

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMPASHI, J.A. And NGWEMBE, J.A.)

CIVIL APPEAL NO. 388 OF 2022

ABUBAKAR KHALID HAJI.....1ST APPELLANT
GEMACO AUCTION MART INTERNATIONAL LTD.....2ND APPELLANT

VERSUS

ZAMZAM YUSUF MUSHI.....1ST RESPONDENT
YUSUF HAMIS MUSHI.....2ND RESPONDENT
FRANK LIONEL MARIALLE.....3RD RESPONDENT

**[Appeal from the Ruling and Order of the High Court of Tanzania, Land
Division at Dar es Salaam]**

(Maghimbi, J.)

dated 24th day of September, 2019

in

Misc. Land Application No. 472 of 2019

.....

RULING OF THE COURT

6th & 21st November, 2023

MKUYE, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Land Division) at Dar es Salaam in Misc. Land Application No. 472 of 2019 dated 24th September, 2019 (Hon. S. Maghimbi, J.). Before it could be fixed for hearing, the 1st respondent raised a preliminary objection (the PO), the notice of which was filed on 10th March, 2023 to the effect that the appeal is hopelessly time barred for having being lodged beyond 60 days contrary to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules") and failure to attach a

certificate of delay in respect of Misc. Land Application No. 472 of 2019 between **Abubakar Khalid Haji and Gemaco Auction Mart International Limited and Zamzam Yusuph Mushi, Yusufu Hamis Mushi and Frank Lionel Marialle.**

When the matter was called on for hearing the appellants were represented by Mr. Derick Pascal Kahigi, learned advocate whereas the 1st respondent, 2nd and 3rd respondents were represented by Mr. Salimu Mushi, Ms. Agnes Dominic and Ms. Rita Odunga Chihoma, the learned advocates, respectively.

When availed an opportunity to elaborate his preliminary objection Mr. Mushi contended that the appeal was time barred since it was lodged beyond 60 days required by Rule 90 (1) of the Rules. He elaborated that the Ruling impugned was handed down on 24th September, 2019 but the intended appeal was filed on 2nd September, 2022 which was after a lapse of two years period from the date of delivery of the Ruling. He added that the appellant cannot benefit from the provisions of Rule 90 (1) of the Rules since **one**, there is no letter requesting the copies of proceedings in respect of Misc. Land Application No. 472 of 2019. **Two**, the certificate of delay at page 322 cannot salvage the appeal as it relates to Land Case No. 142 of 2016 as shown in the title and parties in the matter. **Three**, the letter from the

Registrar at page 321 of the record of appeal makes reference to Land Case No. 142 of 2016 and Misc. Land Application No. 472 of 2019 meaning that the Registrar's response to the appellants referred to a different letter with Ref No. Land Case No. 142 of 2016 and therefore the Certificate of Delay in relation to the case at hand is nowhere to be seen or rather it was not issued. In this regard, it was Mr. Mushi's prayer that the appeal be struck out with costs for being time barred.

On their part Mses. Dominick and Chihoma did concede to Mr. Mushi's argument and implored the Court to strike out the appeal for being time barred.

In response, Mr. Kahigi in the first place conceded that the certificate of delay issued by the Registrar was defective. However, as to the way forward, he was of the view that the same was curable because the letter by the appellants to the Registrar and the proceedings letters at pages 316, 317, 318, 319 and 320 of the record of appeal were in respect of Misc. Land Application No. 472 of 2019 arising from Land Case No. 142 of 2016. He added that although the Certificate of Delay made reference to Land Application No. 142 of 2016 without mentioning Misc. Land Application No. 472 of 2019, it was an oversight by both Registrar and the appellants. Nevertheless, having regard to the overriding objective principle he beseeched the Court to allow them to

bring a valid certificate of delay while relying on the case of **Bright Technical System and General Supplies Ltd v. Institute of Finance Management (IFM)**, Civil Appeal No. 12 of 2020 page 5 (unreported) where the Court allowed the appellants to go and seek for a valid certificate of delay and file it by way of a supplementary record of appeal. He also referred us to the case of **Ms. Flycatcher Safaris Ltd v. Hon. Minister for Lands and Human Settlements Development**, Civil Appeal No. 142 of 2017 pg 6 (unreported) to bolster his argument.

He thus beseeched the Court to allow the appellant to seek for a valid certificate of delay from the Registrar under Rule 4 (2) (a) and (b) of the Rules and bring it through a supplementary record of appeal and ultimately adjourn the hearing of the appeal to enable them rectify the defective certificate of delay.

In rejoinder Mr. Mushi argued that, since the 1st respondent was initially issued with a defective certificate of delay to the date and requested to be issued with a valid one, he ought to ask them to rectify even case number. He was of the view that considering that the wrong citation of the case number and the parties were not minor defects, this appeal be struck out for being time barred as it is not curable even under the overriding objective principle. In support of his proposition,

he cited the case of **Board of Trustees of Orthodox Church v. Rodgers Mashanda an Karagwe District Council**, Civil Appeal No. 138 of 2020 pg 12 (unreported) where the Court declined the invitation to grant leave and allow the applicant to remedy the time barred appeal under Rule 96 (7) of the Rules.

Having heard and considered the submissions from either side we are satisfied that the certificate of delay, is indeed, defective. This is so, as rightly submitted by both parties although the appeal is against the Ruling and order of the High Court of Tanzania (Land Division) at Dar es Salaam in Misc. Land Application No. 472 of 2019, the certificate of delay at page 322 of the record of appeal purporting to exclude the number of days requisite for preparation of the documents sought relates to the decision in Land Case No. 142 of 2016 shown in the title which is yet to be determined. Apart from that, in its title, it reflects the parties in Land Case No. 142 of 2016 whereby the plaintiffs were **Yusufu Hamis Mushi** and the defendants **Abubakar Khalid Haji, Frank Lionel Marialle and Gemaco Auction Mart International Ltd** instead of the parties in Misc. Land Application No. 472 of 2019 who were **Zamzam Yusuf Mushi** as applicant and **Yusufu Hamisi Mushi, Abubakar Khalid Haji, Frank Lionel Marialle and GEMACO Auction Mart International Limited** as respondents.

It was Mr. Mushi's argument that since there is no letter requesting for proceedings in respect of Misc. Land Application No. 472 of 2019; the certificate of delay relates to Land Case No. 142 of 2016; and the letter from the Registrar (page 321) makes reference to Land Case No. 142 of 2016 and Misc. Land Application No. 472 of 2019 meaning that his response was on a different letter referring to Land Case No. 142 of 2016 then there is no certificate of delay in relation to the appeal at hand. Mr. Kahigi is of the view that the defect is curable as the appellant's letters to the Registrar requesting for the copies of proceedings related to Misc. Land Application No. 472 of 2019 arising from Land Case No. 142 of 2016 (see pages 316, 317, 318, 319 and 320) and that the omission to cite it in the certificate of delay was an oversight by the Registrar and the appellants did not observe it.

We have considered the rival arguments and keenly scanned the record of appeal. We have observed that the decision sought to be appealed against in this Court is a Ruling and Order in Misc. Land Application No. 472 of 2019 which reviewed the decision based on a preliminary objection in Land Case No. 142 of 2016 dismissing it under section 3 of the law of Limitation Act, Cap 89 R.E. 2002 for being time barred. The impugned decision.

The impugned decision in Misc. Land Application No. 472 of 2019 was handed down (Maghimbi, J.) on 24/9/2019. That matter was between Zamzam Yusuph Mushi as an applicant and Yusufu Hamisi Mushi, Abubakar Khalid Haji, Frank Lionel Marialle and GEMACO Auction Mart International Ltd as respondents. Upon being dissatisfied by that decision, Abubakar Khalid Haji and GEMACO Auction Mart International Ltd filed a notice of appeal on 10/10/2016 and a letter requesting for copies of the Ruling, Drawn Order, Proceedings, Exhibits and other documents for appeal purpose was tilted Misc. Land Application No. 472 of 2019 (Arising from Land Application No. 142 of 2016) (pg 314). Thereafter, followed reminder letters dated 2/6/2020 and 7/5/2021 (pages 316, 317, and 319) both requesting for documents in relation of Misc. Land Application No. 472 of 2019 arising from Land Case No. 142 of 2016. As it can be discerned from the above, the matter that was intended to be appealed against was Misc. Land Application No. 472 of 2019.

However, it seems to us that the problem arose in the letter by the appellant's counsel **dated 2/8/2022 addressed to the Registrar which requested to be supplied with copies of proceedings, Ruling, Drawn Order, certified exhibits and certificate of delay in Land Case No. 142 of 2016 and Misc. Land Application No.**

472 of 2019 making reference to the Registrar's letter dated 22/7/2022 which was responding to the letter by the appellants dated 10/10/2019 requesting for the copy of proceedings in respect of Misc. Land Application No. 472 of 2019 arising from Land Case No. 142 of 2016. It is noteworthy that the Registrar's letter attached the requested documents as well as the certificate of delay shown at page 322 dated the same date 22/7/2022 which bears in certain features as follows:

One, the title is wrong as it refers Yusufu Hamis Mushi and Zamzam Yusufu Mushi as 1st and 2nd plaintiffs and Abubakar Khalid Haji, Frank Lionel Marialle and GMEACO Auction Mart International Ltd as 1st, 2nd and 3rd defendants as if the intended appeal was in respect of Land Case No. 142 of 2010 instead of the parties as they were in Misc. Land Application No. 472 of 2019. **Two,** the certificate of delay shows as if it relates to an appeal against the decision in Land Case No. 142 of 2016 which was not determined by Hon. Maghimbi J. on 24/9/2019 because what was determined by Hon. Magimbi J. on 24/9/2019 was Misc. Land Application No. 472 of 2019. **Three,** it reckons the time to be excluded from 10/10/2019 when the appellants requested for the proceedings in relation to the decision in Misc. Land Application No. 472 of 2019 as there is no letter which requested for proceedings relating Land Case No. 142 of 2016.

That notwithstanding looking at those documents generally, it is crystal clear to us that matter intended to be appealed against was Misc. Land Application No. 472 of 2019 and not Land Case No. 142 of 2016. Also, it can be deduced from certificate of delay that the appeal related to it as it refers to the decision that was made by Hon. Magimbi, J. on 24/9/2019 which was on Misc. Land Application No. 472 of 2019 and not in any other matter. It is unfortunate that this inadvertence was not detected by the Registrar or even the appellants. Although the omission might have been caused by the Registrar, we are of the view that even the appellants ought to satisfy themselves if the certificate of delay was properly extracted. See **Bright Technical System and General Supplies Ltd** (supra).

The issue, that follows is whether or not such omission is curable which issue we think, must not detain us much.

As alluded to earlier on, Mr. Mushi's stance is that the omission it is not curable with only one remedy for the appeal to be struck out and Mr. Kahigi's position that it is curable under Rule 96 (7) of the Rules.

We have considered the fact that the appellants all through show that they intended to appeal against the decision in Misc. Land Application No. 472 of 2019 which was arising from Land Case No. 142

of 2019. Secondly, the certificate of delay shows that it related to the decision of Hon. Maghimbi J., handed down on 24/9/2019. Thirdly, the exclusion of number of days used in preparation of proceedings reckons from the date when the letter applying for proceedings in Misc. Land Application No. 472 2019 was filed as there was no other such letter relating to Land Case No. 142 of 2016.

Much as we acknowledge that the defect might have been to a large extent accused/attributed by the Registrar, we are of the view that, it is curable under the circumstances expounded herein above. Apart from that we hold a view that the anomaly is curable more so when guided by the overriding objective principle expounded in numerous decisions including **Bright Technical System and General Supplies Ltd** (supra) and **Ms Flycatchers Safaris Ltd** geared towards determining matters substantively.

In this regard, given the circumstances of the matter, we find that striking out the appeal as sought by the respondents may not be the appropriate position to take but allowing the appellants to rectify the anomaly would suffice. As such, in terms Rule 4 (2) (a) and (b) of the Rules, we grant the appellant's prayer to go and seek a rectification of a defective certificate of delay and obtain the one which in conformity with

the requirement of the law and in accordance with what was sought in the letter by the appellants dated 10/10/2019. In the event, we order that the rectified certificate of delay should be filed through a supplementary record of appeal within thirty days from the date of this Ruling. Meanwhile, we adjourn the hearing of this appeal until the next convenient session as shall be determined by the registrar.

DATED at DAR ES SALAAM this 20th day of November, 2023.


R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2023 in the presence of Mr. Derick Kahigi, learned counsel for the appellants and Ms. Queen Sambo holding brief for Mr. Salim Mushi, Ms. Agnes Dominick and Ms. Rita Chihomo for the 1st, 2nd, and 3rd respondents respectively, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL