IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 85 OF 2016

RAYMOND OBED KITILYA ..... APPELLANT

VERSUS

THE COMMISSIONER FOR LANDS MINISTRY OF LANDS,

HOUSING AND HUMAN SETTLEMENT .....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

KHALID HAMISI .....3RD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Kalombola, J.)

Dated the 10th day of September, 2015
in
Land Case No. 69 of 2009
.....

RULING OF THE COURT

13th July& 15th September 2022

MAKUNGU,J.A.:

The appellant, Raymond Obed Kitilya, sued the Commissioner for Lands and Attorney General, (hereafter referred to as the 1st and 2nd respondents) and Khalid Hamis (the 3rd respondent) before the High Court of Tanzania at Dar es Salaam (Kalombola, J) in Land Case No. 69 of 2009. It was his claim before the trial court that he was a lawful

owner of a piece of land described as Plot No. 220 Block '22' situated at Bunju Area, Kinondoni District within Dar es Salaam City and for an order nullifying the re-allocation of the said piece of land which was made by the 1st respondent to the 3rd respondent. The appellant lost the suit in the decision dated 10th September, 2015. He has thus come before this Court by way of this appeal which was lodged on 23rd June, 2016.

Consequent to the foregoing, the 1st and 2ndrespondents counsel filed a notice of preliminary objection on 24th May, 2021 on the following two points of law:

1. That the appeal is incompetent for contravening Rule 90(1) of the Court of Appeal Rules, 2009 as the letter to the Registrar of the High Court applying for copies of proceedings, Judgment and Decree was served to the 1st and 2nd respondents out of time; and
2. That the appeal is hopelessly time barred in contravention of Rule 90 (1) and (2) of the Court of Appeal Rules, 2009 as amended.

When the appeal was called on for hearing on 13th July, 2022, Mr. Raymond Obed Kitilya, the appellant, appeared in person, unrepresented. On the other side, Mr. Deodatus Nyoni, learned Principal State Attorney who was assisted by Ms. Jacqueline Kinyasi and Mr. Salehe M. Manoro both learned State Attorneys, entered appearance for the 1st and 2nd respondents. As it has been the case in the previous hearing dates, the 3rd respondent was not in Court. The appellant was quick to intimate to the Court that the 3rd respondent was previously duly served with the notice of hearing through publication in compliance with the previous Court orders and the Court ordered the hearing to proceed in his absence. He prayed the Court to proceed with the hearing of this appeal in the absence of the 3rd respondent.

Mr. Nyoni earnestly welcomed the proposal by Mr. Kitilya and we granted the prayer and ordered to proceed with the hearing in the absence of the 3rd respondent.

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.

Submitting on the first point of the preliminary objection, Mr. Nyoni, while referring to the proviso in Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009, as amended (the Rules), argued that the appeal before us is out of time as the same was supposed to be filed within a period of sixty (60) days from the date of the notice of appeal. To demonstrate that the appeal was out of time, he submitted that the appellant filed his letter requesting for a copy of the proceedings in the High Court (the letter) but he served the letter on the 1st and 2nd respondents beyond prescribed time. The learned counsel took us to page 128 of the record of appeal which shows that the letter filed on 23rd September 2015, but the 1st and 2nd respondents received on 20th November, 2015 almost 59 days from the date when the letter was lodged. The letter was supposed to be served within a period of 30 days as per the proviso in Rule 90 (1) he argued. It is his contention that as the letter was served beyond 30 days, it is taken that the appellant did not have a valid certificate of delay which excluded the alleged days. He submitted further 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. Reliance was placed on the cases of **The Principal Secretary, Ministry of Defence and National Service V. Duran P. Valambhia** [1992] TLR 387 and **Mondorosi Village Council and 2 Others V. Tanzania Breweries Limited and 4 Others,** Civil Appeal No. 66 of 2017 (unreported).

On the second point of the preliminary objection, briefly, the submission of Mr. Nyoni was to the effect that the appeal was hopelessly filed out of time because the certificate of delay in this appeal is not substantially in the Form L as specified in the first schedule to the Rules. Submitted further that the certificate of delay is incorrect and invalid by failure to indicate the number of days which should be excluded in computing the time for instituting the appeal in the Court and contended that the appellant cannot thus rely upon the certificate of delay issued.

On the basis of the two points raised, the learned counsel prayed for the appeal to be struck out with costs.

In response to the foregoing submissions, the appellant admitted that the letter was served on the 1st and 2nd respondents beyond the specified time. However, he argued that the delay was due to the fact that the 2nd respondent moved to another location which was difficult to find and did not provide their address of service as required under Rules 24 and 86 (1) and (2) of the Rules. He submitted that the respondents have not complained because they were served with the letter and they have not been prejudiced. In addition, he submitted that the irregularity is curable under the overriding objective principle which was introduced in our jurisdiction.

Finally, the appellant argued that the case of **Valambhia** cited by the counsel for the 1st and 2nd respondents is distinguishable in that, the same was struck out for the appellant's failure to serve the letter to the respondent as required by Rule 90 (2) of the Rules. In this appeal the letter was served and therefore urged the Court to disregard the objection so as to go to the irregularities in the appeal.

In a short rejoinder, Mr. Nyoni 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 the overriding objective

principle. He contended that the overriding objective principle cannot be applied blindly, in disregard of the mandatory provisions on procedure.

As to the issue of address Mr. Nyoni contended that the appellant served them the notice of appeal on time on 25-9-2015 on that address and served them the letter out of time on 20-11-2015 on the same address. He insisted that the case of **Valambhia** (supra) is relevant to the objection and therefore the appeal is time barred.

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 in time 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 instituted 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 provisions of Rule 90 (1) of the Rules make it mandatory for the appellant to lodge a 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 from 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. In this appeal the letter was served but out of time. In our views the same condition would also apply to our situation since the appellant failed to serve the letter in time on the respondents. 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. Valambhia 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 23rd September, 2015 (at page 125 of the record of appeal), he also lodged on the same date 23rd September 2015 a letter requesting to be supplied with a copy of the certified decree and proceedings, this is according to the letter found at page 128 in the record of appeal. It is evident that, although the appellant's letter appears to have been copied and served on the respondents but it was not served in time on the respondents, a fact

conceded by the appellant. It follows therefore, that, the letter of 23rd September, 2015 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 23rd September 2015 when he lodged his notice of appeal in terms of Rule 90 (1) of the Rules. Since the instant appeal was lodged on 23th June, 2016 more than seven months beyond the sixty days' limitation period, it is time – barred.

Given the circumstances obtained in this appeal therefore, we are settled that the appeal before us is incompetent for being time barred.

On the other hand, before we make the final order, we wish to state that we have taken note of the prayer by the appellant that if we find, as we have found, that the appeal is time barred, we should invoke the overriding objective principle contained in the provisions of sections 3 A (1) and (2) of the (AJA) to allow the appeal to be heard on merit.

We think that in the circumstances of this appeal in which the issue of limitation touches on the jurisdiction of the Court, insisting on the compliance of the mandatory requirement of lodging an appeal within the prescribed time is in tandem with facilitating the just determination of the matter before us in accordance with the law.

The Court cannot have jurisdiction to entertain an appeal which is time barred and no extension of time has been sought and granted. We think the issue of time limit is not a technicality which goes against the just determination of the case or undermines the application of the overriding objective principle contained in section 3 A (1) and (2) and 3 B (1),(a) the AJA.

In this regard, we agree with what the Court stated in **Mondorosi Village Council and Others** (supra), 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.

In the present appeal, we think we cannot overlook the fact that the appeal before the Court is time barred and give it artificial life against the requirement of the law.

From the foregoing, we think this ground of preliminary objection, suffices to dispose of our determination on the competence of the appeal. We thus think we need not determine the remaining ground on the notice on preliminary objection.

In the event, we sustain the preliminary objection on the first ground. Accordingly, we strike out the appeal with costs to the 1st and 2nd respondents for being time barred.

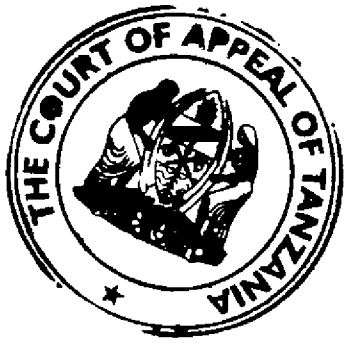
DATED at **DAR ES SALAAM** this 13th day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 15th day of September, 2022 in the presence of Appellant in person, and Mr. Salehe Manoro, learned State Attorney for the 1st and 2nd Respondent is hereby certified as a true copy of the original.



G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL