

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 180 OF 2017

SHABIR TAYABALI ESSAJI.....APPELLANT

VERSUS

FARIDA SEIFUDIN ESSAJI.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Mkasimongwa, J.)

dated the 16th day of December, 2016

in

Probate and Administration Cause No. 109 of 2007

RULING OF THE COURT

24th Sept. & 17th Oct., 2018

MKUYE, J.A.:

In Probate and Administration Cause No. 109 of 2007, Farida Seifudin Essaji (the respondent) had petitioned for the probate of the will of Seifuddin Tayabali (deceased) who died at Buruhani Health Centre, Dar es Salaam on 18th day of October, 2007. The appellant,

Shabir Tayabali Essaji entered a caveat objecting the petition on the grounds that:

- 1) *The probate cause was opened without involving the objector who is also the beneficiary of a house located on Plot No. 44/77.*
- 2) *The petitioner would not administer the estate fairly in which she has an interest and she is a beneficiary.*
- 3) *The petitioner has included all property mentioned in the will without mentioning caveator's shares in all assets.*
- 4) *The will is defective in material and substance for failure to mention the shares of the caveator in the properties as the caveator is directly the Director to Dar Ocean Products Ltd. which has been dissolved.*

5) That the petitioner has failed to disclose all the properties forming part of Dar Ocean Products Ltd. and their value.

Upon the caveat having being entered, the matter turned into a civil suit whereby the petitioner and the caveator became a plaintiff and a defendant respectively. Three witnesses testified for the plaintiff (respondent) and five witnesses for the defendant (appellant). At the end of hearing, the High Court ruled that the caveat filed by the appellant was devoid of merit and granted the probate. It went further to appoint the respondent an executor of the last will and testament of the deceased Seifuddin Tayabali.

Aggrieved by that decision the appellant has brought the appeal to this Court consisting five grounds of appeal which for reason to be appeared shortly, we shall not reproduce them.

When the appeal was called on for hearing, Mr. Ambrose Malamsha learned counsel appeared for the appellant, whereas the

respondent enjoyed the services of Mr. Gaudious Ishengoma and Fayaz Bhojan both learned advocates.

From the very outset we wished to satisfy ourselves on the propriety or otherwise of the appeal. This was after we had detected that the certificate of delay as shown at page 275 of the record of appeal excludes the period between 22nd day of December 2016 when the appellant filed the notice of appeal and applied for copies of the requisite documents for preparation of record of appeal and 9th day of June, 2017 when the appellant was supplied with such documents copies of judgment and decree requested for but the appeal was filed on 11th day of August, 2017. We were of the view that the appeal was lodged out of time. We thus invited the parties to address us on this point.

Mr. Malamsha argued that the appeal was within time. He said, though the decision was handed down on 16/12/2016 and the certificate of delay excludes the period from 22/12/2016 to 9/6/2017, the said certificate was issued to the appellant on 14/6/2017. In his

view, the time excluded was between 22/12/2016 to 14/8/2017 which makes the appeal filed on 11/8/2017 to be within time.

Upon prompting by the Court on whether the excluded days are reckoned from the date of issuance of the certificate of delay or the time indicated in the certificate, he did not comment on that. He instead contended that in that sense the certificate was erroneous which renders the appeal incompetent before the Court. As to the way-forward, he left the matter in the hands of the Court to decide.

In response, Mr. Bhopan while acceding to the issue raised by the Court, he argued that the period excluded in the certificate of delay was from 22/12/2016 when the appellant applied for copies of documents to 9/6/2017 when he was supplied with the documents. As to the way forward, he urged the Court to ignore such an anomaly which he treated as "a minor or slight defect" and proceed with hearing the appeal on merit. He implored us to do so under Rule 4(2)(a) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In rejoinder, Mr. Malamsha decided to go along Mr. Bhopan's line of argument in as far as the issue of the way forward was concerned.

The issue is whether or not the appeal was lodged within time.

Rule 90(1) of the Rules which governs institution of appeals to this Court requires the appeal to be lodged within sixty days from the date when the notice of appeal is lodged. It also provides for the Registrar of the High Court to exclude the days which were required for the preparation and delivery of the copies of proceedings, judgment and decree to the appellant provided the appellant had applied in writing for such documents within thirty days and the copy of such application letter was served on the respondent.

The said provision stipulates as follows: -

"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 the 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.*

- (2). *An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy of it was served."*

[Emphasis added]

In this case the judgment sought to be impugned was delivered on 16/12/2016. The appellant lodged the notice of appeal on 22/12/2016 and applied for the copies of proceedings and decree on the same date. He was thereafter issued with a certificate of delay by the Deputy Registrar of the High Court which reads as follows:

"IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO.

109 OF 2007

SEIFUDDIN TAYABALI ESSAJUAPPELLANT

VS.

FARIDA SEIFUDDIN ESSAJU.....RESPONDENT

*[CERTIFICATE OF DELAY UNDER RULE 90(1) OF
COURT OF APPEAL RULES]*

*This is to certify that, a **period from 22nd day
of December, 2016 when the appellant
lodged Notice of Appeal and applied for***

copies (sic) requisite documents for preparation of the record of appeal to 9th day of June, 2017 when the appellant were (sic) supplied with requested document, is to be excluded for such days were required for the preparation and delivery of the said requisite papers to the appellant.

GIVEN under my HAND and the SEAL of the Court this 14th day of June, 2017.

*R. B. Massam
**DEPUTY REGISTRAR
DAR ES SALAAM."***

After having carefully examined the above quoted certificate of delay we agree that the same was issued some few days (in particular five days) after the relevant documents were already delivered to the appellant. The certificate of delay clearly shows that it excludes the days between 22/12/2015 to 9/6/2016 as time having been required for the preparation and delivery of the copy of the requisite papers to

the appellant. Also it is vivid that the same was issued on 14/6/2016 as shown at the bottom of the said certificate. However, we think, this was not an error which vitiated the gist of the certificate as Mr. Malamsha seemed to suggest. On this we are guided by our decision in the case of **Kantibhai M. Patel v. Dahyabhai F. Mistry**, [2003] TLR 437 where the Court held that:

"A proper certificate under the Rule is, therefore, one issued after the preparation and delivery of a copy of the proceedings to the appellant. The words "as having been required" clearly refer to a past event."

Some few years later the same principle was reiterated in the case of **Andrew Mseul and 5 Others v. The National Ranching Company Ltd and Another**, Civil Appeal No 205 of 2016 where the Court held 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 same case, the Court went further to state as follows:

*"The rule does not either provide for a certificate to be issued at a particular time, **save only that it may be issued after the preparation and delivery of the record of proceedings."***

[Emphasis added]

Hence, in view of the position of the Court cited above, the proposition by Mr. Malamsha that the time excluded should be reckoned from 22/12/2015 to 14/6/2016 when the certificate was issued does not hold water in the sense that it has nothing to do with the period excluded.

Putting it differently, the date of issuance of the certificate of delay cannot be within the period which was expressly excluded in it. In our case, as the certificate of delay was issued on 14/6/2016 after the appellant had been supplied with the requisite documents on 9/6/2016 which is the period covered under the certificate, it is our considered view that, the certificate of delay was not erroneous.

Further to that, since the Deputy Registrar excluded **“the period from 22nd day of December, 2016 when the appellant lodged notice of appeal and applied for copies of requisite documents for preparation of the record of appeal to 9th day of June 2016 when the appellant were (sic) supplied with the requested documents”**, we are satisfied that the period which was excluded is from 22/12/2016 to 9/6/2017.

The importance of certificate of delay is to protect appellant in case the period of filing an appeal has lapsed. In the case of **National Social Security Fund v. New Kilimanjaro Bazaar Ltd.** [2008] TLR 160 the Court held as follows:

"A certificate of delay under Rule 83(1) of the Court Rules is a vital document in the process of instituting an appeal. It comes into play after the normal period of sixty days for filing an appeal has expired. We are of the view that there must be strict compliance with the rule..."

In this case, the judgment sought to be impugned was handed down on 16/12/2015. On 22/12/2015, the appellant lodged a notice of appeal and applied to be furnished with copies of proceedings judgment and decree. According to the certificate of delay, he was supplied with the requisite documents on 9/6/2016. He lodged his appeal on 11/8/2016. By simple calculation, from 9/6/2016 to 11/8/2016 the appeal was filed after 62 days which was contrary to provisions of Rule 90(1) of the Rules which requires the appeal to be filed within sixty days from the date when the notice of appeal was filed. To put it differently, he did not comply with the provisions of the proviso to Rule 90(1) of the Rules after the exclusion of the period

which was required for the preparation of the documents requested.

We are therefore satisfied that the appeal was filed out of time.

We have also considered the issue raised by Mr. Bhopan and supported by Mr. Malamsha that as the defect was "minor or slight" it should be waived and proceed with the hearing of the appeal. We have also looked at the provisions of Rule 4(2) (a) of the Rules relied upon by Mr. Bhopan. It provides as follows:

"Where it is necessary to make an order for the purposes of -

(a) dealing with any matter for which no provision is made by these Rules or any other written law;

(b)

(c),

the Court may on application or on its own motion give directions as to the procedure to be

adopted or make any other order which it considers necessary."

However, we do not agree with the two learned counsels' proposition for two main reasons. **One**, Rule 4(2) (a) of the Rules which was relied upon by Mr. Bhopan, is not applicable in the circumstances. The provision is applicable where there is no specific provision governing the situation. The appeal at hand is governed by Rule 90(1) of the Rules which is a specific law to cater for the situation. **Two**, as we have already made our finding, the appeal was filed out of time. It is trite law that the issue of time limitation is fundamental as it goes to the root of the jurisdiction of the court to adjudicate on a certain matter. It is, therefore, important for any court to ascertain at the commencement of any proceedings on whether or not the matter is within time. This is because, if the court proceeds without the required jurisdiction the whole proceedings and decision thereof might end up to be a nullity. In the circumstances, the issue of time limitation is not and cannot be treated as "a minor or slight" issue

which can just be waived as the counsel suggested. Therefore, the prayer cannot be granted.

All said and done, it is our finding that the appeal is incompetent before the Court for being filed out of time. We, thus, strike it out with no order as to costs.

DATED at DAR ES SALAAM this 8th day of September, 2018.

K. M. MUSSA
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.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL