

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

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 406 OF 2020

KELLEN ROSE RWAKATARE KUNTU 1ST APPELLANT

HUMPHREY KAULILA KENNETH RWAKATARE 2ND APPELLANT

TIBE KENNETH RWAKATARE 3RD APPELLANT

MUTTA ROBERT RWAKATARE 4TH APPELLANT
*(As legal representatives of deceased **Rev. Dr. G.P. Rwakatare**)*

REGISTERED TRUSTEES OF

MIKOCHENI ASSEMBLIES OF GOD 5TH APPELLANT

VERSUS

ZITHAY KABUGA RESPONDENT

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

(Ndika, J.)

dated the 23rd day of January, 2015

in

Land Case No. 127 of 2008

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RULING OF THE COURT

6th July, & 10th August, 2022

MASHAKA, J.A.:

This ruling is on the preliminary objection raised by the respondent, Zithay Kabuga challenging the competency of the appeal lodged by the appellants. The appellants have preferred this appeal against the *ex parte* judgment and decree of the High Court of Tanzania (Ndika, J as he then was) dated 23rd January, 2015 in Land Case No. 127 of 2008.

The genesis of this appeal can be traced from the disputed ownership of Plot No. 449 Block "A" Tabata within Ilala District, Dar es Salaam Region on which the respondent being in possession of a Certificate of Title No. 26508 with Land Office No. 64420 since 1st July, 1978 had commenced construction of a residential bungalow which was yet to be completed.

In 1986, while on transit from Blantyre Malawi to Dar es Salaam the respondent's husband was involved in a car accident at Tukuyu and passed away. The respondent attended the burial ceremony at Tukuyu and stayed there for almost six months. When she returned to Dar es Salaam, she found that her house built on Plot No. 449 Block "A" Tabata area was demolished by the appellants and church buildings were constructed on that plot. Upon inquiring about the development, the 1st appellant claimed that one Stanslaus J. Shalua (not party to this appeal) sold the plot to the appellants.

The respondent seeking for redress from the court, instituted the Land Case No. 127 of 2008 at the High Court (Land Division) claiming among others; payment of TZS 700,000,000.00 being the cost of the demolished house, the appellants be evicted from her plot and an order of vacant possession be issued against them. As gleaned from the record, the summons and the plaint were duly served to the appellants who failed

to file a written statement of defence, hence the order of *ex-parte* hearing was issued. Unsuccessfully, efforts were taken by the appellants to set aside the order for *ex-parte* hearing. Subsequently, the respondent proving her claim *ex-parte*, an *ex-parte* judgment was delivered in her favour.

Dissatisfied with the *ex-parte* judgement, the appellants delayed to lodge the notice of appeal within the prescribed time. They sought for and obtained extension of time to lodge the notice of appeal which was granted on 10th June, 2019. On 17th June, 2019 the appellants wrote a letter to the Registrar High Court of Tanzania, (Land Division) requesting to be supplied with the certified copies of the proceedings, judgement, decree, exhibits and any other documents for purposes of pursuing an appeal. Thus, all the necessary documents were supplied to the appellants as requested hence this appeal. The memorandum of appeal lodged by the appellants raised three grounds of appeal which we do not intend to narrate as it will become apparent shortly.

On 24th November, 2020 a notice of preliminary objection was lodged by the respondent under rule 107 of the Tanzania Court of Appeal Rules, 2009 (the Rules) contending that:

"The appeal is time barred on the basis of Rule 90(1) of the Court of Appeal Rules Cap 141 R.E

2019 as the appellant is not among the beneficiaries of a certificate of delay issued by the Registrar at page 217 of the record in terms of rule 90(1) and 90(3)".

When the appeal was called for hearing, Mr. Emmanuel Augustino, learned advocate entered appearance representing the appellants, whereas the respondent present in person also enjoyed the services of Mr. Daniel Haule Ngudungi, learned advocate.

The rule of practice dictates that we determine first the preliminary objection before we can embark on hearing the appeal on merit. We invited the learned advocates for the parties to address us on the point of objection raised by the respondent.

Submitting in support of the point of preliminary objection, Mr. Ngudungi stated that the appeal contravenes rule 90 (1) and (3) of the Rules. It was Mr. Ngudungi's contention that the letter to the Registrar was filed on 17th June, 2020 beyond the required thirty days as the impugned judgment was delivered on 23rd January, 2015 almost five years and four months late. He clarified that the appellants were mandatorily required to file the letter to the Registrar within thirty days and a copy thereof be served to the respondent.

Further Mr. Ngudungi explained that the appellants cannot rely on the exclusion period as stated by the proviso to rule 90 (1) of the Rules making the certificate of delay invalid. He contended further that though the notice of appeal was lodged on 10th June, 2019, the appeal was lodged on 6th November, 2020 beyond the sixty days' time limit, thus the appeal was out of time. Mr. Ngudungi implored the Court to strike out the appeal with costs.

In reply, Mr. Augustino at the outset submitted that the preliminary objection had no foundation, only later on to concede to the submissions by Mr. Ngudungi explaining that he was opposing the prayer made to strike out the appeal. Although he conceded that the letter to the Registrar requesting for certified copies of the proceedings, judgment, decree and exhibits was indeed filed on the 17th June, 2019, he invited the Court to invoke the overriding objective principle to remedy the omission and overrule the preliminary objection for the interests of justice.

Rejoining, Mr. Ngudungi reiterated his submission in chief and maintained that the decisions of the Court are clear, once a matter is time barred, it cannot invoke the overriding objective principle. In support of his argument, he referred us to the case of **Vicent Kioja @ Ngeleja v. Republic**, Criminal Appeal No. 157 of 2018 (unreported).

We have heard the submissions for and against the point of objection and considered the record of appeal before us. The issue for our determination is whether the appeal is competent before us. The point of objection rests on rule 90(1) of the Rules which we reproduce as follows: -

*"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 made].*

In the light of the above provision, an appeal has to be lodged within sixty days from the date the notice of appeal was lodged. Therefore, the exception stipulated under Rule 90 (1) of the Rules is in respect of computation of sixty days period within which an intended appellant is required to lodge his appeal. However, some days may be excluded only if the appellant wrote a letter to the Registrar of the High Court requesting for the copies of judgment, decree and proceedings within thirty days from the date the impugned judgment was pronounced. Further, sub-rule (3) of rule 90 of the Rules obliges the intended appellant who would wish to benefit from the exclusion of the excess time, to ensure that the letter to the Registrar requesting for certified copies of the requisite documents is served on the respondent. Failure to comply with rule 90 (3) of the Rules would disentitle the intended appellant to benefit from the exclusion of the period beyond the sixty days. There is a plethora of authorities of this Court, to the effect that once the appellant fails to comply with rule 90 (3) of the Rules, the Court strikes out the appeal for being time barred. See for instance, **Victoria Mbowe v. Christopher Shafurael Mbowe and Another**, Civil Appeal No. 115 of 2012, **Mayira M. Mayira and Four Others v. Kapunga Rice Project**, Civil Appeal No. 359 of 2019 and **Mondorosi Village**

Council and Two Others v. Tanzania Breweries Limited and Four Others, Civil Appeal No. 66 of 2017 (all unreported).

In the present appeal, the impugned judgement was delivered on 23rd January, 2015 and the appellants lodged a notice of appeal on 10th June, 2019 upon obtaining extension of time in Civil Application No. 485/17 of 2018. The letter to the Registrar of the High Court requesting for the copies of requisite documents was lodged on 17th June, 2019 more than five years had elapsed from the date the impugned judgement was pronounced, that is on 23/1/2015. This is beyond thirty days from date of decision, the prescribed time limit. Thus, the appeal of the appellants contravened the proviso to rule 90(1) of the Rules.

The appellants cannot rely on a certificate of delay issued by the Registrar of the High Court purporting to exclude time to enable the appellants lodge her appeal out of time. See for instance, **Mondorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others**, (supra), **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017, **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2018 (all unreported).

Consequently, on account of the delayed request to be supplied with the copies of certified proceedings, judgment and decree, the appellants cannot rely on exclusion period in the certificate of delay. Thus, the period available to the appellants in which to institute an appeal was sixty (60) days from the date of filing the notice of appeal. Counting on those days, it is clear that the appeal was lodged beyond the sixty days required under rule 90(1) of the Rules.

The learned counsel for the appellants implored the Court to invoke section 3A of the Appellate Jurisdiction Act, Cap 141 R.E. 2019, to cure and remedy the appeal by invoking the overriding objective principle which is geared at achieving the ends of substantive justice.

The question to be answered is whether a time barred appeal can be remedied by invoking the overriding objective principle.

In the case of **Mondorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others** (supra), the Court echoed and emphasized the objects and reasons behind the introduction of the overriding objective principle observing that:

"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory

provisions of the procedural law which go to the very root of the foundation of the case."

In **Jeremiah L. Kunsindah v. Leila John Kunisindah**, Civil Appeal No. 260 of 2017 (unreported), we underscored that the overriding objective did not replace the duty of parties, especially advocates, to observe the rules of the game set in the Rules. The overriding objective principle was not meant to be a magic wand for those who disregard procedural rules. We borrowed a leaf from our counterparts in Kenya, where the overriding objective principle is commonly known as the oxygen principle in **Union of Tanzania Press Clubs and Halihalisi Publishers Ltd v. The Attorney General of the United Republic of Tanzania**, Civil Appeal No. 89 of 2018 (unreported), citing with approval the Kenya case of **Hunter Trading Company Ltd v. Elf Oil Kenya Ltd**, Civil Appeal No. 6 of 2010, where the Court reiterated:

"The need to guard against arbitrariness and uncertainty when applying the Oxygen principle and insisted that rules and precedents that are Oxygen compliant must be fully complied with to maintain consistency and certainty. It warned that if improperly invoked the O2 principle could easily become an unruly horse. It is our duty to tame it by application of sound judicial principles".

In view of what we have endeavored to discuss, we decline to invoke the overriding objective principle to remedy a time barred appeal for the reason that it is in contravention of Rule 90 (1) of the Rules which prescribes the time limit of filing an appeal. To do otherwise is to condone non-compliance with the laws which would plunge the administration of justice into chaos. In the event, we sustain the preliminary objection.

Consequently, the appeal is incompetent on account of being time barred. We strike it out with costs.

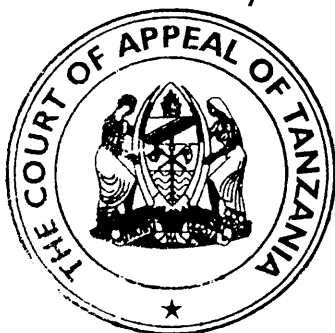
DATED at DAR ES SALAAM this 9th day of August, 2022.


S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 10th day of August, 2022 in the presence of Mr. Emanuel Augustino, the learned counsel for the Appellants, Mr. Daniel Ngudungi and Ms. Jackline Kulwa, the learned counsels for the Respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL