

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MGEYEKWA, J.A.)

CIVIL APPEAL NO. 90 OF 2021

ABDULKADIR SULEIMAN MBEO (*Administrator of the
Estate of the Late SUWED SADIQ*) **APPELLANT**

VERSUS

RAYMOND ANGAUFOON LEIYA **1ST RESPONDENT**

ANGAUFOON A.L. NKYA **2ND RESPONDENT**

NATIONAL BANK OF COMMERCE LTD **3RD RESPONDENT**

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

(Kileo, J)

dated the 02nd day of December, 2005

in

Land Case No. 24 of 2004

RULING OF THE COURT

15th November & 7th December, 2023

MGEYEKWA, J.A.

On 17th February, 2004 the late Suwed Sadiq sued Raymond Angaufoon Leiya and Angaufoon A. L. Nkyia in Land Case No. 24 of 2004 before the High Court, Land Division jointly and severally for vacant possession of the land on Plot No. 192 Block 'W' (the suit property)

situated at Magomeni area in Dar es Salaam under Certificate of Title No. 20628. The third respondent was joined as a third party after the application of the 1st and 2nd respondents. It is noteworthy that Suwed Sadiq passed away on 28th August, 2020 and thus Abdulkadir Suleiman Mbeo was appointed as the legal representative by the Primary Court of Magomeni on 10th December, 2020.

For better appreciation of the sequence of events leading to this appeal, we propose to set out briefly the historical background obtained from the record of appeal. As indicated above, on 17th February, 2004, the appellant instituted Land Case No. 24 of 2004 against the respondents. The 1st and 2nd respondents on 15th March, 2004 lodged joint written statement of defence where they denied all the allegations and pleaded that the suit was *res judicata* to Civil Case No. 64 of 1999. In addition, they raised a counterclaim for a declaration that they are the lawful owners of the suit property. In the alternative, the late Suwed Sadiq claimed compensation for the unexhausted improvements.

Subsequently, the 1st and 2nd respondents on 8th July, 2004 applied for a third party notice which was served to the Attorney General and National Bank of Commerce Ltd (3rd respondent). On 16th August, 2004,

the 3rd respondent lodged a third party notice and a written statement of defence, in which it was pleaded, among others, that the issue of ownership of the suit property was finally determined by the High Court in Civil Case No. 64 of 1999.

Having heard the parties on the issue of *res judicata*, the learned High Court judge on 2nd December, 2005 sustained the respondents' objection and, hence, dismissed the suit for being *res judicata*.

Dissatisfied by the decision of the High Court, the appellant lodged several applications and appeals before the High Court and this Court seeking to assail the decision of the High Court in Land Case No. 24 of 2004. Particularly, the late Suwed Sadiq, on 3rd February, 2009 lodged Civil Appeal No. 27 of 2006 which was struck out by the Court on 3rd February, 2009. Subsequently, he lodged Civil Appeal No.6 of 2014, but the same was marked withdrawn by the Court on 7th December, 2018.

On the other hand, on 7th September, 2018, the appellant lodged Miscellaneous Land Application No.65 of 2018 for correction of errors in the ruling of the High Court (Kileo, J) in respect of Land Case No. 24 of 2004. The application was granted as per the ruling of the High Court dated 31st May, 2019.

Moreover, on 3rd June, 2019 the appellant applied to the Deputy Registrar of the High Court to be supplied with a copy of the corrected ruling and drawn order. The appellant also successfully lodged before the High Court Misc. Land Application No. 518 of 2019 for extension of time within which to lodge a notice of appeal out of time against the High Court's ruling in respect of Land Case No. 24 of 2004. Thus, the notice of appeal in respect of this appeal was lodged by the late Suwed Sadiq on 21st October, 2020.

Before the hearing of the appeal could proceed on merit on 6th November, 2023, the Court wanted to satisfy itself on the propriety or otherwise of the appeal before it on two issues. One, whether it was filed within 60 days of the date when the notice of appeal was lodged in the Court. Two, the validity of the notice of appeal. The parties were therefore required to address the Court on those matters. Mr. Joseph Rutabingwa, learned advocate who appeared for the appellant prayed for adjournment to enable him prepare the response because he needed time to scrutinize the record of appeal. The request was not contested by Mr. Sylvester Shayo and Dr. Onesmo Michael Kyauke, both learned advocates who appeared for the first and second respondents and third respondent

respectively. Therefore, the hearing of the appeal was adjourned to 15th November, 2023.

When the appeal was called on for hearing on 15th November, 2023, the same counsel appeared for the respective parties.

When Mr. Rutabingwa was given an opportunity to expound on the issue of time limit, he submitted that after the delivery of the impugned ruling of the High Court in respect of Land Case No.24 of 2004, on 5th December, 2005, the appellant requested to be supplied with a copy of proceedings of the High Court in compliance with the law. Subsequently, the appellant filed Civil Appeal No. 27 of 2006 which was unfortunately, struck out by the Court on 3rd February, 2009. He went on to submit that the appellant sought extension of time and when he was granted, he lodged Civil Appeal No. 6 of 2014 which was however marked withdrawn by the Court on 5th July, 2018. Mr. Rutabingwa submitted further that, after the withdraw of Civil Appeal No. 6 of 2014, the appellant applied to the High Court for correction of the errors in the ruling in Land Case No. 24 of 2004 which was granted on 31st May, 2019 and that he applied for a certified copy of the ruling on 4th June, 2019.

It was thus Mr. Rutabingwa's submission that in reckoning the days of delay the period started to run from the date when the appellant applied for a certified copy of the proceedings of the High Court on 5th December, 2005 to 11th February, 2021 when he obtained the corrected ruling and not from 4th June, 2019 indicated in the certificate of delay. The learned counsel was certain that upon the striking out of the first appeal, the letter dated 5th December, 2005 remained intact. To bolster his proposition, he cited the case of **Caste Corporation v. The Board of Trustees of the Public Service Social Security Fund**, Civil Application No. 288/16 of 2021 [2022] TZCA 540 (7 September 2022, TanzLII).

Based on the above submission, he conceded that the certificate of delay in the record of appeal is defective for not indicating the correct date, that is, 5th December, 2005 when the appellant applied to be supplied with certified copy of proceedings instead of 4th June, 2019. However, he urged the Court to grant the appellant leave to approach the Deputy Registrar of the High Court to rectify the error in the certificate of delay thereafter file a supplementary record of appeal containing the rectified certificate of delay. Supporting his proposition, he cited the cases of **Juma Sitta Bundara and Others v. Kidee Mining (T) Ltd**, Civil

Appeal No. 239 of 2019 [2022] TZCA 47 (22 February 2022, TanzLII) and **Bright Technical System & General Supplies Ltd v. Institute of Finance Management (IFM)**, Civil Appeal No.12 of 2020 [2022] TZCA 710 (11 November 2022, TanzLII).

In response, Mr. Shayo submitted that the appeal was lodged out of time since the letter dated 5th December, 2005 cannot be relied upon for computation of time as stated by Mr. Rutabingwa. He clarified that, when the Court struck out Civil Appeal No.27 of 2006, no document in the record of appeal survived. It was the contention of Mr. Shayo that, the Deputy Registrar of the High Court cannot rectify the certificate of delay and exclude the number of days including those in which the proceedings were in the Court of Appeal where the two appeals stated above were struck out and marked withdrawn respectively. He maintained that since the notice of appeal in respect of this appeal was lodged on 21st October, 2020, the appeal had to be lodged on or by 20th December, 2020. In the circumstances, the learned counsel argued that the available remedy is to strike out the instant appeal. In conclusion, he implored us to decline the appellant's prayer and strike out the appeal with costs.

Dr. Kyauke, on his part, supported the submission by Mr. Shayo on time limit. He submitted that, the certificate of delay is invalid and thus it cannot be corrected. To buttress his contention, he referred us to the case of **Caste Corporation v. The Board of Trustees of the Public Service Social Security Fund** (supra). Dr. Kyauke, emphasized that, since the Court struck out Civil Appeal No. 27 of 2006, no document in the record of appeal survived. He also submitted that the decisions of the Court relied upon by the counsel for the appellant are distinguishable with the circumstances of this appeal and therefore are not applicable. He concluded that the appeal is incompetent for being time barred and urged the Court to strike it out with costs.

In his rejoinder, Mr. Rutabingwa reiterated his submission in chief and stressed that the appellant be granted leave to approach the Deputy Registrar of the High Court to rectify the certificate of delay.

We have considered the submissions made by the learned counsel for the parties on the issue of time limit. The issue in controversy that calls for our consideration is therefore whether the appeal is time barred. In resolving this issue, we shall begin by expounding the principles governing the period in which the appeal must be lodged as stipulated under rule 90

(1) of the Tanzania Court of Appeal Rules (the Rules). For the sake of clarity, we find it apposite to cite it in extenso thus: -

*"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) N/A*

*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.**"* [Emphasis added.]

Going by the above provision, the appellant is required to lodge his appeal within sixty (60) days from the date of the lodgement of a notice of appeal. The only exception is where the appellant has not obtained a certified copy of the proceedings from the High Court after requesting the same in writing within thirty (30) days after the delivery of the impugned decision.

The above-explained exception apply in a situation when the normal period of 60 days for lodging an appeal expires without an appeal being lodged whereas, a certificate of delay is needed.

In the present appeal, according to the record of appeal, it is not disputed that after the delivery of the impugned ruling of the High Court on 2nd December, 2005, the appellant applied for certified copy of proceedings through a letter dated 5th December, 2005 as reflected at page 176 of the record of appeal. It is also plain that the Court struck out Civil Appeal No. 27 of 2006 which was lodged by the appellant and thus all documents that had been filed including the letter and the notice of appeal suffered the same consequences of being struck out. Therefore, we are at one with the respondents' counsel that the said letter did not survive the wrath suffered by the appeal. For this stance, see **Davis Bernard Haule v. National Microfinance Bank PLC (NMB)**, Civil Application No. 195/9 of 2019 [2020] TZCA 158 (23 March 2020, TanzLII) and **Eveline J. Ndyetabula v. Star General Insurance (T) Limited**, Civil Appeal No. 189 of 2019 [2022] TZCA 538 (7 September 2022, TanzLII). Thus, though the appellant counsel refrained from stating that when Civil Appeal No. 6 of 2014 was lodged no reliance was made in the

said letter, we are certain that the appeal was lodged after time was extended to lodge the notice of appeal followed by the appeal. It is thus no wonder that even in the instant appeal, the notice of appeal was lodged on 21st October, 2020 after the appellant's application for extension of time was granted by the High Court (Opiyo, J) in Miscellaneous Land Case No. 518 of 2019 on 9th September, 2020. It is noteworthy that before 21st October, 2020, the appellant had made his application for rectification of the error in the ruling which was granted on 31st May, 2019 and written a letter to be supplied with the proceedings on 3rd June, 2019. The said letter cannot therefore be of assistance in reckoning the number of days to be excluded, that is, from 4th June, 2019 to 11th February, 2021. It follows that the certificate of delay in the record of appeal is invalid and that it cannot be rectified as requested by the appellant's counsel. For this stance see **Tanzania Telecommunications Co. LTD V Stanley S. Mwabulambo**, Civil Appeal No. 26 of 2017 [2021] TZCA 272 (30 June 2021, TanzLII).

We are mindful of the request by the appellant that he should be allowed to approach the Deputy Registrar of the High Court to rectify the certificate of delay to cover the period between 5th December, 2005 when

he wrote the first letter to 11th February, 2021 when he was supplied with the rectified copy of the ruling. We equally decline the request for the following reasons. First, we agree with the respondents' counsel that since Civil Appeal No.27 of 2006 was struck out by the Court on 3rd February, 2009, the documents pertaining to it suffered the consequences as intimated above. We are supported by the decision of the Court cited above. In this regard, we hold that the decisions of the Court cited by the appellant to support his stance are distinguishable with the circumstances of this appeal. In those decisions what was struck out was the notice of appeal. Two, even if we are to allow the appellant to rectify the certificate of delay, the Deputy Registrar of the High Court is not mandated to exclude the number of days to include even those when the proceedings were in the Court of Appeal. This is so because the period from 5th December, 2005 to 11th February, 2021 covers the number of days including those in which the appellant was in this Court pursuing Civil Appeals No. 27 of 2006 and No. 6 of 2014. This stand was well elaborated by the Court in the case of **Hamisi Mdida & Another v. Registered Trustees of Islamic Foundation**, Civil Appeal 59 of 2020 [2020] TZCA 1918 (17 December 2020, TanzLII), in which we stated:

"We need to emphasize that the Registrar of the High Court is required to comply fully with the reproduced provisions of Rule 90(1) and Form L when preparing and issuing the certificate of delay to the respective appellant. He must state in very clear terms that the days to be excluded in computing the period of limitation are those from the time when the appellant applied for a copy of proceedings to the date he notified him that the documents were ready for collection. Moreover, the Registrar of the High Court should only exclude a total number of days pertaining to the preparation and delivery of the copy of proceedings in the High Court. According to the Rules, the Registrar of the High Court cannot therefore purport to also exclude the days in which the proceedings relate to the applications or appeals handled by the Court of Appeal". [Emphasis added].

Guided by the above authority, we do not agree with Mr. Rutabingwa's prayer to be granted leave to approach the Deputy Registrar of the High Court to issue a corrected certificate of delay.

In the circumstances, since the notice of appeal was lodged on 21st October, 2020, the appeal had to be lodged within 60 days, that is, by 20th December, 2020. This appeal is therefore time barred contrary to the requirement of rule 90 (1) of the Rules.

Having reached that conclusion on the first issue, in the circumstances of this appeal, we do not find it necessary to deal with the propriety of the notice of appeal.

For the aforesaid reasons, we hold that the appeal is incompetent for being lodged out of the prescribed period of sixty (60) days contrary to rule 90 (1) of the Rules. Consequently, we strike out the appeal with costs.

DATED at DAR ES SALAAM this 29th day of November, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 7th day of December, 2023 in the presence of Mr. Evodius Rutabingwa, learned counsel for the Appellant and Ms. Hamisa Nkya, learned counsel for the 3rd Respondent also holding brief for Mr. Sylvester Shayo, learned counsel for the 1st & 2nd Respondents, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL