

**IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA**

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 324 OF 2021

HAKIMU MFAUME APPELLANT

VERSUS

MANDE SHABANI RESPONDENT

**(Appeal from the Ruling and Orders of the High Court of Tanzania
at Kigoma)**

(Matuma, J)

**dated the 18th day of March, 2020
in
Misc. Land Application No. 2 of 2020
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RULING OF THE COURT

10th & 16th June, 2022

KITUSI, J.A.:

This land matter commenced at the Ward Tribunal of Burega about a decade ago and it has found its way to this Court by way of appeal. The parties are litigating over a piece of land located at Burega area within Kigoma/Ujiji Municipality. This is the second time this appeal is being called on for hearing after the first on 5th July, 2021.

Two issues cropped up when we were about to hear the appeal this time around. The first issue was whether the appellant complied with our order made in the previous hearing on 5th July, 2021. The relevant part of that order reads: -

"On our part, we accede to the uncontested prayers to withdraw and refile the appeal and we grant the same, Therefore, pursuant to rule 102 (1) of the Rules, we mark the appeal withdrawn with an order to refile it in sixty (60) days to be reckoned from 5th July, 2021. Since the issue of the propriety of the appeal was raised by the Court, we make no order as to costs ..."

Messrs. Kamaliza Kamoga Kayaga and Thomas Matatizo Msasa, learned advocates acting for the appellant, pointed out that what prompted that order was the Court's view that the record of appeal before it had not been properly arranged in compliance with rule 96 (1) of the Tanzania Court of appeal Rules, 2009 (the Rules). Mr. Kayaga submitted that the appellant has complied with our said order dated 5th July, 2021 by refiling the appeal within 60 days and lodging the current record of appeal which is properly arranged as per the Rules.

Mr. Ignatius Rweyemamu Kagashe learned advocate for the respondent had no qualm with the first issue, whether the order has been complied with or not. We are also satisfied that the appellant has substantially complied with our order dated 5th July, 2021 by refiling this appeal within 60 days upon correcting the previous errors.

The second issue was whether that compliance precludes us from raising and determining other issues relating to the competence of the appeal. This issue was born out of our realization that the appeal might be time barred, judging from the dates on which some essential statutory steps were taken by the appellant. This is because the impugned judgment was delivered on 18/3/2020 and notice of appeal lodged on 23/3/2020 just about five days later. The letter to request for a copy of proceedings was written by the appellant on 8/5/2020. The Deputy Registrar of the High Court wrote to the appellant on 5/10/2020 to notify him that the copy of the requested documents was ready for collection. On the basis of these letters the Deputy Registrar of the High Court issued the appellant with a certificate of delay excluding 150 days from 8/5/2020 to 5/10/2020 as days that were required to prepare and serve the appellant with the copy of proceedings.

We invited the learned counsel to respond to our probing whether the appellant could rely on that certificate of delay and if not, what would be the fate of this appeal. After some cajoling, Mr. Kayaga threw in the towel and conceded that the certificate of delay could not be of any assistance to the appellant because the letter to request for a copy of proceedings was written beyond the prescribed period of 30 days. Mr. Kagashe was of the same view.

The relevant provision in this issue is rule 90 (1) and (3) of the Rules which provides: -

"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) NA

*(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."* [Emphasis added]

It follows therefore that the certificate of delay issued by the Deputy Registrar of the High Court in this case, is invalid and incapable of being relied upon because of the failure of the appellant to apply for certified

copies of proceedings within 30 days of the date of the decision. As for the consequences of that turn of events, Mr. Kayaga was relentless, understandably because the matter is fairly old and no one would wish it to drag for a day longer. Therefore Mr. Kayaga had two arrows to his bow. First, he submitted that since on 5th July, 2021 when the appeal was placed before the Court the only defect that was noted was in relation to the arrangement of the record and an order for correction of that defect was made, this instant appeal should be taken to have no other defects. Secondly, the learned advocate impressed on us that in our wisdom we may always invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (AJA) to cure any defects so as to proceed with the hearing of the appeal.

There was also quite a good deal of oscillation on whether the refiled appeal could be based on the same notice of appeal considering the fact that the new appeal bears a number different from the previous one. Mr. Kayaga submitted that the Court order dated 5th July, 2021 aimed at sparing the appellant from going back to the High Court to seek rectification as all defects were taken to have been overtaken by events. The learned advocate urged us to make orders that will not require the appellant to go back to the High Court, because that will delay more the resolution of this old dispute.

Mr. Kagashe was opposed to the arguments made by Mr. Kayaga and insisted that the appeal being time barred should be struck out with costs.

First of all, we are firmly of the view that since the letter requesting for a copy of proceedings was written beyond the 30 days provided by rule 90 (1) of the Rules, rendering the certificate of delay that was prepared on the basis of that letter invalid, this appeal is time barred. As this is a jurisdictional issue, and as it is settled law that jurisdiction cannot be assumed, our order dated 5th July, 2021 cannot preclude us from inquiring into the question of limitation of time.

Still we have to interrogate Mr. Kayaga's invitation asking us to find ways of curing the defect so that we proceed to hear and determine the appeal on merits. With respect, we are not too sure that section 4 (2) of AJA that the learned counsel sought to rely on gives us powers to give legitimacy to a time barred appeal. Not even the overriding objective principle introduced by sections 3A and 3B of the AJA. In an almost similar scenario in the **District Executive Director Kilwa District Council v. Bogeta Engineering Limited** [2019] 1 T.L.R 271, we cautioned thus: -

"The Court cannot have jurisdiction to entertain an appeal which is time barred and no extension of time has been sought and granted. We think the issue of time limit is not a technicality which goes

against the just determination of the case or undermines the application of the overriding objective principle contained in sections 3A (1) and (2) and 3B (a) of Act No. 8 of 2018”.

See also **Martin D. Kumaliya & 117 Others v. Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (unreported). In Kenya, where this principle is referred to as the oxygen principle, the Court of Appeal had the following to say in **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission and 6 Others** [2013] eKLR:-

"It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic one that will automatically compel the court to suspend procedural rules”.

We are inspired by that statement and for all those reasons, we conclude that this appeal is time barred. We understand what this order will mean to the parties especially the appellant, bearing in mind Mr. Kayaga’s plea that we should avoid sending his client back to the High

Court. However, with respect, the laws of limitation are merciless. [Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni, Civil Appeal No. 19 of 2016 (unreported)]. Consequently, this appeal is struck out for being time barred. As this issue was raised by the Court, we make no order as to costs.

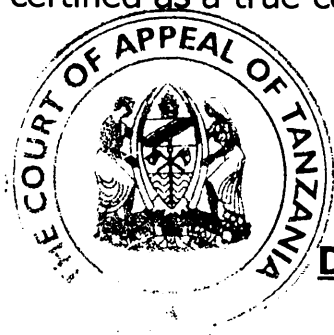
DATED at KIGOMA this 15th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered on this 16th day of June, 2022 in the presence of the Ms. Edna Aloyce holding brief Mr. Thomas Matatizo Msasa counsel for the appellant and Mr. Ignatius Kagashe counsel for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL