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. 184 OF 2021

MICHAEL SAMWEL KYANDE ..... 1ST APPELLANT

MICHAEL SAMWEL KYANDE (As a personal legal representative of KYANDE FILLY MICHAEL and FILLY NDEONANSIA MWASA) ..... 2ND APPELLANT

VERSUS

THE BOARD OF TRUSTEES OF NATIONAL SOCIAL SECURITY FUND ..... RESPONDENT

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

(Mugeta, J.)

dated the 11th day of March, 2020
in
Land Case No. 121 of 2016

.....

RULING OF THE COURT

7th & 14th February, 2024

MWANDAMBO, J.A.:

Mr. Mutakyamirwa Philemon, learned advocate representing the appellants prayed for leave to lodge a supplementary record of appeal when the appeal was called on for hearing. The essence of the prayer made under rule 96 (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) was to include in the supplementary record, a copy of a

letter to the Registrar, Land Division dated 30 March 2020 applying to be supplied with certified copies of proceedings, judgment and decree for the appeal purposes in terms of rule 90 (1) of the Rules. That prayer was objected by the respondent's learned State Attorneys led by Mr. Charles Mtae who appeared together with Mr. Frank Mgeta and Ms. Kumbukeni Kondo necessitating this ruling.

Addressing the Court, Mr. Mutakyamirwa drew the Court's attention at page 85 of the record of appeal showing a copy of a letter dated 12 March 2020 and delivered to the Registrar on 13 March 2020, two days after the delivery of the impugned judgment. The learned advocate impressed upon us that the said a copy of the said letter was erroneously included in the record of appeal and hence the quest to substitute the correct one delivered to the Registrar and a copy served on the respondent on 10 April 2020. Counsel urged that the letter appearing at page 85 of the record of appeal was not served upon the respondent contrary to rule 90 (3) of the Rules with the effect that the appeal instituted on 3 June 2021 on the basis of a certificate of delay issued on 27 May 2021 was way beyond 60 days prescribed under rule 90 (1) of the Rules. Counsel contended that, since the appellant complied with rule 90 (1) and 90 (3) of the Rules by applying for

requisite copies of documents for appeal purposes and had a copy served on the respondent, the earlier letter was redundant though the certificate of delay makes reference to it instead of the correct one delivered on 31 March 2020. He implored the Court to grant the prayer and allow the appellant to lodge a supplementary record of appeal containing a proper copy of the letter and a fresh certificate of delay.

Resisting the prayer, Mr. Mgeta was adamant that the appeal ought to be struck out for being instituted out of time based on an invalid certificate of delay issued to the appellant who had not complied with rule 90 (3) of the Rules. According to the learned State Attorney, the letter sought to be included in a supplementary record has never been referred anywhere in the record of appeal but the one delivered on 13 March 2020 which suggested that such letter was not delivered to the Registrar which cannot make good the already incompetent appeal.

Re-joining, Mr. Mutakyamirwa contended that, the letter in his possession contains official seals of the High Court to which it was delivered and that of the respondent which are public institutions and from which the Court is entitled to take judicial notice under section 59 of the Evidence Act (the Act). This is so, he argued, the letter was delivered to the Registrar, Land Division and an official stamp evidencing

receipt as was done on a copy sent to the respondent. Winding up his submission, counsel invited the Court to invoke the overriding objective under section 3A and 3B of the Appellate Jurisdiction Act (the AJA) and grant the prayer.

We find it necessary to begin our discussion with the obvious, that is, after the introduction of the overriding objective through section 3A and 3B of the AJA, not every procedural sin results in the death of justice. That explains the rationale behind rule 96 (7) of the Rules, amongst others, which vests discretion in the Court to grant leave to an appellant to lodge a supplementary record to make good an omission in a record of appeal. Nonetheless, as we said in **Judith Mbwile v. FBME Bank Limited (Under Liquidation) & Another**, Civil Appeal No. 154 of 2018 (unreported), the Court acts under that rule on the assumption that the omission in the record of appeal is rectifiable and capable of curing a defect in an appeal. Put it differently, the rule does not give to litigant a carte blanche, so to speak, to lodge a supplementary record in each and every case. Indeed, **Judith Mbwile** (supra) is just one of the cases where the Court declined the prayer to lodge a supplementary record upon being satisfied that rectification of a certificate of delay

would not rescue an otherwise incompetent appeal on account of time bar.

The position obtaining in the instant appeal reveals that, on 13 March 2020, the appellant's advocates delivered a letter to the Deputy Registrar, Land Division requesting to be supplied with certified copies of proceedings, judgment and decree for the purpose of appeal. It is glaring from the copy of the letter appearing at page 85 of the record of appeal that, it was not copied to the respondent as required by rule 90(1) of the Rules, neither is there any proof of it having been sent to the respondent. Acting on the said letter, on 6 April 2021, it is plain from page 279 of the record of appeal, the Deputy Registrar sent to the appellant's advocates the documents they had requested. However, it turned out that the documents supplied were inadequate which prompted M/s. Eminent Attorneys representing the appellants to ask the Deputy Registrar in a letter dated 25 May 2021 to issue a certificate of delay excluding the period up to 8 April 2021, the date on which exhibits were supplied to them. It is plain from that letter, Eminent Attorneys made reference to their previous letter delivered on 13 March 2020, now claimed to have erroneously included in the record of appeal. Acting on that request, on 27 May 2021, the Deputy Registrar, issued a certificate

of delay excluding a period of 392 days from 13 March 2020 to 9 April 2021 as necessary for the preparation and delivery of the requisite documents. Subsequently, the appellant instituted the appeal on 3 June 2021.

It is beyond any controversy that, as the Deputy Registrar issued the certificate of delay without being satisfied that the appellant complied with rule 90 (3) of the Rules, such certificate is as it were worthless. As submitted by Mr. Mgeta, since the appellants did not serve a copy of the letter delivered to the Deputy Registrar on 13 March 2020 in compliance with rule 90 (3) of the Rules, their appeal should have been instituted within 60 days from the date of lodging the notice of appeal in terms of rule 90 (1) of the Rules. In other words, the appellants ought to have instituted their appeal by 3 June 2020, the latest. The appellant's advocate now seeks to lodge a supplementary record which will include a letter said to have been delivered to the Deputy Registrar on 31 March 2020 and a copy sent to the respondent. That will entail issuance of a fresh certificate of delay excluding the period from 31 March 2020 to the date the Deputy Registrar notified the appellants' advocates of the availability of copies of the documents they had requested for collection in terms of rule 90(1) of the Rules. It will be

recalled that, Mr. Mgeta strongly objected the move because, as he put it, the letter sought to be introduced was never delivered to the Deputy Registrar regardless of the stamps affixed on it.

We had a considerable engagement with the learned counsel on this aspect and, indeed, upon perusal of the original record of appeal also shown to counsel, it turned out that no such letter exists in that record. That notwithstanding, Mr. Mutakyamirwa implored us to take judicial notice of the stamp of the High Court as proof of delivery and consider its absence as attributed to a mere misplacement of it. That argument appears to be attractive but the burden on it lies in the fact that it does not reflect the reality on the ground. This is so because, had that letter been delivered, counsel should have referred to it in their letter dated 25 May 2021. Instead, counsel referred to the letter delivered on 13 March 2020 which has been consistently referred in other correspondence as well as the certificate of delay. In our view, if that letter had indeed been delivered as claimed, it is not clear to what prevented the learned advocate from drawing the Deputy Registrar's attention to it after issuing the certificate of delay. Worse still, whereas the appeal was instituted on 3 June 2021, counsel never realised that something was amiss in the record which would have warranted taking

necessary steps towards rectification. He waited until the 11th hour when the appeal was called on for hearing. In the absence of cogent explanation why the letter sought to be introduced is missing from the record coupled with the fact that it has not been referred anywhere by the learned counsel, we cannot take his words from the bar as a gospel truth and act on them. The Court has consistently held that certificate of delay can be disregarded where there are grounds to do so. See, for instance, **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Ltd,** Civil Appeal No. 16 of 2004 (unreported). It is our considered view that, the position must extend to other documents including letters such as the one sought to be included in supplementary record if there are strong reasons to do so. We have already expressed our suspicion on the delivery of the said letter to the Registrar on the date shown at the top of it and, just as we have done on suspicions certificate of delay, we shall take the same position in the instant appeal.

The upshot of the above is that, we decline the appellants' prayer to lodge a supplementary record of appeal under rule 96 (7) of the Rules. That said, we endorse Mr. Mgeta's submission that the appeal instituted beyond 60 days as required by the Rules, is as it were

incompetent and we strike it out. As the learned counsel did not press for costs, each party shall bear his own costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 13th day of February, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 14th day of February, 2024 in the presence of Ms. Jaddens Jackson, learned counsel for the Appellants and Mr. Stephen Kimaro, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL