

**IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA**

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

CIVIL APPEAL NO. 540 OF 2023

HARIDI ALLY LIMAMA.....APPELLANT

VERSUS

MASASI DISTRICT COUNCIL.....1ST RESPONDENT

**THE BOARD OF TRUSTEES OF PUBLIC
SERVICE SOCIAL SECURITY FUND.....2ND RESPONDENT**

THE ATTORNEY GENERAL.....3RD RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Mtwara)**

(Muruke, J.)

dated the 29th day of June, 2022

in

Civil Case No. 02 of 2020

RULING OF THE COURT

7th & 10th June, 2024

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania at Mtwara dated 29th June, 2022 in Civil Case No. 02 of 2020. In that case, Haridi Ally Limama, the appellant herein sued Masasi District Council, The Board of Trustees of Public Service Social Security Fund (PSSSF) and the Attorney General (the first, second and third respondents respectively) for payment of:

- a) A sum of TZS 279,228,922.41 being a refund of the money paid to the first respondent for the appellant's terminal benefits as of 30th June 2017;*
- b) Statutory interest rate of 5% per annum of the terminal benefits from 30th June, 2017 to the date of full payment;*
- c) Monthly pension at the rate of TZS. 260,000.00 from the retirement date to the date of payment;*
- d) Statutory interest rate of 5% per annum of the monthly pension from the date of retirement to the date of payment;*
- e) Monthly pension from the date of payment of prayer (c) above to the date of the death of the appellant; and*
- f) Costs of the suit.*

It is on record that, upon being served with the appellant's plaint, the respondents filed a joint written statement of defence challenging the appellant's claims. The respondents contended that the appellant was duly paid his social security benefits after being terminated from his employment by the first respondent. As such, the respondents prayed for the dismissal of the appellant's suit.

Having heard the parties, the learned trial Judge partly allowed the appellant's prayers as she ordered the first respondent to pay the appellant

TZS 776,387.60 plus interest rate of 5% per annum from 2003 when the appellant's cheque was issued to the date of the judgment together with general damages at the tune of TZS. 5,000,000.00. In addition, the second respondent was ordered to pay to the appellant terminal benefits of 13 months plus interest at the rate of 5% per annum from March, 2015 to the date of judgment. The learned trial Judge also awarded the appellant an interest on the decretal sum at the rate of 7% from the date of judgment to the date of payment. She finally ordered for the costs of the suit to be borne by the first respondent.

Aggrieved, the appellant on 27th July, 2022 lodged a notice of appeal and on 28th July, 2022, he wrote a letter to the Registrar of the High Court requesting for certified copy of High Court's proceedings, judgment and decree in Civil Case No. 02 of 2020 for appeal purposes. Thereafter, on 31st January, 2023, the Registrar of the High Court notified the appellant that the requested documents were ready for collection and issued a certificate of delay to that effect. Subsequently, on 23rd February, 2023, the appellant lodged a memorandum of appeal which comprised three (3) grounds of complaint. However, for reasons which will be apparent shortly, we do not

deem it appropriate, for the purpose of this ruling, to reproduce them herein.

At the hearing of the appeal, the appellant was represented by Mr. Marwa Masanda, learned counsel whereas the respondents were represented by Mses. Kause Kilonzo Izina and Nyambilila Ndoboka together with Messrs. Maroa Wambura and Nzumbe Machunda, all learned State Attorneys.

At the outset, Ms. Izina prayed for and obtained leave of the Court to address us on the point of preliminary objection that:

"The appeal is incompetent for failure by the appellant to serve the respondents with a copy of the letter requesting to be supplied with the certified copy of the High Court's proceedings, judgment and decree thus contravening the mandatory provisions of Rule 90 (3) of the Tanzania Court of Appeal Rules, 2009."

Guided by the established practice that, when a preliminary objection has been raised against an appeal or application, the same has to be determined first, we invited the learned counsel for the parties to address us on the above point of objection raised by the respondents.

Submitting in support of the said point of objection, Ms. Izina argued that the appellant had failed to serve the respondents with a copy of the letter by which the former applied for certified copy of the High Court's documents as required by rule 90 (3) of the Rules. To clarify on her point, Ms. Izina referred us to page 248 of the record of appeal and contended that, although a copy of the said letter had been included in the record, the same was not served on the respondents. Relying on our previous decisions in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 387, **Samwel Mwera Siyange v. District Executive Director & 3 Others**, Civil Appeal No. 133 of 2020 [2023] TZCA 17793: [6 November 2023: TanzLII] and **Novatus Williams Nkwama v. Tughe**, Civil Appeal No. 354 of 2020 [2022] TZCA 40: [21 February 2022: TanzLII], the learned State Attorney argued that, the said omission renders the certificate of delay issued to the appellant invalid, thus having the effect of making the appeal time barred. Based on her submission, Ms. Izina prayed that the appeal be struck out for being hopelessly time barred.

In his response, although, Mr. Masanda readily conceded that the appellant's letter found at page 248 of the record of appeal indicated that it was not served on the respondents, he argued that the same was served on the respondents together with other documents in one bundle, including the notice of appeal. To substantiate his argument, Mr. Masanda produced the said bundle which clearly indicated that the respondents endorsed only on the notice of appeal in acknowledgement of receipt of service on the same, but have not signed, stamped and or acknowledged the receipt of service on the appellant's letter. He however, urged us to invoke the principle of overriding objective and find that the letter was also served on the respondents. As such, the learned counsel urged us to overrule the preliminary objection raised by the respondents and proceed to hear the appeal on merit.

In her brief rejoinder, Ms. Izina challenged the submission made by her learned friend by arguing that the same is not supported by the record of the appeal. That, even in the bundle of documents he produced, still there is no proof that the said letter was served on the respondents as the same is not endorsed by the respondents to signify acknowledgement of

service of the same. The learned State Attorney clarified further that, since the service of the notice of appeal and the appellant's letter are regulated by different Rules (Rules 84 (1) and 90 (3) of the Rules respectively) and have different timelines and stages of serving them, the appellant was required to prove service on each of them.

Ms. Izina also challenged the submission by Mr. Masanda to have relied on the principle of overriding objective by arguing that the same cannot be applied in the circumstances of this appeal. It was her strong argument that, since the appellant did not serve his letter requesting for the certified copy of the High Court's documents on the respondents as required by Rule 90 (3) of the Rules, he is not entitled to benefit from the excluded days in the certificate of delay. She thus emphasized that the appeal is time barred and deserves to be struck out for being incompetent.

On our part, having examined the record of appeal and the submissions advanced by the learned counsel for the parties for and against the preliminary objection, the main issue for our determination is whether the appeal is properly before the Court. We shall preface our discussion under Rule 90 (1) and (3) of the Rules which regulates the

timelines of instituting an appeal in this Court. It categorically states 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.

*(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 served on the respondent.*** (Emphasis added).

It is clear from the above cited provisions that, the appellant was required to lodge an appeal within sixty (60) days from the date of filing the notice of appeal. The only exception to this requirement is where an appellant has not obtained a certified copy of the High Court's proceedings and has applied for the same, in writing, within thirty (30) days of the impugned decision and served a copy thereof on the respondents. That, the Registrar may issue a certificate of delay excluding the period or number of days required or used to prepare and deliver the certified High Court proceedings to the appellant.

In the instant appeal, it is on record that the decision sought to be challenged was handed down on 29th June, 2022, the notice of appeal was lodged on 27th July, 2022 and the memorandum of appeal was lodged on 23rd February, 2023 after lapse of almost seven (7) months.

As correctly argued by Ms. Izina, pursuant to Rule 90(1) of the Rules, the appeal ought to have been lodged within sixty (60) days of the filing of the notice of appeal. This is so, because, the appellant's letter requesting to be supplied with the certified copy of the High Court's documents for appeal purpose was not served on the respondents contrary to Rule 90 (3)

of the Rules cited above. As such, the appellant is not entitled to benefit from the exclusion of days envisaged under the proviso to Rule 90 (1) of the Rules. In the case of **Victoria Mbowe v. Christopher Shafurael Mbowe & Another**, Civil Appeal No. 115 of 2012 [2016] TZCA 847: [22 July 2016: TanzLII], when this Court was confronted with an akin situation, it stated as follows:

"... We have found nothing in the record showing or suggesting that the appellant ever applied for the copy of the proceedings within the time and in a manner provided for under Rule 90 (1) of the Rules. Similarly, Rule 90 (2) [Now 90 (3)] lays it down that an appellant cannot rely on the exception clause in Rule 90 (1) unless his application for a copy is in writing and served on the respondent. Again, there is nothing in the record upon which compliance with the provisions of the said Rule 90 (2) of the Rules could be ascertained."

Again, in the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387, the Court stressed that:

"There must be a time limit within which the appellant is to serve the respondent with a copy of the letter to the Registrar. We think that the period of 30 days within which the appellant is required under rule 83 (1) to apply to the Registrar for a copy of the proceedings should be construed to be co-extensive with the period within which the appellant has to send a copy of that letter to the respondent."

See also the cases of **Mwanaasha Seheye v. Tanzania Ports Corporation**, Civil Appeal No. 37 of 2003 (unreported), **Njake Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017 [2018] TZCA 304: [3 December 2018: TanzLII] and **Nyanza Road Works Limited v. Hussein Bahaji**, Civil Appeal No. 349 of 2019 [2020] TZCA 1807: [7 October 2020: TanzLII]. Specifically, in **Njake Enterprises Limited** (supra), the Court stated that:

"Having found that there was no valid certificate of delay, the appellant cannot benefit from the exclusion of time in which it was supposed to file its appeal. Since this appeal was filed on 5/12/2016, a period of 596 days after the notice of appeal was filed, this is beyond the prescribed period of sixty (60) days, the same is time barred."

The purpose of serving a copy of the letter on the respondents is not only to enable them to prepare for the case but it is also relevant in the computation of the period of limitation for filing an appeal.

We are mindful of the fact that, in his submission, Mr. Masanda produced a bundle of documents, including the notice of appeal which was endorsed by the respondents in acknowledgement of receipt of service and the appellant's letter in question which was not endorsed by the respondents to signify that the same was served, but he urged us to find that the same was served on the respondents together with the notice of appeal. With profound respect, we are unable to agree with Mr. Masanda on this aspect. As correctly argued by Ms. Izina, service of the notice of appeal and the appellant's letter are regulated by different Rules and have different timelines and stages of serving them. Therefore, there is no doubt that the appellant was required to prove service on each of them. Furthermore, the appellant did not include in the said bundle, any document, such as a covering letter and or an affidavit evidencing that, service of the said letter was effected on the respondents. In the case of **Moshi Municipal Council v. J.S. Khambaita Limited & Another**, Civil

Appeal No. 193 of 2020 [2023] TZCA 17381: [10 July 2023: TanzLII], a similar argument was made, that although the letter requesting for copies of the proceedings, judgment and decree contained in the record was not endorsed, since a copy thereof was attached to the copy of the notice of appeal, endorsed by the respondent, then the copy of the letter should be taken to have also been served. The Court dismissed that argument by stating that:

"It should be understood that, the Rules governing service of notice of appeal and the letter to the Registrar are different. As intimated above, it is clear that the copy of the letter to the Registrar requesting for copies of proceedings, judgment and decree for appeal purposes included in the record of appeal and the one shown to the Court by Mr. Nyoni were not signed by the first respondent to signify acknowledgment of receipt of the same."

Likewise, in this appeal, since there is no proof that the appellant's letter was served on the respondents as required by Rule 90 (3) of the Rules, the submission by Mr. Masanda is unfounded and the appellant cannot benefit from the exception under the proviso to Rule 90 (1) of the

Rules. Therefore, we agree with the submission by Ms. Izina that the appeal is time barred.

We are increasingly of the view that the said omission cannot be cured by the principle of overriding objective as suggested by Mr. Masanda, as the issue of time limitation goes to the root of the matter. This Court on several occasions had categorically stated that the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case. See for instance our previous decisions in **Njake Enterprises Limited** (supra) and **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 [2018] TZCA 303: [14 December 2018: TanzLII].

It is our settled view that, in the instant appeal, we cannot overlook the fact that the appellant's appeal was lodged beyond sixty (60) days prescribed by the law, hence hopelessly time barred and thus, the same cannot be resurrected by the principle of overriding objective as the Court cannot have jurisdiction to entertain an appeal which is time barred.

In the event, we sustain the preliminary objection raised by the respondents. Consequently, we strike out the incompetent appeal for being hopelessly time barred.

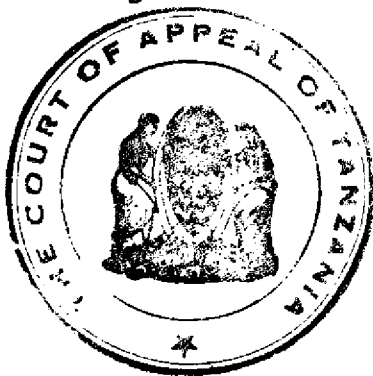
DATED at **MTWARA** this 8th day of June, 2024.

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 10th day of June, 2024 in the presence of the Appellant in person and Ms. Getruda Christopher, learned Senior State Attorney for the Respondents/Solicitor General who took brief of Mr. Marwa Masanda, learned counsel for the appellant is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "A. L. Kalegeya".

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL