

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CIVIL APPEAL NO. 215 OF 2017

YAZIDI KASSIM T/A YAZIDI

AUTO ELECTRIC REPAIRSAPPELLANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

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

(Mwangesi, J.)

dated the 29th day of April, 2016

in

Civil Case No. 6 of 2001

RULING OF THE COURT

28th & 31st August, 2018

MBAROUK, J.A.:

This is an appeal from the judgment and decree of the High Court of Bukoba (Mwangesi, J. as he then was) dated 29th April, 2016 in Civil Case No. 6 of 2001. The appellant, Yazidi Kassim t/a Yazidi Auto Electric Repairs instituted a suit against three defendants i.e. C.451 S. SGT Ramadhani as 1st

defendant, Idelfonce Emil as 2nd defendant and the Attorney General as the 3rd defendant. He claimed from the 1st and 2nd defendants jointly and severally T. Shs 7,177,040/= being special and general damages and further claimed from the 1st and 3rd defendant jointly and severally Tshs. 42,833,960/= being special and general damages. The claims were due to the alleged unlawful arrest, confiscation of his properties and malicious prosecution and the loss which he did incur in the business, because of illegal criminal prosecution. The High Court's finding was that the plaintiff failed to establish his claims, hence the suit failed. Aggrieved by that decision, the appellant has preferred this appeal.

When the appeal was called on for hearing, it transpired that the respondent had filed a two points notice of preliminary objection on 15th August, 2018 in terms of Rule 107(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to the following effect:-

- "1. The appeal is bad in law for having violated the mandatory provisions of rule 90 (1) of the Court of Appel Rules, 2009 taking into consideration that the Certificate of Delay is defective for not indicating exactly when the copy of proceedings was delivered to the appellant.*
- 2. That the appeal is bad in law for want of competence of the parties that is the appellant and the Respondent."*

In this appeal, the appellant appeared in person, unrepresented, whereas the respondent / Attorney General was represented by Mr. Athumani Matuma, learned Senior State Attorney.

As per the practice of this Court, where a notice of preliminary objection has been filed in an appeal or

application, the Court hears the preliminary objection first before allowing the appeal to be heard on merit.

In arguing his 1st preliminary objection, Mr. Matuma submitted that, the requirement under Rule 90(1) of the Rules has been contravened due to the fact that the certificate of delay issued by the Deputy Registrar of the High Court at Bukoba has failed to indicate the number of days to be excluded. He submitted that for not indicating the exact number of days in the certificate of delay, the requirement to file an appeal within sixty (60) days in terms of Rule 90(1) of the Rules will be difficult to justify, and in the absence of that justification, the appeal will be taken to have been filed out of time.

He added that, in the instant appeal, the record shows that, the judgment sought to be appealed against was delivered on 29th April, 2016 as shown at page 432. The notice of appeal, was filed on 3rd May, 2016. Thereafter, the

memorandum of appeal was filed on 27th March, 2017. He further added that in terms of Rule 90(1) of the Rules, the appellant is mandatorily required to file his appeal in the appropriate registry, within sixty (60) days of the date when the notice of appeal was lodged. He said, counting from 3rd May, 2016 when the notice of appeal was lodged to 27th March, 2017 when the appeal was lodged about seven months passed. He added that the sixty days time passed since 2nd July, 2016.

Mr. Matuma further pointed out that, it would have been different if in the certificate of delay the number of days to be excluded in terms of the proviso to Rule 90 (1) of the Rules were stated. He said, for failure of not stating in the certificate of delay the exact number of days to be excluded, the appellant cannot enjoy the exemption of the number of days to have been excluded as provided in the proviso to Rule 90 (1) of the Rules. For that reason, Mr. Matuma urged us to

find the certificate of delay found at page 3 of the record of appeal defective. In support of his argument, he cited to us the decisions of this Court in **Andrew Mseul and five others v. The National Ranching Company Ltd and The Attorney General**, Civil Appeal No. 205 of 2016 and **Methodia Method v. The Head Master Mugeza Secondary School and two others**, Civil Appeal No. 206 of 2016 (both unreported).

He further urged us to find that the defect found in the certificate of delay renders the appeal incompetent. He therefore, prayed for this incompetent appeal to be struck out with costs. Mr. Matuma then prayed not to argue his 2nd preliminary objection as it might be taken to have been filed in the alternative.

On his part, the appellant strongly argued against the preliminary objection and maintained that the date to be taken when the copies of proceedings, judgment and decree

were delivered to him should be the date of the issuance of the certificate of delay on 17th March, 2017. He said, if the court will consider that date as the one which he was delivered with the copies he applied, his appeal is to be taken to have been filed within time. He added that, the copies which he applied were provided to him by the court in piece-meal. The appellant also claimed that he cannot be faulted or blamed for the defect in the certificate of delay made by the Court. The appellant then prayed for the Court to distinguish the two cases referred by the learned Senior State Attorney representing the respondent. In support of his averment he cited to us the decision of this Court in the case of **African Marble Company Ltd v. Tanzania Saruji Corporation** [1999] TLR 306 and **D. T. Dobie & Company (Tanzania) Ltd v. N. B. Monatebele** [1992] TLR 152.

Finally, the appellant prayed for the preliminary objection filed by the respondent to be overruled and allow the appeal to proceed to be heard on merit.

In his rejoinder, Mr. Matuma submitted that, there is no evidence in the record which has shown that the certificate of delay was delivered on 17th March, 2017. He added that in the case of **Andrew Mseul** (supra) the interpretation of Rule 90 (1) of the Rule was given. He also said, that even if the appellant put the blame on the side of the court on the defect found in the certificate of delay, the appellant was obliged after having noted the anomalies in the certificate of delay to inform the Deputy Registrar so as to correct them before he filed his appeal. He then urged us to distinguish the case of **African Marble** (supra) with this case. He then reiterated his earlier prayer for the preliminary objection to be sustained with costs.

Having heard the rival submissions from both sides, we have found it prudent to reproduce the certificate of delay as it appears at page 3 of the record of appeal as follows:-

**"IN THE HIGH COURT OF TANZANIA
BUKOBA SUB-REGISTRY
AT BUKOBA
CIVIL CASE NO. 6/2001**

**YAZID KASSIM T/A YAZID
AUTOR ELECTRICT
REPAIRS.....PLAINTIFF
VERSUS
THE ATTORNEY
GENERALDEFENDANT**

**CERTIFICATE OF DELAY (UNDER R. 90
(1) OF THE TANZANIA COURT OF
APPEAL RULES 2009)**

I hereby certify that the application for copies of proceedings, Judgment, decree and other documents in respect of the above mentioned suit was lodged in this court on 29/04/2016 by the plaintiff, up to the date of issuance of this certificate of delay being signed the documents applied for were not supplied in time by the court.

Therefore due to this delay in preparation of the proceedings these days be excluded from the days of instituting the appeal under rule 90(1) of the Tanzania Court of Appeal Rules, 2009.

Dated at Bukoba this 17th day of March, 2017.

**DEPUTY REGISTRAR
BUKOKA."**

In addition to that, we also find it relevant to cite Rule 90(1) of the Rules the provision upon which the requirement and purpose of a certificate of delay has been derived. The same reads 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 costs of appeal.*

*Save that where an application for 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.***

(Emphasis added)

As pointed out in the above cited provision of the – proviso to Rule 90(1) of the Rules is that, the **Registrar of the High Court is required to issue a certificate** after having computed the time within which the appeal is to be instituted having considered the number of days taken for **the**

preparation and delivery of the copies of proceedings, judgment and decree applied by the appellant. As pointed out in the decision in **Andrew Mseul** (supra), the interpretation of Rule 90(1) of the Rules was given, where it was stated as follows:

*" 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)

Looking at the certificate of delay in the instant case, the same is completely silent on the number of days which are supposed to be excluded in favour of the appellant. We are of the view that, that was the gist of the preliminary objection preferred by the respondent. We are further of the view that the Deputy Registrar was wrong and misdirected himself when he took into account the day when judgment of the High Court was delivered i.e 29th April, 2016 up to the date of issuance of the certificate of delay as the dates to be taken into account when excluding the number of days. That was contrary to the directions given by Rule 90(1) of the Rules and its proviso, where it is required that the number of days to be excluded should be from the date when the proceedings of the High Court were requested to the day when the same were delivered to the appellant.

With due respect, we are of the view that the contents in the certificate of delay are not in compliance with the

direction given in Rule 90(1) of the Rules and its proviso. A valid certificate of delay must take into account the number of days to be excluded from the date when the proceedings were applied / requested by the appellant to the day when the same were delivered to him as directed by the proviso to Rule 90(1) of the Rules. Non-compliance with that requirement renders the certificate of delay invalid. See **Omary Shabani Nyambu v. Permanent Secretary Ministry of Defence & 2 others**, Civil Appeal No. 105 of 2015 (unreported).

We therefore think that the authorities in **African Marble Company Ltd** and **D. T. Dobie** (supra) referred by the appellant in support of his argument are not applicable in the circumstance of this appeal.

For that pin pointed anomaly in the certificate of delay,
we sustain the preliminary objection and hereby strike out the
appeal with costs.

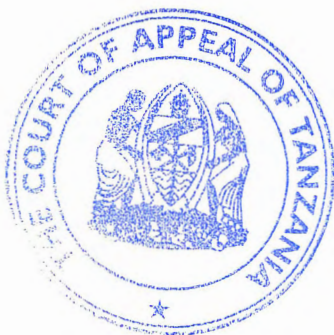
DATED at **BUKOBA** this 30th day of August, 2018.


M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL