("the Rules") to the effect that:

"The appeal is hopelessly time barred as it contravenes the provision of Rule 90 (1) and (2) of the Tanzania Court of Appeal Rules, 2009."

As it is a customary practice of this Court that where there is a notice of preliminary of objection raised in an appeal or application, the Court hears the preliminary objection first before allowing the appeal or application to be heard on merit. Hence, we allowed the preliminary objection to be argued first, before the hearing of the appeal on merit.

At the hearing before this Court, Mr. Gaspar Nyika together with Ms. Antonia Agapiti both learned advocates appeared for the appellant, whereas the first, second and third respondents had the services of Mr. Cornelius Kariwa, Mr. Kephas Mayenje and Mr. Godwin Musa Mwapongo learned Advocates respectively.

Mr. Mayenje prefaced his submission by arguing that the appeal before the Court is time barred. Elaborating, he went on to describe the sequence of events, which according to him, logically, demonstrates in clear terms that the appeal is time barred. The learned counsel pointed out that the impugned Judgment was delivered on 29.09.2017 and on 02.10.2017 the appellant wrote a letter to the Deputy Registrar, High Court (Land Division) "Deputy Registrar" requesting to be supplied with copy of Judgment, Decree, Proceedings and copies of all the exhibits tendered in court during the trial for pursuing an appeal to the Court. Illustrating further, Mr. Mayenje, contended that on 09.09.2019, the appellant wrote another letter to the Deputy Registrar acknowledging that on 06.08.2019 they collected certified copies of Judgment, Decree and Proceedings and the said letter was received by the Deputy Registrar on 12.09.2019. He further elaborated that, the appellant in that letter indicated that upon perusal of the proceedings they noted some errors which were discernible in the typed proceedings and therefore, they requested for correction of the noted errors so that they could be supplied with the correct and complete copy of the proceedings. Furthermore, the appellant requested to be issued with a certificate of delay in terms of Rule 90 (1) of the Rules, Mr. Mayenje submitted.

In further arguing in support of the preliminary objection, Mr. Mayenje spiritedly submitted that, the Deputy Registrar on 17.01.2020 in response to the appellant's letter of 09.09.2019 supplied to the appellant the requested documents, and that letter was received by the appellant same day on 17.01.2020. He curiously argued that, it was surprising that, there was no any evidence of perusal of the court record which led to the discovery of the said errors. He rounded up by arguing that the certificate of delay ought to have referred to the letter dated 17.01.2020 and not the one dated 28.02.2020 whose basis of reply is not apparent on record and therefore, since the appeal was lodged on 20.03.2020 the instant appeal is time barred. To facilitate the appreciation of the proposition he put forward the learned counsel, referred us to page 11 of the typed decision in **Exim Bank (Tanzania) Limited v. Pendaël Joel Mollel**, Civil Appeal No. 116 of 2017, page 10 of the typed decision in **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 and page 13 of the typed decision in **The Board of Trustees of The National Social Security Fund v. New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004 (all unreported).

Upon being prompted by the Court he argued that reckoning from 17.01.2020, the appeal was supposed to be lodged on 17.03.2020. He implored us to strike out the appeal for being incompetent.

Mr. Kariwa and Mr. Mwapongo, in turns supported the preliminary objection for the reasons advanced by Mr. Mayenje. They argued further that, the Deputy Registrar's letter dated 28.02.2020 which is referred in the certificate of delay was in response to the appellant's letter of 23.12.2019, however, in their view, there is no indication of any letter which was written by the appellant after the Deputy Registrar's letter of 17.01.2020 which was received the same day by the appellant. In their view the Deputy Registrar wrote the letter dated 28.02.2020 without being moved.

On the adversary, Mr. Nyika, was very adamant and prefaced his submission by contending that the respondents want the Court to refer to the letter dated 17.01.2020 in reckoning days instead of the letter dated 28.02.2020 which was referred by the Deputy Registrar in the certificate of delay. He further contended that the letter of 28.02.2020 was in response to the appellant's reminder letter dated 23.12.2019. The learned advocate forcefully submitted that, it would appear that the Deputy Registrar was preparing documents which were ready to be supplied to the appellant by 28.02.2020. To this end, Mr. Nyika contended spiritedly that the appellant

cannot and should not be condemned for the act of the Deputy Registrar. He argued further that, the letter of 17.01.2020 supplied other documents whereas the letter of 28.02.2020 as its title depicts was referring to the certificate of delay. He stressed that, the last letter from the Deputy Registrar which should be used to reckon days is the one of 28.02.2020 and not that of 17.01.2020. Mr. Nyika distinguished the cases cited by Mr. Mayenje, and in our view rightly so, in that the circumstances obtained in those cases cited are not similar to the circumstances of the appeal before us. While referring to the case of **The Board of Trustees of The National Social Security Fund** (supra), and section 112 of the Evidence Act, Cap. 6 R.E 2019 he argued that the Court may infer and presume that the Deputy Registrar was right in doing what she did and that the certificate of delay is correct and valid. Mr. Nyika, finally, prayed that the preliminary objection be dismissed and the appellant should be awarded costs for the day.

In rejoinder submission Mr. Mayenje was fairly brief. He contended that, clearly, the Deputy Registrar is empowered to exclude the days that were required to prepare documents for appeal purposes but in so doing the Deputy Registrar does not move himself and that the only time for exclusion is the time required to prepare copy of Judgment, Decree and Proceedings in terms of Rule 90(1) of the Rules and that the last letter from the Deputy

Registrar is the one dated 17.01.2020 and not anyone else. He finally, replied that in the case of **The Board of Trustees of The National Social Security Fund** (supra), the Court ended up striking out the appeal.

On his part, Mr. Mwapongo, emphasized that, the letter which should be used to reckon days is the one dated 17.01.2020 and not the other dated 28.02.2020 which in their view leaves much to be desired as the Deputy Registrar appears to have written the letter of 28.02.2020 from nowhere.

From the submission of the learned trained minds the only issue that requires our determination is whether or not the instant appeal is proper before the Court. We think that, this issue can be conveniently resolved by recapitulating the chronological events relating to the correspondence between the appellant and the Deputy Registrar (Land Division) that tells it all. The impugned Judgment was delivered on 29.09.2017 and the appellant on 02.10.2017 wrote a letter requesting for a copy of Judgment, Decree and proceedings for purposes of preparing the appeal. On 06.08.2019 the appellant received the requested documents and through the letter dated 09.09.2019, the appellant acknowledged receipt and requested for rectification of errors which he came across upon further perusal of the supplied documents. Furthermore, the appellant through the same letter dated 09.09.2019 which the Deputy Registrar acknowledged receipt on

12.09.2019 requested for a copy of the certificate of delay and in response to that letter, the Deputy Registrar on 17.01.2020 supplied the appellant with the requested documents.

The procedural requirements in relation to institution of the appeal before the Court, are clearly spelt out under Rule 90 (1) and (2) of the Rules.

It reads: -

*"(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 notice of appeal was lodged** with-*

- (a) a memorandum of appeal in quintuplicate;*
- (b) the record of appeal in quintuplicate;*
- (c) security for 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.”

The above provision makes it mandatory for the appellant to lodge the appeal within sixty days of filing of the notice of appeal. However, that requirement is subject to the proviso for exemption of time required for seeking and obtaining from the High Court a copy of the proceedings in that court as may be certified by the Registrar where an application for such copy is made within thirty days of the delivery of the decision sought to be challenged and served upon the respondent in accordance with Rule 90 (3) of the Rules.

In the instant appeal, and based upon the provision cited above, we think that, the sequence of actions leading to this appeal leads to a logical conclusion, as rightly argued by Mr. Mayenje that, the date upon which to reckon for appeal purposes is 17.03.2020 taking the letter dated 17.01.2020 as the final letter from the Deputy Registrar notifying the appellant that the requested rectifications were duly done. The argument by Mr. Nyika that, the letter of 28.02.2020 should be used to reckon days for appeal purposes, is in our considered opinion erroneous and misleading. The logic behind that reasoning is not far-fetched as Mr. Nyika himself admittedly argued that, the letter of 28.02.2020 was meant to request for a certificate of delay as the title

of that letter conspicuously indicates. It is imperative to stress that, the letter of 28.02.2020 was immaterial to the appellant for the purposes of lodging the appeal before this Court because a certificate of delay is not one of the documents contemplated under Rule 90(1) of the Rules, and in any case, on 17.01.2020 when the appellant received the requested documents it was still within sixty days required under Rule 90(1) of the Rules to lodge the appeal.

We wish to express that, when it comes to exclusion of the days for appeal purposes, the law in particular Rule 90(1) of the Rules requires the Registrar of the High Court to consider the date when the appellant requested for copy of the proceedings, up to the date when the appellant was notified that the documents were ready for collection. We are firmly of the view that, according to the current set up of the provisions of Rule 90 (1) of the Rules, the period taken for obtaining a certificate of delay is not amenable for computation of the time to be excluded in lodging the appeal, more so after the party has been notified that documents are ready for collection. In that regard, we are decidedly of the opinion that, the authorities cited to us by Mr. Mayenje, learned counsel are not applicable in the circumstances of the present appeal.

It is instructive to interject a remark, by way of a postscript that, given the nature of the dispute and the manner upon which the appellant was corresponding with the Deputy Registrar, ordinarily, he would not have hesitated to write a reminder letter(s) if at all there were still some missing documents after the Deputy Registrar's letter of 17.01.2020 as alleged or at all.

It appears to us that, in the instant appeal the appellant ought to have lodged the appeal immediate upon receipt of the requested documents on 17.01.2020 but did not do so until 20.03.2020 which was completely out of sixty days prescribed by law. Time and again, we have emphasized the need for parties to take necessary steps within the time required by law or within reasonable time where the law does not specify time and there is a considerable body of case laws on this, but if we can just cite one is the case of **Loswaki Village Council and Another v. Shibesh Abebe** [2000] T.L.R. 204, particularly at page 208 where we observed that: -

"Those who seek the aid of the law by instituting proceedings in a court of justice must file such proceedings within the period prescribed by law, or where no such period is prescribed, within a reasonable time."

The above position, we hasten to observe, is an elementary rule well founded in law as such it cannot correctly be said that the appellant filed the appeal within sixty days prescribed by Rule 90 (1) of the Rules computing the period from 17.01.2020.

In the result, we uphold the preliminary objection. The appeal is hereby struck out with costs for being time barred.

It is so ordered.

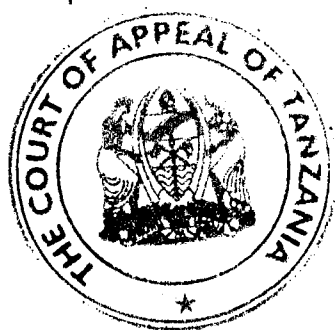
DATED at DAR ES SALAAM this 1st day of April, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered on this 5th day of April, 2022, in the presence of Ms. Antonia Agapiti, learned counsel for the appellant and Ms. Glory Venance learned counsel for the 1st Respondent, Mr. Kephass Mayenje, learned counsel for the 2nd respondent and Mr. Godwin Musa Mwapongo, learned counsel for the 3rd respondent is hereby certified as a true copy of the original.




A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL