

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

(CORAM: MWANDAMBO, J.A., KIHWELO, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 126 OF 2021

GEOFFREY MATHEW..... APPELLANT

VERSUS

ZENUFA LABORATORIES RESPONDENT

**(Appeal from the judgment and decree of the High Court of Tanzania,
Labour Division at Dar es Salaam)**

(Wambura, J.)

dated the 17th day of July, 2020

in

Revision No. 484 of 2019

RULING OF THE COURT

13th February & 05th March, 2024

MGONYA, J.A.:

The appellant was dissatisfied by the judgment and decree of the High Court in Revision No. 484 of 2019 setting aside an award made in his favour by the Commission for Medication and Arbitration, (CMA).

On 13th July, 2022, the Court noted that a copy of the letter to the Registrar applying for copies of proceedings was missing. Besides, the certificate of delay was wanting in that respect. From those legal

shortfalls, the Court granted the appellant leave to lodge supplementary record of appeal incorporating a copy of the letter to the Deputy Registrar in compliance with rule 90 (1) of the Rules; as well as a properly drawn certificate of delay.

When the appeal resumed for hearing before us, the appellant had the services of Mr. Evold Mushi, learned advocate whereas the respondent was represented by Mr. Gilbert Mushi, learned advocate. Before the commencement of hearing, the respondent's counsel contended that the appeal is unmaintainable and bad in law for being preferred out of the prescribed time contrary to rule 90 (3) of the Rules.

Elaborating, the respondent's counsel argued that the basis of his assertion lies in the fact that the letter which was written to the Deputy Registrar of the High Court requesting for the records of appeal was not served on the respondent. The learned advocate maintained that, under the circumstances, the appellant cannot rely on the certificate of delay to exclude any period for institution of the appeal. The respondent's counsel argued that, the appeal is time barred and it should to be struck out.

In his response, the appellant's counsel said that, the appeal is within time after the appellant had lodged a supplementary record of appeal containing a copy of the letter to the Registrar, High Court and a rectified certificate of delay.

On the issue of service, the counsel beseeched the Court to give him benefit of doubt by believing him that he served the respondent with the letter as required under rule 90 (3) of the Rules, despite lack of proof of service. Counsel insisted that, although the letter in the record of appeal has no indication that was received by the respondent, he is sure that it was served on the respondent's counsel.

Having heard counsel for both sides, the issue before us for determination is whether the appeal is competent and properly before the Court. The objection by the respondent's counsel revolves around rule 90 of the Rules. For ease of reference, rule 90 (1) and (3) of the Rules provides:

"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) N/A

(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 record of appeal shows that the notice of appeal was lodged in the High Court on 3/8/2020 and thereafter the Memorandum of Appeal and record of appeal was filed on 19/4/2021 almost 256 days contrary to rule 90 (1) of the Rules. Further, page 219 shows that the letter requesting for certified copies of judgment, decree and proceedings was delivered before the High Court on 6/10/2020. However, the said letter

does not indicate that the respondent was served as claimed by the appellant. Given the fact that the respondent's stance is that he was not served, and since the copy of the letter which was intended for that purpose does not show proof of service, it is obvious that the appellant had the burden of proof that he really served the respondent. However, the appellant has failed to discharge that burden. We therefore agree with the respondent's counsel that indeed, the letter was not served on the respondent.

It is plain from page 222 that the appellant was issued with the certificate of delay excluding 170 days. However, since we have held that a copy of the letter to the respondent requesting for the records from the High Court was not served on the respondent, the certificate issued to the appellant becomes ineffective. With that finding, we hasten to hold that, the appeal is time barred attracting an order striking it out. See: **Attorney General Zanzibar v. Jaku Hashim Ayoub & Another**, Civil Appeal No. 241 of 2020; **Augustino Mkalimoto (As Administrator of the Estate of the Late Mlamstembo Mkalimoto v. Village Schools of Tanzania & Others**, Civil Appel No. 154 of 2019, (unreported).

Consequently, we hereby strike out the appeal with no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 04th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 05th day of March, 2024 in the presence of Mr. Godfrey Ngassa, learned counsel for the Appellant and Respondent is absent, is hereby certified as a true copy of the original.



A. S. Chugulu
A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL