

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 190 OF 2017

**HAMZA RAMADHANI APPELLANT
VERSUS**

ABEL ALOYCE 1st RESPONDENT

CHOICE MOTORS LTD..... 2nd RESPONDENT

RELIANCE INSURANCE CO. LTD 3rd RESPONDENT

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

(Shangwa, J.)

dated the 26th day of November, 2013

in

Civil Appeal No. 48 of 2013

RULING OF THE COURT

12th July & 5th August, 2021

MASHAKA, J.A.:

The appellant lodged Civil Case No. 1 of 2009 before the Resident Magistrate's Court of Dar es Salaam at Kinondoni claiming TZS 50,000,000/= against the respondents as compensation for injuries suffered as a result of a motor vehicle accident. An *ex - parte* judgment was entered in favor of the appellant. Being dissatisfied with the said

decision, the respondents filed an application to set aside the *ex- parte* judgment which was dismissed. Still dissatisfied, the respondents preferred an appeal to the High Court, Civil Appeal No. 48 of 2013 challenging the decision of the trial court. The High Court found the appeal merited and allowed it. It set aside the trial court's *ex - parte* judgment and decree and ordered the case file be returned to the trial court for hearing of the suit *inter partes*.

This time, the ruling did not appease the appellant who has appealed against that decision. The appeal is predicated on three grounds, which for reasons that will shortly come to light, we see no need to recite them herein. This appeal is confronted with a notice of preliminary objection lodged under Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), comprised of one point which reads as follows:-

"The appellant's failure to have served on the respondents' advocate a copy of his letter to the Registrar of the High Court applying for copy of the proceedings in the High Court as per the mandatory requirements of the Rule 90 (2) of the Rules, 2009".

As a matter of practice, the Court decided to dispose of the preliminary objection first and we invited Mr. Octavian Temu, learned

advocate representing the respondents to take the floor. Mr. Temu submitted that when the appellant filed a notice of appeal under Rule 90(1) of the Rules 2009, the letter written to the Registrar of the High Court of Tanzania requesting to be supplied with copies of proceedings, judgment and decree in Civil Appeal No. 48 of 2013, delivered on the 26th November 2013 was not served to the respondents or their advocate. The learned counsel pegged his argument on this letter at page 389 of the record of appeal that it was not copied and served to him, hence the appellant cannot benefit from Rule 90(1) of the Rules. He argued further that the letter contained in his copy of the record of appeal at page 389, bears no official stamp on it. Hence, the learned counsel argued, the certificate of delay at page 392 and the letter from the Registrar of High Court at page 391 conflict with Rule 90 (2) of the Rules which disqualifies the appellant to benefit from the exclusion of days. Learned counsel cited the cases of **Stephen Wasira v. Joseph Warioba** [1997] T.L.R. 206, **Mrs. Kamiz Abdullah M. D. Kermal v. The Registrar of Buildings and Miss Hawa Bayona** [1988] T.L.R. 201, **D. P. Vallambia v. Transport Equipment Ltd** [1992] T.L.R. 6 and **Simon Lanya v. The Permanent**

Secretary, Ministry of Public Safety and Security and Three Others, Civil Appeal No. 40 of 2010 (unreported).

He concluded his submissions by asking the Court to find merit in the preliminary objection and uphold it, resulting in the striking out of the appeal with costs.

In reply to the foregoing submission, Mr. Cornelius Kariwa, learned Advocate representing the appellant informed the Court that he received instructions to represent the appellant in this appeal, having taken over from Mr. R. C. K. Myovela, Advocate who represented the appellant during the trial and in the first appellate court. The learned counsel explained that the letter at page 389 was received in the office of the learned counsel for the respondents on the 18/12/2013 and was signed to acknowledge service. Under the circumstances, he contended that the preliminary objection is devoid of merit, with the effect that, the appeal was instituted on time because the appellant was entitled to benefit from Rule 90 (1) of the Rules.

Mr. Kariwa conceded that the letters at pages 389 and 390 of the record of appeal were not copied to the advocate for the respondents. He acknowledged that letters at pages 222 and 389 of the said record are

same but with discrepancies. However, the learned counsel could not furnish to the Court original letters referred to at pages 222, 389 and 390. He maintained that since the letter at page 389 shows that it was received at the office of Mr. Temu for the respondents, it should be deemed that service was effected and therefore, the appellant was entitled to benefit from Rule 90(1) of the Rules. Finally, Mr. Kariwa prayed that the preliminary objection be overruled with costs.

The learned counsel for the respondents rejoined and reiterated his submission in chief and he argued that there was no proof of service of the letter as well as a copy of the notice of appeal. The learned counsel implored the Court to sustain the preliminary objection and strike out the appeal with costs.

Our starting point is Rule 90 (1) and (3) of the Rules which provides that:-

"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 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”.

It is clear from the above Rule that time of limitation to institute an appeal within sixty days is not applicable where there is evidence that the appellant made a written application to the Registrar of the High Court to be supplied with the requisite copies for appeal purposes within thirty days and a copy of such letter was served on the respondent. Once there is such proof, the Registrar is obliged to issue a certificate of delay excluding the period when the requested copies were yet to be made available to the appellant. Therefore, the sixty days shall start to run from that date as

certified by the Registrar. The consequences of non-compliance with Rule 90(3) of the Rules renders the appeal time barred and puts to question of jurisdiction of the Court to determine the appeal.

It is not disputed by Mr. Kariwa and Mr. Temu that the appellant wrote the letter requesting to be supplied with copies of proceedings, judgment and decree to the Registrar of the High Court but there is no indication that it was copied to the Advocate for the respondents. According to the record of appeal, the notice of appeal was lodged on the 18th December, 2013. The letter requesting for copies of proceedings, judgment and decree was written on the 17th December 2013. That letter does not show the date it was received by the Registrar of the High Court neither was it copied and served to the advocate for the respondents. The copy of the said letter in the record of the appeal and the Court shows an official stamp of Octavian & Company Advocates. However, no such stamp features on the copy of the letter in the record served to the advocate for the respondents. These glaring differences between the same letter in same record of appeal were indeed conceded to by Mr. Kariwa.

We are drawn specifically to the letter at page 389 to the record of appeal, the copy alleged to be served to the advocate for the respondents.

Doubts set in as we ponder how can it be possible for this copy of letter which does not bear the official stamp of Octavian and Company Advocates as shown on the other said copies. The learned counsel for the appellant could not explain to the Court the reason for this said copy not to bear the said stamp and could not provide proof of service. The only answer to this question is that the absence of the official stamp on the said copy of letter of the respondents' copy of the record of appeal is that definitely the said letter was never served to the advocate of the respondents as claimed by the appellant.

We have also scrutinized the letter at page 391 of the record of appeal written by the Deputy Registrar of High Court, Dar es Salaam Zone dated 20th July, 2017 addressed to the firm of MYOVELA R. C. K & CO. ADVOCATES and copied to OCTAVIAN AND COMPANY ADVOCATES which referred the notice of appeal lodged on the 18th December 2013 informing the appellant that the copies of proceedings, ruling and drawn order were ready for collection upon payment of necessary court fees. Though the appellant was previously represented by Mr. Myovela, there is also no indication that he copied the notice of appeal and letter requesting for the said copies to the respondents' advocate.

The failure to serve the respondents offended Rule 90 (3) of the Rules and as such, the appellant cannot rely on the exclusion of the period stated under the proviso to Rule 90 (1) of the Rules. In the case of **Simon Lanya v. The Permanent Secretary, Ministry of Public Safety and Security and Three Others (supra)** cited by the learned counsel for the respondents, the Court held that:-

*“Under the proviso of Rule 90 (1) of the Rules, the appellant cannot shield himself under the exception of sub rule (1) of Rule 90 unless a copy of the letter addressed to the Registrar of the High Court asking for the record of proceedings was sent to the respondent. This Court in the case of **D. P. Vallambia v. Transport Equipment Ltd [1992]** T.L.R. 246 citing Rule 83 (2) of the old Court of Appeal Rules, 1979 which is in pari materia with the current Rule 90 (2) of the Rules held that if the respondent does not serve upon the applicant a copy of their letter in which they apply for a copy of the proceedings as required by Rule 83 (2) they are not covered by the exception in sub rule (1). Thus, if the Registrar issued them with a certificate under sub rule (1) of Rule 83 such certificate was issued under a mistake of fact. Consequently, the period*

available in which to institute the appeal was sixty days.”

This is the position held by the Court in similar circumstances, we mention just a few, for instance **Mohamed Issa Mtalamile and Three Others v. Tanga City Council and Another**, Civil Appeal No. 200 of 2019 and **Augustino Mkalimoto (As Administrator of the Estate of the late Mlamsitembo Mkalimoto) v. Village Schools of Tanzania and Two Others**, Civil Appeal No. 154 of 2019 (both unreported), see also, **Stephen Wasira v. Joseph Warioba** (supra) and **D. P. Vallambia v. Transport Equipment LTD** (supra). In that regard, the appeal instituted on 31st August 2017 was more than 3 years from the date of lodging the notice of appeal well beyond the sixty days prescribed under Rule 90 (1) of the Rules.

The appellant cannot benefit from the exclusion of days under the proviso to Rule 90 (1) of the Rules, he should have instituted his appeal within sixty days from the lodging of the notice of appeal. The purported appeal is time barred. Consequently, the appellant was required to lodge his appeal within sixty days from 18th December, 2013 of the date of filing the notice of appeal. This appeal which was instituted on the 31st August,

2017 was out of time and thus incompetent before the Court. The preliminary objection is found to be merited and we sustain it.

Having sustained the preliminary objection, we strike out the appeal for being time barred with costs.

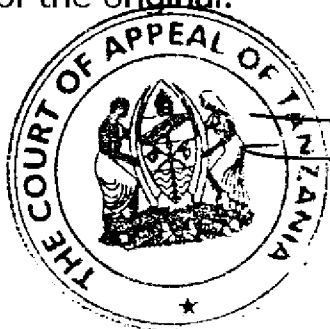
DATED at **DAR ES SALAAM** this 3rd day of August, 2021

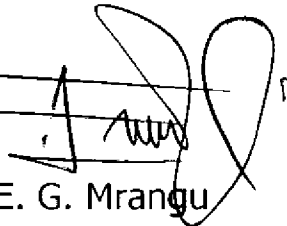
F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 5th day of August, 2021 in the presence of Ms. Glory Venance, learned counsel for the Appellant and Mr. Octavian Temu, learned counsel for the respondent, is hereby certified as a true copy of the original.




E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL