IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM, MWAMBEGELE, J.A., FIKIRINI, J.A And MAKUNGU, J.A.)

CIVIL APPEAL NO. 189 OF 2019

EVELINE J. NDYETABULA .... APPELLANT

VERSUS

STAR GENERAL INSURANCE (T) LIMITED .... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, District Registry at Dar es Salaam)

(Munisi, J.)

dated the 6th day of March, 2019
in
Civil Appeal No. 19 of 2018

RULING OF THE COURT

15th July & 7th September, 2022

MAKUNGU, J.A.:

On 18th May, 2012, a motor vehicle, Noah Station Wagon with registration No. T. 492 BAV (the motor vehicle) belonging to the appellant herein was involved in a road accident and sustained extensive damage. The appellant claimed that she had the benefit of a comprehensive insurance policy issued to her by the respondent herein, through a company going by the name of Ndanu Insurance Brokers (E.A) Limited which is not part of this appeal. On that basis, she demanded

reimbursement of repair costs for the motor vehicle, special damages for loss of business and general damages.

The respondent denied the claim, contending that it had not issued the alleged cover and that the said Ndanu Insurance Brokers (E.A) Ltd being an insurance broker, did not remit the premium as per insurance practice and procedure. The Resident Magistrate Court at Kisutu entered judgment and decree with costs for the respondent jointly and severally with the broker who was the second defendant in the trial court for repair costs amounting to Tzs. 13,500,000/= and specific damages due to loss of income Tzs. 42,080,000/= and general damages in the sum of Tzs. 3,000,000/=.

The respondent successfully appealed to the High Court at Dar es Salaam (Munisi, J.) where the decision of the trial court against her was quashed and set aside on the ground that the insurance broker is not an agent of the insurer. The said decision is now the subject of this appeal. The appellant in this appeal raised eight (8) grounds of appeal which for reasons to be apparent shortly we do not intend to reproduce.

The respondent through Mr. Joseph Kipeche, learned advocate lodged a notice of a preliminary objection on 4th July, 2022 to the effect:

"That the appeal is hopelessly time barred on the following grounds:

(a) *Absence of the Registrar's letter, in the record of appeal, informing the appellant or his advocate that the requested documents are ready for collection in reply to the appellant's letter dated 11th March, 2019 appearing at page 55 of the record of appeal.*

(b) *The certificate of delay appearing at page 7 of the record issued in the absence of the Registrar's letter is defective and cannot be used to exclude any time used by the Registrar for preparation and delivery of the copy of the proceedings."*

At the hearing of this appeal on 11th July, 2022 the appellant was represented by Ms. Joyce Sojo assisted by Mr. Elisa Mndeme, both learned advocates, whereas the respondent had the services of Mr. Joseph Kipeche, Mr. Fredrick Kihwelo and Ms. Juliana Douglas Lema, all learned advocates.

Prior to commencement of hearing, we found it appropriate to get views of parties' advocates on a legal point raised by the respondent regarding the absence of a letter from the Registrar of the High Court replying to the appellant's letter informing the appellant or his advocates that the requested documents were ready for collection and possible way forward.

In that respect, Ms. Sojo admitted to the absence of the letter and prayed for a short adjournment, if possible, within the same session, as Ms. Sojo did not recall, if her client to have received the missing

letter. She thus needed a short adjournment in order to ascertain the status of the letter's whereabouts including confirming with the Registrar of the High Court in Dar es Salaam, so that they could thereafter appear before us and make appropriate prayers necessary for a plausible way forward.

In reply, Mr. Kipeche had no objection to the prayer for a brief adjournment of the hearing.

Based on the uncontested prayer, prudence and wisdom were both in favour of granting the requested adjournment. In the circumstances, hearing of the appeal was adjourned for four (4) days within the session from 11th July, 2022 to 15th July, 2022 for the above specific purpose.

When the appeal was called on for a resumed hearing on 15th July, 2022 Ms. Sojo assisted by Mr. Mndeme both learned advocates appeared for the appellant and the respondent was appearing by Messrs. Kipeche, Kihwelo and Ms. Lema, all learned advocates.

At the outset, Ms. Sojo rose to inform the Court that during the time that the hearing stood adjourned, the appellant's side approached the Registrar of the High Court and the latter confirmed that indeed, the letter to inform the appellant that a copy of the proceedings was ready

for collection was never written. However, she did not concede that the absence of that letter makes the appeal incompetent. She prayed to proceed with the hearing of both preliminary objection and the appeal. The prayer was unopposed by Mr. Kipeche and we granted it.

Mr. Kipeche, when invited to address us on his points of objection strongly submitted that in the absence of the letter from the Registrar informing the appellant that the requested copy of the proceedings was ready for collection, there is no basis upon which a valid certificate of delay could have been prepared and issued. He contended that because of the absence of the letter, even the certificate of delay is defective and cannot be used to exclude anytime used by the Registrar for preparation and delivery of the copy of the proceedings. To bolster his argument, he referred us to the decision of this Court in the case of **Henry Zephyrine Kitambwa v. The President of the United Republic of Tanzania and 2 others,** Civil Appeal No. 114 of 2020 (unreported). He finally prayed that the present appeal ought to be struck out with costs.

In her response, Ms. Sojo prefaced by stating that the preliminary objection has no merit. She submitted that the appeal was instituted within time after excluding the time as certified by the Deputy Registrar for the preparation of the copies of documents requested and delivered

to the appellant. She elaborated that although the information they received from the Registrar of the High Court reflected the factual status, but all the same when the appellant felt aggrieved and wished to contest the decision of the High Court, he took necessary steps including requesting for a copy of proceedings from the Registrar of the High Court, by writing a letter in which case he complied with Rule 90(1) of the Rules. However, she argued, although the letter was never replied, the appellant on 04/06/2019 was verbally informed by the office of the High Court Registrar and was availed with the copy of the proceedings necessary for lodging an appeal.

In the case of **Kitambwa** (supra) the learned counsel submitted that is not applicable to this case because it is recent case of 2022 which imposed the requirement of written notification. She argued that when this appeal was filed on 2nd August, 2019 there was no such requirement in the Rules. The only requirement of the Rule 90(1) is notification which may be in writing or otherwise.

Arguing for a way forward favourable to the appellant if this Court found the appeal is incompetent, Ms. Sojo was of a firm position that instead of striking out all the documents when striking out the appeal, which is the usual remedy for incompetent appeals, she implored us to strike out the record of appeal, but spare the notice of appeal, which

according to her was a valid document which could not be affected by the order striking out the rest of the appeal. That to her, would meet the justice of the matter.

In a brief rejoinder, Mr. Kipeche submitted that the certificate of delay did not indicate when the appellant was notified that the requested documents were ready for collection and no letter from the Registrar. He reiterated that the appellant has not presented evidence to show that he received the notification verbally from the Registrar's office on 4th June, 2019, thus it remains to be a statement from the bar.

As this ruling is written essentially because of the absence of that letter from the Registrar, before proceeding to determine counsel's contending positions at this stage, it is, we think, instructive to briefly make a point or two on the use value of the letter in question in the context of the provisions of Rule 90(1) of the Rules, and consequences of its absence to the certificate of delay, specifically and the appeal, generally.

In the case of **Tanzania Telecommunications Company Limited v. Stanley S. Mwabulambo**, Civil Appeal No. 26 of 2017 (unreported), this Court observed that it is not correct to say that

whatever the Registrar writes in the certificate is correct, because the dates appearing on the certificate should be borne out of the record and in the absence of such record, such certificate of delay cannot be relied upon for containing unverifiable details. Briefly stated, the usefulness of the letter from the Registrar to the appellant is to assist the Registrar to state with certainty in the certificate of delay, the end date of this period for exclusion which must be based on the letter from the Registrar to the appellant.

Having the same view in **Puma Energy Tanzania Limited v. Diamond Trust Bank Limited,** Civil Appeal No. 54 of 2016 (unreported) this Court observed that, the letter from the Registrar is meant to enable him to issue a certificate of delay that reflects a verifiable and definite latest cut-off date from which the sixty days within which to lodge an appeal under Rule 90(1) of the Rules, starts to run. The relevant period for exclusion, is the duration between when the copy of the proceedings was requested to the date of the letter from the Registrar informing the appellant that the said copy is ready for collection.

Having heard the submissions of counsel on the matter, the two issues before us for resolution are, **one**, whether the appeal is time barred on account of having a defective certificate of delay; and **two,**

whether this Court can strike out appeal and leave the notice of appeal unaffected.

The first issue we were called upon to consider, is whether the appeal is time barred on account of having a defective certificate of delay. Rule 90(1) of the Rules which relates to institution of appeal and the certificate of delay provides thus:

> *"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 costs of the appeal,*
>
> *Save that* ***where an application for a copy of the proceedings in the High Court has been made within sixty 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 the copy to the appellant".*
>
> (Emphasis supplied)

In the instant appeal, it is not in dispute that the letter of the Registrar of the High Court which informed the appellant that the documents were ready for collection was not in the record of appeal. In the absence of that letter, the respondent argued that the certificate of delay is defective since it mentioned 4th June, 2019 the date the appellant was supplied with the copy of proceedings but not borne out of the record. This is because the date upon which the Registrar informed the appellant that the documents were ready for collection is the one upon which the time limit to lodge the appeal ought to start counting. In fact, the appellant forcefully argued that he was verbally notified by the office of Registrar and no such letter was received by the appellant's counsel on 4th June, 2019 that is why the appellant collected the documents on the same date. The learned counsel for the appellant also argued that the Registrar was better placed to know the dates appearing in the certificate of delay and that there is no evidence to show that he erred in issuing it. With due respect to the learned counsel, it is not correct to say that whatever the Registrar writes in the certificate is correct. This is because, it is only the date when the appellant applied for the copy of proceedings and the date when he is notified that the same is ready for collection are the ones which are supposed to be indicted in the certificate. In this case, the Registrar indicated 4th June, 2019 as the date the appellant was

supplied with the copy of proceedings which is not borne of the record of appeal thus making the certificate erroneous.

From the foregoing analysis, we are of the settled position that an erroneous, certificate of delay cannot be relied upon by the appellant in computation of the time within which to lodge the appeal. This position was reaffirmed in the case of **Tanzania Occupational Health Services v. Agripina Bwana and Another,** Civil Appeal No. 127 of 2016 (unreported) where the Court stated;

> *"As matters stand now, the certificate of delay is, as it were, worthless. It serves no useful purpose to the appellant for the purpose of computing the time for instituting the appeal. We have said in numerous cases that the Deputy Registrar's certificate is not beyond question and thus the court is entitled to disregard it for being erroneous."*

It follows therefore that, the certificate of delay which excluded the days not borne out of record is erroneous thus defective. The absence of a letter from the Registrar in the record of appeal, in this matter triggered a chain of detrimental effects to the appellant's appeal. The said dreadful consequences to the appeal include, **one,** the certificate

of delay issued in the absence of the letter is defective and cannot be used to exclude any time used by the Registrar for preparation and delivery of the copy of the proceedings. **Two,** consequently, the appeal was supposed to be lodged within sixty days from 20th March, 2019 when the notice of appeal was lodged, see the case of **Tanzania Telecommunication Company Limited** (supra); and **three,** the present appeal, having been lodged on 2nd August, 2019 was lodged hopelessly out of time.

The appellant was thus required to lodge the appeal within sixty days from 20th March, 2019 when she filed the notice of appeal. Therefore, this appeal which was filed on 2nd August, 2019 was time barred thus incompetent before the Court.

The second issue was that, because the appeal is incompetent, it has to be struck out except the notice of appeal, which according to the submission on behalf of the appellant, was a valid document.

The main question, before us, and indeed the major point for determination of this appeal, at this level is whether legally, we can strike out an appeal leaving behind the notice of appeal. The following part of this ruling is devoted to that very deliberation.

There are two scenarios of this appeal that we gathered from counsel for the appellant that need a reflection. We need to deliberate on them because it appeared to us that, they were the reason why the appellant's counsel, found themselves all of a sudden at a centre of a quagmire, from which they could not get out easily or without difficulty. The points have a bearing and they revolve around the assertion that the appellant was notified verbally to go to the High Court and collect the documents her advocates has requested in writing.

First, the assertion was made before us from the bar, thereby falling short of the necessary authenticity that was expected in the circumstances. In our view, the only reliable authority that could have confirmed that the appellant was notified by official at the High Court, in all fairness, would have been the Registrar of the High Court who, in the first place, had a statutory duty to inform the appellant by way of a letter that a copy of the proceedings was ready for collection. Indeed, the essence of adjourning hearing of the matter on 11th July, 2022 for four (4) days was to facilitate procurement of authentic information from a reliable source, but to the contrary, what was presented to the Court on 15th July, 2022 were unsupported oral contentions from the bar. There was nothing credible in writing from the Registrar. There was not even a complaint that the Registrar refused to put anything in writing.

Second, there was no evidence that the appellant collected the documents from the High Court in the normal course of business. In our view, had that been the case, there would be presented to Court at least a receipt acknowledging payment of court fees in respect of the documents received. This did not happen even after we had granted the adjournment. If collection of the copy of the proceedings was an authentic process, evidence in that respect, would have been availed to Court.

A similar scenario ensued in the recent past. In the case of **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited,** Civil Appeal No. 19 of 2014 (unreported), Professor Jwani Mwaikusa, then counsel for the appellant in that appeal had approached the High Court and took possession of a copy of the proceedings. It turned out however that, **first,** he did so without officially being informed that the documents were ready for collection; and **secondly,** he took the documents without any proof of payment of any court fees for the received copy of the proceedings. This Court made an observation on that informal collection of the proceedings from the High Court as follows:

> *"It has now turned out that there was no payment of court fees. This means that there was no*

official delivery of the documents to the appellant on the 23/05/2003. ***There should have been, in our view, on official communication from the Registrar to the learned advocates for the appellant that the documents requested in their letter dated 10/02/2003 were, now ready for collection, and after that the Registrar would issue a certificate in terms of Rule 83(1) [now Rule 90(1) of the Rules]. We deprecate what appears to be the clandestine obtaining of court documents and we cannot give our blessing to such conduct. We must discourage it at any costs."***

(Emphasis added).

Like it happened in the case referred to immediately above, in this case we were not availed with any evidence that there was any court fees paid for the documents allegedly collected from the High Court. What happened in this case was the conduct similar to that, which the Court expressed deep disapproval above, a habit the Court refused to bless, a conduct to be discouraged at all costs, to use the exact phrase employed by the Court in the above case. On the same aspect of collecting document without formal invitation and without paying fees upon collecting them, see also the case of **Paulina Samson Ndawavya v.**

Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 (unreported). The point we want to drive home ultimately in this case, is that, no one is even sure that the alleged copy of the proceedings was lawfully obtained.

With that illustration outlining the status akin to that obtaining in this appeal, it is perspective and deliberate at some deserving detail, the major topic of the day. According to the submission on behalf of the appellant, is that we ought to strike out the appeal but then leave behind the notice of appeal, for it is valid. To agree or to disagree with the argument, we will tread along the path, in terms of trend and alignment, that this Court has always taken and steadily maintained, and see whether it leads us to a destination that the appellant's counsel desired.

The relevant case, in our considered view, is that of **Mohamed Suleiman Mohamed v. Amne Salum Mohamed and Ten Others**, Civil Appeal No. 87 of 2019 (unreported). In that appeal, before the appeal was lodged, the appellant had filed Civil Appeal No. 142 of 2017 (the original appeal) previously in 2017. The original appeal, had however been struck out on account of failure to comply with rule 96(1) (h) and (2) (c) of the Rules.

The subsequent appeal was then filed, after seeking and obtaining extension of time to file it. However, it was filed without seeking and

obtaining extension of time to lodge a fresh notice of appeal. The basis of the appellant for not seeking extension of time to lodge a fresh notice of appeal, was an assumption that when the original appeal was struck out, the notice of appeal survived the order striking out the appeal. When a preliminary objection was taken out arguing that the subsequent appeal was incompetent for want of a valid notice of appeal, this Court in no uncertain terms stated that;

> *"From the rival arguments of the learned counsel for the parties, the only issue for determination is whether or not the appeal is incompetent for want of a notice of appeal and leave to appeal. With regard to the existence of the notice of appeal, it is a correct position of the law as argued by Mr. Rajab that,* ***following the striking out of Civil Appeal No. 142 of 2017 for which the notice of appeal included in this appeal was lodged, the notice suffered the same consequence of being struck out****".*
>
> *(Emphasis added)*

Invariably, the position of the law where an incompetent appeal is struck out for whatever might be the reason; the Court has persistently by maintained that the notice of appeal that initiated the appeal, suffers consequences of equal measures as the appeal. There is an unbroken

chain of authorities of this Court on the subject, including **Robert John Mugo (the Administrator of the Estate of the late John Mugo Maina) v. Adam Molel,** Civil Appeal No. 2 of 1990; **William Loitiame v. Asheri Naftali**, Civil Appeal No. 73 of 2002; and **Tanganyika Cheap Store v. National Insurance of Tanzania Limited,** Civil Appeal No. 51 of 2005 (all unreported). The other case discussing a similar matter is **William Shija v. Fortunatus Masha** [1997] TLR 213 in which it was held that:

> ***"The applicant was correct in contending that when the appeal had been struck out, the notice of appeal was also struck out;*** *in that situation, if a party still wished to appeal, a fresh application had to be filed in the High Court seeking extension of time in which to give notice of appeal".*
>
> *(Emphasis added).*

On the prayer that, we strike out the appeal and leave behind the notice of appeal, we hope the above discussion elucidates the clear position of the law.

In the final analysis and in view of the above discussion that when an appeal is stuck out for being incompetent, no document in the record of appeal survives the wrath suffered by the appeal, the notice of appeal

alike. We are unable, in the circumstances, to strike out the appeal and leave the notice of appeal to survive the impact of the blow.

In the event, this appeal which is incompetent for being time barred is struck out together with all documents composing the record of appeal, the notice of appeal inclusive. The respondent shall have her costs.

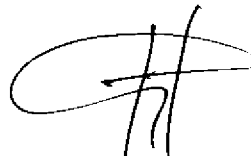
DATED at **DAR ES SALAAM** this 1st day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

O.O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 7th day of September, 2022 in the presence of Ms. Janeth Shayo, learned counsel for the appellant and Mr. Joseph Kipeche and Juliana Lema, learned counsels for Respondent is hereby certified as a true copy of the original.



G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL