IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 30 OF 2020

ABSA BANK TANZANIA LIMITED (FORMERLY KNOWN AS BARCLAYS BANK TANZANIA LTD ..... 1ST APPELLANT
JOSEPH JOHN NANYARO ..... 2ND APPELLANT

VERSUS

HJORDIS FAMMESTAD..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania (Commercial Division) at Arusha)

(Fikirini, J.)

dated the 8th day of October, 2019
in
Commercial Case No. 6 of 2018

.....

RULING OF THE COURT

22nd September & 1st October, 2021

KOROSSO, J.A.:

Hjordis Fammestad, the respondent herein, successfully sued the appellants vide Commercial Case No. 6 of 2018, claiming for payment of USD 335,121.59 being the amount withdrawn allegedly without her authorization plus interest rates of 15% and 7% being commercial and court rates respectively.

The background to the matter, albeit in brief is that, the respondent herein on 14/7/2015 opened a US Dollar account, that is, account no 7000070 in the name of the respondent and instructed the 1st appellant to add a co-signatory to the account, who goes by the

name as Mr. Jaime E. E. Benito. On 16/8/2016, the respondent instructed the 1st appellant to add the name of Mr. Joseph John Nanyaro, the 2nd appellant, as a new co-signatory in the same account. Apart from the instructions to add the new signatory, there was also a specific instruction given to the bank, on operation of the said account and the 2nd appellant was not authorised to withdraw more that USD 10000.0 without the signature of the respondent. Between 1/5/2017 and 31/12/2017, the 2nd appellant made numerous withdrawals from the account without seeking the 2nd signature of the respondent contrary to the instructions given on the mandate to operate the account given on 16/8/2016. As a result, the respondent suffered a loss of USD 395121.59.

The defence by the 1st appellant was that the account was operated properly and that the contested cash withdrawals by the 2nd appellant were proper as the respondent was made aware of the said transactions through SMS's sent to the respondent on every debit transaction made. The advanced argument was that even if there was no direct consent to the transactions from the respondent, she was obliged to report any unauthorized transactions in her account to the 1st appellant upon notification. On the part of the 2nd appellant, he argued that as a joint account holder he had equal rights to the use of the

account and was not limited on the amount to withdraw. Regardless, he reasoned, the cash withdrawn was expended to purchase building materials for the construction of Sakola Sunrise Limited, a lodge of which he and the respondent were shareholders.

The resultant finding of the trial court after a full trial was judgment in favour of the respondent, hence the current appeal in this Court lodged by the dissatisfied 1st and 2nd appellants. The appellants filed a joint memorandum of appeal parading nine grounds of appeal. However, for reasons which shall soon be apparent we shall not reproduce them at this juncture.

On the day the appeal was called for hearing, the 1st and 2nd appellants were represented by Mr. Mpaya Kamara and Mr. John Laswai both learned Advocates, while the respondent enjoyed the services of Mr. Salimu Juma Mushi, learned Advocate.

It is on record that on 16/6/2020 and 15/10/2020, which was before the commencement of the hearing, the respondent did file notices of preliminary objections and each notice contained one preliminary point of objection. The two points of objection raised state thus:

1. the appeal is hopelessly time barred as the certificate of delay at page 573 of the record of appeal is misleading and problematic and thus incurably defective.
2. that the appeal is incompetent and bad in law for it has been preferred by a wrong party to the original proceedings in Commercial Case No. 6 of 2018 and without prior leave of the court.

It was also on record that on the 25/8/2021, the Court through the Registrar of the Court, received a letter from Dexter Attorneys, signed by Salimu Juma Mushi, counsel for the respondent, invariably advancing the respondent's intention to withdraw the notices of preliminary objections filed on 16/6/2020 and 15/10/2020 so as to pave way and expedite the hearing of the appeal on merit in the interest of justice.

In the spirit of the above stated letter, the respondent's counsel when called upon to expound on the preliminary objection points filed, he began by informing the Court of their intention to withdraw the two points of preliminary objection raised filed on 16/6/2020 and 15/10/2020 respectively so as to do away with any delay in the hearing of the appeal on merit taking into account that the matter originated from

commercial transactions and the looming urgency to finalize it soonest so that business may go on.

Thereafter, and upon a short dialogue with the Court, the learned counsel was prompted by the Court to expound on the alleged defects in the certificate of delay and the propriety of the certificate of delay. Mr. Mushi argued that; **first**, the certificate of delay does not comply to Rule 90(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in terms of format as it is not substantially similar to the prescribed format that is, Form L as specified in the First Schedule to the Rules. **Second**, it offends Rule 90(1) of the Rules since the time said to be excluded in counting the time to file an appeal refers to a letter requesting certified copies of the judgment, decree and proceedings of impugned decision dated 28/10/2019 while in fact the requisite letter as found at page 569 of the record of appeal is dated 17/10/2018 and was received in Court on 21/10/2018. **Third**, the certificate of delay purports to exclude 70 days, whereas if the letter requesting essential documents was on 21/1//2019 counting it from then to when the certificate of delay was issued, that is, on 16/12/2019 it means only 56 days were spent to prepare the essential documents for the appeal. Essentially, the number of days stated to be excluded do not reflect the correct number of days to be excluded. **Fourth,** since the memorandum of appeal was filed on

14/2/2020, and considering the fact that as per Rule 90(1) of the Rules, an appeal is to be filed sixty days after filing a notice of appeal, which in the instant case was filed on 21/10/2019, it means the date of filing of the appeal expired on 20/1/2020 and when the memorandum of appeal was filed on 14/2/2010, the time to file had already expired and it was thus filed out of time. **Fifth,** there is a discrepancy in the date recorded as the date the Registrar informed the parties on collection of the essential documents, in that, while the certificate of delay alludes to 16/12/2019, the letter itself found at page 570 of the record of appeal was dated on 6/12/2019.

The learned counsel submitted that he was aware of the two schools of thoughts on the consequences where a certificate of delay is found to be defective. He argued that while one side argues that where a certificate of delay is defective it goes to the jurisdiction of the Court and once the Court is so satisfied on the defect in the certificate of delay the remedy available is to strike out the appeal, a position he is so inclined. The rival side argues that the remedy for the defective certificate of delay is to rectify it and that this position is founded on application of the overriding objective principle and he informed us that he was not in support of this stance because it is detrimental to his client's case and beneficial to the appellant

Mr. Kamara on the other hand, while appreciating the gesture of withdrawal of the preliminary points of objection by the learned counsel for the respondent, was cognizance of the fact that despite the said withdrawal the Court cannot proceed hearing of an appeal in the wake of obvious defects in the certificate of delay if it is so found. The learned counsel agreed with Mr. Mushi on the highlighted defects in the certificate of delay and reasoned that such anomalies rendered it to be defective. He argued that since clearly that is the case in the instant appeal, the crucial point for interjection is to deliberate and determine the proper way forward under the circumstances.

The learned counsel for the appellant urged the Court to find that in the instant case the way forward is to allow the appellants to rectify the certificate of delay so that hearing of the appeal can proceed on merit on the basis of correct record. He sought to rely on the decision of **RSA Limited vs Hanspaul Automechs Limited and Another**, Civil Appeal No. 179 of 2016 (unreported), contending that in the cited case similar defects as those found in certificate of delay of the instant case were noted and the Court, having been guided by the overriding objective principle allowed the appellant to rectify the defects therein. He, thus, implored us to take leaf from the cited decision and allow the

appellants to file supplementary record to include a proper certificate of delay.

In addition, the learned counsel for the appellant sought and was granted leave to address the Court on another issue of concern to hearing of the appeal on merit. He informed the Court that having only recently joined the appellants team as can be discerned from the record of appeal, upon perusal of the record of appeal he discovered that there are crucial documents missing in the record of appeal, which essentially rendered the record incomplete. According to Mr. Kamara, the missing documents include the witness statement of one Imani Gratian (DW3) although the record shows that the statement was duly admitted by the court. He thus prayed that the appellants be allowed to file supplementary record so as to file a correct certificate of delay and the missing evidence of DW3 under Rule 96 (7) and (8) of the Rules.

Mr. Mushi's rejoinder began by expressing appreciation for the concession by the learned counsel for the appellants regarding alluded to defects in the certificate of delay but on his part, he was firm that the said defects are incurable and the appeal should be struck out. He urged the Court to refrain from invoking the overriding objective principle arguing that such an action will be departing the essence of the said

principle. For him, the overring objective principle is geared to expedite the adjudication process, and thus the request from the appellant's counsel to be given time to rectify the certificate of delay and subsequently to file supplementary record will further delay the hearing of the appeal. He argued that based on the nature of the matter, it being a commercial case, and due to the fact that the respondent business has been put to a halt awaiting the outcome of the pending appeal, giving the appellant more time to rectify the certificate of delay will further delay finalization of the appeal. His prayer was for the appeal to be struck out with costs.

Having carefully considered the submissions from the counsel for the rival sides, we find there are mainly two matters for consideration and determination. One, whether the certificate of delay is defective and if it is found thus, the consequences thereto and two, whether there are essential documents missing and the remedy thereto.

We are constrained to start our deliberation of the matter before us by first considering the import of the relevant provision giving rise to issuance of certificate of delays. The essence of Rule 90(1) of the Rules, according to the case of **CRDB BANK PLC vs True Colour Ltd and Another**, Civil Appeal No. 29 of 2019 (unreported), is that:

> *"it requires the appellant to lodge his appeal within sixty (60) days from the filing of the notice of appeal. However, the said Rule provides for an exception to a person who fails to do so if he was unable to obtain the copies of proceedings within time, only if, he applied for such proceedings within thirty days from the date of judgment and a copy of such application was served to the respondent within the same period. If the appellant has done so, the same Rule requires the Registrar of the High Court to issue a certificate of delay excluding a number of days which were used for preparation of the copies of proceedings applied for by the appellant in the computation of time within which the appeal is to be lodged. On top of that, Form L of the 1st Schedule to the Rules which is made under Rule 90(2) of the Rules elaborates the particulars to be filled in it including the aggregate number of days which are being excluded."*

We find the above extract to underscore the crux of the said Rule without more. This Court has in numerous decisions emphasised the need to conform with the mandatory requirement underlined in Rule 90 of the Rules as it relates to computation of time to appeal and that non-compliance would render the certificate of delay incurably defective and the appeal time barred with the resultant consequence of being struck

out-(See **Livingstone Enock and Three Others vs Serge Smolonogov and Another,** Civil Appeal No. 33 of 2019; **Omary Shaban S. Nyambu vs The Permanent Secretary Ministry of Defence and 2 Others**, Civil Appeal No. 105 of 2015; and **Meneja Mkuu, Zanzibar Resort Limited vs Ali Said Paramana**, Civil Appeal No. 263 of 2017 (all unreported) to name a few).

We are also mindful of other decisions of this Court where another school of thought on the consequence of a defective certificate of delay has prevailed, taking the position that, a defective certificate of delay may be rectified inspired by the overriding objective principle as found in section 3A of the Appellate Jurisdiction Act, Cap 141 RE 2002, now 2019 and Rule 2 of the Rules. The Court has instead of striking out the appeals which would have been rendered time barred in the absence of a proper certificate of delay, allowed respective appellants to seek and obtain valid certificates of delay and proceed with hearing the appeal on merit as can be seen from our decisions in **M/S Universal Electronics and Hardware (T) Limited vs Strasbag International GmbH (Tanzania Branch),** Civil Appeal No. 122 of 2017; **M/S Flycatcher Safaris Ltd vs Hon. Minister for Lands and Human Settlement Development and Another**, Civil Appeal No. 142 of 2017; and **Geita**

Gold Mining Ltd vs Jumanne Mtafuni, Civil Appeal No. 30 of 2019 (all unreported) to name a few).

In **Abdurahman Mohamed Ally vs Tata Africa Holding (T) Limited**, Civil Appeal No. 58 of 2017, the Court held:

> *"On our part we agree with both learned counsel that the defect in the certificate of delay renders the appeal incompetent for being time barred. Ordinarily, that would have the effect of causing it to be struck out. However, given the fact that the mistake was made by the court and although on his part, the appellant's counsel had the duty of ensuring that a properly drawn certificate was sought and included in the record of appeal, going by the spirit of the overriding objective, we allow the prayer made by the appellant's counsel.... we allow the appellant to secure and include in the record of appeal, a correct certificate of delay."*

Again, in the case of **Geita Gold Mining Ltd** (supra) the Court stated:

> *"In view of the above guiding authorities, we think the appellant still has room to benefit the exclusion of time provided for under rule 90(1) of the Rules in terms of sections 3A, 3B and rule 2 of, respectively, the AJA and the Rules... In the*

circumstances, we find ourselves constrained to allow Mr. Mwamtembe's uncontested prayer so as to inject oxygen to the appeal which would otherwise have been struck out on account of the defective or invalid certificate of delay. This position we have taken, we respectfully think, and as stated above, will augur well with the overriding objective in the resolution of disputes which is provided under sections 3A, 3B and Rule 2 of, respectively, the AJA and the Rules."

In the instant appeal, and as conceded by the counsel for the appellant there are obvious anomalies in the certificate of delay. The relevant certificate of delay is found at page 574 of the record of appeal it is titled; Certificate under Rule 90(1) of the Court of Appeal Rules, 2009. Its contents are as follows:

"This is to certify that an aggregate of 70 days were required for the preparation and delivery of copies of proceedings and other documents applied for by the Defendant in their Advocates letter dated 28th day of October, 2019. The said documents were supplied to the Applicant Advocate on the 16th day of December, 2019".

The said certificate is dated 16/12/2019. A cursory glance of the same reveals various infractions of Rule 90(1) and (2) of the Rules; **one**, it contravenes Form L of the First Schedule to the Rules in terms of

format, this fact has been conceded by counsel for both sides. **Two**, the recorded dates on the start of the exclusion period are at variance with the actual dates. The proviso to Rule 90(1) expounds that the application for proceedings in the High Court has to be within 30 days of the date of the decision and the time to institute an appeal shall exclude the time from the application for proceedings. In the instant case, the impugned decision was delivered on 18/10/2019 and the appellant filed a notice of appeal on 21/10/2019. He presented his application for the certified copies of proceedings on 21/10/2019 as found at pages 567 and 569 of the record of appeal. The certificate of delay states that the letter applying for proceedings was presented on 28/10/2019 instead of the actual date of 21/10/2019. **Three**, the number of the aggregate days for exclusion are at variance with the actual aggregate number of days from the date of applying for proceedings to date of collection of essential documents. The certificate of delay excludes 70 days starting from 28/10/2019 to 16/12/2019, however this is not the case because the stated duration as submitted by the respondent's counsel is only about 56 days as also contended by the learned counsel for the respondent. In essence what it means is that what was recorded as days to be excluded do not augur with the reality. Evidently, we agree with

the submissions by the counsel for the respondent which were conceded by the counsel for the appellant that the certificate of delay is defective.

Consequently, with the finding above, the pertaining issue for determination is what is the remedy available. Whilst on the part of the respondent, they contend that the defective certificate of delay renders the appeal incompetent, since the appeal should have been filed 60 days from the date of filing the notice of appeal, the Court should find that the appeal is time barred and strike it out. While on the other hand, the appellants side has beseeched us to be inspired by our previous decisions engrained with the overriding objective principle and find that under the circumstances, and in the interest of the justice the way forward is to allow the appellant to rectify the defects in the certificate of delay and file a supplementary record under Rule 96(7) of the Rules which shall include a proper certificate of delay.

We have taken time to examine the two schools of thoughts to inspire us when determining the way forward for the instant appeal, where we have found the certificate of delay to be defective and thus invalid. We find guidance in the way the Court approached this issue in the case of **Geita Gold Mining Ltd** (supra) and **CRDB BANK PLC** (supra) where the holding in the case of **Arcopar (O.M.) S.A vs**

Harbert Marwa and Family and 3 Others, Civil Application No. 94 of 2013 (unreported), was cited with approval where we held:

> *"... where the Court is faced with conflicting decisions of its own, the better practice is to follow the more recent of its conflicting decisions unless it can be shown that it should not be followed for any of the reasons discussed above."*

We are thus of the view that, having regard to the circumstances of the instant case, and the decisions in the recent cases cited above which had an opportunity to determine the way forward in the wake of a defective certificate of delay, we are of the firm view that invoking the overriding objective principle will inject the much-needed oxygen to the instant appeal to give it a new impetus. In the process, we allow the appellant to enjoy the exclusion of time provided under Rule 90(1) of the Rules, in terms of sections 3A and 3B of AJA and Rule 2 of the Rules.

For the foregoing, the appellant is to seek and obtain a valid certificate of delay. We further order that the appellant is to lodge supplementary record in terms of Rule 96(7) of the Rules within thirty (30) days of this Order which will include the proper certificate of delay and the documents missing from the record of appeal, that is, the evidence of DW3 which was duly admitted in the trial court.

Meanwhile, in terms of Rule 38A (1) of the Rules, we adjourn the hearing of this appeal to another convenient session to be fixed by the Registrar. Each party to bear own costs for the adjournment.

It is so ordered.

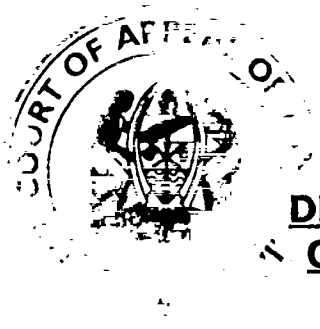
DATED at **ARUSHA** this 1st day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 1st day of October, 2021 in the presence of Mr. Alpha Ngóndya, learned counsel for the appellants and Ms. Alfredina Manga, learned counsel for the respondent Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL