

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

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And KENTE, J.A.)

CIVIL APPEAL NO. 136 OF 2020

FILON FELICIAN KWESIGA.....APPELLANT

VERSUS

BOARD OF TRUSTEES OF NSSF.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
Labour Division at Bukoba)**

(Masoud, J.)

dated the 10th December, 2019

in

Misc. Labour Application No. 6 of 2017

RULING OF THE COURT

26th & 27th August, 2021

KEREFU, J.A.:

The High Court of Tanzania (Masoud, J) sitting at Bukoba, dismissed the applicant's Misc. Labour Application No. 6 of 2017 seeking extension of time to lodge an application for revision against the decision of the Commission for Mediation and Arbitration delivered on 24th June, 2013. That decision of the High Court was delivered on 10th December, 2019.

Aggrieved, the appellant on 7th January, 2020 lodged a notice of appeal in this Court and on 10th March, 2020, he lodged a memorandum of appeal which comprised two (2) grounds of complaint. However, for the reasons which will be apparent shortly, we do not deem appropriate, for the purpose of this ruling, to reproduce them herein.

Having been served with the memorandum of appeal, the respondent lodged a notice of preliminary objection to the effect that: -

- (1) *The appeal is time barred and thus offending the mandatory provisions of Rule 90 (1) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended that -*
 - (a) *The memorandum and record of appeal were lodged on 10th March, 2020 being after the period of 63 days from the date of lodging the notice of appeal, which was on 7th January, 2020;*
 - (b) *The purported written letter requesting for the copy of proceedings in the High Court was lodged on 9th January, 2020 but was neither copied nor served to the respondent and it is not part of the record;*

(c) The certificate of delay is incorrect, improper and erroneously certified rendering it being non-existing before the eyes of the law hence the appeal is time barred.

(2) The appeal is untenable in law the applicant's failure to serve the notice of appeal to the respondent within 14 days.

At the hearing of the appeal, the appellant appeared in person without legal representation whereas the respondent was represented by Mr. Deodatus Nyoni, learned Principal State Attorney assisted by Mr. Ayoub Sanga, learned State Attorney.

As is the rule of practice, before we could embark on the hearing of the appeal on merit, we have to hear first the preliminary objection. As such, we invited the parties to address us on the points of objection raised by the respondent.

Upon taking the floor, Mr. Nyoni abandoned the second point of objection and went on to argue only the first point. Submitting in support of that point, Mr. Nyoni contended that the appeal is incompetent for being lodged out of time. To clarify on this point, Mr. Nyoni argued that, the impugned decision sought to be challenged

was delivered on 10th December, 2019, the notice of appeal was lodged on 7th January, 2020 and the memorandum of appeal was lodged on 10th March, 2020. Relying on the provisions of Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), Mr. Nyoni argued that, the appeal should have been instituted within sixty (60) days after filing the notice of appeal and not otherwise. He then argued that, since the appeal herein was lodged after lapse of 63 days from the date of lodging the notice of appeal, it is time barred and deserves to be struck out.

The learned Principal State Attorney contended further that, whereas the proviso to Rule 90 (1) of the Rules empowers the Registrar of the High Court to exclude, in the certificate of delay, the period from when the appellant requested for the copies of the certified documents till when the same become ready for collection and supplied to him, the appellant herein cannot benefit from that Rule in the circumstances of this appeal. This is so, because he argued, **first**, it is not clear as to when the appellant requested for the said documents and when the same were supplied to him, as there is no appellant's letter or even the Registrar's letter included in

the record of appeal to that effect contrary to Rule 90 (1) of the Rules. **Second**, the appellant did not serve a copy of the letter to the Registrar on the respondent in contravention of Rule 90 (3) of the Rules.

He thus challenged the validity of the certificate of delay issued by the Registrar found at page (iii) of the record of appeal by excluding the period from 9th January, 2020 to 20th August, 2020 indicating that it was the period used to prepare the said documents, while the memorandum of appeal was lodged on 10th March, 2020. It was his argument that, the certificate of delay had wrongly excluded the number of days contrary to Rule 90 (1). He insisted that, since the appellant's letter referred to in the certificate of delay was not served on the respondent as required under Rule 90 (3) of the Rules, the appellant cannot benefit from the excluded period, hence the appeal is hopelessly time barred. To bolster his proposition, Mr. Nyoni cited the cases of **Mayira M. Mayira and 4 Others v. Kapunga Rice Project**, Civil Appeal No. 359 of 2019 and **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others**,

Civil Appeal No. 66 of 2017 (both unreported). He then urged us to strike out the appeal with costs for being time barred.

In his response, apart from conceding that he did not serve the letter requesting for copies of the certified documents and that the said letter was not included in the record of appeal, the appellant maintained that the appeal was lodged within time. He contended that, he lodged the notice of appeal on 7th January, 2020 and the memorandum of appeal was lodged on 5th March, 2020 which he said, was after lapse of only 59 days from the date of lodging the notice hence, according to him, the appeal was lodged within the time prescribed by the law. He thus urged us to overrule the preliminary objection raised by the respondent with costs and proceed to hear the appeal on merit.

When probed by the Court, on the purpose of including the certificate of delay in the record of appeal, if the same was lodged within the prescribed time, the appellant, being a layperson did not have much to say, but he only insisted that the appeal was lodged within time.

In a brief rejoinder, Mr. Sanga challenged the submission made by the appellant as he argued that is not supported by the record. He contended that, if at all it is true that, the appellant lodged the appeal within the prescribed period, then he would not have struggled to include the certificate of delay therein. It was his argument that, since the appellant had readily conceded that he did not serve his letter requesting for the certified copies of the documents to the respondent as required by Rule 90 (3) of the Rules, then he is not entitled to benefit from the excluded days in the certificate of delay. He thus emphasized that the appeal is time barred and deserves to be struck out with costs.

On our part, having examined the record of appeal and the submissions advanced by the parties for and against the preliminary objection, the main issue for our determination is whether the objection raised is meritorious.

There is no doubt that the issue raised is regulated by Rule 90 (1) and (3) of the Rules which 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."

From the above cited provisions, some points emerge. **One**, an appeal is mandatorily required to be instituted within sixty days from the date when the notice of appeal was lodged. **Two**, in order for the appellant to benefit from the exclusion of time spent in preparation

and delivery of documents, he must apply for certified copy of the proceedings in the High Court within thirty (30) days of the date of the decision against which it is desired to appeal and the application for the copy of proceedings must be in writing and a copy of it must have been served on the respondent.

In the instant appeal, it is on record that the decision sought to be challenged was handed down on 10th December, 2019, the notice of appeal was lodged on 7th January, 2020 and the memorandum of appeal lodged on 10th March, 2020. With respect, we find the submission of the appellant that he lodged the appeal on 5th March, 2020 to be misconceived as it is not supported by the record.

It is also clear that, the record is silent on when exactly the appellant requested to be supplied with the certified copies of the High Court's documents as the applicant's letter to that effect, though referred in the certificate of delay, is not included in the record. It is equally not clear as to when the said documents were ready for collection and when exactly the appellant was availed with the same, as again, the Registrar's letter to that effect is not part of the record.

As correctly argued by Mr. Nyoni, 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, in his submission, the appellant had readily conceded that he did not serve the letter requesting for the certified documents to the respondent. As such, he 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 and Another**, Civil Appeal No. 115 of 2012 (unreported), 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 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."

In finding that the appeal in question was time barred in the absence of the letter requesting for the copy of certified documents, the Court went on to state that: -

"As matters stand, we are in agreement with Mr. Muganyizi that in the absence of a letter applying for the copy of proceedings, the appellant was supposed to institute her appeal within sixty (60) days reckoned from 7/12/2010 when she lodged her notice of appeal. Thus, we are settled in our mind that the present purported appeal which was instituted on 11/12/2012 In violation of Rule 90 (1) of the Rules is, unarguably, time barred."

Similarly, in this case, since the appellant has conceded that he did not serve the purported letter to the respondent he cannot benefit from the exception under the proviso to Rule 90 (1) of the Rules. Therefore, we agree with the counsel for the respondent that the appeal is time barred.

As regards the validity of the certificate of delay, there are several decisions of this Court on that aspect; they include, **Khantibhai M. Patel v. Dahyabhai F. Minstry** [2003] TLR 437;

Yazidi Kassim t/a Yazidi Auto Electric Repairs v. The Hon. Attorney General, Civil Appeal No. 215 of 2017, quoting with approval the case of **Andrew Mseul and 5 Others v. The National Ranching Company Ltd and Another**, Civil Appeal No. 205 of 2016 (all unreported), to mention, but a few. Specifically, in **Khantibhai M. Patel** (supra) this Court held *inter alia* that:

"A proper certificate under rule 83(1) (now Rule 90 (1)) of the Rules of the Court is one issued after the preparation and delivery of a copy of the proceedings to the appellant and the certificate contained in the record of appeal was improper; it might have been an inadvertent error and no mischief was involved but the error rendered the certificate invalid. An error in a certificate is not a technicality which can be glossed over; it goes to the root of the document". [Emphasis supplied].

In addition, in **Andrew Mseul** (supra) the Court observed that: -

"A valid certificate of delay is one issued after the preparation and delivery of the requested copy of the proceedings of the High Court. That necessarily presupposes that the Registrar would certify

and exclude such days from the date when the proceedings were requested to the day when the same were delivered [Emphasis added].

However, and as correctly argued by Mr. Nyoni, in the certificate of delay herein, the Registrar, instead of excluding days used to prepare the documents, he indicated completely different dates of 9th January, 2020 to 20th August, 2020 and wrongly excluded days which were not subject for exclusion as per Rule 90 (1) of the Rules. For clarity, we find it prudent to reproduce part of the said certificate of delay hereinbelow:-

"CERTIFICATE OF DELAY

Made under Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009

*I hereby certify that the application for copies of the proceedings, decree and other documents in respect of the above-mentioned suit/proceedings was lodged in the High Court at Bukoba **on 9th January, 2020 by the appellant up to the date of issuance of this certificate of delay the aforesaid proceedings/ documents applied for were not supplied in time by the High Court.** Therefore, due to this delay in*

*preparation of the proceedings and those other documents the entire period **from the time of applying the above-mentioned proceedings/ documents be excluded in computation of time until on 20th August, 2020 when all proceedings will be completed and supplied to the appellant.***" [Emphasis added].

Reading the above certificate and following the above authorities, we are in agreement with the counsel for the respondent that the certificate of delay is fatally defective for being issued contrary to the requirement of the above Rule. It is our considered view that, where the Registrar issues a certificate of delay without providing the appellant with a copy of the proceedings, as the case herein, then, such a certificate is pre-mature, hence ineffective.

We are of the further view that the circumstances obtained in this appeal, cannot be cured by the principle of overriding objective as the same cannot be blindly applied on such an omission which goes to the root of the appeal. The Court cannot have jurisdiction to entertain an appeal which is time barred and where the certificate of delay is ineffective for having been issued prematurely. See the cases of **Njake Enterprises Limited v. Blue Rock Limited and**

Another, Civil Appeal No. 69 of 2017 (unreported) and **Mondorosi Village Council and 2 Others** (supra) where we 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.

Furthermore, and for the avoidance of doubt, we have refrained from invoking the provisions of Rule 96 (7) of the Rules, to which we often resort to inject oxygen to a defective certificate of delay by granting leave to the appellant to lodge a supplementary record to include a valid certificate of delay in the record. This is so, because, in this case, as indicated above, the appellant is not entitled to benefit from the exception under the proviso to Rule 90 (1) of the Rules, as he did not serve, on the respondent, the letter applying for the copy of the certified documents for appeal purposes. That is the reason why we have found and held that, in the circumstances, the appeal cannot be resurrected by the principle of overriding objective.

In the premises, we are of the settled view that the appeal before us is incompetent for being time barred. In the end, we sustain the preliminary objection raised by the respondent.

Consequently, we strike out the appeal for being time barred.
Considering that this is a labour related matter, we make no order as
to costs.

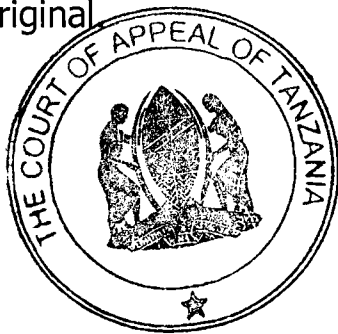
DATED at **BUKOBA** this 27th day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 27th day of August, 2021, in the
presence of Mr. Gerald Njoka, learned State Attorney and Appellant
in the absence with notice, is hereby certified as a true copy of the
original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL