IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)

CIVIL APPEAL No. 36 OF 2019

JACOB BUSHIRI.....APPELLANT

VERSUS

1. **MWANZA CITY COUNCIL**
2. **ABDUL MZIRAY**
3. **THOBIAS ANDREW**

..... RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Mwambegele, J.)

dated the 1st day of November, 2012
in
Land Appeal No. 27 OF 2010
.....

RULING OF THE COURT

8th & 14th July, 2021

KIHWELO, J.A.:

This appeal emanates from the decision of the High Court of Tanzania at Mwanza in Land Appeal No. 27 of 2010 in which the High Court of Tanzania endorsed the decision of the District Land and Housing Tribunal in Land Case Appeal No. 137 of 2007 that declared the second respondent the lawful owner of Plot No. 1061 Block "A", Luchelele, Mwanza City and the sale agreement between the second and the third respondents was declared a lawful transaction. The appellant was ordered to file an application for compensation.

The second and third respondents raised the initial preliminary point of objection vide a notice lodged on 26th March, 2019. The objection contains four grounds which for reasons to be apparent shortly we do not intend to reproduce them.

Apparently, the second and third respondents through Mr. Constantine Mutalemwa, learned advocate lodged a notice of additional preliminary objection on 29th June, 2021 to the effect;

> *"That the Certificate is misleading and incorrect or invalid as the same includes the documents from page 4 to page 94, and from page 98 to page 104 of the record of appeal, which documents were not supplied to the Appellant by the Registrar of the High Court and more so the Appellant never requested for such documents."*

At the hearing of the appeal, Mr. Chama Augustine Matata, learned advocate appeared to represent the appellant while Mr. George Michael Kalenda assisted by Ms. Sabina Johnson Yongo, and Ms. Mariam Ukwaju both learned State Attorneys appeared to represent the first respondent and Mr. Constantine Mutalemwa, learned advocate appeared to represent the second and third respondents.

As is ordinarily the practice of the Court, once a preliminary objection is raised, the Court would shelve the hearing of the substantive matter to allow the disposal of the preliminary objection first. We thus allowed Mr.

Mutalemwa to address us on the point of preliminary objections and apart from the preliminary points of objections raised by the second and third respondents, we requested the parties to address the Court on the effect and consequences of the failure by the appellant to serve respondents the letter requesting for certified copies of decree and proceedings dated 9th November, 2012 despite the fact that the said letter, which was in the original Court records, appears to have been copied to the respondents.

In his submissions in support of the preliminary objection, Mr. Mutalemwa canvassed the additional preliminary objection having abandoned the earlier preliminary point of objection lodged by the second and the third respondents on 26th March, 2019.

Briefly, the submission of Mr. Mutalemwa was to the effect that the appeal was hopelessly filed out of time because the certificate of delay found at page 105 of the record of appeal is misleading, incorrect and invalid. It was his submission that since the certificate of delay referred to the letter Ref. No. CAM/HC/26/2018 dated 4th October, 2018 by which the appellant applied for a copy of decree only the inclusion of other documents in the record of appeal which were not requested by the appellant and supplied by the Registrar makes the entire appeal incompetent.

It was Mr. Mutalemwa's further argument that looking at Rule 90(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the certificate of delay in this appeal is not substantially in the Form as specified in the First Schedule to the Rules and specifically he referred to Form L and contended that the appellant cannot thus rely upon the certificate of delay issued. Reliance was placed on the case of **Director General, Regional Manager (Iringa) NSSF v. Machumu Mkama,** Civil Appeal No.5 of 2018 (unreported).

Mr. Mutalemwa forcefully argued that it was not clear how and when the appellant received documents which it does not show that they were supplied to them by the Registrar and that in the eyes of the law the certificate of delay cannot be relied upon by the appellant in the exclusion of days in terms of Rule 90(1) of the Rules and that the omission was incurably defective.

In addressing on the question which was raised by the Court, that the appellant filed the letter requesting for a copy of the proceedings in the High Court but did not serve that letter on the respondents, Mr. Mutalemwa, was fairly brief and submitted that in terms of Rule 90(1) and (2) of the Rules the appellant was not entitled to rely upon the exemption of time even if the certificate of delay was correct and valid. He, thus, invited the Court to find that the appeal is out of time and strike it out with costs.

Mr. Kalenda supported the second and third respondents' learned advocate submission on the two points of objection in that the appeal is time barred because the certificate of delay is misleading, incorrect and invalid for non- compliance with Form L by failing to state when did the appellant apply for copies of proceedings, when was he supplied and more fundamentally by failure to indicate the number of days which should be excluded in computing the time for instituting the appeal in the Court. According to him Rule 90 of the Rules provides exception which entitles the appellant to exclusion of such time as the Registrar may certify as long as two conditions are met, one, is the request for a copy of the proceedings in the High Court and two, is the service of the letter. He however, argued that since the appellant did not fulfil the second condition which is service upon the respondents of the letter to request for a copy of the proceedings this appeal is incompetent.

In his brief response, Mr. Matata prefaced by conceding that failure to serve upon the respondents the letter requesting for a copy of the proceedings in the High Court is an irregularity but curiously went on to argue that the irregularity is curable as it does not go to the root of the appeal. Mr. Matata, submitted further that, the irregularity is curable under the overriding objective principle which was introduced in our jurisdiction

through Written Laws (Miscellaneous Amendments) (No.3) of 2018 (Act No. 18 of 2018). To fortify his argument, he referred us to the Kenyan case of **Daniel Kimani Njihia vs Francis Mwangi Kimani and Another** [2010] eKLR and prayed that the Court grants leave to the appellant to file supplementary record containing a correct and valid certificate of delay along with all other missing documents to rectify the anomaly.

Consequently, Mr. Matata stressed that the appellant may apply for extension of time to serve the letter requesting for a copy of the proceedings upon the respondents.

In rejoinder, Mr. Mutalemwa submitted that, the irregularity is fundamental and goes to the root of the jurisdiction of the Court and not merely technical which can be cured by supplementary record. As to the overring objective principle he contended that it cannot be applied blindly in disregard of the mandatory provisions on procedure.

We have anxiously examined the record of appeal and dispassionately considered the rival submissions on the preliminary objection, we think, for reasons that we shall assign, that this matter can be conveniently disposed of upon the determination of the issue of failure by the appellant to serve on the respondents a copy of the letter applying for the proceedings in the High Court.

Our starting point would be restating what the law provides in relation to the institution of the appeal and certificate of delay. Rule 90(1) and (3) of the Rules, as it was at the material time, provided as follows:

> *"(1) Subject to the provisions of Rule 128, an appeal shall be institute by lodging in the appropriate registry,* ***within sixty days of the date when 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 was served on the Respondent.*** *" [Emphasis added]*

It is instructive to recapitulate that the provision of Rule 90(1) of the Rules makes it mandatory for the appellant to lodge record of appeal as well

as memorandum of appeal within sixty days of filing of the notice of appeal. However, that requirement is subject to the proviso for exemption of time required for seeking and obtaining from the High Court a copy of the proceedings in that Court as may be certified by the Registrar where an application for such copy is made within thirty days of the delivery of the decision sought to be challenged. Furthermore, the entitlement to exemption was further conditioned under sub-rule (3) of Rule 90 above that the application for the copy of proceedings must be in writing and that a copy of it must have been served on the respondent. We have on several occasions held that failure to copy and serve upon the respondent the written request for a copy of the proceedings disentitles the appellant from relying upon the exemption under Rule 90(1) and that any certificate of delay purportedly issued to grant an exemption in the circumstances would be invalid. In the case of **D.P. Valambia v. Transport Equipment Ltd** [1992] TLR 246, this Court, citing the old Rules, Rule 83(2) of the Tanzania Court of Appeal Rules, 1979 which is similar to the current Rule 90(3) of the Rules, held, at page 256, that:

> *"Since also on my finding,* ***the respondents did not send to the applicant a copy of their letter in which they applied a copy of the proceedings, as required by Rule 83 (1),***

they are not covered by the exemption in sub-rule (1) and that therefore ***the Registrar issued them with a certificate of delay under sub-rule (1) while laboring under mistake of fact****. Consequently, the period available to the respondents in which to institute the appeal was sixty days."* [Emphasis added]

In the instant matter, the appellant, having duly lodged his notice of appeal on 12th November, 2012 (at page 96 of the record of appeal), he also lodged on the same date 12th November, 2012 a letter requesting to be supplied with a copy of the certified decree and proceedings, this is according to the letter found in the original Court record as the appellant did not include this letter in the record of appeal. It is evident that, although the appellant's letter appears to have been copied to the respondents but it was not served on the respondents the fact conceded by Mr. Matata counsel for the appellant. It follows therefore, that, the letter of 12th November, 2012 was in total contravention of the dictates of the provisions of Rule 90(3) of the Rules and that the appellant was not entitled to rely upon the exemption under sub-rule (1). It follows therefore, that, the purported certificate of delay the appellant sought to rely upon was mistakenly handed out by the Registrar and that it was invalid. That being the case, the appellant ought to have instituted his appeal within sixty days from 12th November, 2012 when he lodged his notice of appeal in terms of Rule 90(1) of the Rules. Since the

instant appeal was lodged on 30th January, 2019 more than six years beyond the sixty days' limitation period it is time-barred.

It is not insignificant, to say that, Mr. Matata, conceded that much after being probed by the Court but contended that the defect is curable by the overriding objective principle. With due respect, we think that the above provisions as cited tell it all. The institution of an appeal within sixty days is a jurisdictional issue and a mandatory requirement which cannot be salvaged by the overriding objective principle which was not meant to allow parties to circumvent the mandatory rules of the Court or turn blind to the mandatory provisions of the procedural law which go or have the effect of going to the foundation of the case. See: **SGS Societe Generale De Surveillance SA and Another v. VIP Engineering and Marketing Limited and Another,** Civil Appeal No. 124 of 2017 (unreported) in which the Court turned down the appellants' invitation to invoke the overriding objective principle to dismiss one of the objections raised by the respondent that had urged the Court to strike out the appeal for failure of the Registrar to endorse the Memorandum of Appeal with which the appeal had been instituted. In upholding the preliminary point of objection, the Court stated at page 23 of the judgment that the amendment by Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the

mandatory provisions of the procedural law which go to the foundation of the case.

In view of the foregoing, we feel that this point alone is sufficient to dispose of this matter. We find no need to deal with the preliminary objection which was raised by Mr. Mutalemwa. Accordingly, we strike out the appeal with costs to the respondents for appearance only.

DATED at **DAR ES SALAAM** this 14th day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 14th day of July, 2021 in the presence Mr. Constantine Mutalemwa, learned advocate holding brief of Mr. Chama Augustine Matata, learned advocate for the appellant and Mr. Hemedi Halidi Halifani, Senior State Attorney for the 1st respondent and Mr. Constantine Mutalemwa, learned advocate for the 2nd and 3rd respondent is hereby certified as a true copy of the original.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL