

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPEAL NO. 01 OF 2020**

*(Mlacha, Nangela and Kakolaki JJJ)*

**ERICK NICHOLAUS NDWELA ..... APPELLANT**

**VERSUS**

**TULO YOHANA SHEKUMKAY ..... 1<sup>st</sup> RESPONDENT**

**THE ADVOCATES COMMITTEE ..... 2<sup>nd</sup> RESPONDENT**

**RULING**

11<sup>th</sup> Feb 2021 & 08<sup>th</sup> March, 2021.

**E. E. KAKOLAKI J**

This ruling is in respect of preliminary points of objection raised by the 2<sup>nd</sup> respondent against the appellant's appeal. The 2<sup>nd</sup> respondent is challenging competence of the appeal canvassed with five points going thus:

- (1) The Appellant's Appeal is time barred.

- (2) The Appeal is incompetent for lack of Notice of Appeal contrary to rule 17(1) of the Advocates (Disciplinary and Other Proceedings) Rules (GN No. 120 of 2018).
- (3) The Appeal is bad in law for being improperly filed contrary to rule 17(5) of the Advocates (Disciplinary and Other Proceedings) Rules (GN, No. 120 of 2018).
- (4) The Appeal is incompetent for want of affidavit verifying Petition.
- (5) The appeal is unmaintainable for being preferred against ex-parte orders.

The said points of objection were vehemently resisted by the appellant who invited this court to dismiss them with costs.

Briefly, the facts that gave rise to this appeal can be stated as follows: the appellant, who was enrolled as practising advocate of the High Court and subordinate courts thereto save for primary court, with roll No. 1940, was suspended for five (5) years from practicing by the 2<sup>nd</sup> respondent, following allegations of professional misconduct levelled against him by the 1<sup>st</sup> respondent. He was further ordered to refund the 1<sup>st</sup> respondent Tanzanian Shillings Two Hundred Thousands only (Tshs. 200,000/=) and pay compensation amounting to Tanzanian Shillings One Million (Tshs. 1,000,000/=). The proceedings against him were conducted ex-parte and a decision was entered on 17/06/2020 in his absence, leaving him suspended from practice for five (5) years from the date of the ruling of the committee. Discontented, the appellant on 30/06/2020 lodged a notice of appeal with the secretary of Advocate Committee, which was followed by the letter requesting for certified copies of proceedings, decision and

orders for appeal purposes filed on 24/08/2020. The said documents requested were supplied to him on the 04/09/2020 and, as a result, the petition of appeal was presented for filing in this Court on the 06/10/2020 carrying seven grounds of appeal. When the same was served to the respondents, the 2<sup>nd</sup> respondent picked up objections against the said appeal in five grounds as alluded to.

As a matter of practice when a preliminary objection is raised the same must be disposed first. See the cases of **Meet Singh Bachu Vs. Gurmit Singh Bachu**, Civil Application No. 144/02 of 2018, **Godfrey Nzowa Vs. Seleman Kova and Tanzania Building Agency**, Civil Appeal No. 3 of 2014 and **Yazidi Kassim t/a Yazidi Auto Electric Repairs v. The Attorney General**, Civil Application No. 552/04 of 2018 (All CAT unreported). Aware of the practice, parties opted to dispose of the objections by way of written submission and filling orders were issued by the court to that effect. It is the appellant and 2<sup>nd</sup> respondent only who complied with the court orders for filing submissions. We will, thus, consider and base our decision on those two parties' submissions. The appellant in this matter appeared represented by Mr. Lwigiso Ndelwa advocate assisted by Mr. Lucas Kusimwa and Innocent Mwelelwa, learned advocates, whereas the 2<sup>nd</sup> respondent enjoyed the services of Ms. Kause Kilonzo, learned State Attorney, while the 1<sup>st</sup> respondent was absent.

Submitting in support of the preliminary points of objection raised, from the outset, Ms. Izina for the 2<sup>nd</sup> respondent intimated on the 2<sup>nd</sup> respondent's decision to abandon the 2<sup>nd</sup> and 4<sup>th</sup> preliminary points of objection and pursue only the remaining three points separately. As Ms.

Izina chose to start with the first point, for the reasons to be disclosed soon, it pleased us also to consider and determine it first as we hereby do.

Submitting on the first point of objection, it was Ms. Izina's contention that this appeal is time barred. She said the law under section 24A(1) of the Advocates Act [Cap. 314 R.E 2019] provides that, an advocate who is aggrieved with the decision of the Advocate Committee may appeal to the High Court against such decision or order within thirty (30) days. She stated that, the cited provision has to be read together with Rule 17(4) of the Advocates (Disciplinary and Other Proceedings) Rules, GN. No. 120 of 2018 which provides for the procedure where the appeal is not filed in time and how the time delayed in filing the appeal is sought by the appellant to be excluded from computation. Ms. Izina intimated, the decision sought to be challenged was delivered on 17/06/2020 and, in computing thirty (30) days stated by the law, the appellant was supposed to file his appeal by 17/07/2020 but to the contrary he filed it on 06/10/2020 which is far beyond the time prescribed by the law.

On the application of Rule 17(4) of GN. No. 120 of 2018, she argued that, the same cannot bail out the appellant as the letter requesting for the proceedings, decision and orders was written on 24/08/2020, when thirty (30) days within which to appeal had already passed as the decision sought to be challenged was passed on 17/06/2020. And, further that, no reasons were given by the appellant for such inordinate delay. She therefore implored us to find the appeal is time barred and dismiss it.

As alluded to, the appellant resisted the raised points of objection. With regard to the first preliminary point of objection, Mr. Mwelelwa, for the appellant, while agreeing that the appeal was to be filed within thirty (30) days of the decision or order, was of the submission that the appeal was filed in time. He had it that, in computation of the time within which to file the appeal, the time spent by the appellant while awaiting to be supplied with copies of proceedings, decision, ruling or order are excluded as provided under Rule 17(4) of GN. No. 120 of 2018, as this Court has to look on the date of certification of the documents required for appealing process.

Mr. Mwalelwa said, in this matter the decision appealed against was delivered on the 17/06/2020 and the letter requesting for the certified copies of documents was served to the Committee Secretary on 24/08/2020 while the requested documents were served or issued to the appellant on 04/09/2020. To him, and by simple arithmetic, thirty (30) days from 04/09/2020 elapsed on the 03/10/2020 and the appeal was filed in Court electronically on the 02/10/2020 at 20:49, so the same was well within time.

He argued further that, under Rule 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules, 2018, a document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted. And, that, by filing at 20:49 on the 02/10/2020 as instructed by the secretary to the Committee, the appeal was filed within time. Lastly, he stated that, since the relevant documents to this appeal were certified by the Secretary to

the Advocates Committee, issued to the appellant and filed in court in accordance with the law, this appeal was filed in time. He urged us, therefore, to find this point of preliminary objection devoid of merit, thus dismiss it with costs.

We have keenly considered the fighting submissions on this first point of objection. What is discerned from both parties' submissions is that, they are both at one that an advocate aggrieved with the decision of the Committee may prefer an appeal to this Court within thirty (30) days of the decision or order appealed against. The relevant provision in support of that concession is section 24A(1) of the Advocate Act, which reads thus:

*(1) Any advocate aggrieved by any decision or order of the Committee under this Act may, within thirty days of such decision or order, appeal to the High Court against such decision or order.*

It is also not a disputed fact that under Rule 17(1) of GN. No. 120 of 2018, time when the appellant is awaiting to be supplied by the Secretary with documents for appeal purposes, as may be certified by the Secretary shall be excluded when computing the time within which to appeal is to be lodged in court as required by the law. The said rule 17(4) provides that:

*(4) "In computing the time within which the appeal is to be lodged, there shall be excluded such time as may be certified by the Secretary as having been required for the preparations and delivery of certified copies of the Judgment, Ruling or order of the Committee appealed against,"*

What remains in dispute in this matter is when should the time to lodge the appeal start to reckon? Ms. Izina says time should start to run from the date when the decision appealed against was delivered i.e., on 17/06/2020, as the letter requesting for documents for appeal purposes was served to the Secretary on 24/08/2020, after thirty (30) days of time of lodging the appeal by the appellant had lapsed, thus Rule 17(4) of GN. No. 120 of 2018 cannot come into play. Mr. Mwelelwa is of the contrary view that time should be reckoned from 04/09/2020 when the appellant received the necessary documents after filing with the Secretary a letter requesting them on 24/08/2020.

We are in agreement with Ms. Izina that, under the circumstances of this case, time started to count on 17/06/2020, the date when the decision was delivered. We will tell why? As per section 24A(1) of Advocates Act, the appeal was supposed to be filed within thirty (30) days of the date of the decision appealed against, and for this matter on or before 17/07/2020. Our perusal of the record unearthed the fact that, the Notice of Appeal was filed on 30/06/2020. And, further that, the letter for request of necessary documents for appeal purposes was served to the Secretary on 24/08/2020. Sixty eight (68) days passed, after the date of delivery of the decision appealed against and, thirty eight (38) days after the time within which to file the appeal had passed.

In other words, the documents were requested outside the prescribed time limit within which to file the appeal which, in this case, was 17/07/2020. We therefore agree with Ms. Izina that, the appellant is not covered under Rule 17(4) of GN. No. 120 of 2020. Had it been that the letter requesting

for the said necessary documents was written in time i.e. before 17/07/2020 then the appellant could have the audacity of seeking refuge under that rule. We are satisfied and therefore of the firm finding that, by filing the appeal on the 06/10/2020 as per the filing fee receipt or 02/10/2020 as alleged by the appellant, the appeal was time barred.

The above findings notwithstanding, even where we are to assume that the said letter for requesting certified documents from the Committee was filed timely, which is not the case, and the said documents supplied to the appellant on the 04/09/2020 as alleged, still we would hold the appeal to be filed out of time. We hold this unshaken stance as Rule 17(4) of GN. No. 120 of 2018 makes it mandatory for the party seeking exclusion of the period when he/she was awaiting for supply of certified necessary documents for appeal purposes, to obtain a certificate from the Secretary certifying that, the time between the date of lodging the said letter for request of documents, delivery of the documents to him/her, to the date of issue of the said certificate be excluded from computation of the time within which the appeal is to be lodged. And, we would add, the said certificate must be valid one.

For the purposes of fortifying our stance on this point we take the liberty of reproducing the said rule 17(4). It provides that:

*(4) "In computing the time within which the appeal is to be lodged, there shall be excluded such time as may be **certified by the Secretary as having been required for the***



***preparations and delivery of certified copies of the Judgment, Ruling or order of the Committee appealed against,"***

Now who should issue a valid certificate? The requirements of issuance of certificate of delay under Rule 17(4) cited above are more or less similar to the ones in Rule 90(1) of the Court of Appeal Rules of 2009 that calls for requirement of issuing of a certificate of delay by the Registrar of the High Court to the appellant who seeks to have the time spent awaiting for preparations and supply of the certified copies of all necessary documents for appeal purposes to be excluded from computation of time within which the appeal is to be filed. The said Rule 90(1) provides thus:

*"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.**"*(emphasis supplied)

Discussing the importance of issuance of certificate, and a valid one, the Court of Appeal in a very recent case of **Hamis Mdinda and Another Vs. Registered Trustees of Islamic Foundation**; Civil Appeal No. 59 of 2020 [2020] TZCA 1918; (17 December 2020) had the following to say:

*"Basically, we are entitled to emphasize that a **valid certificate of delay is one issued by the Registrar of the High Court** after the preparation, notification and delivery of the requested copy of the proceedings of the High Court to the appellant.*

*Moreover, such certificate of delay must indicate and take into account, among other things, the exact number of days to be excluded from the date the proceedings are requested to the date when the appellant is notified that the respective copies are ready for collection."* (Emphasis supplied)

Applying the interpretation of Rule 90(1) of the Court of Appeal Rules on the issue of valid certificate as adumbrated in the above cited case to the instant case, we are of the settled mind that, under Rule 17(4) of the Advocates Rules, a valid certificate has to be issued by the Secretary to the Committee.

In this case there is no evidence to prove that the appellant was issued with a certificate of delay by the Secretary of the Committee certifying that the time between the dates of receipt of the letter requesting for documents and delivery of the said document to the appellant be excluded from computation as were spent in preparations and delivery of certified copies of the ruling or order of the Committee appealed against.

In absence of that certificate, we would not be prepared to exclude the alleged days spent awaiting for the supply of the necessary documents for appeal purposes, thus the appeal fails for being preferred out of time. This point having disposed of the appeal, we do not find any pressing issue requiring us to consider the remaining two points of preliminary objection as doing so will be an academic exercise which we are not prepared to indulge on.

In the premises and for the foregoing reasons, we would sustain the first preliminary point of objection as we hereby do. We further proceed to struck out the appeal with costs for being incompetent as it was filed out of time. The appellant is at liberty to re-institute the appeal subject to law of limitation of actions.

It is so ordered.

DATED at DAR ES SALAAM this 08<sup>th</sup> day of March, 2021.

  
L. MLACHA

**JUDGE**

  
D. NANGELA

**JUDGE**

  
E.E. KAKOLAKI

**JUDGE**

