

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

(CORAM: MKUYE, J.A., SEHEL, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 136 OF 2021

**MARY AGNES MPELUMBE (in her capacity as Administratix
of the estates of the late Isaya Simon Mpelumbe) APPELLANT**

VERSUS

SHEKHA NASSER HAMAD RESPONDENT

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

(Nchimbi, J.)

dated the 28th day of November, 2013

in

Land Case No. 89 of 2008

.....

RULING OF THE COURT

20th Oct. & 5th November, 2021

SEHEL, J.A.:

The appellant, Isaya Simon Mpelumbe (now deceased) through his legal representative, one Mary Agnes Mpelumbe, an administratix of his estate, lodged the appeal to this Court against the decision of the High Court (Land Division) at Dar es Salaam in Land Case No. 89 of 2008. Pursuant to Rule 107 (1) of the Tanzania Court of Appeal Rules (the Rules),

the respondent filed a notice of preliminary objection wherein she raised one point of law that:

"... to the extent that an earlier appeal by the appellant against the same judgment (Civil Appeal No. 85 of 2017) was on 23rd June, 2020 struck out by the Court for being time barred, the appeal is not maintainable before the Court because it had been filed in violation of the principle set out in: -

- 1. **Mary Agness Mpelumbe v. Shekha Nasser Hamad**, Civil Appeal No. 85 of 2017 (unreported);*
- 2. **Ngoni-Matengo Co-operative Marketing Union Ltd v. Alimahomed Osman** [1959] E.A 577;*
- 3. **Hashim Madongo & 2 Others v. Minister for Industry and Trade & 2 Others**, Civil Appeal No. 27 of 2003 (unreported);*
- 4. **MM Worldwide Trading Company Ltd & 2 Others v. National Bank of Commerce Limited**, Civil Appeal No. 258 of 2017 (unreported) and*

**5. Barclays Bank Tanzania Limited v. Phyiisiah
Hussein Mcheni, Civil Appeal No. 19 of 2016
(unreported)."**

The facts relevant to the objection are straight forward. They go as follows: Isaya Simon Mpelumbe (now deceased) sued the respondent over a piece of land situate at Plot No. 224, Block D, located at Tegeta in Dar es Salaam region (the disputed plot) seeking for a declaratory order that he was lawfully legal owner of the disputed plot on account that on 8th December, 1994 he was issued with a certificate of title number 44083 over it. That certificate of title was tendered in evidence as exhibit P1. He further sought for the respondent to be ordered to remove the construction she made in the disputed plot and claimed for general damages to a tune of TZS. 65,000,000.00, costs of the suit and any other reliefs as the court may deeme fit to grant.

The respondent on the other hand, disputed the claim. She averred that she was the lawful owner on account of the letter of offer issued to her on 1st April, 1986 thus the certificate of titled issued to the appellant could not supersede her letter of offer. The letter of offer was tendered in evidence as exhibit D1.

After hearing both parties' evidence, the High Court observed that the letter of offer was issued prior to the certificate of title. Therefore, it declared the respondent as the lawful owner and dismissed the appellant's suit.

Aggrieved with that decision, the appellant filed Civil Appeal No. 85 of 2017 (hereinafter referred to as 'the former appeal') which was struck out for being time barred as the Court was satisfied that the appellant omitted to serve on the respondent a letter requesting for certified copies of judgment, decree and proceedings which was contravening the provisions of Rule 90 (3) of the Rules. Following the striking out of the appeal, the appellant went back to the High Court and started the process afresh. He sought an extension of time to lodge a notice of appeal. He was granted 30 days within which to file the notice of appeal. He timely filed it hence the present appeal.

At the hearing, Mr. Edwin John Shibuda, learned advocate appeared for the appellant whereas Mr. Gasper Nyika, also learned advocate, appeared for the respondent.

Addressing us on the point of law, relying on the authority in **Hashim Madongo & 2 others** (supra), Mr. Nyika submitted that since the appeal was struck out for being time barred it was not open for the appellant to go back to the High Court to seek for an extension of time to file the appeal afresh. He further submitted that although the word used by the Court was striking out, the Court should take cognizant of the substance that led to the striking out of the appeal as it was held in the case of **Ngoni-Matengo Co-operative Marketing Union Ltd** (supra). He said, the substance that led to the striking out of the appeal was that the appellant did not comply with Rule 90 (3) of the Rules because she failed to serve on the respondent a letter requesting for certified judgment, decree and proceedings. The consequence of such an omission was that the appellant could not benefit from the exception provided under Rule 90 (1) of the Rules thus she was required to lodge the appeal within a stipulated period of sixty (60) days but she did not. He submitted that the Rules are silent on the resultant effect on the failure to file the appeal within the stipulated period of sixty days. It was, therefore, his submission that the Court should take inspiration from section 3 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019 (the LMA) as it did in the case of

Barclays Bank Tanzania Limited (supra) and find that a time barred appeal ought to have been dismissed instead of being struck out. Mr. Nyika added that a policy behind a limitation period is to ensure that there is end to litigations.

When probed by the Court if the respondent appealed against the ruling of the High Court that granted leave to the appellant to lodge an appeal out of time, Mr. Nyika pointed out that, in the High Court, the respondent raised the point but it was overruled and she did not file any appeal against that ruling. Explaining the reason for not doing so, he said, it was because the order of striking out the appeal was made by the Court thus the High Court could not have altered the decision of the Court. It was his submission that since the Court struck out the appeal, the High Court could not have held that the appellant had no right to seek an extension of time. At the end, Mr. Nyika prayed for the appeal to be struck out.

On his part, Mr. Shibuda sturdily opposed the preliminary objection. He admitted that the former appeal was struck out after the Court had found out that the appellant omitted to serve on the respondent a copy of the letter requesting for certified documents for appeal purpose. He, however, added that the Court was right in striking out the appeal and

that, the appellant thereafter took lawful steps in trying to resurrect the struck-out appeal. He pointed out that the appellant went to the High Court to seek extension of time which was lawfully granted thus enabled the appellant to file the present appeal. It was his submission that the present appeal is in order and in any event the respondent did not seek review against the decision of striking out of the former appeal. At the end, he urged us to dismiss the preliminary objection with costs.

From the parties' submission, it is not in dispute that the former appeal lodged by the appellant was struck out by the Court. They are also in agreement that the appellant went back to the High Court and was granted extension of time to file the present appeal. Since the former appeal was found to be time barred, Mr. Nyika urged us to find that the High Court had no jurisdiction to extend time to lodge the present appeal after the former appeal having been found to be time barred. He contended that the former appeal was as good as it was dismissed. Mr. Shibuda had a contrary view, as indicated above. He thus urged us to dismiss the preliminary objection.

Having heard the competing arguments, we wish to start with Civil Appeal No. 85 of 2007, the former appeal, where both counsel for parties

invited us to look into the substance of the appeal as it was correctly held in the case of **Ngoni-Matengo Co-operative Marketing Union Ltd** (supra). In that appeal, the Court was faced with a preliminary objection that the appellant was not entitled to benefit from the exception under Rule 90 (1) of the Rules in computing time within which to lodge an appeal. It was argued that the record of appeal did not contain a letter of the appellant showing that he requested for copies of proceedings, judgement and decree and such letter was not served on the respondent in compliance with Rule 90 (3) of the Rules. After reproducing Rule 90 (1) and (3) of the Rules, the Court observed that the letter was missing in the record of appeal and it was not served on the respondent. It thus held:

"There is no gainsaying therefore that, since it is clear from the record that the appellant did not comply with the provisions of Rule 90 (3) of the Rules, the omission renders the appeal time barred. For that reason, we find the appeal incompetent. In the event, the same is hereby struck out with costs."

Looking at the above extract, we observe that the substance of the matter that led to the striking out the appeal was the non-compliance with Rule 90 (3) of the Rules thus the appellant was not entitled to rely on the

exception provided under Rule 90 (1) of the Rules. For ease of reference, we reproduce Rule 90 of the Rules, 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.

(2) Not relevant

(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 was served on the respondent.”

Accordingly, the exception stipulated under Rule 90 (1) of the Rules is in respect of computation of sixty days period within which an intended appellant is required to lodge his appeal. Further, sub-rule (3) of that Rule obliges the intended appellant who would wish to benefit from the exclusion of the excess time, to ensure that the letter requesting for certified copies of the documents is served on the respondent. Failure to comply with Rule 90 (3) of the Rules would disentitle the intended appellant to benefit from the exclusion of the period beyond the sixty days. There is a plethora of authorities of this Court including the appellant's former appeal, to the effect that once the appellant fails to comply with Rule 90 (3) of the Rules, the Court strikes out the appeal for being time barred.

Mr. Nyika invited us to depart from that established position by urging us to consider the substance of the reason for the order, rather than the words used to make the order. The substance, as we have alluded herein, was that in the former appeal, the appellant did not comply with Rule 90 (3) of the Rules thus his appeal was found to be time barred and

was struck out. We do agree with Mr. Nyika that the Rules are silent on the consequences to befall upon a party who institutes an appeal beyond the period prescribed under Rule 90 (1) of the Rules. Nonetheless, we are unable to go along with his submission that the appeal before us is incompetent because we find that the cases mentioned in the notice of the preliminary objection are distinguishable in facts. In those cases, the Court discussed specific statutes that imposed time limitation within which a party could approach the court to seek redress in a cause of action. The Court did not deliberate on a right of a party to file an appeal or application. We shall show the difference for each and every case.

Starting with the case of **Hashim Madongo & 2 Others** (supra), the issue before the Court was whether it was still open to the appellants to file in the High Court an application seeking extension of time to apply for prerogative orders against an industrial court decision after the High Court (Kalegeya, J. as he then was) had struck out an application for leave to apply for prerogative orders of *certiorari* and *mandamus* on the ground that it was time barred. The appellants were the employees of the Dar es Salaam Regional Trading Co. Ltd (the 3rd respondent). Their employment was terminated. They filed a dispute in the Industrial Court which was

dismissed. Upon dismissal, they went back to the High Court to seek leave to apply for prerogative orders of *certiorari* and *mandamus*. In other words, the appellants were challenging a decision of the quasi-judicial body by way of prerogative orders. That application was struck out by Kalegeya, J. (as he then was) for being time barred. After several attempts before the High Court and this Court, the appellants managed to obtain leave to file a representative suit. Thereafter, they filed an application for extension of time to apply for prerogative orders of *certiorari* and *mandamus*. That application was dismissed. Thus, they appealed to the Court. Being mindful on the principle stated in the case of **Ngoni-Matengo Co-operative Marketing Union Ltd** (*supra*) that, it is the substance of the matter to be looked at, rather than the words used, the Court said:

"Under section 3 of the Law of Limitation Act, a proceeding which is instituted after the prescribed period has to be dismissed. Therefore, reading section 3 together with section 46 thereof, and section 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, it occurs to us that Kalegeya, J. ought to have dismissed the application after he was satisfied that it was time-barred. It was not open to him to strike out the application as it happened in this case."

The Court then held that after the application before Kalegeya, J. was dismissed, as it should have been, it was not open to the appellants to go back to the High Court and file the application for extension of time to apply leave for orders of *certiorari* and *mandamus*.

In the case of **MM Worldwide Trading Company Limited** (supra) the appeal concerned the jurisdiction of the trial court of a suit founded on contract that was, formerly, struck out for being time barred. Initially, the respondent filed a suit against the appellants for breach of the terms of the credit facilities and the contract of guarantee. During trial, the appellants raised a preliminary objection which was upheld by the trial court that the suit was time barred. The respondent thereafter instituted a fresh suit pleading continuing breach. The suit was determined on merits in favour of the respondents. Aggrieved, the appellants filed an appeal to the Court, advancing two grounds of appeal. However, only one ground that, in absence of any order extending time within which to do so, the trial court had no jurisdiction to try a suit that was hopelessly time barred after it was declared so in the former suit. Applying the principle set in the case of **Ngoni-Matengo Co-operative Marketing Union Ltd** (supra) the Court held, irrespective of the words used, that the subsequent suit was

res judicata as the issue of limitation was finally and conclusively determined in the former suit thus it was not open to the respondent to institute a fresh suit as she did and the trial court had no jurisdiction to try it.

The issue before the Court in the case of **Barclays Bank Tanzania Limited** (supra) was whether it was proper for the High Court to strike out a labour complaint with leave to refile it after it was found and held to be time barred. In determining the issue, the Court revisited sections 43 and 46 of the Law of Limitation Act, Cap. 89 R.E. 2019 (henceforth LLA) and rule 10 (1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules published in the Government Notice number 64 of 2007 and also considered the case of **Hezron M. Nyachia v. Tanzania Union of Industrial and Commercial Workers and Another**, Civil Appeal No. 79 of 2001 where it was stated that:

"...although the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance set the time limit for instituting actions to be six months, but did not provide for the consequences of filing a matter out of time, section 3 of the LLA was applicable in dismissing the petition."

It then held that:

"In view of that position of the law, it is our conclusion that the learned High Court Judge should have resorted to section 3 (1) of the Act to dismiss the complaint instead of striking it out as she did."

Flowing from the facts of the cases, it is patently clear that the principle set therein cannot be dragged and applied wholly in the present appeal. We have endeavored to show that the issue of time limitations discussed in the three cases centered on a time limit set for initiating a cause of action for proceedings in the judicial review, claim based on a contract and proceedings under employment and labour relations. None of the cases discussed an appeal lodged in contravention of Rule 90 of the Rules. Besides it is settled law that the LLA is not applicable in the Court of Appeal, this Court could only seek inspiration from its spirit where it deem it necessary to do so-(See **Halais Pro-Chemie v. Wella A.G** [1996] T.L.R 269 and **Tanzania Telecommunications Co. Ltd v. Vedasto Ngashwa & 4 Others**, Civil Application No. 67 of 2009 (unreported)).

In any case, we are not persuaded that non-compliance of Rule 90 (3) of the Rules would have resulted into dismissal of the former appeal. In so far, it seems to us that sub-rule (3) provides a direction as to what an

intended appellant should do in order to benefit from the exception provided under Rule 90 (1) of the Rules. Much as Mr. Nyika would like us to find that the former appeal was dismissed, we find ourselves more inclined with the submission of Mr. Shibuda that the former appeal was struck out. Although we admit that Mr. Nyika had an attractive viewpoint, it falls short to the realities. The former appeal was struck out on account of non-compliance of the procedure stipulated under Rule 90 (3) of the Rules. This is in accordance with the existing practice of the Court as laid down in its numerous decisions. That practice has now acquired the force of law and it is the current legal position in the country that an appeal filed in contravention of Rules 90 of the Rules is normally struck out and not dismissed. Our position, that the practice of the Court had acquired a legal force, is fortified with our previous decisions in the cases of **Hassani Ramadhani v. Saada Mussa**, Civil Application No. 84 of 2003 and **Sugar Board of Tanzania v. 21st Century Food & Packaging Ltd. & 2 Others**, Civil Reference No. 1 of 2005 (both unreported).

In the end, we find that the preliminary objection is without substance. We accordingly dismiss it with costs. We further order that the

hearing of the appeal be scheduled to another convenient date to be fixed by the Registrar.

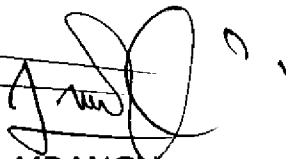
DATED at **DAR ES SALAAM** this 4th day of November, 2021.


R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered on this 5th day November, 2021, in the presence of Mr. Edwin Shibuda, learned counsel for the appellant and Ms. Antonia Agapit, learned counsel for the Respondent, is hereby certified as a true copy of the original.


E.G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL



The seal of the Court of Appeal of Tanzania is circular, featuring the national coat of arms of Tanzania in the center. The text "THE COURT OF APPEAL OF TANZANIA" is written around the perimeter of the seal.