

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPLICATION NO. 404/02 OF 2019

LOONDONOMONI MALLYA.....APPLICANT

VERSUS

LEPARAKWO RASIRASI1ST RESPONDENT
SONGOYO OLE MATATA.....2ND RESPONDENT

**(Application for extension of time within which to apply for leave to
appeal to the Court of Appeal from the Decision of the High Court of
Tanzania at Arusha)**

(Massengi, J.)

dated the 14th day of November, 2016

in

Land Appeal No. 24 of 2016

.....

RULING

29th November & 6th December 2022

GALEBA, J.A.:

This is an application for extension of time within which Loondomoni Mallya, the applicant may lodge an application for leave to appeal to this Court. He lost before the High Court, Massengi J., in Land Appeal No. 24 of 2016, in favour of the respondents on 14th November 2016. The application has been brought pursuant to rule 45A (1) (b) of the Tanzania Court of Appeal Rules 2009, (the Rules), and although it is not indicated, the application is before me by virtue of the provisions of rule 10 of the Rules.

This application was brought after the one at the High Court for similar orders had been dismissed by Gwae J. on 22nd October 2019. This date, 22nd October 2019 is worthy taking note of, for it is significant in the manner this application will be determined.

At the hearing of this application on 29th November 2022, the applicant was represented by Mr. Stephano James, learned advocate, and the respondents had the services of Messrs Nelson Merinyo and Lesirian Nelson Merinyo, both learned advocates.

Prior to commencement of hearing, I inquired from Mr. James whether the application was lodged within the prescribed time, because the High Court dismissed a similar application for extension of time on 22nd October 2019 and he lodged this one on 18th November 2019, which is almost twenty-six days well beyond the fourteen days prescribed under rule 45A (1) of the Rules.

In reply, he submitted that it is true that the application was lodged beyond the fourteen days prescribed by law, but he had procured a certificate of delay from the High Court and attached it with the affidavit supporting the notice of motion. According to him, the certificate shows that the period of eighteen days from 29th October 2019 to 15th November

2019, was excluded such that the application was then filed within the prescribed time of fourteen days.

As I was not certain of what would be the reply by Mr. Merinyo, I required Mr. James to argue the entire application, which he did. For the reasons to be clearer in the course of this ruling, I will not refer or consider the points by counsel on the substantive application.

Mr. Nelson Merinyo, is the one who argued in opposing the application. In respect of the point that was raised by the Court, he submitted that this application is incompetent because the same was filed out time. He forcefully attacked the certificate of delay, stating that the same is defective such that it cannot be relied upon to exclude any time. In elaborating the defects in the certificate, he contended that; the **first** defect is that although the decision of Gwae J. was passed on 22nd October 2019, the certificate of delay shows that it was signed on 15th October 2019 even before the decision of the High Court was passed. **Secondly**, he submitted that the certificate is defective because, it was issued under rule 90 (1) of the Rules which excludes time for filing appeals, instead of being issued under rule 45A (2) of the Rules, which deals with certificates of delay to exclude time to file applications. Because of the two defects, Mr. Nelson Merinyo moved the Court to strike out the appeal for being time barred.

In rejoinder, Mr. James was not at all shaken, he admitted that indeed there were errors as indicated by counsel for the respondents, but the errors are minor and curable by invoking the Overriding Objective Principle under section 3A (1) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA). So, he essentially contended that, the errors pointed out are not that material; I should gloss over them and proceed to determine the substantive application since, considering the certificate of delay, the application was in time.

I will start with Rule 45A (1) (b) of the Rules which provides that:

"45A.-(1) Where an application for extension of time

to:-

(a) N/A;

(b) apply for leave to appeal;

(c) N/A

is refused by the High Court, the applicant may

***within fourteen days** of such decision apply to
the Court for extension of time."*

[Emphasis added]

This rule means that after the High Court refused extension of time, the applicant had fourteen days to present to Court a similar application, as the High Court and the Court enjoy concurrent jurisdiction on that aspect. The application must be presented before expiry of those days,

otherwise a valid certificate of delay must be sought under rule 45A (2) of the Rules from the Registrar of the High Court and presented along with the application.

I have considered the arguments of learned counsel, and I think the appropriate issue for determination is whether the defects in the certificate of delay are curable by invoking the Overriding Objective Principle or not, because, the fact that the certificate is defective is not disputed. The disputed certificate is as follows:

"CERTIFICATE OF DELAY

(Made under Rule 90(1)).

This is to certify that the period from 29th October 2019 when the applicant requested for copies of proceedings, Judgment and Decree in the above suit, up to 15th November 2019 when those documents were supplied to him, a total number of 18 days should be excluded in computing the time for instituting the appeal to the Court of Appeal of Tanzania.

GIVEN under my hand and the seal of the Court this 15th day of October 2019.

Sgd

S. P. Mwaiseje

DEPUTY REGISTRAR

HIGH COURT, ARUSHA."

As agreed by both parties, the fact that the certificate shows that it was signed on 15th October 2019 while it is excluding time between the dates after that very date, is evidence that, indeed the certificate of delay is defective.

To be brief, I must state that the position of this Court is that anything called a certificate is a serious document, and it cannot be acted upon unless the same is free of error. According to numerous decisions of this Court including **Kantibhai Patel v. Dahyabhai Mistry**, [2005] T.L.R. 237, a defect in a certificate of delay is not a technicality whose effect may be remedied by invoking the doctrine of overriding objective. Any defect in a certificate is a serious irregularity that goes to the root of the very certificate and vitiates its authenticity unless it is rectified. In that case, this Court held that:-

*"The very nature of anything called 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 other purpose because it is not better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over; it goes to the very root of the document. You cannot sever the erroneous part from it and expect the*

remaining part to be a perfect certificate; you can only amend it or replace it altogether as by law provides."

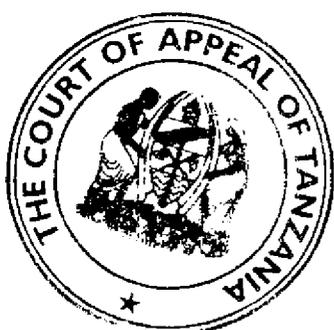
Having on record a certificate of delay which is defective, simply means that the certificate cannot be used to exclude any time period, which means the application in the High Court having been dismissed on 22nd October 2019 and this application having been lodged on 18th November 2019, the application was filed beyond the fourteen days prescribed under rule 45A (1) of the Rules, hence time barred. In law, an application lodged out of time is incompetent, liable for being struck out. It is for this reason that I cannot engage into a discussion concerning the substantive application.

In the circumstances, this application is hereby struck out with costs.

DATED at ARUSHA, this 5th day of December 2022

Z. N. GALEBA
JUSTICE OF APPEAL

This Ruling delivered this 6th day of December, 2022 in the presence Mr. Stephano James, Counsel for the Applicant, and Mr. Nelson Merinyo assisted by Mr. Leserian Nelson, counsel for the Respondents, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL