IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., GALEBA, J.A And MAIGE, J.A.)

CIVIL APPEAL NO. 111 OF 2019

LRM INVESTMENT COMPANY LTD.....1ST APPELLANT
CENTRAL PARIS COMPLEX COMPANY LTD.....2ND APPELLANT
DIDAS PATRICE MOSHI.....3RD APPELLANT
AZILA DIDAS MUSHI.....4TH APPELLANT
CAROLINA DIDAS MUSHI.....5TH APPELLANT
LILIAN DIDAS MUSHI.....6TH APPELLANT

VERSUS

DIAMOND TRUST BANK TANZANIA LIMITED ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania,
(Commercial Division) at Dar-es-Salaam)

(Sehel, J.)

dated the 14th day of November, 2018
in
Commercial Case No. 47 of 2017

RULING OF THE COURT

31st May & 2nd June, 2022

MUGASHA, J.A.:

The respondent instituted against the appellants Commercial Case No. 47 of 2017 before the High Court of Tanzania (Commercial Division) by way of 'summary suit' on a claim of TZS. 3,871,225,331.69/= plus interest and costs. A brief factual background underlying the present appeal is to the effect that: It was alleged that, on 8/4/2014, the respondent availed to

the 1st appellant a credit facility for an aggregate sum of TZS 1,280, 555,556/= in the following description; that is to say; **one,** the continuation of an overdraft facility of TZS. 600,000,000/=; and **two,** the continuation of the working long-term loan facility TZS. 700,000,000/= with an outstanding balance of TZS. 680,555,556/=. The aforesaid loan facility was guaranteed by the 2nd, 3rd, 4th, 5th and 6th appellants. The credit facility was secured by the mortgage of a number of immovable properties registered in the name of the 3rd and 4th appellants.

In addition, the credit facilities were secured by fixed and floating debentures over all the assets belonging to the 1st and 2nd appellants. On 11/12/2015, the aforesaid credit facilities were renewed upon the terms and subject to the conditions in the respondent's credit facilities letter dated 11/12/2015 with REF. DTB/CB/4670/2015. On 8/4/2015, the respondent availed to the second defendant a separate and distinct loan facility for the sum of TZS. 2,100,000,000/= on the terms subject to the conditions in the credit facility letter dated 8/4/2014 with reference DTB/CB/1566/2014. This loan was secured by the personal guarantees of the 3rd, 4th, 5th and 6th appellants plus the corporate guarantee of the 1st appellant and by fixed and floating debentures over all assets belonging to

the 1st and 2nd appellants. The aforesaid loan facility to the second appellant was renewed upon the terms and subject to the conditions of the respondent's credit facility letter dated 22/8/2016 with reference DTB/CB/2904/2016. These renewed loan facilities were secured by personal and corporate guarantees dated 26/8/2016 of the 1st, 3rd, 4th, 5th and 6th appellants.

Having defaulted payment obligations under their respective credit facilities and the entire outstanding balances as earlier stated, the respondent instituted a suit against the appellants under summary procedure predicated under Order XXXV of the Civil Procedure Code, [Cap 33 R.E 2019] (the CPC). The respondent claimed several reliefs namely: **one,** payment of the sum of TZS. 3,871,225,331.69/= being the total outstanding amount; **two,** interest of the aforesaid sum of TZS. 1,048,389, 796.64 due from the first appellant at the rate of 17.5% per annum from 4th March 2017 to the date of judgment; **three,** interest in the aforesaid sum of TZS. 2,822,835,535.05/= due to the second appellant at the rate of 19% per annum from 4th March 2017 up to the date of judgment or sooner payment; and **four**, cost of the suit.

As the suit was filed under the summary procedure, the appellants had no automatic right to appear and defend without being granted by the trial court, leave to appear and defend upon application under Order XXXV Rule 3 (1) of the CPC.

Having received court summons notifying them on the right to apply for leave to appear and defend the summary suit, the appellants filed the respective application vide Miscellaneous Commercial Cause No. 152 of 2017. The application was confronted by a preliminary objection raised by the respondent's counsel on ground of being predicated under wrong enabling provisions. As the preliminary objection was sustained, the application was struck out on ground that it was not properly before the court. Subsequently, the appellants unsuccessfully preferred another application vide Misc. Commercial Application No. 320 of 2017 for leave to defend which was dismissed on account of being time barred. Thus, the respondent's counsel prayed the trial court for a summary judgment on account of there being no application for leave to appear and defend from the appellants' side. The respective summary judgment was entered by the trial court on 14/11/2018. It is against the said backdrop; the appellants have preferred the present appeal.

On account of what will ensue in due course, we shall not reproduce the grounds of appeal. At the hearing, the appellant had the services of Mr. Anindum Semu, learned counsel whereas the respondent had the services of Dr. Frederick Ringo and Mr. Zacharia Daudi, learned counsel. Before the commencement of the hearing, we wanted to satisfy ourselves on the propriety or otherwise of the appeal in the wake of a missing letter of the Registrar of the High Court which notified the appellant on the readiness of the certified proceedings of the impugned decision for collection.

Upon being invited to take the floor, apart from conceding that the respective Registrar's letter is missing, Mr. Semu's belief was that the appeal is properly before the Court. On this, he advanced the following reasons: **One,** since the law does not specify the manner in which the Registrar shall communicate with the appellant on the collection of the certified proceedings, the certificate of delay suffices as it bears the date when the certified documents were supplied to the appellants' counsel. **Two,** as he had collected the certified proceedings following a phone call by one Mtei from the Registry of the High Court Commercial Division, that is in accordance with the envisaged mode of communication with the Registrar which is not specific. **Three,** the appellants are not bound by the

requirement stipulated under Rule 90 (5) of the Rules which became operational in 2017 prescribing the formal notification by the Registrar on the readiness of the certified documents for collection which was not the case under the old position of the law which is applicable in the present case. However, the appellants' counsel did not specify the alleged old position of the law and did not cite any decision of the Court in that regard. Upon being probed by the Court if he had paid fees for the respective certified document before collection, he claimed to have been supplied with the same free of charge pursuant to the direction of the Chief Justice vide Circular No. 1 of 2018.

On the other hand, Mr. Daudi for the respondent urged the Court to strike out the appeal for being not competent. On this, he argued that, in the absence of the Registrar's formal notification to the appellants on the readiness of the documents for collection, Rule 90 (5) of the Rules was contravened as it is not certain as to when the proceedings were supplied to the appellants' counsel. He added that, since it is the Registrar's letter which precedes the certificate of delay, the missing Registrar's letter to the appellants' counsel is an incurable omission which cannot be remedied by what purports to be the date of supply of the certified stated in the

certificate of delay. He further contended that, besides the uncertainty as to when the certified documents were supplied to the appellants' counsel, it is unknown if what is contained in the record of appeal was obtained through genuine means. He as well, urged the Court to ignore the appellants' counsel assertion that he was notified about the readiness of the documents by one Mtei for being a mere statement from the bar without valid proof. That apart, it was argued that Mr. Mtei not being a Registrar, is not mandated to execute the Registrar's exclusive mandate prescribed under Rule 90 (5) of the Rules. Finally, Mr. Daudi reiterated his earlier prayer that the appeal be struck out on account of being incompetent.

In rejoinder, Mr. Semu reiterated his earlier submission and urged the Court to find the appeal properly before the Court.

After a careful consideration of the submissions of learned counsel for either side and the record before us, the issue for our consideration is whether the appeal is properly before the Court. We shall preface our discussion commencing with the position of the law which regulates the

timelines of instituting an appeal before the Court which is governed by Rule 90 (1) of the Rules which stipulates:

> *"Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within 60 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 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 decisions 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 on that copy to the appellant."*

In light of the cited provisions, the appellant is required to file an appeal within sixty days from the date of filing notice of appeal. However,

where he has applied for copies of certified proceedings, judgment and decree from the Registrar within thirty days of the impugned decision in writing and served a copy thereof on the respondent, the Registrar may issue a certificate of delay excluding the period or number of days required for the preparation and delivery of the requisite documents. As to when and the mode of supplying certified proceedings, Rule 90 (5) of the Rules gives the following directions:

> *"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 expiry of the ninety (90) days."*

The said provision came into being in 2017 following the amendment of the Rule 90 of the Rules, vide Government Notice No. 362 which witnessed the introduction of sub-rule 5 of Rule 90. Our understanding of Rule 90 (5) is that, it imposes a twofold obligation on the Registrar that is, **one**, to ensure that the proceedings are ready for delivery within ninety

(90) days from the date the appellant applied to be supplied with the proceedings; and **two,** to inform the appellant on the readiness of the applied documents for collection. Apart from prescribing the limit within which the Registrar must prepare the certified documents, it cements the earlier settled position that, the documents for the purpose of an appeal should be secured after the appellant has obtained the Registrar's official communication that the requested documents are ready for collection. This was emphasized by the Court in the case of **THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND VS NEW KILIMANJARO BAZAAR LIMITED,** T.L.R [2005] 160. In the said case, the appellant's counsel had approached the High Court and took possession of a copy of the proceedings without being officially informed by the Registrar that the documents were ready for collection and without any proof of payment of requisite court fees for the received copy of the proceedings. Thus, the Court held as follows:

> *"(i) it is the duty of the High Court to supply documents applied for and supply them promptly and that the parties should exercise diligence in the conduct of their cases;*

(ii) *since there was no payment of court fees it means that there was no official delivery of the documents to the appellant on the 23rd May, 2003. There should have been, in our view, an official communication from the Registrar to the learned advocate for the appellant that the documents requested in their letter dated 10th February, 2003 were ready for collection and after that the Registrar would issue a certificate in terms of Rule 83 (1);*

(iii) *a certificate of delay issued by the Registrar was incorrect and misleading because by 23rd May 2003 there was no evidence that, the document the advocate of the appellant had applied from the Registrar had been supplied to him;*

(iv) *the fact that the Registrar had not supplied the appellant with the documents requested for rendered the certificate of delay incorrect."*

Although the said decision was made under Rule 83 of the old repealed 1979 Court Rules, it remains to be good law having been embraced by Rule 90 (5) of the current Rules as earlier intimated.

Therefore, in the case at hand, Rule 90 (5) of the Rules was already in force when the appellants' counsel lodged the notice of appeal on 19/11/2018 and wrote a letter dated 14/11/2018 to the Registrar seeking to be supplied with the certified proceedings. As such, with respect, Mr. Semu's assertion is untrue on the appeal processes being commenced before the promulgation of sub-rule 5 of rule 90 of the Rules. Besides, in any case, even if the sub-rule was not in existence, still, the law was already long settled in the case of **NSSF VS KILIMANJARO BAZAAR** (supra) having emphasized that the Registrar's official communication to the appellant on readiness of the certified proceedings. For the purpose of clarity, we emphasise that, official communication is that which is formal and it must be documented and not otherwise.

In the case at hand, as conceded by the appellant's counsel, it is glaring that the record of appeal does not contain the Registrar's formal communication notifying the appellants or their advocate that the certified proceedings were ready for collection. In this regard, we find wanting Mr. Semu's assertion that he was, vide a phone call, informed by one Mtei to collect the certified proceedings. As correctly argued by Mr. Daudi, the assertion is a mere statement from the bar which is not supported by any

proof and besides, it does not in any way constitute a formal documented official Registrar's communication to the appellants' counsel. Similarly, we decline Mr. Semu's invitation to discern the Registrar's date of official communication with the appellant from what appears in the certificate of delay to be the date when the appellants' counsel was supplied with the certified proceedings. We are fortified in that regard, in the absence of the documented Registrar's official communication to the appellant, there is entirely no evidence that the certified documents the appellants' advocate had applied, were supplied to him. This cannot be remedied with what is purported in the certificate of delay and the omission stands out to be incurable.

Furthermore, although we have no qualms that pursuant to the Chief Justice's direction No. 1 dated 6/3/2018, no fees were to be paid by parties in respect of any judgment, Ruling, Decree, Orders, or Drawn Orders in the High Court among others, the cited direction does not waive the requirement of official Registrar's communication with the appellant to obtain the certified proceedings. Therefore, as earlier alluded to, in the absence of the documented Registrar's official communication to the appellant's counsel that the certified proceedings were supplied to the

appellants, the certificate of delay is misleading. Besides, it cannot be ascertained if the purported copy of proceedings constituting the record of appeal was lawfully obtained. We say so because the Court cannot condone clandestine obtaining of documents which must be discouraged as we said in the case of **HENRY ZEPHYRINE KITAMBWA VS THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA AND TWO OTHERS,** Civil Appeal No. 114 of 2020 (unreported). In the premises, the certificate of delay is invalid and it cannot be acted upon to salvage the plight of the appellants. On account of what transpired, we urge the advocates to exercise due diligence in the conduct of cases to relieve their clients of unnecessary embarrassment.

In view of what we have endeavoured to discuss, the said omission adversely impacts on the present appeal which is rendered incompetent considering that, since the notice of appeal was filed on 23/11/2018, the appeal ought to have been filed within sixty (60) days thereof which was not the case. Therefore, as the appeal was filed almost six months thereafter that is, on 29/4/2019, it is hopelessly time barred and we are constrained to strike it out. Since the matter was raised *suo motu* by the Court, we make no order as to costs.

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

S. E. MUGASHA

JUSTICE OF APPEAL

Z. N. GALEBA

JUSTICE OF APPEAL

I. J. MAIGE

JUSTICE OF APPEAL

This Ruling delivered on 2nd day of June, 2022 in the presence of Mr. Zacharia Daudi, counsel for the Respondent also holding brief of Mr. Anindumi Semu, Counsel for the Appellants, is hereby certified as a true copy of original.

A. L. KALEGEYA

DEPUTY REGISTRAR

COURT OF APPEAL