

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: LEVIRA, J.A., GALEBA, J.A. And ISMAIL, 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 MAREALLE 3RD RESPONDENT

**[Appeal from the Decision of the High Court of Tanzania, Labour
Division at Dar es Salaam]**

(Maghimbi, J.)

dated the 24th day of September, 2019

in

Miscellaneous Land Application No. 472 of 2019

.....

RULING OF THE COURT

12th March & 12th April, 2024

GALEBA, J.A.:

In terms of the decree of the High Court in Consolidated Land Cases No. 76 and 91 of 2004, Yusuf Hamis Mushi, the second respondent in this appeal, was one of the judgment debtors, and Frank Lionel Marealle, the third respondent was the decree holder. Following execution of the same decree, on 22nd April, 2012, the second respondent's property located at

Plot No. 139 Regent Estate in Dar es Salaam, was sold by GEMACO Auction Mart International Ltd, the second appellant, to Abubakar Khalid Haji, the first appellant. In order to render the sold property vacant, on 10th May, 2016, the High Court issued an eviction order.

Upon learning of the eviction threats, on 16th May, 2016, Zamzam Yusuf Mushi, the first respondent, jointly with the second, instituted Land Case No. 142 of 2016 against the two appellants and the third respondent in this appeal. When that case was called on for hearing, a preliminary objection was raised, that it was time barred. Following determination of that point, on 21st August, 2019, the High Court (Kairo J.) dismissed the suit with costs.

The order dismissing the suit aggrieved the first respondent, who lodged Miscellaneous Land Application No. 472 of 2019, seeking to have the order reviewed and her case restored. Consequent to hearing of that application, the High Court, (Maghimbi J.), allowed it thereby restoring Land Case No. 142 of 2016.

The High Court's restoration order aggrieved the appellants, hence the present appeal. Nonetheless, on 20th March, 2023, the first respondent lodged a notice of preliminary objection, that the certificate of delay was

defective. The objection was heard and by a ruling delivered on 21st November, 2023, this Court (Mkuye, J.A., Mwampashi, J.A., And Ngwembe, J.A.), issued the following order:

"In this regard... in terms of 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 is 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..."

In compliance with this order, on 23rd November, 2023, the appellants requested for a rectified certificate from the Registrar. The latter issued a rectified certificate to the appellants, and on 20th December, 2023, the appellants lodged a supplementary memorandum of appeal, attaching on it, the said certificate, then this appeal was set down for hearing.

Before the appeal was to be heard, Mr. Mushi raised yet another preliminary objection whose notice had earlier been given, that:

"1. The appeal is hopelessly time barred for;

- (a) The appellants' failure to attach the Rectified Certificate of Delay issued to them in conformity with the orders of this Court dated 20th November, 2023.*
- (b) Containing a Certificate of delay that is problematic and defective; and*
- (c) The appellant's failure to attach the letter that informed them on the collection of the rectified certificate."*

At the hearing of this appeal, appearing for the appellants was Mr. Derick Pascal Kahigi learned advocate, and for the first respondent was Mr. Salim Mushi, learned advocate. The second and third respondents, respectively, enjoyed the services of Ms. Agnes Dominic and Mr. Rita Odunga Chihoma, both learned advocates.

Upon taking the floor to argue the objection, Mr. Mushi contended that the rectified certificate of delay was defective such that it cannot be relied upon to exclude any period of time delayed to lodge the appeal. His arguments, in summary were; **first**, the rectified certificate of delay states that it was the applicant who requested for a copy of the proceedings, whereas the applicant in Miscellaneous Civil Application No. 472 of 2019 was Zamzam Yusuf Mushi, who never requested for any copy of the

proceedings from the High Court. The learned counsel contended further that, as **Form L** in the first schedule to Tanzania Court of Appeal Rules, 2009 (the Rules), shows that a person who requests for a copy of the proceedings, under rule 90 (1) of the Rules, is "*the appellant*", then the certificate of delay is erroneous for containing the word "*the applicant*" in the place of the phrase "*the appellant*". According to learned counsel, reference in the certificate that it was the applicant who applied for a copy of the proceedings, was a serious transgression.

The **second** point was that, the new certificate excludes 1,521 days which are more than 1,015 which had been excluded in the previous defective certificate. Mr. Mushi's argument, was that as the appeal had been filed on 2nd September, 2022, it was not only erroneous but also pointless to certify time within which to lodge the appeal, beyond that date. This, according to him, was an infraction vitiating the rectified certificate of delay. The learned counsel contended that, a valid certificate of delay must, on all occasions, be free from any error, and to support his contention, he referred us to this Court's decisions in **Absa Bank Tanzania Limited and Another v. Hjordis Fammestad**, Civil Appeal No. 30 of 2020 and

Tanzania Telecommunications Co. Limited v. Stanley S. Mwabulambo, Civil Appeal No. 26 of 2017, (both unreported).

The other alleged violation fronted by Mr. Mushi, was that, the appellants did not attach to the supplementary record of appeal, a letter from the Registrar of the High Court, notifying them that the rectified certificate was ready for collection.

In reply, Mr. Kahigi submitted that the word *applicant* in the rectified certificate was not misleading, because the parties who requested (applied) and were furnished with a copy of the proceedings, were the appellants in this appeal. He referred the Court to rule 90 (1) of the Rules, which refers to the person who requests for a copy of the proceedings as an applicant because that rule terms the request "*an application*". As for **Form L** in the Rules, Mr. Kahigi referred us to rule 90 (2) of the Rules and contended that the words in that form are usable *mutatis mutandis*, such that, depending on the circumstances in a particular case, the word appellant may be used, but also the word applicant, may as well, be used.

As for the variance in the number of days in the defective certificate and the rectified certificate, the counsel briefly submitted that, it was proper to exclude the days up to the day that the rectified certificate was issued.

Finally, on the case of not attaching a letter inviting the appellants to collect a certificate of delay, he submitted that the letter is attached at page 62 of the supplementary record of appeal.

On her part, Ms. Dominic adopted Mr. Mushi's position and supported his prayers.

Ms. Chihoma contended that the Registrar was justified to exclude the days up to the date that she issued the rectified certificate, because the very rectified certificate of delay ought to be part of the record of appeal.

In our view, the preliminary objection raised must be resolved in the context of this Court's ruling delivered on 21st November, 2023 and the powers of the Registrar exercisable under rule 90 (1) and (2) of the Rules.

Simply put, the ruling of this Court included at page 2 of the supplementary record of appeal, did the following; **one**, it made it clear that the previous certificate of delay was defective, and; **two**, it permitted the appellants to approach the Registrar of the High Court and obtain a certificate of delay which would be in conformity with the requirements of the law and in accordance with what was sought in the letter by the appellants dated 10th October, 2019. **Three**, the ruling permitted the

appellants, to file a supplementary record containing the rectified certificate within 30 days from the date when the ruling was pronounced.

Under the law, powers to issue certificates of delay in appeals are vested in the Registrar of the High Court. The relevant provision is rule 90 (1) and (2) of the Rules, which provides as follows:

"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) The certificate of delay under rules 45, 45A and 90 (1) shall be substantially in the Form L as

specified in the First Schedule to these Rules and shall apply mutatis mutandis.”

[Emphasis added]

Our starting premise is to determine whether referring to a party who loses in a case, and requests for a copy of the proceedings, as *the applicant* is offensive of any law. In this case, when the appellants lost in Miscellaneous Land Application No. 472 of 2019, they requested for a copy of the proceedings for appeal purposes. Rule 90 (1) of the Rules, refers to this kind of request as *an application*. Thus, referring to the person who requests for a copy of the proceedings as *the applicant*, is harmonious to rule 90 (1) of the Rules. Thus, the argument that the use of the term *applicant* in the rectified certificate of delay rendered it invalid, is itself, invalid and we reject it out of hand.

The other issue that was hotly contested, was the complaint that the Registrar of the High Court was not justified to write more days than those that were indicated in the invalid certificate. This complaint calls for a brief discussion that will bring to light a clear grasp of the powers of the Registrar and the contents of a valid record of appeal, under rules 90 (1) and 96 (1), both of the Rules, respectively.

It is logical that we start with rule 90 (1) of the Rules under which the only judicial officer with mandate to issue a certificate of delay, is the Registrar of the High Court. It is also significant to remark that, in issuing a rectified certificate of delay, the Registrar is not bound to make any reference to, or to include any content from the defective certificate, unless the Court ordering the rectification, so directs. This Court, in its order of 21st November, 2023, did not require the Registrar to observe any specific conditions in composing the rectified certificate of delay. In fact, the Court directed the Registrar to issue the rectified certificate, according to law. That means, the Registrar had all the powers under rule 90 (1) of the Rules in drawing up the rectified certificate.

In retrospect also, we should point out that the objective of inclusion of the certificate of delay in any record of appeal, is to exclude all the time that was necessary for the Registrar, to prepare the documents that are required for inclusion in the record of appeal. With that in mind, we will then cross over to rule 96 (1) of the Rules, in order to find out the documents that the Registrar is supposed to prepare and supply to the intended appellant, where the appeal cannot be filed within 60 days of filing the notice of appeal. Rule 96 (1) of the Rules provides that:

"96.-(1) For the purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3) contain copies of the following documents;

(a) to (j) N/A

*(k) **such other documents, if any, as may be necessary for the proper determination of the appeal,** including any interlocutory proceedings which may be directly relevant, save that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any of their parts that are not relevant to the matters in controversy on the appeal."*

[Emphasis added]

That is to say, in the context of a matter like the present appeal which was not filed within 60 days from when the notice of appeal was lodged, a certificate of delay becomes "*a document necessary for determination of the appeal,*" in terms of rule 96 (1) (k) of the Rules as highlighted above. That is so because, an appeal lodged beyond 60 days from when the notice of appeal was lodged, cannot be determined unless a valid certificate of delay is part of the record of appeal. The relevant point to underscore here

and underline, is the very last observation we have just made; that a valid certificate of delay has to be part of the record of appeal to justify the Court's powers to deal with the matter.

Mr. Mushi's complaint as to the addition of the number of days in the rectified certificate, may be settled by an answer to this question; when did the Registrar, complete preparation of the last document for inclusion in the record of appeal. In this case, it is clear that the Registrar issued the rectified certificate of delay on 11th December, 2023, which was the latest document that she issued. In other words, as long as the last valid document to be included in the record of appeal, which in this case is the rectified certificate, could only be ready for issuance on 11th December, 2023 which was the 1,521st day, the time necessary to prepare it for purposes of exclusion of time, included that date, and our settled view is that the Registrar had powers to do so under Rule 90 (1) of the Rules.

We also consider as invalid, the argument that, since the appeal was lodged on 2nd September, 2022, therefore time to file it, cannot be excluded up to and including 11th December, 2023. The point is, physically, the appeal was lodged on 2nd September, 2022, but the same had never been a competent appeal because of lack of a valid certificate of delay, until the

date on which the valid certificate was procured and ultimately filed in Court. Legally, therefore, prior to the lodging of the supplementary record of appeal containing the rectified certificate, no proper appeal could be entertained by the Court.

Thus, our brief conclusion on this point is that, the Registrar was justified to have excluded all the time up to 11th December, 2023 because that is the day on which she issued the last document for inclusion in the record of appeal. Accordingly, Mr. Mushi's grounds (a) and (b) of his notice of objection, have no legal backing and we reject them.

The last complaint which was equally faint and moonshine, was that the supplementary record did not contain the letter from the Registrar informing the appellants' advocate that the rectified certificate was ready for collection. This complaint lacks basis because the process to procure the rectified certificate of delay was pursuant to this Court's order which set 30 days as the time within which to file the supplementary record of appeal. If this was the case, the letter from the Registrar inviting the appellants or their advocate to collect the rectified certificate would be, as we hold, of no relevance.

Based on the above discussion, the preliminary objection is overruled with costs.

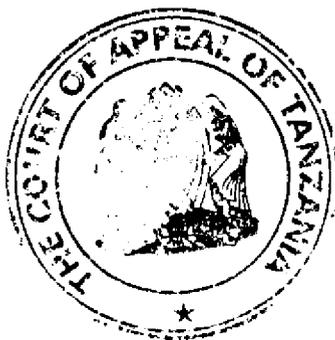
DATED at DAR ES SALAAM, this 9th day of April, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

Ruling delivered this 12th day of April, 2024 in the presence of Mr. Leobinus Mwebesa Leonidas, learned Counsel for the appellants, Ms. Agnes Dominick, learned counsel for the 2nd Respondent also holding brief for Ms. Salim Mushi, learned counsel for the 1st Respondent and Ms. Queen Sambo holding brief for Ms. Rita Chihoma, learned counsel for the 3rd Respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL