**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. 272 OF 2019**

**VOLTALIA S. A. FRANCE..... APPELLANT**

**VERSUS**

**NEXTGEN SOLAWAZI LIMITED ..... RESPONDENT**

**(Appeal from the Ruling and Drawn Order of the High Court of Tanzania, Commercial Division at Dar es Salaam)**

**(Sehel, J.)**

**dated the 13th day of December, 2018**
**in**
**Miscellaneous Commercial Cause No. 01 of 2018**

.....

## RULING OF THE COURT

4th July, & 18th August, 2022

**MAKUNGU, J.A.:**

This appeal arises from the Ruling and Drawn order of the High Court of Tanzania (Commercial Division) at Dar es Salaam before Hon. Sehel, J. (as she then was) dated 13th December 2018 in Misc. Commercial Cause No. 01 of 2018. In that case the respondent petitioned to the High Court to revoke the submission clause in the Engineering, Procurement and Construction (EPC) Agreement, entered between the parties.

It was respondent's prayer before the High Court that the dispute be filed in the court of relevant jurisdiction in the United Republic of

Tanzania and alternatively the court appoints arbitral forum within the United Republic of Tanzania to determine the dispute.

Appellant resisted the petition and in doing so she raised a preliminary objection on several points. However, the points of objection were overruled. Having heard the matter on merit, the High Court granted the petition by revoking the submission clause of the EPC Agreement. The appellant was aggrieved by that ruling and orders of the High Court hence this appeal. In the present appeal the appellant advanced ten grounds of appeal which for a reason to be apparent shortly we do not intend to reproduce them.

The respondent after being served with the record of appeal and pursuant to Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules") filed a notice of preliminary objection couched in the manner set out hereunder;

a) The appeal is incompetent for being accompanied by a defective certificate of delay.
b) The appeal is hopelessly time barred for being lodged under a defective certificate of delay.

At the hearing of the appeal, Mr. Gerald Nangi, learned counsel appeared to represent the appellant whereas Mr. Jovinson Kagirwa, learned counsel appeared for the respondent.

As is the rule of practice of the Court that before we ventured to determine the merits of the appeal, we invited parties to address us first on the preliminary points of objection.

Mr. Kagirwa discussed the two points in one. He pointed out that the certificate of delay appearing at page 381 of the record of appeal does not reflect the correct number of days utilized in preparing and availing the requested documents to the appellant. He argued that if one counts the days from 17th December, 2018 when the appellant wrote a letter requesting to be supplied with the documents for filling an appeal to 16th September, 2019 when the documents were availed to the appellant, the aggregate period is 273 days and not 242 as reflected in the certificate of delay. He further argued that: **first** the certificate of delay 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 the impugned decision dated 13th December, 2018 while in fact the requisite letter as found at pages 366 and 367 of the record of appeal is dated 17th December, 2018 and received in court on the same date. **Second**,

it purports to exclude 273 days, whereas if the letter requesting essential documents was received on 17th December, 2018 counting it from then to when the certificate of delay was issued, that is on 16th September, 2019 it means only 242 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. **Third,** since the memorandum of appeal was filed on 10th October, 2019 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 9th January, 2019 it means the date of filing of the appeal expired on 9th December, 2019 and the memorandum of appeal was filed on 9th January, 2019 the time to file had already expired and it was thus filed out of time. He relied on the decisions of this Court in the cases of **ABSA Bank Tanzania Limited (Formerly known as Barclays Bank Tanzania Ltd and Joseph John Nanyaro v. HJORDIS Fammestad**, Civil Appeal No. 30 of 2020 and **Magombezi Mines Company Limited v. Kidee Mining (T) Limited,** Civil Appeal No. 238 of 2019 (both unreported).

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 one school 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 school argues that the remedy for the defective certificate of delay is to rectify it and that this position is found 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. Nangi on the other hand agreed with Mr. Kagirwa on the highlighted defects in the certificate of delay and reasoned that such anomalies were done by the court which 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 appellant to rectify the certificate of delay so that hearing of the appeal can proceed on merit on the basis of correct record. He contended that in the above cited cases by the respondent's counsel 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 a leaf from the cited decisions and allow the appellant to file a supplementary record to include a proper certificate of delay.

In rejoinder Mr. Kagirwa reiterated his stance that the said defects in the certificate of delay are incurable and the appeal should be struck out. He urged the Court to refrain from applying the overriding objective principle arguing that such an action will be departing from the essence of the said principle. In the end he repeated his earlier prayer that the points of objection be upheld and the appeal be struck out.

Having considered the submissions made by the learned counsel for the parties the issue for our consideration is the propriety or otherwise of the appeal before us.

As submitted above that there is a defective certificate of delay which Mr. Kagirwa argued that it cannot be cured by filing a supplementary record of appeal. As conceded by Mr. Nangi the certificate of delay appearing at page 381 of the record of appeal has anomaly in the total number of days computed from the time the appellant wrote a letter requesting to be supplied with cerified copies of proceedings, judgment and decree to the date when the appellant was supplied with the requested documents. For ease of reference we produce part of the extract of the said certificate of delay, it reads:-

*"This is to certify that the period from December 17th, 2018 when Respondent Advocates requested copies of proceedings, ruling and drawn order in the above appeal up to September 16th, 2019 when the respondent was notified that the documents were ready for collection, a total number of 242 days should be excluded in computing the time for instituting the appeal to the Court of Appeal of Tanzania."*

Reading from the above certificate of delay, the Registrar miscalculated the total number of days taken to prepare and supply the documents to the appellant. As rightly submitted by Mr. Kagirwa, the aggregate number of days taken to prepare and supply the same is 273 and not 242.

In the case of **Andrew Mseul and 5 others v. The National Ranching Company and Another**, Civil Appeal No. 205 of 2016 (unreported) we echoed that:

*" 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."*

In the event the Registrar of the High Court miscalculated the days spent in preparing and supplying the documents to the appellant. We therefore find that the certificate of delay is invalid as conceded by Mr. Nangi.

The ensuing question is, what is the way forward. Mr. Kagirwa impressed upon us to find that the appeal is time barred and we should strike it out an account that the appellant cannot rely on the invalid certificate whereas Mr. Nangi urged us to invoke the overriding objective principle particularly, to invoke section 3A (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to allow the appellant to file a supplementary record to include a valid certificate of delay.

Fortunately, the Court has had an occasion to deal with a matter similar to the one at hand. This was in the case of **ABSA Bank Tanzania Limited** (supra), where a certificate of delay had defects on the aggregate days excluded in the certificate of delay. The days were at variance with the actual aggregate number of days used to prepare and supply the documents to the appellant. The certificate of delay excluded 70 days while the actual days spent was only 56 days. Such anomaly was conceded and the question to the Court was the way forward. In deliberating on the way forward, the Court considered the two schools of thought on the consequence of a defective certificate of

delay. The first school advocates that a defective or invalid certificate of delay goes to the root of the matter and therefore cannot be rectified and hence the appeal has to be struck out. The other school advocates for invocation of the overriding objection principle with the aim of timely disposal of matters, in terms of sections 3A and 3B of the AJA and Rule 2 of the Rules thus the Court has been granting leave to the appellants to seek and obtain a properly drawn certificate of delay instead of striking out the appeal. At the end, the Court concluded:

> *"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... the appellant is to seek and obtain a valid certificate of delay."*

We hasten to add that more often than not, the Court denied to grant leave to the appellant to file supplementary record of appeal

where it is found that the appellant had not either written a letter requesting for certified copies of proceedings, judgment and decree or has not served the said letter upon the respondent in terms of Rule 90 (3) of the Rules that disentitles the appellants to rely on the exclusion period under the proviso to Rule 90(1) of the Rules. As such, even if a certificate of delay is issued, it is inconsequential to the appellants. In such a situation, the Court declined to apply the overriding objective principle see: the cases of **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017, **Geita Gold Mining Ltd v. Jumanne Mtafuni,** Civil Appeal No. 30 of 2019, **Martin D. Kumalija and 117 Others v. Iron and Steel Ltd**, Civil Appeal No. 70/18 of 2018 and **Mohamed Issa Mtalamile and 3 Others v. Tanga City Council and Another**, Civil Appeal No. 200 of 2019 (all unreported).

For instance, in **Martin D. Kumalija & 117 Others** (Supra) where after the appellant lodged the notice of appeal took no further action in requesting for copy of proceedings, judgment and decree. Thus, the Court observed that:

> *"As matters stand, there is no proof that the appellant requested for a copy of proceedings from the High Court for the purpose of his*

*intended appeal within thirty days of delivery the impugned decision. Moreover, even if it is assumed that such a request was ever made, there is no indication that the respondent copied and served that letter on the applicants in terms of Rule 90 (2) of the Rules for it to be availed with the exclusion under the exception to Rule 90 (1) of the time required for preparation and delivery of the copy from the sixty day's limitation for instituting an appeal."*

In the present appeal, the situation is different. As alluded earlier, the anomaly is on the aggregate days excluded in the certificate of delay which invalidated the said certificate. Given the circumstances of the case and in the interest of justice, we are of the view that the overriding objective principle is applicable in the present situation. 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 section 3A, 3B and Rule 2 of, respectively, the AJA and the Rules.

In the end, we sustain the preliminary points of objection but for the interest of justice we grant leave to the appellant to file a supplementary record of appeal in terms of Rule 96 (7) of the Rules

within thirty (30) days from the delivery of this ruling to include a proper certificate of delay.

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 its own costs for the adjournment.

It is so ordered

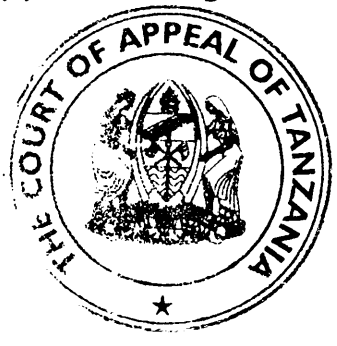
**DATED** at **DAR ES SALAAM** this 15th day of August, 2022.

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

P. S. FIKIRINI
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

The Ruling delivered this 18th day of August, 2022 in the presence of Mr. Gerald Nangi, learned counsel for the Appellant and Mr. Mvano Mlekano, learned council for the respondent, is hereby certified as a true copy of the original.




A.L. KALEGEYA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**