

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

**(CORAM: MKUYE, J.A., KIHWELO, J.A., And MAKUNGU, J.A.)**

**CIVIL APPEAL NO. 16 OF 2020**

**AZANIA BANK LIMITED ..... APPELLANT**

**VERSUS**

**KEC INTERNATIONAL LIMITED..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania  
(Commercial Division) at Dar es Salaam**

**(Philip, J.)**

**Dated the 20<sup>th</sup> day of June, 2019**

**In**

**Commercial Case No. 152 of 2015**

**.....**

**RULING OF THE COURT**

1<sup>st</sup> November, 2022 & 8<sup>th</sup> February, 2024

**MAKUNGU, J.A.:**

On 20.6.2019 the High Court of Tanzania (Commercial Division) at Dar es Salaam, in Commercial Case No. 152 of 2015 passed a decree in favour of the respondent KEC INTERNATIONAL LIMITED. In that case, the appellant, AZANIA BANK LIMITED was the defendant where the respondent was the plaintiff. The plaintiff in its plaint claimed against the defendant payment of USD 830,895.43 being the amount due and payable in connection with the Advance Payment Guarantee Agreement issued by

the defendant in favour of the plaintiff, in respect of a sub-contract-agreement between the plaintiff and the third party known as New Wave Advanced Capital (Pty) Ltd, interests and costs of the suit. At the end of the trial, the claim was allowed.

Dissatisfied with the decision and decree of the High Court, the appellant lodged a notice of appeal and applied to the Registrar of the High Court (Deputy Registrar) for a certified copy of the proceeding for appeal purpose on 27. 06.2019. Thereafter, on 20.11.2019 the Deputy Registrar wrote a letter to notify the appellant that the requested documents were ready for collection and the same date, a certificate of delay was issued. The instant appeal was then lodged on 24.01.2020.

The appeal comprises seven grounds of appeal. However, for reasons which will be apparent shortly, we do not deem appropriate, for the purpose of our ruling to reproduce them herein below.

When the appeal came for hearing on 1.11.2022, the appellant was represented by Mr. Seni Songwe Malimi, learned counsel, whereas the respondent had the services of Mr. Sinare Zaharan assisted by Ms. Jacqueline Kapinga, both learned counsel.

At the outset Mr. Malimi prayed for an adjournment of the hearing of the appeal for a simple reason that he received the notice of hearing on 27. 10. 2022 when he was in Morogoro. He prayed in terms of rule 38 A (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to adjourn the hearing so as to get well prepared for the appeal. According to him, in terms of rule 108 of the Rules, the notice of hearing ought to be served within 14 days before the hearing date but in his case it was served within 3 days. Although, Mr. Malimi also noted that, the appellant filed her written submissions two years ago, but he would wish to present his oral submission before the Court. On his part, Mr. Zaharan, learned counsel for the respondent agreed to the prayer made by his learned friend.

Prior to the adjournment of the hearing of the appeal as prayed by the parties, the Court required the parties to address it on two points. **One**, on the propriety or otherwise of the appeal and specially on the validity of the certificate of delay dated 28.11.2019. **Two**, on the appellant's failure to include the 3<sup>rd</sup> party (New Wave Advanced Capital (Pty Ltd) in the notice of appeal.

Mr. Malimi conceded to both points raised by the Court. On the issue of certificate of delay, he submitted that while it was indicated in the said certificate of delay that the appellant's letter which requested for a copy

of proceedings was dated 20.06.2019, the letter to that effect showed that it was written on 27.06.2019. Therefore the certificate is defective. In the circumstances, he prayed the Court to rely on overriding objective in terms of sections 3A and 3B of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] and the appellant to be allowed to approach the Registrar of the High Court to rectify the certificate of delay and the appellant to obtain a proper certificate to be lodged in a form of supplementary record of appeal. To support his contention, he referred us to the case of **Absa Bank of Tanzania Limited (Formerly known as Barclays Bank Tanzania Limited & Another v. Hjordis Fammestad**, Civil Appeal No. 30 of 2020 (unreported).

In addressing the second issue relating to the 3<sup>rd</sup> party not being included in the notice of appeal, Mr. Malimi strongly contended that the same are non-consequential as it does not affect the validity of the appeal. He argued that the omission never occasioned any prejudice or injustice to anybody and as such it can as well be safely ignored in order to achieve substantial justice. He strongly urged us to proceed with the hearing in her absence since she did not appear before the trial court throughout the hearing of the case. He added that the judgment of the High Court and the grounds of appeal did not touch her. He prayed the Court if it

finds that it is necessary to be included in the appeal, the appellant to be allowed to amend the notice of appeal for that purpose.

In response, the respondent's counsel attacked the certificate of delay appearing at page 680 of the record of appeal by arguing that it suffered shortfalls, the first being that indicated by the appellant's counsel, as the date the appellant requested for a copy of the proceedings of the High Court was wrong. On that basis, the certificate of delay is defective and consequently the appeal is time barred. He implored on the Court, in the circumstances of this matter, not to invoke the overriding objective principle as that would be tantamount to condoning non-compliance with the law regulating the timelines to file an appeal to the Court. To support his argument, he referred us to the case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017 (unreported) where the Court emphasized that the overriding objective principle should not be blindly invoked. He concluded by urging the Court to strike out the incompetent appeal as it is in violation of rule 90 (1) of the Rules.

On the second issue of omission to include the 3<sup>rd</sup> party in the appeal, Mr. Zaharan was not in the position to address the Court properly

because he had no authority at hand on that issue and therefore left the matter to the Court to decide.

In his brief rejoinder, Mr. Malimi strongly urged the Court not to consider the cited case of **Mondorosi** because it is distinguishable from this case. In that case he said the certificate was not included in the record but in our case the certificate is in the record and the letter was filed in time and therefore the appeal is not time barred. He insisted that the error was done by the Registrar, may be the slip of the pen and can be corrected by a filing supplementary record to incorporate a proper certificate of delay.

Having heard counsel for the parties on the above points, we are settled that the certificate of delay is defective. We thus have no hesitation to state that the said error vitiates the certificate of delay. In the circumstances the crucial point for our determination is the way forward as proposed by each counsel of the parties.

As stated in a number of decisions of the Court an obvious error in the certificate of delay goes to its very root and vitiates it. For instance, in **ECO Bank Tanzania Limited v. Future Trading Company Limited**, Civil Appeal No. 82 of 2019 (unreported), we made reference to

the decision of the Court in **Kantibhai Patel v. Duhyabhai F. Mistry**

[2003] T.L.R. 437 in which it was plainly stated that:

*"The very nature of anything called certificate requires that it be free from error and should an error crop into it, the certificate is vitiated. It cannot be used for any other purpose because it is not better than a forged document an error in a certificate is not a technicality which can be conveniently glossed over; it goes to the very root of the document you cannot sever the erroneous part from it and expect the remaining part to be a perfect certificate; you can only amend it or replace it altogether as by law provides."*

In the present appeal, there is no doubt that although on 27.06.2019 the Registrar of the High Court received the appellant's letter dated 27.06.2019 requesting to be supplied with copies for the purpose of appeal, he still indicated a different date (20.06.2019) in the certificate of delay. Much as Mr. Malimi submitted that despite the error indicated in the certificate of delay no mischief was involved, but as correctly stated in **Kantibhai Patel v. Duhyabhai F. Mistry** (supra) that error rendered the certificate invalid.

Indeed, while we acknowledge the fact that it is the duty of the Registrar of the High Court to issue a proper certificate as required by law, we equally have the view that it is also the responsibility of the party who collects the certificate of delay to ensure that it is correct and if it has any error to request for rectification immediately. A party who receives a defective certificate of delay and act on it without seeking rectification is equally to blame and cannot apportion full responsibility on the Registrar of the High Court.

All in all, in this appeal, considering the circumstances that led to the said defect we have no hesitation to state that the error in the certificate of delay is largely attributed to the Registrar of the High Court.

As to what will be the way forward, the Court in the case of **M/s Universal Electronics and Hardware (T) Limited v. Strasbag International GmbH (Tanzania Branch)**, Civil Appeal No. 122 of 2017 (unreported) held that, a defective certificate of delay may be rectified by lodging a valid one.

Again, in the case of **Absa Bank Tanzania Limited** (supra), the Court stated that, where a certificate of delay is defective, the appellant should be allowed to seek and obtain a valid one.



In the result, in terms of rule 4 (2) (a) and (b) of the Rules, we allow the appellant to seek a rectification of the certificate of delay to make it to be in conformity with the requirement of the law and in accordance with the relevant materials which were placed before the Registrar of the High Court. Consequently, we order a rectified version of the certificate of delay, if obtained, be lodged in a form of supplementary record of appeal within twenty one (21) days from delivery of this Ruling.

The last point was the failure of the appellant to include the 3<sup>rd</sup> party in the notice of appeal. It is apparent that this appeal is pegged under the notice of appeal filed on 27.06.2019 as found at pages 669 to 671 in the record of appeal. Having read the record of appeal, we found the trial court proceeding and the impugned judgment involved the 3<sup>rd</sup> party, one New Wave Advanced Capital (Pty) Ltd. Therefore, it is our view that any omission to include the said 3<sup>rd</sup> party in the filed notice of appeal or failure to serve her with the notice of appeal offends the dictate of rule 84 (1) of the Rules. Mr. Malimi urged us to allow the hearing in her absence since she did not appear before the trial court throughout the hearing of the case. In the case of **Phoenix of Tanzania Assurance Company Ltd v. Jilala Julius Kakenyeli**, Civil Appeal No. 14 of 2017 (unreported), the Court stated inter alia that:

*".... the notice of appeal may be effected even to persons who did not take part in the proceedings before the High Court but they seem to be directly affected by the appeal."*

In the light of the foregoing, and for the purpose of fair trial the notice of appeal has to be amended to accommodate the 3<sup>rd</sup> party. Consequently, we order the appellant to amend the notice of appeal within twenty one (21) days of the delivery of this Ruling.

Order accordingly.

**DATED at DAR ES SALAAM** this 29<sup>th</sup> day of January, 2024.

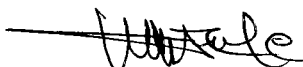
R. K. MKUYE  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

O. O. MAKUNGU  
**JUSTICE OF APPEAL**

The Ruling delivered this 8<sup>th</sup> day of February, 2024 in the presence of Mr. Ibrahim Kibada holding brief for Mr. Seni Songwe Malimi, learned counsel for the appellant and Ms. Jacqueline Kapinga, learned counsel for the respondent is hereby certified as a true copy of the original.



  
O. H. KINGWELE  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**