

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

(CORAM: KWARIKO, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 148 OF 2019

ALI SAIDI KURUNGU	1ST APPELLANT
KHAMISI SALUMU ABDALLAH	2ND APPELLANT
RAMADHANI M. LUKALI	3RD APPELLANT
SALIM MOHAMED ABDALLAH	4TH APPELLANT
KHALID SAID KITOGO	5TH APPELLANT

VERSUS

THE ADMINISTRATOR GENERAL 1ST RESPONDENT

THE REGISTERED TRUSTEES OF MASJID

MABOX-MTONI SOKONI 2ND RESPONDENT

UST. ALI MOHAMED ALI 3RD RESPONDENT

ALI MOHAMED MTULIA 4TH RESPONDENT

ABUBAKAR SULTAN NGONDO 5TH RESPONDENT

OMARI MPOTO KAPILIMA 6TH RESPONDENT

SAIDI SHAHA KASU 7TH RESPONDENT

SELA RAJABU ALI 8TH RESPONDENT

SALUM RAMADHANI LUKALI 9TH RESPONDENT

JUMA OMARI KAPU 10TH RESPONDENT

SALIM KIFO MTAMBULO 11TH RESPONDENT

IBRAHIM MUSSA REHANI 12TH RESPONDENT

OMARI MBARAKA PAZI 13TH RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania,
Dar es Salaam District Registry at Dar es Salaam)

(Mlyambina, J.)

dated the 11th day of December, 2018

in

Miscellaneous Civil Cause No. 427 of 2018

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RULING OF THE COURT

21st March, & 5th April, 2022

GALEBA, J.A.:

At the hearing of this appeal on 21st March 2022, the appellants were represented by Mr. Mohamed Tibanyendera, learned advocate, whereas the

first respondent had the services of Ms. Irene Lesulie, learned Principal State Attorney teaming up with Mr. Julius Msengesi, learned Senior State Attorney, Mr. Galus Lupogo, learned State Attorney and Ms. Angelina Ruhumbika also learned State Attorney. The second to the thirteenth respondents were appearing by Mr. Mussa Kiobya, learned advocate.

Prior to commencement of hearing, Mr. Tibanyendera rose to inform us that he had noted that the certificate of delay upon which his appeal is based, was defective. In amplifying his point, he submitted that although the letter requesting for the copy of proceedings was received by the Registrar of the High Court on 24th December 2018, the certificate of delay indicates that the letter was received by the Registrar on 25th January 2019, which error rendered the certificate defective. In the circumstances, he beseeched us to adjourn the hearing of the appeal in order to afford him opportunity to approach the Registrar of the High Court and apply for a rectified certificate of delay. Further, under Rule 96(7) of the Tanzania Court of Appeal Rules 2009, (the Rules), Mr. Tibanyendera, implored us also to grant him leave to lodge a supplementary record of appeal containing the valid certificate of delay, after he will have procured it from the High Court.

Ms. Lesulie, contested the submission by Mr. Tibanyendera and strongly resisted his prayer. Her argument being that, as Mr. Tibanyendera admitted that the certificate of delay was defective, it was inoperative in the

circumstances, in which case, she contended that the appeal is time barred. As such, the appellants would not be entitled to benefit from the exclusion of time envisaged under the proviso to Rule 90(1) of the Rules, she added. Thus, she moved this Court to strike out the appeal with costs, for want of jurisdiction, for the Court cannot entertain an appeal lodged out time. To bolster her contention, she relied on the decision of this Court in **Filon Felician Kwesiga v. The Board of Trustees of the NSSF**, Civil Appeal No. 136 of 2020 (unreported).

On his part, Mr. Kiobya implored the Court to strike out the appeal with costs in favour of the second to the thirteenth respondents, basing his prayer on the submission made by Ms. Lesulie.

We have carefully reviewed the record of appeal and have particularly noted, as Mr. Tibanyendera submitted and observed by fellow counsel, that indeed the certificate of delay contained at page 301 of the record of appeal, clearly states that the copies of proceedings from the Registrar of the High Court were requested on 25th January 2019. That piece of information is incorrect and erroneous tainting the certificate, as the authentic and proper date on which the first letter requesting for the copy of proceedings was written on 12th December 2018 and was received by the office of the Registrar of the High Court on 24th December 2018. These authentic details are indicated on the very letter contained at page 295 of

the record of appeal. Thus, as it is, the certificate of delay is, for all intents and purposes, defective.

The issue we are called upon to resolve is, do we grant leave to the appellant's counsel to apply for a rectified certificate of delay from the High Court, and lodge it in a form of a supplementary record of appeal, or we strike out the appeal for being time barred as submitted by Ms. Lesulie and Mr. Kiobya.

We propose to start with the case of **Filon Felician Kwesiga (supra)**, cited by Ms Lesulie. In that case, the letter requesting for a copy of proceedings under Rule 90(1) of the Rules was not served to the respondent and it was even not included in the record of appeal. It was held in that matter that, as the letter to the Registrar was not served on the respondent within thirty days from the date of the impugned judgement, then the appellant would not benefit from the exclusion of time envisaged under the proviso to Rule 90(1) of the Rules. In that case, the Court indicated why it did not invoke the provisions of Rule 96(7) of the Rules to grant the appellant leave to apply for a valid certificate of delay and present it as a supplementary record of appeal. In that regard, this Court stated:

*"Furthermore, and for avoidance of doubt, **we have refrained from invoking the provisions of Rule 96(7) of the Rules, to which we often resort to inject oxygen to the defective certificate of delay***

by granting leave to the appellant to lodge a supplementary record to include a valid certificate of delay in the record. This is so, because, in this case, as indicated above, the appellant is not entitled to benefit from the exception under the proviso to Rule 90(1) of the Rules, as he did not serve, on the respondent, the letter applying for the certified documents for appeal purposes. That is the reason why we have found and held that, in the circumstances, the appeal cannot be resurrected by the principle of overriding objective.”

[Emphasis added]

Our hope is that the above quoted excerpt of this Court’s decision in **Filon Felician Kwesiga’s** case (supra), explains sufficiently why this Court refused to invoke Rule 96(7) of the Rules in order to allow the appellant to lodge a supplementary record of appeal. The reason was, as indicated above, that the appellant had not served the letter requesting for a copy of proceedings to the respondent. In our view therefore, the facts in the case of **Filon Felician Kwesiga** (supra) and the present case are clearly distinguishable, because in the case before us, service of the letter applying for a copy of proceedings was not an issue. So, we cannot strike out the appeal based on that authority as Ms. Lesulie and Mr. Kiobya, would have wished us to do.

Mr. Tibanyendera prayed for adjournment of the hearing of this appeal for him to get time of approaching the Registrar of the High Court in order to procure a valid certificate of delay and after getting the rectified certificate, to lodge a supplementary record of appeal containing the valid document. We will henceforth concentrate our attention to determine the validity of this prayer made under Rule 96(7) of the Rules.

Rule 96(7) of the Rules, which was enacted in 2019 *vide* the Tanzania Court of Appeal (Amendment) Rules 2019, G.N. No. 344 of 2019 provides that:-

"Where the case is called on for hearing, the Court is of opinion that document referred to in rule 96(1) and (2) is omitted from the record of appeal, it may on its own motion or upon an informal application grant leave to the appellant to lodge a supplementary record of appeal."

This Court has had something to say in the case of **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2018 (unreported) as far as Rule 96(7) is concerned. It observed in that case that:

"The mischief behind rule 96(7) of the Rules was to put to life in incompetent appeals suffering from defects in the records of appeal, including, but not

limited to non-inclusion of essential documents envisaged under rule 96(1) and 96(2) of the Rules."

The Court went on to state that:

"We think it will now be clear that Rule 96(7) was added with a view to giving effect to the overriding objective particularly section 3B (1) (c) of the AJA and Rule 2 of the Rules which enjoin the Court to handle all matters before it with a view to attaining timely disposal of the proceedings at a cost affordable by the respective parties."

As for the defective certificate of delay, in the case of **Kantibhai Patel v. Duhyabhai F. Mistry**, [2003] T.L.R. 437, this Court held as follows:

*"The very nature of anything called a certificate requires that it be free from error **and should an error crop into it, the certificate is vitiated.** It cannot be used for any other purpose because it is not better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over; it goes to the very root of the document. You cannot sever the erroneous part from it and expect the remaining part to be a perfect certificate; **you can only amend it or replace it altogether as by law provides.**"*

[Emphasis added]

As a way forward, in appeals where the above highlighted points exist, that is, the points that a defective certificate cannot be acted upon but can be amended, this Court has been granting leave in favour of the appellants for them to seek rectification of the certificates of delay and lodge supplementary records of appeal containing the rectified ones. Some of this Court's decisions in this respect are **Mediterranean Shipping Co. (T) Ltd v. Afritex Limited**, Civil Appeal No. 165 of 2017, **Universal Electronics and Hardware (T) Limited v. Strabag International GmbH (Tanzania Branch)**, Civil Appeal No. 122 of 2017, **Ecobank Tanzania Limited v. Future Trading Company Limited**, Civil Appeal No. 82 of 2019, **Geita Gold Mining Limited v. Jumanne Mtafuni**, Civil Appeal No. 30 of 2019 and **Daudi Hagha v. Salum Ngezi and Damian Toyi**, Civil Appeal No. 313 of 2017 (all unreported). For instance, in the case of **Daudi Hagha** (supra) this Court observed:

*"...we are of a firm position that all the three documents, the judgment, the decree and **the certificate of delay** are rectifiable under Rules 2 and 96(7) of the Rules and in further giving effect to the provisions of section 3B (1) (a) and (c) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019]."*
[Emphasis added]

We are satisfied therefore that, a defective certificate of delay, like the one in the record of appeal lodged by the appellant in this appeal, is

rectifiable under the law as observed above. Therefore, the submission by Mr. Tibanyendera in that respect, has substance and his prayer is hereby granted.

Consequently, under Rule 96(7) of the Rules, we grant the appellants leave to procure a rectified certificate of delay from the Registrar of the High Court and lodge a supplementary record of appeal containing it. The supplementary record of appeal shall be lodged in this Court within forty-five (45) days from the date of delivery of this Ruling. Costs shall abide the outcome of the appeal.

Meanwhile, hearing of this appeal is adjourned to the next convenient session of the Court as may be fixed by the Registrar.

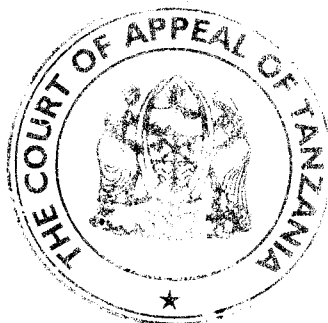
DATED at DAR ES SALAAM, this 1st day of April 2022

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 5th day of April, 2022 in the presence of Mr. Mussa Kiobya advocate for the 2nd – 13th respondents also holding brief of Mohamed Tibanyendera advocate for the appellant, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL