

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM, WAMBALI, J.A., KEREFU, J.A And MWAMPASHI, J.A.)**

**CIVIL APPEAL NO. 184 OF 2018**

**CONTINENTAL SERVICES LIMITED ..... APPELLANT**

**VERSUS**

**CHINA RAILWAY JIANCHANG ENGINEERING  
CO. (T) LIMITED.....RESPONDENT**

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

**(Songoro, J.)**

**Dated the 16<sup>th</sup> day of April, 2018**

**in**

**Commercial Case No. 153 of 2013**

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**RULING OF THE COURT**

**5<sup>th</sup> May & 1<sup>st</sup> September, 2022**

**WAMBALI, J.A.:**

On 18<sup>th</sup> February, 2022, the Court adjourned the hearing of the appeal to a date to be fixed by the Registrar. Basically, the said adjournment was prompted by the fact that the certificate of delay in the record of appeal contained some apparent errors which had a bearing on the time limit of instituting an appeal. Mr. Elvaison Maro, the learned advocate for the appellant therefore prayed for leave of the Court to approach the Deputy Registrar of the High Court, Commercial Division, to rectify the errors and thereafter lodge a supplementary

record of appeal containing a proper certificate of delay. As there was no objection from Mr. Dickson Sanga, the learned counsel for the respondent, the Court granted the appellant the requisite leave and ordered that a supplementary record of appeal containing the rectified certificate of delay be lodged within sixty (60) days from the date of the order, which was, 18<sup>th</sup> February, 2022. The appellant fully complied with the order and lodged the supplementary record of appeal on 19<sup>th</sup> April, 2022 and served it upon the respondent. Subsequently, the respondent through her learned counsel lodged the notice of preliminary objection on 29<sup>th</sup> April, 2022 to the effect:

*"1. That, the Rectified Certificate of Delay at page 12 of the Supplementary Record of Appeal is incorrect, improper, and erroneously certified. Therefore, the appeal is time barred and liable to be strike out with costs. On the ground that;*

*(i) There is no letter issued by the Registrar to notify the Appellant that the requested proceedings were ready for collection".*

The preliminary objection is strongly contested by the appellant. At the hearing before us, Mr. Elvaison Maro, learned advocate represented the appellant, while Mr. Dickson Paulo Sanga assisted by Mr. Runyoro Adolf, both learned advocates, represented the respondent.

Mr. Sanga prefaced his argument in support of the preliminary objection by submitting that though the respondent was given the opportunity to lodge a rectified certificate of delay, the one contained in the supplementary record of appeal is still invalid. He argued that there is no letter from the Deputy Registrar of the High Court in the record of appeal to support the appellant's contention that she was notified that the requested certified copy of proceedings was ready for collection on 17<sup>th</sup> August, 2018.

Relying on the decision of the Court in **Henry Zephyrne Kitambwa v. The President of the United Republic of Tanzania and Two Others**, Civil Appeal No. 114 of 2020 in which reference was made to another decision of **Tanzania Telecommunication Co. Ltd. v. Stanley S. Mwabulambo**, Civil Appeal No. 26 of 2017 (both unreported), Mr. Sanga contended that the absence of such letter from the Deputy Registrar of the High Court rendered the certificate of delay invalid. This is so because, he argued, there is no certainty on when the appellant was notified that the requested certified copy of proceedings was ready for collection. He emphasized that as the date of notification forms the basis of the last date to be reckoned in calculating the number of days to be excluded in computing the period of limitation, that is, sixty (60) days from the date of the notice of appeal within which to

lodge an appeal, the existence of an official communication from the Registrar of the High Court is important. He cited the decisions in **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004 and **Fauzia Jamal Mohamed v. Lilian Onael Kileo**, Civil Appeal No. 203 of 2016 (both unreported) to support his submission.

Mr. Sanga submitted further that the photocopy of the document included in the supplementary record of appeal by the appellant purporting to be the basis of the date when she collected the certified copy of proceedings from the Deputy Registrar of the High Court, cannot assist her or replace the formal notification that the proceedings were collected on the alleged date, that is, 13<sup>th</sup> August, 2018. Besides, he argued, the proper date to be considered is that of notification and not when the appellant collected the certified copy of proceedings. He argued further that the said document is not titled, signed or stamped by the responsible person at the High Court. In his opinion, it is therefore not known as to whether the said document was extracted from the ledger, dispatch or register as it is not certified by the court which is deemed to have issued it since it bears no official seal. The said documents, he submitted, simply indicates the case number and the date, that is, 13<sup>th</sup> August, 2018 purporting to be the date of

collection of the proceedings, which does not relate to the one contained in the certificate of delay, that is, 17<sup>th</sup> August, 2018. Besides, he argued, even if the said document is to be taken as a court document, which is not the case, still the date indicated therein does not show that it was the one in which the appellant was notified that the proceedings were ready for collection.

In the circumstances, Mr. Sanga submitted that, as the certificate of delay is invalid, the appeal is time barred. This is so because, he stated, as the notice of appeal was lodged on 17<sup>th</sup> April, 2018, the appeal had to be lodged within sixty days from that date. On the contrary, he argued, the present appeal which was lodged on 12<sup>th</sup> October, 2018, is hopelessly time barred as it was preferred almost one hundred days after the expiry of the sixty days prescribed under rule 90(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In this regard, Mr. Sanga pressed the Court to find that, as the appeal is supported by an invalid certificate of delay, it is time barred and consequently we should strike it out with costs.

In response, Mr. Maro strenuously opposed the preliminary objection. Nevertheless, at the very outset he readily conceded that the photocopy document included in the supplementary record of appeal to

support the appellant's assertion that she was supplied with the proceedings on 13<sup>th</sup> August, 2018 is of no assistance as there is no indication that it was properly issued by the Deputy Registrar of the High Court. In short, he agreed that its authenticity cannot be confirmed as it is not titled, stamped or certified by the relevant authority in the High Court. Mr. Maro also conceded that there is no letter in the record of appeal to show the date on which the Deputy Registrar of the High Court notified the appellant that the requested certified copy of proceedings by the appellant were ready for collection.

Nevertheless, Mr. Maro maintained that the certificate of delay is valid because by the time the appeal was lodged, that is, on 12<sup>th</sup> October, 2018, the requirement of calculating the number of days to be excluded by basing on the date of request and date of notification was not applicable as it was introduced by Form L found in the First Schedule to the Rules, through G.N. No. 344 of 2019 by virtue of rule 90(2) of the Rules. In his submission, the said requirement could not apply retrospectively to the appeal which was lodged prior to the said amendment. In this regard, he argued that before the amendment, the requirement was that in terms of rule 90(1) of the Rules, the Registrar of the High Court should exclude the number of days from the date of the appellant's letter of request to the date of delivery of a certified copy

of proceedings. To support his submission, he referred the Court to its decision in **Tanzania Private Sector Foundation v. Adolph Qambaita and Another**, Civil Appeal No. 181 of 2016 (unreported). To this end, he maintained that the appellant had no obligation to receive the letter of notification as she was entitled to rely on the date, that is, 13<sup>th</sup> August, 2018, when the certified copy of proceedings was delivered to her by the Deputy Registrar of the High Court as required by the provisions of rule 90(1) of the Rules which remains unchanged even after the amendment introduced by GN. 344 of 2019. Therefore, in his opinion, the application of Form L retrospectively would lead to injustice on the part of the appellant, who as per existing rule, lodged an appeal on time based on the valid certificate of delay, citing the decision in **Felix H. Masha and Another v. Exim Bank Tanzania Limited**, Civil Appeal No. 12 of 2017 (unreported).

In the circumstances, Mr. Maro distinguished the decisions of the Court cited and relied upon by the respondent's counsel on the contention that in the present appeal the certificate of delay is valid.

On the other hand, Mr. Maro submitted that the absence of the letter of notification from the Deputy Registrar of the High Court is not the appellant's fault but of the former who is supposed to issue it. In the end, he submitted that considering the provisions of rule 90(1) of

the Rules, the Deputy Registrar of the High Court should be ordered to rectify again the certificate of delay to indicate the date of request and that of delivery of the certified copy of proceedings to the appellant, that is 13<sup>th</sup> August, 2018, in terms of rule 4(2) (a) and (b) of the Rules.

Having heard the contending submissions of the learned counsel for the parties, the issue for determination is whether the appeal is time barred. As intimated above, it is not doubted that on 18<sup>th</sup> February, 2022, it was plainly clear to the Court and the parties that the certificate of delay included by the appellant in the record of appeal was defective. This was because: **one**, there was no indication of the exact number of days to be excluded in computing the time of limitation from the date of request to the date of notification. **Two**, there was no supporting evidence on record, that is, a letter by the Deputy Registrar of the High Court to show the date when the appellant was formally notified of the readiness of the requested certified copy of proceedings.

Thus, after the appellant's counsel had conceded to the defects in the certificate of delay, considering the interest of justice, the Court granted her leave to approach the Deputy Registrar of the High Court to rectify the certificate of delay to make it in conformity with the provisions of the Rules and the supporting document as intimated above. In this regard, in the same order, the Court went further and



required the appellant to come up with any document to support the rectified certificate of delay. The direction was made after it was clear that the former certificate of delay had not been supported by any letter or any other document to the like to show the date when the appellant was notified that the certified copy of proceedings of the High Court were ready for collection. Fortunately, the substance of the order of the Court on this matter is clearly echoed in Mr. Maro's letter to the Deputy Registrar of the High Court with Reference No. EELM/19/MISC/VOL. XXX/2/2022 dated 21<sup>st</sup> February, 2022, requesting rectification of the certificate of delay as ordered by the Court. The letter is part of the supplementary record of appeal lodged in Court by the applicant on 19<sup>th</sup> April, 2022.

Though the appellant lodged a supplementary record of appeal containing a rectified certificate of delay showing the excluded number of days from 18<sup>th</sup> April, 2018 to 17<sup>th</sup> August, 2018 to be 118 days as required by Form L of the First Schedule to the Rules; there is no letter or any other document supporting the appellant's contention that she was notified of the readiness of the certified copy of proceedings on 17<sup>th</sup> August, 2018. The letter was supposed to be part of the supplementary record of appeal as earlier ordered by the Court.

Unfortunately, as conceded by Mr. Maro, the untitled document contained in the supplementary record of appeal cannot be relied upon to aid the appellant to show the date of notification of the readiness of the proceedings for collection because its authenticity is questionable. There is no dispute that the said document is not certified and authenticated by the seal of the High Court to show ownership of the same, and that it is not known as to whether it was extracted from the court's register or dispatch. Thus, the reference by the appellant in the index of the supplementary record of appeal that it is an extract from the High Court, Commercial Division Main Registry's register from 27/7/2018 to 13/8/2018, purporting to be the date she collected the proceedings has not been substantiated as submitted by the respondent's counsel and conceded by Mr. Maro. Therefore, the date in the certificate of delay, that is, 17<sup>th</sup> August, 2018 purporting to be the date on which the Deputy Registrar of the High Court notified the appellant to collect the certified copy of proceedings similarly remains unsupported for lack of the requisite letter in the record of appeal.

We are however alive to Mr. Maro's arguments that the requirement under Form L to indicate the date of notification by the Deputy Registrar of the High Court was introduced by the amendment to the Rules by GN No. 344 of 2019, and thus it cannot operate

retrospectively to this appeal which was lodged before the requirement came into operation. It is also the argument of Mr. Maro that rule 90(1) of the Rules, requires that the exclusion be made from the date of request to the date of delivery of the certified copy of proceedings to the appellant and not on the date of notification. Mr. Maro further contended that the former certificate of delay was properly formulated in accordance with the Rules. This argument was strongly contested by Mr. Sanga for the respondent.

On our part, we respectfully differ with the arguments advanced by the appellant's counsel because of the following reasons.

One, the submission is an afterthought because, it was not made previously before the Court when it found the former certificate of delay defective and ordered rectification after the appellant's counsel conceded that it was not properly drafted in accordance with the law. Indeed, in Mr. Maro's letter seeking rectification of the certificate of delay after the order of the Court, he plainly expressed his agreement on the requirement of the Deputy Registrar of the High Court to indicate the excluded number of days from the date of request to the date of notification. More importantly, Mr. Maro has not disowned the rectified certificate of delay which was issued to the appellant excluding 118 days from the date of request to the alleged date of notification. Besides,

since the former certificate of delay is no longer applicable in the present appeal, we have no reason to consider it along the rectified certificate of delay.

In the circumstances, we are settled that Mr. Maro cannot raise the matter which he did not raise before the order was issued as that will amount to pre-empting the preliminary objection.

Moreover, even if we are to agree with Mr. Maro's argument that 13<sup>th</sup> August, 2018 is the date when the certified copy of proceedings was delivered to the appellant, which we do not, still, as readily conceded during the hearing, there is no evidence in the the record of appeal to support that assertion. We have earlier on shown that though the authenticity of the photocopy document is questionable and therefore unreliable, the date indicated therein, that is, "13/8/2018" is not supported by the rectified certificate of delay to be the date of notification or collection of the proceedings. In addition, Mr. Maro's argument that lack of the said letter or evidence to that effect is not the appellant's fault, but that of the Deputy Registrar of the High Court has no basis at all. This is so because, it was the appellant's duty to show that she was notified to collect the proceedings on 17<sup>th</sup> August, 2018 as indicated in the rectified certificate of delay.

Second, though, as observed above that Mr. Maro's argument with regard to the issue of the period of exclusion is an afterthought as was not made before the order of the Court was issued, we wish to state without hesitation that, it is not the first time that the Court has dealt with this matter. It has been insisted that the number of days to be excluded should be based on the date of request to the date of notification that the certified copy of proceedings of the High Court are ready for collection. For instance, in **Hamisi Mdeda and Said Mbogo v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 59 of 2020 (unreported), the Court described the role of the Registrar of the High Court in preparing the certificate of delay as follows:

*"He must state in very clear terms that the days to be excluded in computing the period of limitation are those from the time when the appellant requested for copies of proceedings to the date he notified him that the documents are ready for collection".*

[see also **Paulina Samson Ndawanya v. Theresia Thomas Madaha**, Civil Appeal No 45 of 2017 (unreported)].

Thus, the presence of the letter of notification is important for ascertaining the period between the date of request to that date. In **Puma Energy Tanzania Limited v. Diamond Trust Bank Limited**,

Civil Appeal No. 54 of 2016 (unreported) the Court emphasized that the letter from the Registrar of the High Court is intended to facilitate the issuance of a certificate of delay that reflects a verifiable and definite latest cut-off date from which the sixty days within which to lodge an appeal under rule 90 (1) of the Rules, starts to run. It was also stated that the period of exclusion should be between the time the appellant requested for a certified copy of proceedings and the date when the Registrar of the High Court notified the appellant that the said copy is ready for collection. It is in this regard that in **Tanzania Telecommunications Co. Ltd. v. Stanley S. Mwabulambo** (supra) the Court observed that it is incorrect to say that whatever the Registrar of the High Court indicates in the certificate of delay is correct, for the dates appearing on it should be borne out of the record and in the absence of such record, the respective certificate of delay cannot be relied upon for containing unverifiable information. The above referred stance was further acknowledged and endorsed by the Court in **Henry Zephyrne Kitambwa v. The President of the United Republic of Tanzania and Two Others** (supra).

Furthermore, in **CRDB PLC v. True Colour Ltd and Another**, Civil Appeal No. 29 of 2019, the Court held among others that:

*"It is obvious that the certificate of delay is defective ... as it reckons the date of supply of the documents to the appellant as the last date in the computation of time to be excluded instead of the date of notification that the documents are ready for collection."*

We therefore, find the decisions of the Court relied upon by Mr. Maro to support his position distinguishable and inapplicable in the circumstances of the appeal at hand.

All in all, in the present appeal, it is beyond doubt that the letter of the Deputy Registrar of the High Court showing that the appellant was notified to collect the requested certified copy of proceedings on 17<sup>th</sup> August, 2018 is not available in the record of appeal. It follows that the rectified certificate of delay is invalid as it is not supported by the said letter. The rectified certificate of delay, therefore, cannot assist the appellant to rescue the appeal which was lodged after the lapse of some considerable number of days, that is, more than six months after the expiry of the prescribed period of sixty days from the date of the notice of appeal as provided under rule 90 (1) of the Rules, to be within time.

In the event, in the absence of the letter or any other evidence on record showing the date on which the appellant was notified to collect the certified copy of proceedings, the rectified certificate of delay is

invalid and therefore, it cannot be relied upon to exclude the number of days from the period of limitation. Ultimately, we hold that the appeal is incompetent for being time barred. Consequently, we sustain the respondent's preliminary objection and strike out the appeal with costs.

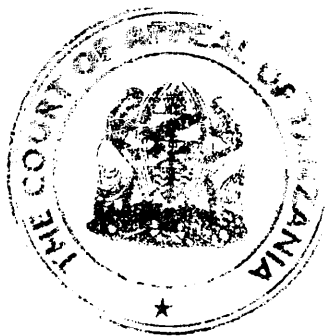
**DATED** at **DAR ES SALAAM** this 1<sup>st</sup> day of September, 2022.


F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Ruling delivered this 1<sup>st</sup> day of September, 2022 in the presence of Mr. Andrew Shirima holding brief of Elvaison Maro, learned counsel for Appellant and Mr. Dickson Sanga, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
C.M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**