

**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. 228 OF 2018**

**REIME (T) LIMITED..... APPELLANT**

**VERSUS**

**MASKI & SONS CONSTRUCTION CO. LIMITED.....RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania,**

**Commercial Division at Dar es Salaam)**

**(Mruma, J.)**

**dated the 2<sup>nd</sup> day of August, 2018**

**in**

**Commercial Case No. 101 of 2017.**

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**RULING OF THE COURT**

6<sup>th</sup> & 24<sup>th</sup> May, 2022

**MWAMPASHI, J.A.:**

This appeal arises from the judgment and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam, in Commercial Case No. 101 of 2017. In that case the respondent herein Maski & Sons Construction Co. Limited sued the appellant, Reime (T) Limited, for USD 120,064.03 and TZS. 3,599,000.00 being the outstanding payments for the transportation service of tower materials and generators she had rendered to the appellant. It was the respondent's case that sometimes in 2011 she had entered into an oral agreement with the appellant for transportation of appellant's tower materials and generators to various destinations within the country for which the appellant had failed to pay

in full. In addition, the respondent prayed for interest on the principal sum at the rate of 25% from the date of the breach of the agreement to the date of judgment as well as for interest at court rate of 12% from the date of judgment to the date of full payment. He also prayed for the costs of the suit.

In her written statement of defence, the appellant did not only deny the claims levelled against her but she also disputed the existence of the alleged oral agreement. After a full trial, the High Court handed down its judgment on 02.08.2018 in favour of the respondent.

Aggrieved and determined to appeal against the judgment and decree, the appellant duly lodged a notice of appeal on 16.08.2018. She also, on the same date, wrote a letter to the Deputy Registrar of the High Court (Deputy Registrar) requesting for a copy of proceedings for appeal purposes. About three weeks later, on 05. 09.2018, the Deputy Registrar wrote a letter to the appellant notifying her that the requested copy of proceedings was ready for collection. According to the record, after being so notified, the appellant took no action till 22.10.2018 when she wrote a letter to the Deputy Registrar firstly, to acknowledge that the letter dated 05.09.2018 had reached her and that the requested copy of proceedings was collected by her on the same date and, secondly, to register her complaint that copies of relevant exhibits and a

certificate of delay were missing from the copy of the proceedings she collected on 05.09.2018. In that letter, the appellant also informed the Deputy Registrar that, following her close follow – up of the missing documents, she managed to get only the certified copies of exhibits on 16.10. 2018. As a certificate of delay was allegedly still missing, she therefore, through that letter, requested to be availed with the same so that she can lodge her appeal to the Court. Acting on that letter, the Deputy Registrar issued the requested certificate of delay on 01.11.2018 which enabled the appellant to lodge the instant appeal on 30.11.2018 raising six grounds of appeal which we, however, for reasons to become apparent in due course, do not intend to reproduce herein.

It is also noteworthy that this is not the first time the appeal comes before this Court for hearing. The appeal came before the Court for the first time on 08.02.2022 but it could not proceed to hearing because the record of appeal was found to be incomplete. For that reason, the hearing of the appeal was adjourned and the appellant was granted leave in terms of rule 96 (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to lodge, within 30 days, a supplementary record of appeal containing complete documents namely; a notice of appeal and the appellant's letters to the Deputy Registrar dated 16.08.2018 and 22.10.2018 respectively.

When the hearing of the appeal resumed on 06.05.2022, the appellant was represented by Mr. Gerald Nangi, learned counsel whereas the respondent had the services of Mr. Castor Rweikiza, also learned counsel.

At the outset, before the hearing of the appeal on merit could be commenced, we invited the counsel for the parties to address us on whether the order of the Court dated 08.02.2022 had been complied with. We particularly requested them to direct their minds to the validity of the certificate of delay appearing at page 707 of the record of appeal and also to the appellant's two letters to the Deputy Registrar contained in the supplementary record of appeal dated 16.08.2018 and 22.10.2018 respectively.

Responding to the above posed question, Mr. Nangi was of the view that the certificate of delay is correct and valid. He explained that the date 16.10.2018 indicated in the certificate of delay refer to the date of the Deputy Registrar's letter which notified the appellant that the requested copy of the High Court proceedings was ready for collection.

On his part, Mr. Rweikiza, contended that the certificate of delay is fatally defective and invalid because the date of 16.10.2018 indicated therein as the date the appellant was notified on the readiness of the requested copy of proceedings, is not borne out of the record. He

therefore insisted that the appeal is time barred and prayed for the same to be struck out with costs.

In his brief rejoinder, Mr. Nangi, maintained that the certificate of delay is correct and valid and therefore that the appeal is not time barred. He however, prayed that in case the certificate of delay is found to be invalid, the Court should find that the defect is minor and does not impair the appeal. It was his argument that the hearing of the appeal on merit could proceed in terms of rule 4 (2) (a) and (b) of the Rules. In any case, he prayed that the appellant should be spared from costs.

From the above brief submissions by the counsel for the parties, the issue for our determination is whether the certificate of delay appearing at page 707 of the record of appeal is correct and valid or not, and if the answer is in the negative, then, what is the effect of an appeal accompanied by an invalid certificate of delay.

We should begin our determination of the above posed issue by restating that institution of appeal to this Court and issuance of certificate of delay is governed by rule 90(1) of the Rules. According to that provision, the appellant is required to lodge his appeal within 60 days from the date of the lodgement of a notice of appeal. However, if the applicant had applied for a copy of the proceedings for appeal purpose, within 30 days from the date of the impugned decision and

duly served the other party and if the requested copy of proceedings is not availed to him within time causing him not to be able to lodge his appeal in time, then in computation of time within which the appeal is to be lodged, the period of time spent for preparation of the requested copy of proceedings, is excluded by a certificate of delay issued by the Registrar of the High Court. It is under the above explained exceptional situation when the normal period of 60 days for lodging an appeal expires without an appeal being lodged when a certificate of delay comes into a play. Rule 90 (2) of the Rules read together with Form L of the 1<sup>st</sup> Schedule to the Rules, provides for the form and the particulars to be filled in a certificate of delay.

It should be insisted that for an appeal to this Court to be competent, the same should, among other things, be lodged strictly within 60 days from the date when the notice of appeal was lodged. However, as we have explained above, where the circumstances call for the period of time spent in preparation of the relevant copy of proceedings to be excluded in the computation of the period of 60 days within which the appeal should be instituted, the appellant desiring to benefit from the said exclusion, must be in possession of a correct and valid certificate of delay issued by the Registrar of the High Court in accordance with rule 90 (1) and (2) of the Rules.

As regard to how a correct and valid certificate of delay should be crafted, the Court in the decision of **Hamisi Mdeda and Saidi Mbogo v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 59 of 2020 (unreported) directed the Registrar of the High Court thus:

*"He must state in very clear terms that the days to be excluded in computing the period of limitation are those from the time when the appellant requested for the copies of proceedings to the date he notified him that the documents are ready for collection".*

The Court, in a number of its decisions has underscored that the mandatory requirements under rule 90(1) and (2) of the Rules should be strictly complied with. It is further insisted by the Court that a certificate of delay is a vital document which must be issued in strict compliance with the requirements of the relevant provision. It is also a settled position that non-compliance with the relevant provisions renders the certificate of delay defective and incapable of being relied upon, with the effect of striking out the appeal for being time barred. In the decision of **Kantibhai Patel v. Dahyabhai Mistry** [2005] T.L.R. 438, the Court stated that:

*"The very nature of anything termed 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 purpose because it is not better than a forged document”.*

The mandatory requirement for the certificate of delay to be free from any error and to be strictly in accordance with the law was also insisted by the Court in **Mwalimu Amina Hamis v. National Examination Council of Tanzania and Four Others** [2019] T.L.R. 552 and in **Livingstone Enock and Three Others v. Senge Smolonogov and Another**, Civil Appeal No. 33 of 2019 (unreported). In the former decision it was observed thus:

*“... an error in the certificate of delay being linked to time of limitation in lodging an appeal, is a mandatory requirement on the procedural law which goes to the very foundation of the appeal and it touches on the jurisdiction of this Court to entertain and determine the appeal. As such the same cannot be a technicality envisaged under article 107(A) (2)(e) of the Constitution”.*

In the instant appeal, as we have also alluded to earlier, the appellant duly requested for a copy of proceedings for appeal purposes on 16.08.2018. It is also undisputable that through a letter of the Deputy Registrar dated 05.09.2018 appearing at page 701 of the record of appeal, the appellant was notified that the requested copy of the High Court proceedings is ready for collection. It is also on record that,



by his letter to the Deputy Registrar dated 22.10.2018 appearing at page 13 of the supplementary record of appeal, the appellant also acknowledged the fact that the requested copy of proceedings was collected on the same date, that is, 05.09.2018. It is also clear that, the certificate of delay which was issued by the Deputy Registrar on 01.11.2018 appearing at page 707 of the record of appeal, excludes the period from 16.08 2018 when the copy of the proceedings for appeal purposes was requested by the appellant up to 16.10.2018 purportedly being the date when the requested copy of the proceedings was supplied to the appellant.

It therefore, goes without saying that, the certificate of delay appearing at page 707 of the record of appeal is invalid for three main reasons; **firstly**, the period of time which ought to have been excluded is that up to the date when the appellant was notified that the requested copy of the proceedings was ready for collection, which is 05.09.2018, and not up to the date the copy was allegedly supplied to the appellant. **Secondly**, the date referred to in the certificate of delay, that is, 16.10.2018, is not borne out of the record and **thirdly**, the certificate of delay is not telling the truth of the matter as there is no letter from the Deputy Registrar supporting the contention that the appellant was notified on 16.10.2018.

We are mindful of the fact that, in his submissions to support his stand that the certificate of delay is correct and valid, Mr. Nangi relied on the appellant's letter to the Deputy Registrar dated 22.10.2018 at page 13 of the supplementary record of appeal. In that letter, a copy of which was not even copied or saved to the respondent, the appellant claimed that the complete copy of the record she had requested was supplied to her on 16.10.2018. Basing on that claim, the appellant, through that letter, implored the Deputy Registrar to issue her a certificate of delay in consideration of the date he allegedly collected the complete copy of proceedings, that is, 16.10.2018. With due respect, we find the argument by Mr. Nangi and the said letter, pregnant of a lot to be desired. **Firstly**, the contention that there was any requested document which was missing from the copy supplied to the appellant on 05.09.2018 is not supported by any evidence. There is nothing in the record of appeal, neither a letter from the appellant to the Deputy Registrar nor from the Deputy Registrar to the appellant to that effect. **Secondly**, the appellant's claim that the said missing documents, were supplied to her on 16.10.2018, is also not supported by the record, as there is no letter from the Deputy Registrar to that effect. **Thirdly**, there is no plausible explanation as to why the appellant who was supplied with the requested copy of the proceedings

on 05.09.2018 and who according to her letter dated 22.10.2018 discovered on the same date that there were some requested documents missing from the copy of proceedings supplied to her, remained silent and inactive for about 47 days till on 22.10.2018 when she wrote the letter to the Deputy Registrar. Even the original record bear testimony that from 05.09.2018 to 22.10.2018 there was no correspondences between the appellant and the Deputy Registrar.

For the above reasons, we find that the Deputy Registrar erroneously issued the certificate of delay in question indicating that the appellant was notified and supplied with the copy of the requested proceedings on 16.10.2018 contrary to his letter appearing at page 701 of the record of appeal which is to the effect that the appellant was notified on 05.09.2018. The certificate of delay is thus erroneous and invalid and the appellant is not entitled to benefit from the exception under rule 90 (1) of the Rules.

Mr. Nangi did also pray and invite us to let the hearing of appeal proceed regardless of it being accompanied by an invalid certificate of delay. With due respect to Mr. Nangi, we are unable to accept the invitation simply because the error of having an invalid certificate of delay which cannot be rectified by the Deputy Registrar for lack of supporting documents as we have alluded to above, touches on the

timeliness of the appeal and the jurisdiction of the Court in entertaining it. The certificate of delay at hand can only be rectified by the Deputy Registrar to indicate that the applicant was notified that the requested copy of the proceedings is ready for collection on 05.09.2018 and not on 16.10.2018 as the applicant wishes. That being the case, even if the applicant had to be granted leave to approach the Deputy Registrar for the rectification of the certificate of delay it will serve no purpose because the period of 60 days will run from 05.09.2018 when she was notified that the requested copy of the proceedings was ready for collection up to the expiry of 60 days, that is, 06.11.2018, hence rendering the appeal which was filed on 30.11.2018, out of time for about 24 days.

The error of having an invalid certificate of delay is a kind of an error which cannot be cured by the principle of overriding objective for the salvation of the appeal. See – **District Executive Director Kilwa District Council v. Bogeta Engineering Limited** [2019] T.L.R. 271 and **Mwalimu Amina Hamis** (supra) whereby in the latter case the Court observed among other things that:

*"...we associate ourselves with what this Court had stated in **Mondorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others**, Civil Appeal No. 66 of 2017*

*and Njake Enterprises Limited v. Blue Rock Limited and Another, Civil Appeal No. 69 of 2017 (both unreported) that the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case”.*

In the result, and for the above reasons, we hold that the appeal is incompetent for being time barred and we hereby accordingly strike it out. Since it is the Court which raised the issue on the invalidity of the certificate of delay *suo motu*, we make no order as to costs.

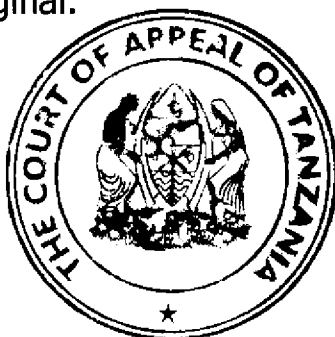
**DATED at DAR ES SALAAM this 19<sup>th</sup> day of May, 2022.**


F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Ruling delivered this 24<sup>th</sup> day of May, 2022 in the presence of Mr. Gerald Shita, counsel for the Appellant and Mr. Castor Rweikiza, counsel for the Respondent is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**