

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 121 OF 2017

MOHAMED IQBAL APPELLANT

VERSUS

**WAHIDI FAUZI SEFU (Administrator of the
estate of the late ADBULHAMID MUSTAFA SHEIKH) 1st RESPONDENT**

**KONDO BAKARI SAID MPOGORO (Administrator
of the estate of the late BAKARI SAID MPOGORO.....2nd RESPONDENT**

**JUMANNE MOHAMED SALUM GANGAMALA
(Administrator of the estate of the late
MOHAMED SALUM GANGAMALA.....3rd RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Mgetta, J.)

dated the 3rd day of February, 2016

in

Land Case No. 126 of 2007

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RULING OF THE COURT

1st & 16th June, 2022

SEHEL, J.A.:

This ruling is in respect of a narrow issue as to whether the Court can exercise its revisional power to a time barred appeal. The facts giving rise to the issue before us are such that; the High Court of Tanzania, Land Division (the High Court) dismissed the appellant's suit

filed against the late Abdulhamid Mustafa Sheikh (the then defendant). In that suit, the appellant claimed that he was the lawful owner of a piece of land situated at Mwera Village in Temeke District, Dar es Salaam (the disputed area) on account that he acquired it in the year 2006, through purchase from the residents of Mwera Village. That, after the purchase, he started to clear the disputed area but without any colour of right the defendant trespassed into it, forced the appellant's workmen to stop working and chased them away. He thus sought the following reliefs; a declaratory order that he was the lawful owner of the disputed area, a perpetual injunctive order restraining the defendant from entering into it, payment of general damages, interests and costs of the suit.

On the other hand, the defendant disputed the appellant's claim and counterclaimed against the appellant and the 2nd and 3rd respondents. He denied to have trespassed into the disputed area as he claimed that the disputed area is part of Kibugumo Dairy Farm situated at Mboamaji, Kigamboni area which has over 2,500 acres and it was granted to his late father, Sheikh Mustafa in 1969 through a Letter of

Offer number 25365. That, he had been residing with his family and conducting farming activities in it since 1969. He further averred that the 2nd and 3rd respondents were trespassers and had no legal right to sell the disputed area. He therefore sought the following orders; a dismissal of the appellant's suit, a perpetual injunctive order restraining the appellant and the 2nd and 3rd respondents from entering into the disputed area, payment of general damages at the tune of TZS. 50,000,000.00, interests and costs of the suit.

In their joint written statement of defence, apart from raising preliminary objections, the 2nd and 3rd respondents admitted to have sold the disputed area to the appellant but denied to have trespassed into it.

In answering the counter claim, the appellant also raised a preliminary objection and claimed that the disputed area was not part of Kibugumo Dairy Farm. He further maintained that it was legally sold to him by the 2nd and 3rd respondents.

Upon dismissing the preliminary objections and after a full trial, the High Court dismissed the appellant's suit and allowed the counter claim with costs. Aggrieved with that decision of the High Court, the appellant

filed the present appeal advancing eleven grounds of appeal which for a reason to be apparent shortly we do not intend to reproduce them.

Upon being served with the record of appeal and pursuant to Rule 107 of the Court of Appeal Rules of 2009 as amended ("the Rules"), the respondent filed two notices of the preliminary objections. The initial notice filed on 12th day of June, 2017 comprised of the following six points of law;

- 1. The appeal is incompetent for failure to include in the record of appeal certified translation of exhibit P1 (appearing on pages 358 to 367 of the record of appeal) contrary to the mandatory requirements of Rule 96 (1) (f) of the Rules.*
- 2. The appeal is incompetent for failure to include in the record of appeal documents which were tendered and endorsed ID-1 and ID-2 by the trial court which are reflected on pages 108 and 109 of the record of appeal contrary to mandatory requirements of Rule 96 (1) (k) of the Rules.*
- 3. The appeal is incompetent for failure to include in the record of appeal the letters of administration granted to Kondo Bakari Saidi Mpogoro (the 2nd respondent) and*

Jumanne Mohamed Salum Gangamala (the 3rd respondent) tendered in court and reflected at page 104 of the record of appeal contrary to mandatory requirements of Rule 96 (1) (k) of the Rules.

- 4. The appeal is incompetent for being lodged outside the sixty (60) days prescribed under Rule 90 (1) of the Rules.*
- 5. The appeal is incompetent for failure to include a certificate of delay issued pursuant to the letter of a Deputy Registrar of the High Court Land Division included at page 504 of the record of appeal contrary to mandatory requirements of Rule 96 (1) (k) of the Rules.*
- 6. The appeal is incompetent for failure to include in the record of appeal proceedings of the application for leave to appeal contrary to mandatory requirements of Rule 96 (1) (k) of the Rules.*

The second notice of the preliminary objection filed on 12th day February, 2019 has the following three points of law, that;

"1. The appeal is incompetent for failure to include in the record of appeal the power of attorney (referred to at page 121 of the record of appeal) contrary to mandatory requirements of Rule 96 (1) (k) of the Rules.

2. The appeal is incompetent for failure to endorse on the notice of appeal (appearing at pages 453-455 of the record of appeal) the time it was lodged contrary to mandatory requirements of Rule 18 of the Rules.

3. The appeal is incompetent for failure to disclose on the Certificate of Delay (appearing at page 545 of the record of appeal) the number of days excluded for preparation of the proceedings contrary to mandatory requirements of Rule 90 (1) of the Rules.

At the hearing of the appeal, Messrs. Deogratias Lyimo Kiritta, John Laswai and Denis Maringo, learned advocates, appeared to represent the appellant. The 1st respondent had the legal services of Messrs. Daimu Halfani and Frank Mwalongo, both learned advocates. The 2nd and 3rd respondents did not enter appearance. It suffices to point out here that following an order of this Court made on 14th July, 2021 that, in terms of Rule 11 (2) of the Rules, the hearing of the appeal shall proceed in absence of the 2nd and 3rd respondents, the hearing proceeded in their absence.

Given the common practice of the Court that the preliminary point of objections should be disposed first before going into determination of

the merit of the appeal, we invited Mr. Daimu to address us on the preliminary objections, which he raised.

Before submitting on the points of law and pursuant to Rule 105 (1) of the Rules, Mr. Daimu sought leave of the Court and it was granted to replace the name of the 1st respondent, the late Abdulhamid Mustafa Sheikh who passed away on 25th February, 2015 with that of the appointed administrator of his estate, one Wahidi Fauzi Sefu.

Mr. Daimu prefaced his submission by informing the Court that he will submit on the fourth point of law concerning a time barred appeal appearing on the first set of the notice of the preliminary objection and abandoned all other points of objection.

Briefly, the submission of Mr. Daimu was on two fronts. First, he submitted that the letter requesting to be supplied with the copies of a judgment, decree and proceedings was not served to the 2nd and 3rd respondents thus in terms of Rule 90 (3) of the Rules, the appellant is disentitled to benefit from the exception provided under Rule 90 (1) of the Rules. He added that the appellant cannot benefit from the exception and therefore, ought to have filed the appeal within sixty (60) days from

the date the notice of appeal was instituted as provided under Rule 90 (1) of the Rules.

Mr. Daimu pointed out that the notice of appeal was lodged on 16th February, 2016 while the appeal was lodged on 30th May, 2017 which is more than a year. It was his submission that since the appeal was lodged beyond the period of 60 days, the appeal is time barred. He therefore prayed for the appeal to be struck out with costs. To cement his argument Mr. Daimu relied on this Court's decision in the case of **Mohamed Issa Mtalamile & 3 Others v. Tanga City Council & Another**, Civil Appeal No. 200 of 2019 (unreported).

On the second limb, Mr. Daimu contended that the date which the appellant was supplied with the requested documents for appeal purposes was not 20th April, 2017 as certified by the Registrar of the High Court in the Certificate of Delay appearing at page 545 of the record of appeal. He contended that, according to the letter appearing at page 540 of the record of appeal, the appellant was notified that the requested documents were ready for collection on 21st November, 2016. In that regard, he submitted that the period for lodging an appeal

started to run from 22nd November, 2016 and ended on 20th January, 2017 and not on 20th April, 2017. He added that, even the appellant acknowledged receipt of the said copies together with a Certificate of Delay vide his letter dated 24th January, 2017 which is appearing at page 541-542 of the record of appeal. For that reason, he urged the Court to strike out the appeal with costs for being filed out of time.

On his part, Mr. Kiritta readily conceded to the first limb of the preliminary objection that the appeal is time barred. He admitted that the letter was not served upon the 2nd and 3rd respondents thus, pursuant to Rule 90 (3) of the Rules, the appellant cannot rely on the exception provided under the proviso of Rule 90 (1) of the Rules.

On the second limb, Mr. Kiritta strongly opposed it. He submitted that the letter dated 21st November, 2016 was not served in time to the appellant and further upon being served and having collected the documents, the appellant noticed that the exhibits tendered during the trial were not supplied to the appellant. He therefore wrote a letter on 24th January, 2017 to request to be supplied with the same. He added that after being served with the exhibits, the new issued Certificate of

Delay had typo error. Therefore, by a letter dated 18th April, 2017 appearing at page 543, the appellant requested for a correct Certificate of Delay which was subsequently issued on 20th April, 2017 and used it to file the present appeal.

At the end, Mr. Kiritta urged the Court not to strike out the appeal and instead, proceed to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (the AJA) and revise the proceedings of the High Court which, he submitted, were a nullity as they were affected by an appearance of an unqualified person who acted as an advocate. He argued that in the record of appeal, specifically from page 105, a person in the name of Mussa Rashid acted and appeared as an advocate for the 2nd and 3rd respondents (the then 1st and 2nd defendants) while he was not an advocate, and if he was, had no valid practicing certificate by then. He supported his submission by citing the decision of this Court in the case of **Edson Osward Mbogoro v. Dr. Emmanuel John Nchimbi & Another**, Civil Appeal No. 140 of 2006 (unreported) where the Court was persuaded by the majority opinion of the Ugandan Supreme Court in the case of **Prof. Syed Huq v. Islamic University**

in Uganda [1997] IV KARL 26 where it held that an advocate who practiced without a valid practicing certificate after a grace period, practiced illegally and that all proceedings taken by such advocate and documents signed by him were invalid "*because to say otherwise would amount to a perpetuation of an illegality.*"

Relying on the case of **Chama Cha Walimu Tanzania v. The Attorney General**, Civil Application No. 151 of 2008 (unreported), Mr. Kiritta further submitted that where the proceedings are tainted with irregularity, the Court cannot leave them to stand as to do otherwise would be tantamount to perpetuating illegality.

Ultimately, Mr. Kiritta urged the Court not to dismiss the appeal but set aside the proceedings, quash the judgment and decree of the High Court.

In rejoinder, Mr. Daimu objected to the prayer for the Court to invoke the power of revision. He argued that the issue of limitation of time goes to the root of the jurisdiction of the Court and that once an appeal is found to be time barred the remedy and the practice of the Court is to strike it out. It cannot be subject for revision. He added that

the argument that Mussa Rashid is not an advocate comes from the bar since in the record of appeal there is no such evidence for the Court to act upon it. While accepting the principle stated in the case of **Chama Cha Walimu Tanzania v. The Attorney General** (supra), he distinguished the case of **Edson Oswald Mbogoro v. Dr. Emmanuel John Nchimbi** (supra) that it did not deal with a time barred appeal and in any event, in that case, there were enough material borne out from the record for the Court to act upon it. Ultimately, he reiterated his earlier prayer that the appeal be struck out with costs.

We have duly considered the parties' submission and noted that it is not disputed that the letter requesting for copies of proceedings, judgment and decree was not served upon the 2nd and 3rd respondents. It is the position of the law, in terms of Rule 90 (3) of the Rules that for the appellant to benefit from the exception provided under Rule 90 (1) of the Rules regarding computation of time to lodge an appeal to the Court, he is mandatorily required to make his application to the Registrar of the High Court in writing and serve it on the respondent. For ease of reference, we reproduce hereunder Rule 90 (1) and (3) of the Rules:

"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.

(2) Not relevant

(3) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the respondent."

It follows that an appeal has to be instituted in the appropriate registry within sixty (60) days from the date of lodging a notice of appeal but where an intended appellant has applied in writing for a copy of the

proceedings within thirty (30) days, and served a copy of that letter on the respondent, the time spent for the preparation and delivery of the requested copy of proceedings, judgment and decree would be excluded by the Registrar of the High Court in the Certificate of Delay. Failure to serve the respondent with a copy of the said letter, the appellant cannot benefit from the exclusion period in computing time to lodge an appeal.

In the case of **Mohamed Issa Mtalamile & 3 Others v. Tanga City Council & Another** (supra), the Court was faced with akin situation whereby the 2nd respondent was served with a copy of the letter requesting to be supplied with the relevant documents for appeal purposes but the 1st respondent was not served with the same. The Court said:

"...failure to serve the 1st respondent offended the provisions of Rule 90 (3) of the Rules and as such, the appellants cannot rely on the exclusion period stated under the proviso to Rule 90 (1) of the Rules. In that regard, since the notice of appeal was filed on 11/1/2018 and this appeal filed on 8/8/2018, the appeal was more than eight (8) months from the date of lodging the

notice of appeal which is beyond the prescribed sixty days. This renders the appeal not competent on account of time barred.”

See: **Uledi Hassani Abdallah v. Murji Hasnein Mohamed & 2 Others**, Civil Appeal No. 2 of 2012, **Martin D. Kumaliya & 117 Others v. Iron and Steel Ltd**, Civil Appeal No. 70/18 of 2018 and **Elly Mwambungu & Another v. Tanzania Building Agency & 2 Others**, Civil Appeal No. 214 of 2020 (all unreported).

Since in the present appeal it is not disputed that the letter was only served to the 1st respondent and not upon the 2nd and 3rd respondents, the appellant cannot benefit from the exclusion period under the proviso of Rule 90 (1) of the Rules. Therefore, the 60 days period for filing an appeal is to be counted from the date when the notice of appeal was lodged. According to the record of appeal, the notice of appeal was filed on 16th February, 2016 and the appeal was lodged on 30th May, 2017. Counting from 16th February, 2016 to 30th May, 2017 there is a period of one (1) year that has elapsed. That period is far beyond the 60 days provided under Rule 90 (1) of the Rules. We,

therefore, entirely agree with the counsel for the parties that the appeal was filed out of time.

Having found that the appeal is time barred, we now have to address the invitation made to us by Mr. Kiritta that we should exercise the powers of revision provided under section 4 (2) of AJA to revise the proceedings of the High Court on account that Mr. Mussa Rashid who appeared as an advocate for the then 1st and 2nd defendants was not an enrolled advocate.

Admittedly, under the provisions of section 4 (2) of the AJA, the revisional power of the Court may be exercised either in the course of hearing an appeal or incidental to an appeal. Nonetheless, there is a plethora of authorities to the effect that, powers of revisions can only be invoked in exceptional circumstance where there is no right of appeal. For instance, in the case of **Transport Equipment LTD v. Devram P. Valambhia** [1995] T.L.R. 161, the Court held:

"(i) The Appellate jurisdiction and the revisional jurisdiction of the Court of the Appeal of Tanzania are, in most cases, mutually exclusive; if there is a right of appeal then that right has to be pursued

*and, **except for sufficient reason amounting to exceptional circumstances**, there cannot be resort to the revisional jurisdiction of the Court of Appeal.”* (Emphasis added)

That position of the law was followed in the case of **Halais Pro-Chemie v. Wella A.G** [1996] T.L.R. 269 when the Court held:

"(ii) Except under exceptional circumstances, a party to proceedings in the High Court could not invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court"

See also: **Moses J. Mwakibete v. The Editor-Uhuru, Shirika la Magazeti ya Chama & Another** [1995] T.L.R. 134, and the unreported cases of **Kezia Violet Mato v. National Bank of Commerce & 3 Others**, Civil Application No. 127 of 2005, **Mansoor Daya Chemicals Limited v. National Bank of Commerce Ltd**, Civil Application No. 464/16 of 2014 and **Felix Lendita v. Michael Longi'du**, Civil Application No. 312/17 of 2017.

In the present appeal, we failed to find any exceptional circumstance in the proceedings of the High Court for the Court to invoke the powers of revision. We find the submission made by Mr. Kiritta that Mr. Mussa Rashid was not a practicing advocate is a ground of appeal and does not amount to exceptional circumstance. As rightly submitted by Mr. Daimu, the issue of limitation of time goes to the root of the jurisdiction of the Court. The case cited to us by Mr. Kiritta of **Edson Osward Mbogoro v. Dr. Emmanuel John Nchimbi** (supra) is distinguishable in facts with the present appeal. In that appeal, the Court was faced with a point of preliminary objection that Dr. Wambali, advocate, who by then acted as advocate for the appellant at the time he drew, signed, certified and lodged in Court the Notice of Appeal, the Memorandum of Appeal and the Record of Appeal, did not have a valid practicing certificate as an advocate because he had defaulted to pay the annual subscription fees. In that respect, the Court did not deal with a time barred appeal. Given that we have failed to find any exceptional circumstance, we decline the prayer made by Mr. Kiritta.

In view of what we have endeavoured to discuss, we uphold the preliminary objection that the appeal is time barred and proceed to strike it out with costs.

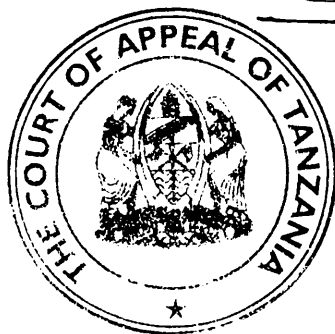
DATED at DAR ES SALAAM this 16th day of June, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 16th day of June, 2022 in the presence of Mr. Levis Lyimo who holding brief of Mr. Deogratias Lyimo Kiritta for the appellant and Mr. Frank Mwalongo assisted by Mr. Daimu Halfan and Ms. Lovenes Denis for the 1st respondent and in absence of the 2nd and 3rd respondents, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL