

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**(CORAM: KWARIKO, J.A., LEVIRA, J.A. And MDEMU, J.A.)**

**CIVIL APPEAL NO. 193 OF 2020**

**MOSHI MUNICIPAL COUNCIL ..... APPELLANT**

**VERSUS**

**J. S. KHAMBAITA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**EFATHA MINISTRY ..... 2<sup>ND</sup> RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania  
at Moshi)**

**(Mwingwa, J.)**

**dated the 18<sup>th</sup> day of January, 2018**

**in**

**Land Case No. 18 of 2015**

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**RULING OF THE COURT**

*4<sup>th</sup> & 10<sup>th</sup> July, 2023*

**LEVIRA, J.A.:**

In the High Court of Tanzania at Moshi, the first respondent successfully sued the appellant, the second respondent and another person who is not a party to this appeal over ownership of a piece of land located in Lukaranga, Soweto Area within Moshi Municipality measuring about 13 acres, referred to as BLOCK HHH"A" SECTION III, Lukaranga Moshi Municipality in Land Case No. 18 of 2015. Aggrieved by that decision, the appellant has preferred the present appeal advancing three

grounds which we shall not reproduce because of what we are about to demonstrate hereunder.

At the hearing of the appeal, the appellant was represented by Mr. Deodatus Nyoni, learned Principal State Attorney assisted by Ms. Magdalena Mwakabungu, learned Senior State Attorney and Ms. Gloria Ssangya, learned State Attorney; whereas, the first and second respondents had the services of Messrs. Elikunda Kipoko and Kephas Mayenje, learned advocates, respectively.

Before commencement of the hearing of the appeal in earnest, we invited the parties to address us on the competence of the appeal as far as service of the notice of appeal and the appellant's letter to the Registrar of the High Court requesting to be supplied with proceedings, judgment and decree for appeal purposes to the respondents is concerned.

Mr. Nyoni commenced his submission by acknowledging the fact that the notice of appeal and the letter to the Registrar requesting for necessary documents for appeal purposes found in the record of appeal were not endorsed to prove service on the respondents. He submitted further that, in terms of Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the notice of appeal is supposed to be served on the respondent within 14 days of lodging it and the letter to the Registrar

within 30 days from the date of lodging it in terms of Rule 90 (3) of the Rules. However, he submitted that the respondents were served and produced a copy of the notice of appeal attached with the letter to the Registrar, which notice was signed by the Managing Director of the first respondent on 9<sup>th</sup> February, 2018 to prove service on the first respondent. He went on to submit that, even the second respondent was served on the same date.

He implored us to note that, although the signature of the first respondent was found on the notice of appeal only, we should consider it sufficient because the letter was attached to the notice of appeal and thus, proper service on the first respondent. Relying on section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), he sought the indulgence of the Court to consider the copy of the notice of appeal together with the attached letter to the Registrar as a proof of service on the first respondent.

Apart from that, it was his argument that, the issue raised by the Court was supposed to be raised as a Preliminary Objection (the PO) by the counsel for the respondents in terms of Rule 107 (1) of the Rules, but that was not the case. In the circumstances, he urged us not to consider counterarguments that would be raised by the counsel for the

respondents. Finally, he urged us to find that the appeal is competent and proceed with the hearing on merit.

In response, Mr. Kipoko submitted that, determination of the issue of competence of the appeal raised by the Court stands to be led by the record of appeal. According to him, the law requires in explicit terms that, the notice of appeal and the letter requesting for necessary documents for appeal purposes to be served on the respondents. As the record testifies, there is no proof to that effect. He disagreed with the submission by Mr. Nyoni that by a mere fact that the notice of appeal was signed by the first respondent on 9<sup>th</sup> February, 2018 and the letter to the Registrar was attached to it though not signed, is sufficient proof of service on the first respondent. He argued that those are distinct documents and therefore endorsement on one of them cannot amount to endorsement on both of them as submitted by Mr. Nyoni.

As regards Mr. Nyoni's argument that the counsel for the first respondent ought to have raised the issue of service by filing a notice of preliminary objection, Mr. Kipoko opposed that argument. It was his submission that, the issue of service of the notice of appeal and the letter to the Registrar touches the aspect of limitation of time which is

synonymous to jurisdiction. Therefore, he said, although it was not raised by the respondents, the Court was justified to raise this fatal irregularity.

He as well opposed the invitation extended to the Court by Mr. Nyoni to invoke sections 3A of the AJA and determine the raised issue on the basis of overriding objective principle. He insisted that, since the letter under consideration was not served on the respondents, the appellant should not benefit from exclusion of days under the certificate of delay, the remedy is to strike out the appeal.

On his part, Mr. Mayenje submitted that, failure to serve the respondent with the letter to the Registrar requesting for necessary documents for appeal purposes renders the appeal incompetent. He acknowledged that, the record of appeal, as it is, is silent whether the respondents were served. However, he supported the submission by Mr. Nyoni by confirming that the second respondent was served with the notice of appeal and the letter to the Registrar on 9<sup>th</sup> February, 2018. He thus persuaded us to consider that the respondents were properly served and proceed with the hearing of the appeal on merit.

Having heard the counsel for both sides and considering the entire record of appeal, the issue that follows is whether the first respondent was served with the notice of appeal and copy of the letter to the Registrar

requesting for necessary documents for appeal purposes. In terms of Rule 83 (2) of the Rules, any person who desires to appeal to the Court shall lodge a notice of appeal within thirty days of the date of the decision against which it is desired to appeal. The intended appellant is also required before or within fourteen days after lodging a notice of appeal to serve copies of it on all persons who seems to him to be directly affected by the appeal in terms of Rule 84 (1) of the Rules.

In the present case, the impugned decision was delivered on 18<sup>th</sup> January, 2018 and there is no dispute that the notice of appeal was lodged on 29<sup>th</sup> January, 2018, well within time. It is also undisputed fact that the said notice was served on the respondents within time, on 9<sup>th</sup> February, 2018 as per the oral account of the counsel for the second respondent and the evidence of service supplied to the Court by the counsel for the appellant. The only contentious issue is in respect of the letter to the Registrar requesting for necessary documents for appeal purposes which the counsel for the appellant claimed that it was attached with the notice of appeal and served on both respondents on the same day. While the counsel for the second respondent acknowledged service of the said letter on the date of service of the notice of appeal, the counsel for first respondent was firm that service was not effected on the first respondent as claimed by the counsel for the appellant.

Rule 90 (1) of the Rules requires an appeal to be instituted within sixty days of the date when the notice of appeal was lodged save that where an application for a copy of proceedings in the High Court has been made within thirty days of the date of decision against which it is desired to appeal, there shall be exclusion of time spent in preparation and delivery of that copy to the appellant as may be certified by the Registrar of the High Court. However, the exception provided under subrule (1) of Rule 90 of the Rules is subject to condition that a copy of the said letter must be served on the respondent. This is provided under Rule 90 (3) of the Rules in the following terms:

*"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.**"*

*[Emphasis added]*

The letter of the appellant to the Deputy Registrar of the High Court of Tanzania at Moshi applying for copy of proceedings, certified copy of judgment and decree in Land Case No. 18 of 2015 is found at page 434 of the record of appeal. Our perusal of the same reveals that, it was intended to be served on the respondents. However, there is no endorsement proving that it was served on any of them. We take note

that, the counsel for the second respondent submitted that the same was served on them on 9<sup>th</sup> February, 2018 as stated by Mr. Nyoni. Nevertheless, a mere fact that the second respondent was served the said copy does not extinguish the obligation of the appellant to serve the first respondent. See: **Ramadhani Haji Abdulkarim (as Administrator of the estate of the late Haji Abdulkarim, deceased) v. Harbart Marwa and Family Investments and 3 Others**, Civil Appeal No. 88 of 2015 (unreported). In this appeal, the respondents are two with different interests over the subject matter. Therefore, the appellant was obliged to serve each of them, but that was not the case. Failure to serve the respondent with a copy of the letter to the Registrar contravenes Rule 90 (3) of the Rules and it renders a certificate of delay invalid.

The certificate of delay in the present appeal is found at page 438 of the record of appeal and it excludes days from 29<sup>th</sup> January, 2018 when the appellant requested for copies of proceedings, judgment and decree from the Registrar to 11<sup>th</sup> November, 2019 when the said documents were ready for collection. The excluded period of at least 651 days cannot benefit the appellant in the circumstances of the present case because of failure to serve the first respondent with a copy of the letter to the Registrar requesting to be supplied with necessary copies for appeal purposes, see: **Juma Busiya v. Zonal Manager, South Tanzania**



**Postal Corporation**, Civil Appeal No. 273 of 2020 (unreported). This we say because the appeal presented before us is against both respondents. In other words, since the impugned decision was delivered on 18<sup>th</sup> January, 2018 and the notice of appeal was lodged on 29<sup>th</sup> January, 2018, the appellant ought to have instituted her appeal within sixty days from the date of notice in terms of Rule 90 (1) of the Rules. This means, notwithstanding the fact that the second respondent was served in time, the appeal was supposed to be lodged on or before 29<sup>th</sup> March, 2018. However, the same was filed on 27<sup>th</sup> November, 2019 after lapse of more than a year, far beyond the prescribed time.

With respect, we are unable to go along with Mr. Nyoni's submission that since the notice of appeal was served on the first respondent, we can as well, under overriding objective principle, consider that the letter was served on him as the same was attached with the said notice. It should be noted that, the time fixed for filing an appeal is a mandatory requirement and a jurisdictional issue which cannot be circumvented by the overriding objective principle, which in essence, need not be applied blindly; see: **Mondorosi Village Council & 2 Others v. Tanzania Breweries Ltd & 4 Others**, Civil Application No. 66 of 2017 (unreported). It should be understood that, the Rules governing service of notice of appeal and the letter to the Registrar are different. As

intimated above, it is clear that the copy of the letter to the Registrar requesting for copies of proceedings, judgment and decree for appeal purposes included in the record of appeal and the one shown to the Court by Mr. Nyoni were not signed by the first respondent to signify acknowledgment of receipt of the same. When the Court was dealing with an akin matter in **Ramadhani Haji Abdulkarim (as Administrator of the estate of the late Haji Abdulkarim, deceased)** (supra), it had this to say:

*"The finding we have made in the present matter that service of the copy of the letter applying for proceedings, ruling and extracted order was uncertain has serious consequence ..... There is no gain saying that omission to serve the third respondent with the copy of the said letter renders the appeal time barred."*

In the light of the above decision, we find that since it is uncertain whether the letter to the Registrar requesting for copies of the proceedings, judgment and decree for appeal purposes was served on the first respondent, the days excluded in the certificate of delay included in the record of appeal cannot benefit the appellant. Therefore, the appeal at hand is incompetent for noncompliance with Rule 90 (3) of the Rules; hence, time barred.

In the final result, we strike out the appeal with no order as to costs.

**DATED** at **MOSHI** this 6<sup>th</sup> day of July, 2023.


M. A. KWARIKO  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

G. J. MDEMU  
**JUSTICE OF APPEAL**

Ruling delivered this 10<sup>th</sup> day of July, 2023 in the presence of Mr. Moses Muyungi, State Attorney for the Appellant and Mr. Eliunda Kipoko assisted by Ms. Lilian Philemon Mushi, counsel for the 1<sup>st</sup> Respondent and Mr. Elikunda Kipoko holding brief of Mr. Kephas Mayenje, counsel for the 2<sup>nd</sup> Respondent is hereby certified as a true copy of the original.



  
E. G. MRANGU  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**