IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., LEVIRA, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 32 OF 2021

AIRTEL TANZANIA LIMITED..... APPELLANT

VERSUS

MIRAGE LITE LIMITED .....RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (District Registry) at Dar es Salaam]

(De Mello, J.)

dated the 7th day of May, 2020
in
Civil Case No. 216 of 2016

.....

JUDGMENT OF THE COURT

25th March, & 25th April, 2022

MKUYE, J.A.:

In this case the appellant, Airtel Tanzania Limited, is appealing against the judgment and decree of the High Court of Tanzania (Dar es Salaam Registry) in Civil Case No. 216 of 2016 handed down on 7th May, 2020.

The facts leading to this appeal are that, sometimes in 2008 the respondent was procured by the appellant to construct for the later a Master Switch room at its head office located at the Zain Building along Bagamoyo Road (now Airtel Building). The term of engagement was to last for a period of six (6) months at a contracted amount of USD 948,428.04. The respondent began work and according to her, the

project was supervised by a consultant known as Kent plan. It is the contention by the respondent that in the course of the implementation of the construction, the consultant introduced some variations which were implemented by the respondent and the said variations culminated into hiking the costs of the project.

The respondent, after having completed the construction, claimed for payment but with respect to the variation costs the appellant was reluctant to pay. Upon various demands, the appellant paid the respondent an amount of USD 47,421.40 which was withheld as a retention fee. Despite concerted efforts by the respondent to demand for payment, the appellant refused to comply with such demands. It is when that the respondent was left with no option and, in the result, instituted civil proceedings against the appellant claiming for payment of USD 272,765.00.

Upon hearing both parties, the High Court found in favour of the respondent whereupon the appellant was required to pay the amounts owing to the respondent to the tune of USD 272, 765.00 with an interest of 20% at the commercial bank rate from November 2010 to the date of judgment; and interest of 12% on the decretal amount from the date of judgment until full payment.

Dissatisfied with that decision, the appellant has appealed to this Court on a memorandum of appeal consisting ten (10) grounds which for a reason to become apparent shortly, we shall not reproduce them. Prior to the hearing of the appeal, the respondent raised a notice of preliminary objection (PO) on points of law to the effect that:

> *"1. The appeal was lodged out of time as the letter requesting appellant to collect the necessary documents is dated 17th December 2020 and the appeal was lodged on 16th February 2021 beyond the statutory period of sixty days.*
>
> *2. The certificate of delay under the record was wrongly procured as the letter notifying the concerned party to collect the documents was addressed to the advocate for the defendant now appellant dated 17th December 2020 not 22nd December 2020."*

At the hearing of the appeal, the appellant was represented by Mr. Gaspar Nyika and Ms. Miriam Bachuba, both learned advocates; whereas the respondent enjoyed the services of Mr. Joseph Rutabingwa, also learned advocate.

On being invited to elaborate the points of (PO), Mr. Rutabingwa prefaced his submission by arguing that in terms of Rule 90 (1) of the

Tanzania Court of Appeal Rules 2009 (henceforth the "Rules"), the appeal is required to be filed within sixty (60) days from the date when the notice of appeal was lodged and that the number of days used for the preparation of copy of proceedings is excluded. He submitted that in this case, the appellant applied for a copy of proceedings on 8th May 2020 as shown at page 184 of the record of appeal. He further pointed out that the letter of the Deputy Registrar (the DR) informing the appellant that the documents were ready for collection was written on 17th December 2020 meaning that, the appellant ought to have lodged her appeal latest by 15th February, 2020, However, Mr. Rutabingwa contended that the appellant filed her appeal on 16th February 2020. which meant that the appeal was delayed by one day.

Mr. Rutabingwa went on submitting that as the 15th February, 2021 was a Monday, a working day, there was no reason why they had to file it on 16th February, 2021 been which was a Tuesday more so, when taking into account that they had already on 10th February, 2021 issued a certificate regarding the correctness of the record of appeal. To fortify his argument, he referred us to the case of **CRDB Bank PLC v. True Colour Ltd and Another**, Civil Appeal No. 29 of 2019 (unreported).

In relation to the point of PO concerning the certificate of delay, it was the learned counsels' argument that according to the certificate of delay, the respondent was notified on 22nd December, 2020 that the documents were ready for collection but the said date is not supported by anything in the record of appeal. He pointed out that, the contention that the certificate of delay misquoted the parties, even if the Court makes an order that it be rectified, the appeal cannot be salvaged due to the fact that the same is time barred. To fortify his argument, he referred to us the case of **Judith Mbwile and Another v. FBME Bank of Limited (under Liquidation) and Another,** Civil Appeal No. 154 of 2018 (unreported) where it was stated that:

> *"...The Court has acted under rule [Rule 96 (7) of the Rules] on various occasions and granted leave extending to cases where the certificates of delay are defective giving effect to the overriding objective principle engraved under section 3 A of the Appellate Jurisdiction Act, Cap 141 RE 2019 (the AJA).* ***However, there is a caveat to that approach. The Court has done so upon being satisfied that the defects in the offensive certificates of delay or other omission in the record are rectifiabie and capable of curing the defect in the appeal.*** *The Court* ***has declined such invitation in cases***

where the defects complained of are incapable of rescuing the appeal through lodging supplementary record of appeal under Rule 96 (7) of the Rules..." [Emphasis added]

Mr. Rutabingwa therefore, beseeched the Court to find that the appeal is incompetent before the Court and is liable to be struck out.

In response, Mr. Nyika submitted that the appeal was not filed out of time since the letter dated 17th December, 2020 informing appellant that the documents were ready for collection was not received by the appellant on that date nor was it the date when he received the said documents. He was of the view that, time has to be reckoned from the date when the appellant received it and not when the Registrar wrote the letter and for that matter the Registrar would have discharged his/her duty when the letter of notification has reached the appellant.

The learned counsel insisted that the appellant did not receive the letter on 17th December, 2020 and that this is supported by the appellant's letter dated 18th December, 2020 reminding the DR to supply them with the relevant documents. He said, the documents were received by the appellant on 24th December 2020, the date when they

were issued with the letter notifying them to collect the documents though it referred to a wrong Case type and Number.

In this regard, Mr. Nyika stressed that the date to be reckoned is the date when the appellant received the notification and not when the District Registrar wrote a letter.

As regards the defective certificate of delay, he conceded to it contending that it excludes the period from 8th May, 2020 to 22nd December, 2020 which is not substantiated. Instead he contended that, it ought to have excluded the period from 8th May, 2020 to 24th December, 2020 when the appellant was notified that the documents were ready for collection and collected them. He was of the view that, if the appellant was allowed to file a supplementary record of appeal which will include the rectified certificate of delay, the appeal would be within time. On this, Mr. Nyika referred to us our decisions in the cases of **Judith Mbwile** (supra). Also, to show that the Court can allow the appellant to rectify the certificate of delay, he referred us to the case of **Juma Siha Bundara v. Kidee Mining (T) Ltd,** Civil Appeal No. 239 of 2019 Pg 13; **ABSA Bank Tanzania Ltd (formerly known as Barclays Bank of Tanzania Ltd) and Another v. Hjordis Fammestad,** Civil Appeal No. 30 of 2020, (both unreported); **True**

Colour Ltd (supra); and **Geita Gold Mining Ltd v. Jumanne Mtafui,** Civil Appeal No. 30 of 2019 (unreported).

He rounded it up that, like in the above cited cases, the appellant should benefit from the overriding objective principle and be allowed to rectify the defect with costs. In any case, he added that the respondent would not be prejudiced if the Court takes that option. In the end, he urged the Court to allow them to rectify the certificate of delay in order to reflect 24th December, 2020 as the date of notification to collect the documents.

In rejoinder, Mr. Rutabingwa countered Mr. Nyika's submission contending that he wants the Court to change the date of computation of time while the date to be reckoned is when the DR notified the appellant to collect the documents. He insited that the appellant ought to have filed the appeal by 15th February, 2021 and that the letter which the appellant wrote on 18th December, 2020 is of no relevance since the DR had already notified him on 17th December, 2020 that the documents were ready for collection. He also reiterated that, even if the appellant is allowed to rectify that certificate of delay, since the appeal was filed out of time, it cannot be salvaged. He ultimately, urged the Court to strike out the appeal with costs.

We have considered the rival arguments in relation to the objection and, we think, the issue for our determination is whether or otherwise the appeal was filed within time; and if the answer is in the affirmative whether the certificate of delay if rectified could salvage the said appeal.

Institution of civil appeals to this Court is governed by Rule 90 of the Tanzania Court of Appeal Rules, 2009 (the Rules). According to Rule 90 (1) of the Rules, an appeal is mandatorily required to be lodged in the appropriate registry within sixty (60) days of the date when the notice of appeal was lodged. The said provision 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...*
>
> *(b) ------*
>
> *(c) -------*
>
> *Save that where an application for a copy of proceedings in the High Court has been made within sixty 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."

This position of the law was restated by the Court in the case of **Juma Mtungirehe v. The Board of Trustees of Tanganyika National Parks t/a Tanganyika National Parks,** Civil Appeal No. 66 of 2011 (unreported). [See also **True Colour Ltd** (supra), **Nyanza Road Works Ltd v. Hussein Bahaji,** Civil Appeal No. 349 of 2019; **Issa Mohamoud Msonga v. Zakaria Stanslaus and 2 Others,** Civil Appeal No. 21 of 2019 pg 4-7; **Sadallah Ibrahim Sadallah v. Nemganga Sadallah and Another,** Civil Appeal No. 357 of 2019; **Rosemary Biria and Another v. Tatu Juma Mohamed,** Civil Appeal No. 20 of 2019; and **Abrogast Arstide and 3 Others v. St. John University of Tanzania,** Civil Appeal No. 26 of 2019 (all unreported)]. For instance, in the case of **Issa Mohamoud Msonga** (supra), the Court stated as follows:

"Rule 90 (1) which is under Part V of the Rules dealing with appeals in civil matters provides for the appeal to be instituted within sixty days of the date of the notice of appeal."

In this case, it is common ground that the decision sought to be impugned was handed down on 7th May, 2020. The notice of appeal was filed on 12th May 2020 while the letter applying for copies of judgment, decree, proceedings and exhibits had been lodged on 8th May 2020. On 8th August, 2020 the appellant also lodged a reminder letter requesting for the documents which was followed by another letter of 18th December, 2020 written after the DR had on 17th December, 2020 written to the counsel for the appellant notifying him that the requested copies of judgment, proceedings, decree and exhibits were ready for collection. It is also on record, as can be gleaned from the certificate of delay, that on 22nd December, 2020 the DR issued a certificate of delay excluding the period from 8th May, 2020 when the appellant requested for the documents to 22nd December, 2020 when the appellant was purportedly notified that the documents were ready for collection being the time spent for preparation of the documents. However, the said notification letter dated 22nd December 2020 is not included in the record of appeal, and thus, as was righty argued by both counsel, it was not substantiated.

We are mindful that Mr. Rutabingwa and Mr. Nyika are in disagreement as to the last date to be reckoned. While Mr. Rutabingwa

maintains that it was on 17th December, 2020 when the DR notified the appellant of the readiness of documents for collection, Mr. Nyika is of the view that it was on 24th December, 2020, not even 22nd December, 2020, when the appellant got informed that the documents were ready and he collected them. Unfortunately, Mr. Nyika's contention regarding the letter of 24th December, 2020 came from the bar without any substantiation since the said letter is not included in the record of appeal.

All in all, the issue as to when exactly the time is to be reckoned has been canvassed by this Court in a number of cases. In the case of **True Colour Ltd** (supra) that was cited by Mr. Rutabingwa, the Court discussed the issue of invalid certificate of delay and found that the same was defective on among others, reckoning the last date of supply of the documents to the appellant as the last date in the computation of the period to be excluded, instead of the date when the appellant was notified that the documents were ready for collection. [See also **Hamisi Mdida and Another v. The Registered Trustees of Islamic Foundation,** Civil Appeal No. 59 of 2020 and **Puma Energy Tanzania Limited v. Diamond Trust Bank Tanzania Ltd,** Civil Appeal No. 54 of 2016 (both unreported).]

In the matter at hand, as alluded to earlier on, Mr. Rutabingwa has heavily relied on a letter by the DR to the appellant's advocate dated 17th December, 2020 notifying him on the readiness of documents for collection. He insisted that the DR's duty ended when he/she wrote the notification letter. According to him, it was immaterial as to when the appellant became aware of the same. And, we think, this is the right interpretation of Rule 90 (5) of the Rules which states as follows:

> *"Subject to the provisions of sub rule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such copy and the appellant shall take steps to collect copy upon being informed by the Registrar to do so, or within fourteen (14) days after the expiry the ninety (90) days."*

This connotes that the notion of remaining "home and dry" after requesting for the copy of proceeding no longer exists. The gist of the above cited provision is to make the intended appellant vigilant in following up the copy of proceedings for appeal purpose. Otherwise, remaining home and dry may cause uncertainties as to when the intended appellant might have been taken step towards instituting the appeal since he/she may continue waiting for months or years under

that pretext which ultimately may defeat the policy that litigation must come to an end. In this regard, we sustain the first point of PO.

As regards the objection relating to the certificate of delay, we agree with both counsel that the said certificate of delay is defective. Much as the appellant applied for the copies of proceedings, judgment and decree for appeal purpose on 8th May, 2020 and notified on the readiness of the said documents for collection on 17th December 2020, the certificate of delay under discussion as shown at page 192 of the record of appeal excludes the period for 8th May 2020 when the appellant applied for the documents up to 22nd December 2020 when the appellant was purportedly notified that the documents were ready for collection which made a total number of 229 days to be excluded. However, the date that is shown is neither here or there because it is not substantiated by any evidence, as was rightly submitted by both counsel. On top of that, even the 24th December 2020 that Mr. Nyika made concerted effort to convince the Court to be the correct last date to be reckoned is not supported by any evidence since there is no letter to that effect which is included in the record of appeal. We also note that the said certificate of delay seems to have been issued by the DR

on 22nd December 2020, which we think, might have been caused by a confusion on the part of the DR.

It is on this basis we find that the certificate of delay is defective since it does not reflect the true picture as to the last date in computation of the period to be excluded.

As to the way forward, we have considered whether the provisions of section 3A of the AJA could be invoked in order to salvage the appeal more so when taking into account that the DR might have contributed to the issuance of a defective certificate of delay. However, we are of the considered view that the overriding objective principle enunciated under that provision is inapplicable in the situation at hand on the basis of our determination on the first point of PO that the appeal is time barred. On this we are fortified by our decision in the case of **Judith Mbwile and Another** (supra) where the Court declined to allow the appellant to file a supplementary record of appeal containing the rectified certificate of delay since the appeal was lodged out of time and doing so would not have rescued the problem related to time bar. Thus, even in the matter at hand, on the basis of what has been alluded to earlier on, we find that, that option will not salvage the appeal.

In the event, we sustain the preliminary objection raised by the respondent and hold that the appeal is incompetent for being lodged out of time. Consequently, the incompetent appeal is hereby struck out with costs.

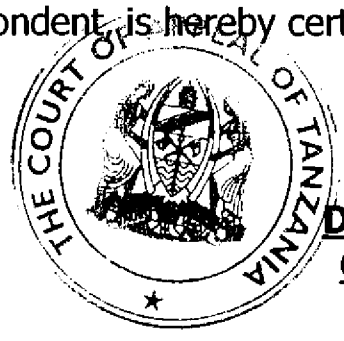
DATED at **DAR ES SALAAM** this 21st day of April, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. A. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of April, 2022 in the presence of Ms. Miriam Bachuba, learned counsel for the appellant and in absence of Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL