

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

**(CORAM: LILA, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)**

**CIVIL APPEAL NO. 154 OF 2018**

**JUDITH MBWILE .....1<sup>ST</sup> APPELLANT  
JACKSON ERNEST MBWILE .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**FBME BANK OF LIMITED (UNDER LIQUIDATION) ..... 1<sup>ST</sup> RESPONDENT  
THE DEPOSIT INSURANCE BOARD, LIQUIDATOR OF  
FBME BANK OF LIMITED, BANK OF TANZANIA..... 2<sup>ND</sup> RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania,  
Commercial Division) at Dar es Salaam)  
(Songoro,J.)**

**dated the 14<sup>th</sup> day of December, 2017**

**in**

**Commercial Case No. 27 of 2014**

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**RULING OF THE COURT**

21<sup>st</sup> February & 7<sup>th</sup> March, 2022

**MWANDAMBO, JA.:**

The appellants Judith Mbwile and Jackson Ernest Mbwile, were aggrieved by the decision of the High Court, Commercial Division (Songoro, J.) entering judgment against them in a suit involving loan recovery made on 14/12/2017. They preferred an appeal against that decision predicated on four grounds of appeal whose contents are not relevant in this ruling.

Ahead of the hearing date, the respondents who are represented by the Solicitor General, lodged a notice of preliminary objection against the competence of the appeal due to defects in the certificate of delay allegedly issued contrary to the dictates of rule 90 (1) of the Court of Appeal Rules, 2009 (the Rules). The particulars in the notice of preliminary objection allege that the Registrar's certificate of delay is erroneous for excluding days necessary for the preparation and delivery of requisite documents for the purpose of the appeal reckoned from 14/12/2017 instead of 18/12/2017 a date on which the appellants requested to be supplied with requisite documents for the purposes of the appeal and 21/02/2018 when the Registrar notified the appellants of the availability of the documents requested. It was contended thus the certificate of delay is worthless in that it cannot be used for the purposes of computing the time to appeal rendering it incompetent for being time barred.

Mr. Deodatus Nyoni, learned Principal State Attorney who was assisted by Ms. Jenifer Msanga and Edwin Webiro, both learned State Attorneys appeared during the hearing to prosecute the preliminary objection which was resisted by Mr. Mathew Simon Kakamba, learned advocate representing the appellants as he did in the High Court. We

feel compelled to say that we were constrained to adjourn the hearing of the appeal initially cause listed on 15/02/2021 at the instance of the learned advocate for the appellants because of the delay in serving him with the notice of preliminary objection in terms of rule 107 (1) of the Rules.

At the resumed hearing, Mr. Nyoni reiterated the contents in the notice of preliminary objections contending as he did that the appellants could not rely on the erroneous certificate of delay considering that the appellants were notified by the Registrar that the documents they had requested, were ready for collection on 21/08/2018. Under the circumstances, Mr. Nyoni argued that the certificate of delay should have reflected 21/02/2018 as the last date from which 60 days for instituting the appeal started running instead of 09/08/2018 which is not borne by any material in the record. He thus implored the Court to find the appeal instituted on 12/09/2018 incompetent for being time barred relying on the **Tanzania Telecommunications Co. Ltd v. Stanley Mwabulambo**, Civil Appeal No. 26 of 2017, **Puma Energy Tanzania Ltd v. Diamond Trust Bank Tanzania Ltd**, Civil Appeal No. 54 of 2016 and **Kaemba Katumbi v. Shule ya Sekondari Mwilamvya**, Civil Application No. 523 of 2020 (all unrepresented). Mr. Nyoni ruled

out the possibility of ordering the appellants lodging a supplementary record of appeal containing a rectified certificate of delay in the exercise of the Court's discretion under rule 96(7) of the Rules. He contended that the certificate of delay in the instant appeal is incapable of rectification and cure the incompetence in the appeal. Whilst admitting the existence of a letter by the appellants' advocate to the Deputy Registrar of the High Court dated 18/04/2018 on the incompleteness of the documents supplied, there was no other letter from the Deputy Registrar informing the appellants' advocate of the availability of the missing documents specified in his letter. Under the circumstances, the learned Principal State Attorney was adamant that in the absence of such a letter, there is no basis upon which the Deputy Registrar will be legally empowered to rectify the certificate of delay showing the date when the appellants' advocate was notified to collect the missing documents for the purpose of the appeal. Mr. Nyoni urged the Court to strike out the appeal for being time barred.

Initially, Mr. Kakamba saw no problem in the certificate of delay even though his own letter requesting for requisite documents from the Deputy Registrar is dated 15/12/2017 but was not delivered until 18/12/2017. He discounted 21/02/2018 as the date on which the Deputy

Registrar notified him of the requisite documents for the purpose of computation of the 60 days for instituting the appeal because the documents supplied to him were inadequate and hence his letter dated 18/04/2018. We agree with the learned advocate that the letter dated 21/02/2018 was overtaken by the events in view of the appellants' advocate's subsequent letter. As to the basis of 9/08/2018 shown in the certificate of delay, Mr. Kakamba explained that there was no other letter from the Registrar informing the appellants' advocate of the availability of the missing documents and that date was a date on which he collected the said documents after physical follow-ups with the Registrar. Otherwise, the learned advocate argued that the absence of such letter was not his default for which the Court can direct the appellant to request the Registrar to avail them. At the end of it all, Mr. Kakamba urged the Court to grant leave to the appellant to lodge a supplementary record of appeal containing a rectified certificate of delay in terms of rule 96 (7) of the Rules.

Submitting in rejoinder, Mr. Nyoni contended that rule 96 (7) could not be of any avail to the appellants because the omission in the record of appeal do not relate to existing documents to be included in the supplementary record of appeal if leave to do so will be granted.

Upon hearing the competing arguments from the learned counsel, there is no longer any dispute that the certificate of delay is erroneous with regard to the dates indicated therein. That being the case the issue for our determination is whether the erroneous certificate is curable by way of rectification and warranting the Court's order granting leave to lodge a supplementary record of appeal as prayed by Mr. Kakamba. This issue has become necessary upon Mr. Kakamba's concession on the errors in the current certificate of delay on record reflecting dates which are not supported by the record. We are mindful of rule 96 (7) of the Rules which gives discretion to the Court to grant leave to appellants to lodge supplementary record of appeal where some vital documents are omitted from the record of appeal. The Court has acted under that rule on various occasions and granted leave extending to cases where the certificates of delay are defective giving effect to the overriding objective principle engraved under section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA). However, there is a caveat to that approach. The Court has done so upon being satisfied that the defects in the offensive certificates of delay or other omission in the record are rectifiable and capable of curing the defect in the appeal.

The Court has declined such invitation in cases where the defects complained of are incapable of rescuing the appeal through lodging supplementary record of appeal under rule 96 (7) of the Rules. See for instance: **Mohamed Issa Mtalamile & 3 Others v. Tanga City Council & Another**, Civil Appeal No. 200 of 2019 and **Mary Agnes Mpelumbe (As the Administratrix of the estate of Isaya S. Mpelumbe, deceased) v. Shekha Nasser Hamad**, Civil Appeal No. 85 of 2017(both unreported).

The position in this appeal is that the Registrar's letter dated 21/02/2018 could not be relied upon because of its inadequacies pointed out in the appellants' advocate's letter dated 18/04/2018. It is equally common ground that the Deputy Registrar never wrote any letter to the appellants' advocate in response to the letter he received on 18/04/2018 with a view to notifying them of the availability of the missing documents. Although Mr. Nyoni was all out to persuade us to accept 21/02/2018 as the date to be taken into account in computing the time for instituting the appeal, we do not think he was correct. We say so because of the appellants' advocate's letter dated 18/04/2018. As we said in **D.T. Dobie & Company (Tanzania) Ltd v. N.B. Mwaitebele** [1992] T.L.R. 152, where a party, on reasonable grounds, writes to the

Registrar asking for missing part(s) of the proceedings, the limitation period does not begin to run against such a party until he receives either the part of proceedings asked for or an assurance that the proceedings sent to him were complete.

With respect, we agree with Mr. Kakamba that time did not start running from 21/02/2018 the date on which the Deputy Registrar notified the appellants' advocate that the copy of the decree applied for was ready for collection. The nagging question is, which date will be taken into account in computing the time for the institution of the appeal if we were to grant leave to rectify the record of appeal? Obviously, granting leave to allow rectification of the certificate of delay will entail the Registrar issuing a letter informing the appellants' advocate of the availability of the documents requested. This question has become necessary considering absence of proof of the exact date the appellants' advocates was called upon to collect the documents.

From our examination of the original record, the following have come to light. On 6/01/2018, the appellants' advocate wrote to the Deputy Registrar vide letter Ref. No. KK/JJM/03/27/2018 acknowledging receipt of copies of documents on 24/05/2018 through *Posta Mlangoni*. Through that letter, the learned advocate requested the Deputy



Registrar to issue a certificate of delay in terms of rule 90 (1) of the Rules. Subsequently, on 10/07/2018, the Deputy Registrar issued a certificate of delay excluding the period from 14/12/2018 to 11/05/2018. The latter date is shown to have been the date on which the appellants' advocate was supplied with copies of the documents requested for appeal purposes. That certificate was never utilised neither was it cancelled. The record shows that on 09/08/2018, the appellants' advocate wrote yet another letter Ref. No. KK/JJM/04/27/208 applying for a second certificate of delay in lieu of the earlier one issued on 11/07/2018 because such certificate was no longer of use to the appellants it being allegedly issued out of time.

The foregoing reveals that contrary to what is stated in the certificate of delay currently on record, the appellants' advocate was supplied with requisite copies of documents on 24/05/2018 through *Posta Mlangoni* and not 9/08/2018 shown in the certificate. Under the circumstances, notwithstanding the absence of a letter from the Registrar as alluded to above, the time for the institution of the appeal started running from 24/05/2018. Indeed, by 11/07/2018, when the first certificate of delay was issued following a request from the appellants' advocate, time for the institution of the appeal had not yet run out. The

appellant could have utilised that certificate and institute their appeal by 24/07/2018. Without deciding, if there were any problems with that certificate, such problems were quite unrelated to the time for the institution of the appeal.

In the light of the foregoing, there is no doubt that the prayer predicated under rule 96 (7) of the Rules for leave to lodge a supplementary record of appeal containing a rectified certificate of delay is hanging in the balance. We say so due to the appellants' advocate's admission having received the requisite copies on 24/05/2018 presumably in response to his letter dated 18/04/2018. Under the circumstances, the Registrar can only rectify the certificate of delay to reflect 18/12/2018 as the date when the appellants applied for copies for the purposes of the appeal to 24/05/2018 when the appellants' advocate received complete set of the documents.

The net effect of the foregoing will be that the appellants should have instituted their appeal by 24/07/2018 the latest. As the appeal was instituted on 12/09/2018 well beyond 60 days from 24/05/2018, the rectification of the erroneous certificate and the filing of a supplementary record of appeal will not rescue the problem related to time bar which was the kernel of Mr. Nyoni's argument when addressing

us on the preliminary objection. It is for that reason we find ourselves constrained to decline the prayer because it will not make good the situation as pointed out earlier.

In fine, we sustain the preliminary objection and hold that the appeal is incompetent for being instituted out of time contrary to rule 90 (1) of the Rules. Such an incompetent appeal must be and is hereby struck out with costs.

It is so ordered.

**DATED at DAR ES SALAAM this 2<sup>nd</sup> day of March, 2022.**

S. A. LILA  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

The ruling delivered on this 7<sup>th</sup> day of March, 2022 in the presence of Ms. Debora Mcharo assisted by Ms. Rose Kashamba, both learned state attorneys for the respondents who is also holding brief for Mr. Mathew Simon Kekemba, learned advocate for the appellants, is hereby certified as a true copy of the original.



  
D. R. Lyimo  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**