

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CIVIL APPEAL NO. 239 OF 2019

JUMA SITTA BUNDARA 1st APPELLANT
IVULI W. JEREMIA 2nd APPELLANT
MARWA W. IKWARE..... 3rd APPELLANT
HAMISI MSANGI..... 4th APPELLANT

VERSUS

KIDEE MINING (T) LIMITED RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Arusha)**

(Mwaimu, J.)

dated the 24th day of February, 2015

in

Civil Case No. 14 of 2011

RULING OF THE COURT

15th & 22nd February, 2022

SEHEL, J.A.:

The respondent, Kidee Mining (T) Limited, successfully sued the appellants and Magambazi Mines Company Limited (not a party to the appeal) before the High Court for breach of a mining co-operation agreement entered between the respondent and the second and third appellants. In its decision delivered on the 24th February, 2015, the High Court held that there was a valid and enforceable agreement between the

parties and that, the appellants breached the agreement. It thus ordered the appellants to jointly pay the respondent TZS. 360,000,000.00 as specific damages, TZS. 800,000,000.00 as general damages, interest at 12% per annum on the decretal sum and costs of the suit. Aggrieved, the appellants filed the present appeal advancing seven grounds which for a reason to be apparent shortly we do not intend to reproduce.

The respondent after being served with the record of appeal and pursuant to Rule 107 (1) of the Court of Appeal Rules, (henceforth "*the Rules*") filed a notice of preliminary objection comprised of two points of law; namely:

- 1. That, the appeal is incompetent for incorporating two Certificates of delay.*
- 2. That, the appeal is incompetent and time barred for incorporating defective Certificates (s) of Delay.*

At the hearing of the appeal, Mr. Moses Mahuna, learned advocate, appeared to represent the appellants whereas Mr. Mpaya Kamara assisted by Ms. Neema Mutayangulwa, both learned advocates appeared for the respondent.

As is the practice of the Court, the preliminary objections have to be disposed first before going into determination of the merit of the appeal, we, thus, allowed Mr. Kamara to address the Court, first.

Mr. Kamara in his submission consolidated the two points of law. He referred us to pages 481 and 483 of the record of appeal, and pointed out that there are two certificates of delay issued by the Deputy Registrar High Court purporting to exclude time within which the appellants could have lodged the appeal to the Court. He argued that the second certificate was issued following a request by Mr. Moses Mahuna that the earlier certificate had a typo error, that is, it referred to a letter dated 9.3.2018 instead of 9.3.2015. However, he argued, the second certificate of delay did not withdraw the first certificate thus creating a confusion, and in any event, the appellants cannot rely on the subsequent certificate because there is still in place the first certificate. He argued, the consequences of such an error render the two certificates of delay invalid. To cement his argument Mr. Kamara relied on the cases of **Omary Shaban S. Nyambu (as Administrator of the late Iddi Moha, deceased) v. Capital Development Authority and Others**, Civil Appeal No. 256 of 2017 and **Godfrey Nzowa v. Selemani Kova & Another**, Civil Appeal No. 3 of

2015 (both unreported). He added that since the two certificates of delay are invalid, the appellants cannot rely upon them in computing time to lodge an appeal, thus, the appeal is time barred. He therefore prayed for the preliminary objection to be sustained and the appeal be struck out with costs.

On his part, Mr. Mahuna readily conceded to the preliminary objections that the record of appeal has two different certificates of delay but he was quick to argue that in the wake of overriding objective principle, the Court has been permitting appellants to file a supplementary record of appeal to include a valid certificate of delay. He therefore prayed under Rule 96 (7) of the Rules to file a supplementary record of appeal to include a valid certificate of delay. He supported his submission with the decisions of this Court in the cases of **Geita Gold Mining Ltd v. Jumanne Mtafuni**, Civil Appeal No. 30 of 2019 and **Ardhi University v. Kiundo Enterprises Tanzania Limited**, Civil Appeal No. 58 of 2018 (both unreported).

Mr. Mahuna added that, in terms of Rule 99 (1) of the Rules, the respondent also had obligation to lodge a supplementary record of appeal to remedy the error.

In re-joinder, Mr. Kamara forcefully objected to the prayer of filing supplementary record of appeal arguing that, Rule 96 (7) of the Rules is not applicable to the appellants' situation because it specifically referred to omitted documents whereas in the appeal before us the certificate of delay was not omitted. He, therefore, reiterated that the record of appeal has two invalid certificates of delay, thus, it cannot be said that the certificate of delay was omitted. He further distinguished the cases cited by Mr. Mahuna that in both cases the issue before the Court was not about two certificates of delay.

Concerning Rule 99 (1) of the Rules, Mr. Kamara argued that it was not the responsibility of the respondent to remedy the defect where there are two certificates of delay which created confusion in the record.

We, on our part, fully agree with both parties' observation that, indeed, the record of appeal has two different certificates of delay referring to different dates of the letter written by the appellants requesting for

certified copies of proceedings, judgment and decree. At page 481 of the record of appeal, there is a certificate of delay referring to a letter dated 9th March, 2018 whereas at page 481 of the same record, there is another certificate referring to a letter dated 9th March, 2015. Both certificates are in respect of this appeal and were issued by the Deputy Registrar of the High Court.

The question that follows is, what is the resultant effect of having more than one certificates of delay in the appeal. Mr. Kamara impressed upon us to find that the appeal is time barred and we should strike it out on account that the appellants cannot rely on the invalid certificates whereas Mr. Mahuna urged us to invoke overriding objective particularly to invoke section 3A (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (henceforth "the AJA") and Rule 2 of the Rules which enjoins the Court to have regard to the need of achieving substantive justice to the parties and timely disposal of all matters at affordable cost. The submission of Mr. Kamara prompted us to look closely at the decisions of this Court that dealt with the issue.

In the case of **Maneno Mengi Limited & Three Others v. Farida Said Nyamachumbe and Another** [2004] T.L.R. 391, after being supplied with a copy of proceedings, the appellants were issued with a certificate of delay. Upon receipt of such documents, the counsel for the appellants noted that he was not supplied with the copy of a decree and judgment. He, thus, reminded the Registrar of the High Court to supply the same. However, his reminder was sent after the expiration of the period for lodging the appeal counted from the issuance of the first certificate. The Registrar supplied him with the copy of a judgment and decree and also issued him a second certificate of delay. Acting on the second certificate of delay, the appellant lodged the appeal to the Court. That appeal encountered three preliminary points of objections. Two of the points of objection boiled down to the argument that appeal was time barred as the second certificate of delay which purported to extend the time within which to institute the appeal is of no legal consequence to the appellants because the Registrar did not have the power to do so. The Court in agreeing with the respondent's objection held:

"There cannot be two certificates of delay concurrently applicable in respect of the same

matter; in this appeal 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 appeal, something the Registrar had no power to do ... It was 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."

In the case of **Omary Shaban S. Nyambu (as Administrator of the late Iddi Moha, deceased) v. Capital Development Authority and Others** (supra), the appellant was supplied with the certified copies of proceedings and judgment and a certificate of delay was also issued to him. Instead of filing the appeal, he requested to be supplied with some missing documents. He made that request twice, as such, two subsequent certificates of delay were issued. Acting on the third certificate of delay, the appellant lodged his appeal to the Court. A preliminary objection was raised on the competence of appeal on account that the record of appeal had more than one certificates of delay. Relying on the principle we stated

in the case of **Maneno Mengi Limited & Three Others v. Farida Said Nyamachumbe and Another** (supra) the Court held that the appellant was not entitled to rely on the subsequent certificate of delay as the three certificates cannot co-exist in one appeal. It thus, struck out the appeal for being time barred.

In the case of **Vodacom Tanzania Public Limited Company (Formerly Vodacom Tanzania Limited) v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 117 of 2019 (unreported), the appellant was issued with the certified copies of proceedings, judgment and decree and a certificate of delay. However, after the expiry of 55 days, the counsel for the appellant requested from the Registrar to be supplied with another set of the certified copies of judgment, decree and proceedings as the previous set was not signed by the Vice Chairman and Members of the Board and he also requested to be supplied with another certificate of delay. It was from that second certificate of delay; the appellant lodged its appeal to the Court. Given that scenario, the Court invited parties to address it on the propriety of the appeal which was accompanied by two different certificates of delay.

Having heard both parties' submissions, the Court struck out the appeal with the following reason:

"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."

It flows from the above cases that the second certificate of delay issued by the Registrar after the expiration of the period for lodging an appeal to the Court is inconsequential to the appellant because the Registrar has no power to extend time within which to file an appeal. We made ourselves clear that the Registrar ought to withdraw the pervious issued certificates because in one appeal there cannot co-exist more than one certificates of delay.

In our recent decision rendered on 12th December, 2019 in the case of **Gedda Franco and Another v. Mohammed Rashid Juma**, Civil Appeal No. 59 of 2017 (unreported) we were confronted with a similar scenario. The appellant who applied for copy of proceedings, judgment and decree was supplied with a certificate of delay on 19th November, 2019. However, he could not lodge the appeal as he was not supplied with copy of the proceedings. On 16th January, 2017 he was supplied with the copy of proceedings and on 20th January, 2017 he was issued with a second certificate of delay. Preliminary objection was raised that the appeal was time barred as the second certificate of delay issued on 20th January, 2017 was invalid. In overruling the preliminary objection, the Court had in mind that, in terms of Rule 90 (1) of the Rules, a certified copy of proceedings

was a key document in filing appeal, if it is not supplied, the appellant cannot lodge the appeal in time. Applying the overriding objective, the Court stated:

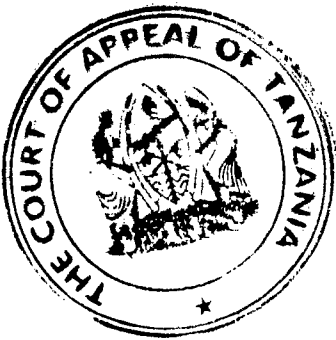
"... once it is applied for by the appellant, a certified copy of the proceedings is a key document which, if not supplied, the prescribed period of filing an appeal does not start to run. A certificate of delay cannot thus be issued unless a certified copy of the proceedings is ready for supply and the appellant has been so informed. Where the Registrar issues a certificate of delay without providing the appellant with a copy of the proceedings, then as argued by Mr. Mohamed, such a certificate is pre-mature, hence ineffective. In our considered view therefore, even though at the time of issuing the second certificate, the Registrar did not withdraw the first one, the omission did not render the second certificate invalid. In our view, the defect was curable under Rule 2 of the Rules which was in force at the time of when the certificates of delay were issued."

We, on our part, associate ourselves with the above position of the law. We shall give our reasons. **First**, it is true that the two certificates of delay bear two different dates, that is, the first certificate referred to a letter dated 9th March, 2015 whereas the second one referred to a letter dated 9th March, 2018. In that regard, the difference is on the years which we find it to be minor and a typo error. Therefore, the circumstance of the present appeal is different from the cases we have referred hereinabove. **Secondly**, being mindful of overriding objective principle that the Court is enjoined to have due regard on substantive justice by facilitating the just, expeditious, proportionate and affordable resolution of disputes, we find that the defect is curable under sections 3A and 3B of AJA and Rule 2 of the Rules. **Thirdly**, in the absence of a valid certificate of delay the same is tantamount to have been omitted in the record of appeal. Our finding that a valid certificate of delay is omitted in the record of appeal, takes care of Mr. Kamara's concern in respect of the word omitted appearing in Rule 96 (7) of the Rules. Without much ado, we are not persuaded with his strict interpretation of the Rule.

All said and for the above reasons, we overrule the preliminary objection and grant leave to the appellants to file a supplementary record

of appeal in terms of Rule 96 (7) of the Rules within forty-five (45) days from the delivery of this Ruling to include a proper certificate of delay.

DATED at **ARUSHA** this 22nd day of February, 2022.



S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Ruling delivered this 22nd day of February, 2022 in the presence of Mr. Moses Mahuna, learned counsel for the Appellant and Mr. Henry Simon, learned counsel for Respondent, is hereby certified as a true copy of the original.

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a smaller, more intricate mark.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL