

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

(CORAM: WAMBALI, J.A., SEHEL, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 20 OF 2022

SHABANI s/o MKAKANZE..... APPELLANT

VERSUS

TERESIA d/o JUDI MKAKANZE..... RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Iringa)**

(Kente, J.)

**dated the 16th day of April, 2019
in**

Land Appeal No. 5 of 2018

RULING OF THE COURT

22nd & 28th March, 2023

SEHEL, J.A.:

The appellant, Shabani s/o Mkakanze, lodged the present appeal to challenge the decision of the High Court of Tanzania at Iringa (the first appellate court) in Land Appeal No. 5 of 2019 (the appeal) that dismissed his appeal for being filed out of prescribed time of forty-five days from the judgement of the District Land and Housing Tribunal, Iringa (the DLHT).

The respondent was the wife of the brother of the appellant, the late Judy Mkakanze (the deceased). In the process of collecting the deceased's assets, the respondent sued the appellant before the DLHT claiming for among other things, a declaration that house No. K/DOR/A/53 was the property of her late husband. The appellant denied the claim contending that the suit property was owned by one, Kaundime Mohamed Ndedela. Having heard both parties' evidence, the DLHT found that the suit property was part of the estate of the deceased. Thus, it ordered the appellant to give vacant possession and pay the costs of the suit. Aggrieved, the appellant unsuccessful appealed to the first appellate court hence the present appeal.

Prior to the date of hearing, on 15th March, 2023, the learned counsel for the respondent filed a notice of preliminary objection to the effect that the present appeal is time barred on the following grounds:

- "1. The appeal is incompetent for failure by the appellant to write a letter to the Registrar of the High Court applying for copies of proceedings, judgment and decree of the High Court as per mandatory requirement of Rule 90 (1) of the*

Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and for failure to serve the same upon the respondent.

2. The appeal is incompetent by absence of letter informing the appellant that the requested documents were ready for collection."

At the hearing of the appeal, the appellant appeared in person. He had no legal representation. The respondent had the legal services of Mr. Marko Kisakali, learned advocate.

It is a practice of the Court to start hearing the preliminary objection before going into merits of the appeal thus we allowed Mr. Kisakali to address us on the points of law he raised.

Mr. Kisakali focused on the first point of law that the appeal was filed out of time. He pointed out that the impugned decision of the first appellate court appearing at pages 22-28 of the record of appeal was delivered on the 18th April, 2019 and the notice of appeal was lodged within time as it was filed on the 24th April, 2019. Yet, he submitted, the appeal was lodged on 26th October, 2021 which is far beyond the statutory sixty days prescribed under the provisions of Rule 90 (1) of the Rules. He

added that had the appellant wished to benefit from the exclusion period provided under the proviso of Rule 90 (1) of the Rules, he ought to have written a letter to the Registrar of the High Court requesting to be supplied with the copy of proceedings, judgment and decree of the first appellate court for the purposes of filing the appeal. Since the appellant has not done that, then the time to lodge the appeal starts to run from the lodgment of the notice of appeal. In that regard, the learned counsel for the respondent urged the Court to strike out the appeal with costs.

The appellant replied that he filed the appeal within time after following all the procedures thus he urged the Court to proceed to hear and determine the appeal on merit.

Mr. Kisakali reiterated his earlier submission that the appeal was filed out of time.

Having heard the contending submissions, we find the issue before us is whether the present appeal is time barred. The time to institute an appeal is prescribed under the provisions of Rule 90 of the Rules which states, *inter alia*:

"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) Not relevant

(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."

The above provisions of the law requires an appeal to be instituted in the appropriate registry within sixty (60) days from the date of lodging a

notice of appeal. That apart, where an intended appellant has applied in writing for a copy of the proceedings within thirty (30) days, and served a copy of that letter on the respondent, the time spent by the Registrar of the High Court for the preparation and delivery of the requested copy of proceedings, judgment and decree would be excluded in the Certificate of Delay to be issued by the Registrar of the High Court. The law further provides that failure to serve the respondent with a copy of the said letter, denies the appellant to benefit from the exclusion period in computing time to lodge an appeal.

We had the advantage to deal with almost similar matter in the case of **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 [2018] TZCA 303; [13 December, 2018, TANZLII] where the appellants lodged an appeal out of the prescribed statutory period of sixty days. The appellants claimed that they wrote a letter to the Registrar of the High Court requesting to be supplied with the copy of proceedings, judgment and decree but the same was not included in the record of appeal. The Court held:

"Therefore, according to Rule 90 (1) of the Rules, an appeal must be filed within sixty (60) days after the notice of appeal was lodged...However, it is not disputed that the letter applying for copy of proceedings of the High Court is not included in the record of appeal.... In the absence of the letter in the record, it is impossible for the Court to know if there has been compliance with the law. We agree ...that, in the absence of the letter, the appellants ought to have filed their appeal within sixty (60) days from the date the notice of appeal was filed."

The Court took the same decision in the case of that **Rosemary Biria & Another v. Tatu Juma Mohamed**, Civil Appeal No. 20 of 2019 [2020] TZCA 1771; [16 September, 2020, TANZLII] that:

"As it is, ...the appellants cannot benefit from the exclusion of number of days used in preparation of such documents under Rule 90 (1) of the Rules, since they did not apply for copies of proceedings, judgment and decree including serving the letter of application to the respondent according to Rule 90 (1) of the Rules....But again, where there is no letter applying for the necessary documents for appeal purpose, then the appeal should have been

lodged within 60 days from the date the notice of appeal was filed, otherwise the appeal lodged after the expiry of that period would be time barred.”

See also: **District Executive Director, Kilwa District Council v. Bogeta Engineering Ltd**, [2019] T.L.R. 271; and **Mary Agnes Mpelumbe (As the administratrix of the estate of Isaya S. Mpelumbe, the deceased) v. Shekha Nasser Hamada**, Civil Appeal No. 85 of 2017 [2020] TZCA 327; [23 June, 2020, TANZLII].

In the present appeal, the procedure that the appellant alleged to have followed is the lodging of the notice of appeal on 24th April, 2019 and seeking leave to appeal. He however did not write a letter requesting for copy of proceedings, judgment and decree of the High Court. As there is no letter applying for the necessary documents for appeal purpose, the appellant was supposed to file his appeal within sixty days from the lodgment of the notice of appeal. The sixty days period of limitation ended on the 23rd June, 2019 while the present appeal was filed on 26th October, 2021. That is, after a delay of two years and four months which is far beyond the sixty days period stipulated under Rule 90 (1) of the Rules. We are therefore satisfied that the present appeal is time barred as it was filed

extremely beyond the prescribed period of sixty days provided for under Rule 90 (1) of the Rules.

In the end, we uphold the preliminary objection and strike out the appeal. Given the circumstances of the appeal, we make no order as to costs.

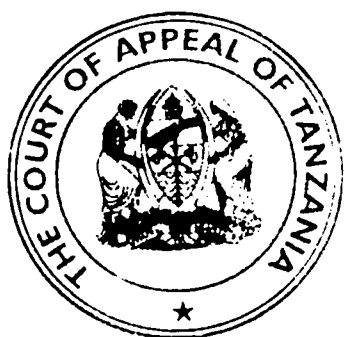
DATED at IRINGA this 27th day of March, 2023.

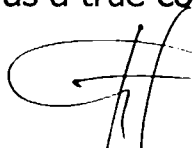
F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The ruling delivered this 28th day of March, 2023 in the presence of the appellant in person and Mr. Marko Kisakali, learned counsel for the respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL