

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

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 114 OF 2019

**WHITE STAR INVESTMENT.....1ST APPELLANT
HALIFA MOHAMED.....2ND APPELLANT**

VERSUS

ZEIN ENTERPRISES COMPANY LTD.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Mkasimongwa, J.)

**dated the 29th day of December, 2017
in**

Civil Case No. 103 of 2012

RULING OF THE COURT

27th April & 13th May, 2022

KEREFU, J.A.:

Zein Enterprises Limited, the respondent herein, successfully sued the appellants, the White Star Investment and Halifa Mohamed (the first and second appellants, respectively) in the High Court of Tanzania at Dar es Salaam vide Civil Case No. 103 of 2012 claiming for payment of the sum of TZS 344,351,049.80 being special damages from the road accident that occurred on 3rd December, 2010 at Kibaha weighbridge involving the first appellant's motor vehicle make Scania truck with Registration No. T513 BKJ attached with Trailer Registration No. T294 BKJ and the respondent's

motor vehicles make Mercedes Benz Actros with Registration No. T453 ALP attached with the trailer Registration No. T376 ARL. The respondent also claimed for the payment of rental charges at the tune of TZS 400,000.00 per day for the Mercedes Benz Actros and TZS 240,000.00 per day for the trailer from the date of the suit to the date of full repair of the same. In addition, the respondent claimed for payment of general damages and costs of the suit.

It is on record that, upon being served with the plaint, the first appellant filed her written statement of defence where she admitted that the Scania truck with Registration No. T513 BKJ attached with Trailer Registration No. T294 BKJ which was involved in the said accident belonged to her and the second appellant was a driver in her company. She however disputed other respondent's claim for payment of special and general damages as she contended that the other motor vehicle which was involved in the said accident was Volvo with Registration No. T453 ALP and not the respondent's Mercedes Benz Actros with Registration No. T453 ACP. As such, the first appellant disputed that she was not vicariously liable and accountable for the alleged accident which damaged the respondent's motor vehicle. On that basis, the first appellant prayed for the dismissal of the respondent's suit in its entirety with costs.

On his part, the second respondent did not file any defence as he was not served because his whereabouts were unknown and the trial court had him served through substituted service but, again, without success. Therefore, the case proceeded *ex parte* against him.

The High Court (Mkasimongwa, J.) heard the evidence of the parties and at the end, the judgment was entered in favour of the respondent. The decision of the High Court prompted the first appellant to lodge the current appeal to express her dissatisfaction. The appeal comprises two grounds of appeal. However, for reasons which will be apparent shortly, we do not deem it appropriate, for the purpose of this ruling, to reproduce them herein.

At the hearing of the appeal before us, the first appellant was represented by Mr. Anney Semu, learned counsel whereas the respondent had the services of Mr. Yahaya Njama, also learned counsel.

Before we could embark on hearing of the appeal on merit, we wanted to satisfy ourselves on the propriety or otherwise of the appeal which is accompanied by two different certificates of delay issued by the Registrar of the High Court on 11th July, 2018 and 14th March, 2019 respectively. The said certificates of delay are referring to different dates of the first appellant's non-existent letters requesting for certified copies of

the High Court's proceedings in Civil Case No. 103 of 2012 dated 16th January, 2018 and 26th February, 2018. As such, we invited the counsel for the parties to address us on that issue.

In his response, apart from conceding that the appeal is accompanied by two different certificates of delay, Mr. Semu was quick to argue that the second certificate was issued following a request by the first appellant, vide her letter dated 30th November, 2018 addressed to the Registrar of the High Court, to be supplied with the second certificate of delay after she was allowed to omit exhibit P7 from the record of appeal as the same was omitted from the initial record of appeal supplied to her with the first certificate.

When prompted by the Court as to whether the first appellant upon being issued with the second certificate of delay on 14th March, 2019 had requested the Registrar of the High Court to withdraw the initial certificate issued on 11th July, 2018, Mr. Semu responded that the first appellant has not made such request and that the initial certificate was not withdrawn. On the validity of the second certificate of delay, Mr. Semu submitted that the same is invalid as the Registrar of the High Court erroneously referred to the first appellant's non-existent letter dated 26th February, 2018 instead of 8th January, 2018 when she requested to be supplied with the said High

Court's proceedings. He added that, it was a minor clerical error that the first appellant's letter found at page 221 of the record of appeal was dated 8th December, 2018 instead of 8th January, 2018. As such, Mr. Semu prayed to be afforded time to approach the Registrar of the High Court to correct the said error and to be granted leave to lodge a supplementary record of appeal to include a valid certificate of delay in the record of appeal.

On his part, Mr. Njama disputed the prayer made by his learned friend as he argued that the second certificate of delay is inconsequential and cannot be acted upon by the Court because the first certificate was not withdrawn by the Registrar of the High Court. He contended further that, on the basis of the second certificate of delay, the appeal is incompetent as it was lodged beyond the sixty (60) days from the date of the period excluded for preparation of the certified copy of the proceedings of the impugned decision. He thus urged the Court to strike out the incompetent appeal with costs for being time barred.

In a brief rejoinder and upon further reflection on the way forward, Mr. Semu submitted that the second certificate of delay issued on 14th March, 2019 is valid and can competently support the appeal. On that regard, Mr. Semu abandoned his first prayer and urged us to ignore the

initial certificate of delay and consider the appeal competent on the basis of the second certificate of delay and proceed to hear the appeal on merit.

Having examined the record of appeal and considered the submissions advanced by the learned counsel for the parties, the main issue for our consideration is the propriety or otherwise of the appeal before us. There is no doubt that the issue raised is regulated by Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) which categorically states 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 added].*

From the above cited provisions, it is clear that an appeal is mandatorily required to be instituted within sixty (60) days from the date when the notice of appeal was lodged and in order for the appellant to benefit from the exclusion of time spent in preparation and delivery of documents, he must apply for certified copy of the proceedings in the High Court within thirty (30) days of the date of the decision against which it is desired to appeal.

In the instant appeal, it is on record that the decision sought to be challenged was handed down on 29th December, 2017 and the notice of appeal was lodged on 16th January, 2018. It is also on record that the first appellant requested to be supplied with certified copy of the High Court's proceedings on 8th December, 2018 as evidenced by her letter found at page 221 of the record of appeal. We are however mindful of the fact that in his submission, Mr. Semu implored us to find that the date of 8th December, 2018 appearing on the said letter was erroneously indicated and that, the correct date is 8th January, 2018. The argument of Mr. Semu on this aspect may be attractive as it is evident that the said letter was served to the respondent on 22nd January, 2018.

Subsequently, on 11th July, 2018, the first appellant was notified by the Registrar of the High Court that the requested documents were ready

for collection and the same were availed to him together with the certificate of delay. The said initial certificate of delay excluded the period from 16th January, 2018 to 11th July, 2018.

However, and upon perusal of the trial court's record supplied to her, the first appellant, among other things, discovered that the Registrar of the High Court had omitted to include the duly endorsed exhibit P7 admitted during the trial. Thus, in her letter, dated 6th August, 2018, the first appellant notified the Registrar of the High Court on that omission and requested to be supplied with the said exhibit. Again, on 18th January, 2019, the first appellant sent another letter to the Registrar of the High Court suggesting that, if the said exhibit is not found, the Registrar may be pleased to invoke the provisions of Rule 96 (3) of the Rules by making directions on the way forward of the appeal excluding the missing exhibit in the record of appeal. Finally, on 28th February, 2019 the Registrar of the High Court accepted the first appellant's request and he allowed her to proceed with the record of appeal without exhibit P7. It is noted that earlier on, the first appellant, in her letter dated 30th November, 2018, requested the Registrar of the High Court to avail her with another certificate of delay. The request was accepted and on 14th July, 2019, the first appellant was issued with the second certificate of delay. The said

certificate excluded the period from 26th February, 2018 to 14th March, 2019.

Following the above narration on what transpired, we fully agree with the observations made by the counsel for the parties that indeed, the record of appeal is accompanied by two different certificates of delay referring to different dates of the first appellant's letter requesting for certified copy of the High Court's proceedings. The initial certificate of delay found at page 227 of the record of appeal is referring to the first appellant's letter dated 16th January, 2018 whereas the second certificate found at page 244 of the same record of appeal referred to the first appellant's letter dated 26th February, 2018. Now, the question which calls for our attention is what is the effect of an appeal that is being accompanied by two different certificates of delay.

We wish to note that, this is not the first time this Court is faced with an akin situation. In **Maneno Mengi Limited & Three Others v. Farida Said Nyamachumbe & Another** [2004] TLR 391, this Court discussed the fate of an appeal which was accompanied by two different certificates of delay. In that case, the appellants after being supplied with a copy of proceedings, were issued with a certificate of delay dated 8th June, 2003. Upon perusal of the said documents, the counsel for the appellants

discovered that the appellants were not supplied with the copy of the judgment and decree. He thus requested the Registrar of the High Court to avail the same. However, his request was sent after the expiration of the period for lodging the appeal counted from the date of issuance of the first certificate. The Registrar of the High Court supplied him with the copy of the judgment, decree and the second certificate of delay dated 8th July, 2003. Relying on the second certificate of delay, the appellants lodged the appeal to the Court. The said appeal was confronted with three points of objection. The first two points challenged the competence of the appeal that it was time barred as the second certificate of delay which purported to extend the time within which to institute the appeal was invalid. The Court sustained the two points of objection and held that: -

"There cannot be two certificates of delay concurrently applicable in respect of the same matter; in this case the certificate of 8th June, 2003 was the valid one and the second certificate of 8th July 2003 was of no legal consequence as it amounted to extending the time within which to file an appeal, something the Registrar had no power to do. It was also wrong for the Registrar to issue a second certificate while the first one had not been withdrawn, if the intention was to withdraw the first

certificate, then the Registrar should have indicated so when issuing the second certificate.”

The above stance was emphasized in the decisions of the Court in **Godfrey Nzowa v. Selemani Kova & Another**, Civil Appeal No. 3 of 2015, **Omary Shaban S. Nyambu (Administrator of the Estate of the late Iddi Moha) v. Capital Development Authority & Two Others**, Civil Appeal No. 256 of 2017 and **Vodacom Tanzania Public Limited Company v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 117 of 2019 (all unreported). Specifically, in **Vodacom Tanzania Public Limited Company** (supra), the appellant was issued with the certified copy of proceedings and a certificate of delay. However, after expiry of 55 days, the counsel for the appellant requested from the Registrar of the High Court to be supplied with another set of the certified copy of the said proceedings as the previous set was not signed by the Vice Chairperson and Members of the Board and he also requested to be supplied with another certificate of delay. Relying on the second certificate, the appellant lodged its appeal in this Court. During the hearing of the appeal, the Court invited parties to address it on the propriety of the appeal which was accompanied by two different certificates of delay. Relying on the above principle, the Court held that: -

"Since the first certificate was not withdrawn, and considering that the two certificates of delay cannot co-exist in one appeal, the appellant cannot rely on the second certificate which is, in our view, inconsequential. In this regard, the first certificate of delay which was a valid one and in terms of the proviso to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009, the appeal ought to have been filed not later than 27/1/2019. However, it was filed 162 days after the expiry of the excluded period and beyond the prescribed period. As earlier stated, the second certificate of delay was of no legal consequence as it constructively extended time within which to file an appeal which is not the mandate of the Registrar. Moreover, it was improper for the Registrar to issue a second certificate of delay without having withdrawn the first one. If the intention was to withdraw the first certificate of delay, then the Registrar should have indicated so when issuing the second certificate of delay."

There is no doubt that, the circumstances obtained in the above cited cases is similar to the matter under scrutiny. As intimated earlier, the appeal before us is accompanied by two different certificates of delay issued by the Registrar of the High Court on 11th July, 2018 and 14th

March, 2019 respectively. It is therefore our considered view that, since the first certificate issued on 11th July, 2018 was not withdrawn and considering that the two certificates of delay cannot co-exist in one appeal, with respect, we find the submission by Mr. Semu to be misconceived as the appellant cannot rely on the second certificate of delay which was improperly issued. The said certificate constructively extended time within which to lodge the appeal which was not within the mandate of the Registrar of the High Court, thus invalid.

We are mindful of the fact that, in his submission, Mr. Semu specifically relied on the said second certificate of delay issued on 14th March, 2019 excluding the period from 26th February, 2018 to 14th March, 2019 and argued that the same is valid and can competently support the appeal. With respect, we are unable to agree with him as in both, the original and the record of appeal, there is no first appellant's letter dated 26th February, 2018 requesting for copy of certified proceedings but only the letter dated 8th December, 2018.

In the same line, even the first certificate, for the sake of argument, could not be as well relied upon by the first appellant as the same excluded the period from 16th January, 2018 to 11th July, 2018 while there is again no letter in the original record and the record of appeal indicating that the

first appellant wrote a letter to the Registrar of the High Court on 16th January, 2018 requesting for the said proceedings but only the letter dated 8th December, 2018. It is our further view that, even if the date of 8th December, 2018 in the first appellant's letter is rectified to 8th January, 2018 or 10th January, 2018 as Mr. Semu would like us to so find, the appeal would still be out of time as it was lodged on 3rd May, 2019 which is after lapse of sixty (60) days prescribed by the law, counting from 11th July, 2018. It is also apparent on the record that, in his letter, dated 11th July, 2018, the Registrar of the High Court acknowledged the first appellant's letter dated 19th February, 2018, which is again, not in both, the original and the record of appeal. Though, the first appellant relied on the letter dated 6th August, 2018 on the issuance of the second certificate, that letter was not referred to by the Registrar of the High Court and the same was not copied to the respondent. It is evident that, even this letter could not have been relied upon as it was written long time after the first appellant had been issued with certificate of delay on 11th July, 2018. In all aspects, we find both certificates of delay found at pages 227 and 244 of the record of appeal invalid. In the circumstances, we refrain to grant leave to the first appellant to approach the Registrar of the High Court to rectify the certificate of delay and lodge supplementary record because

there is no material in the original record and record of appeal to support that move.

Eventually and for the foregoing reasons, the incompetent appeal is hereby struck out with costs for being time barred.

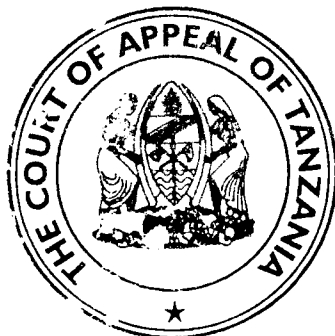
DATED at DAR ES SALAAM this 11th day of May, 2022.


F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The ruling delivered this 13th day of May, 2022 in the presence of Mr. Yahaya Njama, learned counsel for the Respondent and holding brief for Mr. Anindumi Semu, learned counsel for the Appellant, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL