

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

(CORAM: KOROSSO, J.A., GALEBA, J.A And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 309 OF 2017

RAJABU HAMIS MAGULATI1ST APPELLANT
RAJABU KOMBO RAJABU.....2ND APPELLANT
**AMINA ABAS RASHID (the Administrator of
the state of the late HAMIS JUMA SHABANI)3RD APPELLANT**

VERSUS

**MOLE AGRICULTURAL MARKETING
CORPERATIVE SOCIETY.....1ST RESPONDENT**
CHRISTIAN KIWELU.....2ND RESPONDENT
PETER MBEZI.....3RD RESPONDENT
THE NATIONAL MICROFINANCE BANK PLC LTD.....4TH RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Tabora)

(Rumanyika, J.)

dated the 8th day of May, 2017

in

Civil Case No. 03 of 2015

.....

RULING OF THE COURT

26th October & 4th November, 2022

MWAMPASHI, J.A.:

The appellants instituted Civil Case No. 03 of 2015 in the High Court of Tanzania at Tabora against the respondents. In that suit, the appellants' joint claim against the respondents jointly and severally, was for a total of USD 106,848.53 being the value of tobacco sold by them to the 1st respondent, allegedly after being persuaded to do so by the 2nd

and 3rd respondents who were the 4th respondent's officers. The first and decisive issue as framed by the High Court at the commencement of the hearing, was on whether the plaintiffs had a valid claim of money against any of the respondents. Unfortunately to the appellants, in its judgment handed down on 08.05.2017, the High Court, (Rumanyika, J. as he then was), found the said issue in the negative.

It is also worth noting at this point that, apart from finding that none of the respondents was liable, the High Court shouldered the blame on the 1st respondent's chairman and manager who were not parties to the suit but who were witnesses for the defence and who testified as DW1 and DW2, respectively. For appreciation of how the fate of the appellants' suit was finally decided by the High Court, we find it apposite to reproduce the concluding part of the judgment as hereunder:

*"The suit in a nutshell succeeds only to the extent, and for avoidance of doubts that SAID RASHID MAGULATI (DW1), SELEMANI SHABANI KAWOYA (DW2) and such other associates that the Republic shall have chosen to prosecute be charged immediately. It could be for **obtaining goods by false pretences** or something.*

Order accordingly".

It is not surprising that the decision of the High Court aggrieved the appellants. Undaunted, they filed the instant appeal which was, however, confronted with a preliminary objection raised by the 2nd, 3rd and 4th respondents, the subject of this ruling, on the following single point of objection:

- 1. That, while the Appellants were on 5/7/2017 notified by the High Court Deputy Registrar on the readiness for collection of the requested court file documents for record of appeal preparation and the appeal having been filed on 2nd November, 2017 basing on the Deputy Registrar's Certificate of Delay excluding days up to 21st September, 2017 instead of days up to 5/7/2017, contrary to the proviso to Rule 90(1) and (2) and Form L to the schedule both of the Tanzania Court of Appeal Rules, 2009 then the Appellants' appeal is hopelessly time barred.*

According to the record of appeal, just after the delivery of the impugned judgment on 08.05.2017, the appellants duly lodged the notice of appeal and applied to the Deputy Registrar of High Court (the Deputy Registrar) for a copy of the proceedings for appeal purposes on 11.05.2017. The record is also clear at page 223 that the Deputy Registrar notified the appellants that the requested copy of the proceedings was

ready for collection on 05.07.2017. At page 224 of the record of appeal, there is also a letter by the appellants' advocate to the Deputy Registrar dated 22.09.2017 which is basically an application for the certificate of delay but in which the appellants did also claim and complain that the copy of the proceedings supplied to them on 05.07.2017 was incomplete as the requested exhibits were not included. It was also claimed that on 09.08.2017, the appellants wrote to the Deputy Registrar reminding him about the alleged missing exhibits and that the same was supplied to them on 21.09.2017. Acting on that application, that is, the application for the certificate of delay, the Deputy Registrar issued the appellants with the requested certificate of delay on 27.10.2017 in which the period from 11.05.2017 when the notice of appeal was lodged to 21.09.2019 when the exhibits were purportedly supplied to the appellants was excluded. The said certificate of delay appears at page 226 of the record of the appeal. Consequently, the instant appeal was filed on 02.11.2017.

It is also pertinent to note that when the appeal came on for hearing for the first time on 29.10.2021, the certificate of delay was found to be defective for excluding the period from the date of filing the notice of appeal and for not indicating the number of days excluded. Owing to that ailment, the learned advocate who, by then was representing the

appellant, sought and was granted leave to file a supplementary record of appeal so as to include a rectified certificate of delay within 30 days of the order. Pursuant to that order, the appellant duly filed a supplementary record of appeal in which the rectified certificate was included. The said rectified certificate of delay appears at page 10 of the supplementary record of appeal. The instant preliminary objection arises from the said rectified certificate of delay.

As is the practice of the Court, when the appeal came before us on 26.10.2022 for hearing, we had to hear and determine the preliminary objection first. While the 1st appellant appeared in person unrepresented, the 2nd appellant appeared by his legal representative one Ms. Amina Abas Rashid. Despite being duly served, the 3rd appellant defaulted appearance and the hearing had to proceed in his absence in terms of rule 112 (4) and 4 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). As for the respondents, whilst Mr. Mugaya Kaitila Mtaki, learned advocate, represented the 1st respondent, the rest of the respondents were represented by Mr. Kelvin Kayaga, learned advocate.

In his brief but focused submissions in support of the preliminary objection, Mr. Kayaga argued that the appeal is time barred because the appellants cannot rely on the rectified certificate of delay appearing at

page 10 of the supplementary record of appeal which is invalid. He explained that while according to the letter from the Deputy Registrar appearing at page 223 of the record of appeal, it was on 05.07.2017 when the appellants were notified of the readiness of the copy of the proceedings they had requested, in the rectified certificate of delay, it is 21.09.2017 which is indicated as the date when the appellants were so notified. It was insisted by Mr. Kayaga that the said date is not supported by any letter from the Deputy Registrar hence rendering the said certificate invalid. He further contended that since the appellants cannot rely on the said defective certificate of delay and as the notice of appeal was lodged on 11.05.2017, the appeal which was filed on 02.11.2017 was filed outside the prescribed period of 60 days hence in contravention of rule 90 (1) of the Rules and time barred. To cement his argument that the rectified certificate of delay is invalid and that the appeal is time barred, Mr. Kayaga, referred us to the decisions of the Court in **ABSA Bank Tanzania Limited and Another v. Hjordis Fammestad**, Civil Appeal No. 30 of 2020 and **Olepasu Tanzania Limited t/a MAXAM East Africa v. Heineken Brouwerijen B.V and Another**, Civil Appeal No. 321 of 2019 (both unreported).

Mr. Kayaga finally argued that since the appellants were granted leave to rectify the first certificate of delay which was found to be defective and as the rectified certificate of delay filed is still defective then, in terms of rule 96 (8) of the Rules, the appellants cannot be given leave to again rectify the defective certificate for the second time. He therefore urged the Court to strike out the appeal with costs for being time barred.

Mr. Mtaki supported what had been submitted and prayed by his learned friend, Mr. Kayaga. He however urged the Court not to award costs.

The 1st and 2nd appellants, who as we have alluded to earlier, had no legal representation, had nothing of substance to argue. They however beseeched us not to strike out the appeal on account that they were made to believe by their former advocate that every relevant and valid document was included in the record of appeal. They also referred us to the written submission their former advocate had filed on 25.03.2022 in reply to the preliminary objection and prayed for the same to be considered. In the said reply, it is argued that the preliminary objection is baseless, misconceived and that the appeal is not time barred. Making reference to the letter dated 22.09.2017 appearing at page 224 of the record of appeal, it is submitted that the requested exhibits were missing

from the copy of the proceedings which was supplied to the appellants on 05.07.2017 and that a letter dated 22.09.2017 had to be written to the Deputy Registrar as a reminder before the missing exhibits were supplied to them on 21.09.2017. It is insisted that the appeal which was filed on 02.11.2017 is not time barred and further that the rectified certificate of delay is proper and not defective. It is finally argued that the rectified certificate, correctly excludes 133 days computed up to 21.09.2017 when the missing exhibits were supplied to the appellants.

There was nothing from Mr. Kayaga in rejoinder.

The issue for our determination is whether the rectified certificate of delay is defective and invalid hence rendering the appeal time barred. At this point, we find it proper, for ease of reference and appreciation of what is contained in the relevant certificate of delay, to begin by reproducing it as hereunder:

CERTIFICATE OF DELAY

(Certificate made under Rule 4, 5, 45 and 90 (1) of the
Court of Appeal Rules, 2009)

This is to certify that the period from 11th May 2017 when the Appellants requested for certified copies of Judgment, Decree, Proceedings, exhibits and the entire court's record in this Matter up to **21st September, 2017** when the Appellants were notified that

the documents were ready for collection, a total number of 133 days should be excluded in computing the time for instituting the Appeal in the Court of Appeal.

Given Under my **HAND** and **SEAL** of the **COURT** this 8th day of November, 2021.

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA TABORA

Institution of appeal to this Court and issuance of certificates of delay, is governed by rule 90 (1) and (2)) of the Rules, which states that:

"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 the copy to the appellant.

(2) The certificate of delay under rules 45, 45A and 90(1) shall be substantially in Form L as specified in the First Schedule and shall apply mutatis mutandis”.

From the above provision, it is a mandatory requirement that an appeal to this Court must be lodged within sixty (60) days from the date when the notice of appeal is lodged. However, if the prescribed period of sixty (60) days expires without an appeal being lodged and if an appellant who desires to challenge the impugned decision had applied in writing for a copy of proceedings for appeal purpose within thirty days of the date of the impugned decision, the Registrar of the High Court is required to issue a certificate of delay excluding the period or number of days spent in preparation and delivery of the said requested copy of the proceedings to the appellant. See- **Kantibhai Patel v. Dahyabhai Mistry** [2005] T.L.R. 438, **Mwalimu Amina Hamis v. National Examinations Council of Tanzania and Four Others**, Civil Appeal No. 20 of 2015 and **Puma Energy Tanzania Limited v. Diamond Trust Bank Tanzania Limited**, Civil Appeal No. 54 of 2016 (both unreported).

Insisting on the requirement for an appellant who desires to benefit from the exclusion of the period spent in preparation and delivery of a copy of the proceedings to be in possession of a valid certificate of delay, the Court in **Reime (T) Limited v. Miski and Sons Construction Co. Limited**, Civil Appeal No. 228 of 2018 (unreported), observed that:

*"... as we have explained above, where the circumstances call for the period of time spent in preparation of the relevant copy of proceedings to be excluded in the computation of the period of 60 days within which the appeal should be instituted, **the appellant desiring to benefit from the said exclusion, must be in possession of a correct and valid certificate of delay issued by the Registrar of the High Court in accordance with rule 90 (1) and (2) of the Rules**".*

[Emphasis added]

We should also restate the trite position of the law that for a certificate of delay to be valid, the dates indicated therein and on which the computation of the period of exclusion is based, should be borne out of the record. In the absence of such record, the certificate cannot be relied upon for containing unverifiable details. See- **Tanzania Telecommunication Company Limited v. Stanley S. Mwabulambo**,

Civil Appeal No. 26 of 2017 and **ABSA BANK TANZANIA LIMITED** (supra) (both unreported). Further, such a certificate must be free from errors and where it is issued in contravention of rule 90 (1) and (2) of the Rules, it cannot be relied upon in computing the period of limitation. See **Kantibhai Patel** (supra), **Njowoka M. M. Deo and Another v. Mohamed Musa Osman**, Civil Application No. 78/17 of 2020 and **Tanzania Occupational Health Services v. Mrs. Agripina Bwana and Another**, Civil Appeal No. 127 of 2016 (both unreported). In its decision in the former case, the Court stated that:

"The very nature of anything termed a certificate requires that it be free from error and should an error crop into it, the certificate is vitiated. It cannot be used for any purpose because it is not better than a forged document. An error in a certificate is not a technicality which can be glossed over; it goes to the root of a document".

Guided by the above trite positions of the law to which we wholly subscribe, we should now turn to the instant case. As we have alluded to earlier, the preliminary objection that the appeal is time barred on account that the rectified certificate of delay is defective and invalid, is premised on the date indicated in the said rectified certificate as the day the

appellants were notified that the requested copy of the proceedings, was ready for collection, that is, 21.09.2017. It is being argued by Mr. Kayaga, that the said date cannot be verified as it is not borne out of the record hence rendering the certificate invalid. It is common ground that the only letter from the Deputy Registrar we have in the record of appeal which informs the appellants of the readiness of the requested copy of the proceedings, is that dated 05.07.2017 appearing at page 223 of the record of appeal. The date indicated in the rectified certificate of delay as the date the appellants were informed of the readiness of the relevant copy, that is 21.09.2017, is not borne out of the record. There is no letter from the Deputy Registrar in support of that purported claim that the appellants were notified that the requested copy of the proceedings was ready for collection on 21.09.2017.

In their attempt to justify that really 21.09.2017 is the date they were notified of the readiness of the requested copy of the proceedings, the appellant through their written submissions in reply to the preliminary objection argue that the copy of the proceedings they were supplied with on 05.07.2017, was incomplete as the requested exhibits were not included and that they wrote to the Deputy Registrar on 09.08.2017 reminding him about the missing exhibits. It is unfortunate to the

appellants that the alleged letter to the Deputy Registrar is not included in the record of appeal and no reason is given as to why it was not included. Since there is even no letter from the Deputy Registrar not only acknowledging receipt of the alleged letter but also supporting the appellants' allegations that the copy of the proceedings supplied to them on 05.07.2017 was incomplete and also that they were notified of the readiness of the alleged missing exhibits on 21.09.2017, then the purported date cannot be verified. We thus find that the rectified certificate of delay does not reveal the truth of the matter and it is therefore not only defective but also erroneous, and invalid.

Having found that the rectified certificate of delay is invalid and defective then the same cannot be relied upon by the appellant in computation of the period of limitation. As the appellants cannot benefit from exclusion of time in terms of the proviso to rule 90 (1) of the Rules, they were thus required to lodge their appeal within sixty (60) days from 11.05.2017 when they filed the notice of appeal. That being the case, the appeal which was filed on 02.11.2017 was filed well outside the prescribed time and for that reason it is time barred.

Before we pen off, we should, in brief, point out that we have noted the argument by Mr. Kayaga that the appellants cannot be granted leave

to file another rectified certificate of delay because doing so would be in contravention of rule 96 (8) of the Rules, the contention we subscribe to.

In the result, and for the above given reasons, we sustain the preliminary objection and hold that the appeal is incompetent for being time barred. Consequently, we strike it out. Considering the circumstances of this matter particularly the fact that there is no dispute that the appellants have not been paid for the tobacco they sold to the 1st respondent, we make no order as to costs.

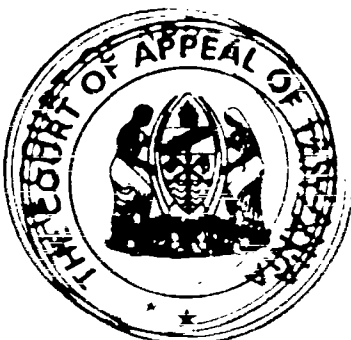
DATED at **TABORA** this 3rd day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Ruling delivered this 4th day of November, 2022 in presence of 1st Appellant in person and Ms. Amina Abasi Rashid legal representative of 3rd Appellant, in the absence of 2nd Appellant. On the part of Respondents, Mr. Mugaya Kaitira Mtaki, counsel for the 1st Respondent and Mr. Kelvin Kayaga, counsel for the 2nd to 4th Respondents, is hereby certified as a true copy of original.



A handwritten signature in black ink, appearing to read "E. G. Mrangu", is written over a set of three horizontal lines.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL