

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 5 OF 2016

- 1. THE EDITOR, THE GUARDIAN NEWSPAPER 1ST APPELLANT**
- 2. THE GUARDIAN LIMITED.....2ND APPELLANT**

VERSUS

YONO AUCTION MART & COMPANY LIMITED RESPONDENT

(Appeal from the decision and Decree of the High Court of

Tanzania at Dar es Salaam)

(Shangwa, J.)

Dated 16th day of April, 2015

In

Civil Case No. 165 of 2004

RULING OF THE COURT

3rd & 18th June, 2019

MUGASHA, J.A.

The respondent had successfully sued the appellants for the tort of defamation in the High Court of Tanzania, sitting at Dar es Salaam. According to the plaint, the respondent's claim was based on appellants' publication of the defamatory article which appeared in the Guardian newspaper of 28th September 2004, issue No. 3065 (ISSN 0856 – 5422). In that regard, the respondent had claimed TZS. 500,000,000 as general

damages. At the end of the trial, the High Court awarded the respondent only TZS. 30,000,000/=.

The appellants were not amused. They lodged a notice of appeal on 7th May, 2015 and on 13th May, 2015 wrote to the District Registrar requesting to be supplied with the proceedings of the impugned decision. Finally, they lodged an appeal on 8th January, 2015 containing six grounds of complaint. However, for reasons to be apparent in due course we shall not reproduce the grounds of appeal.

The appeal was confronted with two sets of preliminary objections contained in the notices dated 24th March, 2017 and 23rd May, 2019. As is the usual practice of the Court we had to hear first the preliminary points of objection.

At the hearing, the appellants were represented by Mr. Michael Ngalo, learned counsel whereas the respondent had the services of Mr. Elisaria Moshi, learned counsel. Mr. Moshi opted to abandon the initial set of the notice of preliminary objection dated 24th March, 2017 and the third ground of preliminary objection contained in the notice dated 23rd May, 2019. As this was not objected to by Mr. Ngalo we marked abandoned the

respective preliminary points of objection. Thus, the remaining preliminary points of objection contained in the notice dated 23rd May, 2019 by the respondent are as hereunder paraphrased:-

- 1) That the certificate of delay is incompetent, incorrect, improper and erroneously certified rendering the appeal time barred.
- 2) The appeal is incompetent as the record of appeal has omitted to include full proceedings and documentary exhibits in the record of appeal in violation of Rule 96(1) (c), (d), (f), (g) and (k) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In addressing the first preliminary point of objection, Mr. Mosha attacked the certificate of delay to have contravened the requirements of Rule 90 of the Rules on the following fronts: **One** – while the appellant lodged the notice of appeal on 7th May, 2015 and applied on 13th May, 2015 to be supplied with proceedings on the impugned decision the period excluded in the Certificate of delay is from 7th May, 2015 to 9th November, 2015 which cover the six (6) days from the date of filing the notice of appeal. On this he argued that, the appeal was thus time barred by sixty six (66) days from the date when the notice of appeal was filed.

Two, the Certificate of delay wrongly excludes seventy (70) days which were not utilised in the preparation of the proceedings of the impugned decision because on 5th August, 2015 the Deputy Registrar had written to the appellants notifying them that, the requisite proceedings were ready for collection which was acknowledged by the appellants on 31st August, 2015 vide Janeth Masue. Mr. Mosha thus argued that, the Certificate of delay is invalid and the appeal is time barred and incompetent as the appellant cannot rely on the exclusion stated under the proviso to Rule 90 (1) of the Rules. To support his propositions he cited to us the cases of **MAKAME VUAI USSI VS JOHN MOSES PAUL AND TWO OTHERS**, Civil Appeal No. 51 of 2012 (unreported), **KANTIBHAI M. PATEL VS DAHYABHAI F. MISTRY** [2003] TLR 37 and **THE COMMISSIONER GENERAL TRA VS JSC ATOMREDMETZOLOTO (ARMZ)**, Civil Appeal No. 100 of 2017 (unreported).

On the second ground of the preliminary objection, Mr. Mosha submitted that, since the appellants have omitted to include the vital documents in the record of appeal, that is contrary to Rule 96 (1) (c), (d), (f), (g) and (h) of the Rules which renders the appeal incompetent on account of incomplete record. When we brought to his attention the current position whereby under Rule 96(7) of the Rules as amended by G.N

344 of 26th April, 2019 which mandates the Court on its own motion or on application of the party to include the omitted documents by lodging a supplementary record of appeal, Mr. Mosha insisted that the omitted documents are vital for the determination of the appeal and their non-inclusion is fatal. He thus urged us to strike out the appeal with costs.

On the other hand, Mr. Ngalo opposed the preliminary points of objection. He argued that, since the appellants applied to the Registrar within thirty (30) days requesting to be supplied with the proceedings of the impugned decision, the appellants are entitled to enjoy the exclusion under the proviso to Rule 90(1) of the Rules. He pointed out that, the cutoff point is not the filing of the notice of appeal as viewed by Mr. Mosha but rather the date of requesting to be supplied with the proceedings in respect of the impugned decision. Mr. Ngalo argued that, the authorities cited by the respondent are not applicable in the circumstances of the present matter in the light of the certificate of delay obtained by the appellants on 9th November, 2015. When probed by the Court if he was aware of the Registrar's letter dated 5th August, 2015 which notified the appellants on the readiness of the requested proceedings for collection, Mr. Ngalo conceded, to have received the letter on 31st August, 2015.

However, he maintained that, the appellants were not obliged to avail explanation on the failure to collect the proceedings of the impugned decision because time to file the appeal began to run on 9th November, 2015 after the appellants had collected the requisite proceedings as is reflected in the Certificate of delay at hand.

Mr. Ngalo conceded on the second point of preliminary objection on the appellants having omitted to include some documents in the record of appeal. However, he sought the indulgence of the Court to invoke Rule 96(7) of the Rules to remedy the defect and grant the appellants leave to file the omitted documents by way of supplementary record. He thus urged us to dismiss the preliminary objections.

In a brief rejoinder, Mr. Moshia argued that, since the appellants became aware on the readiness of the requested proceedings on 31st August, 2015, but they never bothered to collect the requisite proceedings until after the expiry of seventy (70) days, the Certificate of delay is invalid to have included such period which was not utilised for the preparation of the requested proceedings. On the omitted documents, he argued that, since it is not optional on the party on which documents to be omitted in

the record the appeal, the appeal is rendered incompetent. Reiterating his earlier prayer, he urged us to strike out the appeal with costs.

Having heard the submissions of both counsel for the parties, the issue for our determination is whether or not the certificate of delay is invalid thus rendering the appeal time barred. The certificate of delay is governed by Rule 90(1) of the Rules which provides 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 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."

It is clear that, after lodging the notice of appeal, the appellants' counsel on 13th May, 2015 wrote a letter Ref. NCA/DSM/145/15 to the Deputy Registrar of the High Court of Tanzania Dar es salaam Registry seeking to be supplied with certified copies of the proceedings of the impugned decision in Civil Case No. 165 of 2004.

In this appeal, it is not in dispute that, vide the Deputy Registrar's letter dated 5th August, 2015 the appellants were notified that the proceedings in the impugned decision were ready for collection. The said letter which was addressed to the appellants' counsel reads as follows:

"REF: NO. CIVIL CASE 165 OF 2004

5th August, 2015

*Ngalo & Company Advocates,
6th Floor IPS Building,
Samora Avenue/Azikiwe Street,
P.O. BOX 79872,
DAR ES SALAAM.*

RE: CIVIL CASE NO. 165 OF 2004
EDITOR, THE GUARDIAN NEWS PAPER 1ST APPELLANT
THE GUARDIAN LIMITED 2ND APPELLANT
VERSUS
YONO AUCTION MART & COMPANY LIMITEDRESPONDENT

Please refer to your letter Ref. No. NCA/DSM/087/15
dated 13 day of May, 2015 regarding the above quoted
matter.

The requisite copies of proceedings, exhibits, judgment
and decree are now ready for collection upon payment of
necessary court fees of Tshs 50,000/=."

The appellants' counsel conceded to have received that letter on 31st August 2015. However, in the certificate of delay the period excluded is as follows:

"This is to certify that a period form 7th day of May
2015 when the appellant lodged Notice of Appeal
and 13th day of May, 2015 when the appellants
applied for copies of Proceedings, Judgment and
Decree to 9th November, 2015 when the appellants
were supplied with the documents is to be excluded

for such days were required for the preparation and delivery of the said requisite papers to the appellants”.

In the light of the Deputy Registrar’s letter, since the proceedings of the impugned decision were ready for collection from 5th August, 2015 and received by the appellants’ counsel on 31st August, 2015, the question for our consideration is whether or not the whole period from 7th May, 2015 to 9th November, 2015 was utilized for the preparation of the record as is reflected in the certificate of delay.

A valid certificate of delay is one issued after preparation and delivery of the requested copy of the proceedings of the High Court. That, entails the Registrar to certify and exclude days from the date when the proceedings were requested to the day when the same were delivered. See: **ANDREW MSEUL & 5 OTHERS VS THE NATIONAL RANCHING CO. LTD & ANOTHER**, Civil Appeal 205 of 2016 (Unreported)

In the case of **PAULINA SAMSON NDAWAVYA VS THERESIA THOMAS MADAHA** Civil Appeal No. 45 of 2017 (unreported), The Court re-stated the

required procedure and its compliance once the appellant is notified by the Registrar about the readiness of the requested proceedings as follows:

*"... The procedure is that, once the copies have been prepared the Registrar informs the appellant to collect them from the Registry. The Registrar then proceeds to issue the Certificate. **As for computation of time, it is from the date when the appellant becomes aware that the copies are ready for collection that the time starts to run**".*

[Emphasis supplied]

Moreover, as regards the time when the appellant is made aware of the readiness of the copies of the proceedings, this is when time starts to run for the institution of the appeal. See - **BIRR COMPANY LTD VSC-WEED CORPORATION, ZANZIBAR** Civil Application No. 7 of 2003 and **TANZANIA UNIFORM AND CLOTHING CORPORATION VS CHARLES MOSES**, Civil Reference No. 10 of 1993 (both unreported).

In view of the settled position of the law, in the present matter, since the appellants became aware that the requested proceedings were ready for collection on 31st August, 2015 that is when time began to run against them in respect of instituting an appeal. This in our considered view cannot be remedied by the mere fact that the certificate of delay was collected on 9th November, 2015 because the appellants were not obliged to collect the proceedings after being duly notified by the Registrar as suggested by Mr. Ngalo. We find this omission to have signified lack of diligence on the part of the appellants together with respect their respective counsel. We are fortified in that account and as correctly submitted by Mr. Moshia that the certificate of delay is indeed invalid for excluding the period of seventy (70) days not utilised to prepare the record of proceedings of the impugned decision as it is evidenced by the Registrar's letter dated 5th August, 2015 which was received by the appellants' counsel on 31st August, 2015. The invalidity in the certificate of delay goes to the root of the document and it cannot be glossed over.

In view of what we have endeavoured to discuss, we are satisfied that the omission by the appellants has adverse impact on the time limit of filing the appeal before the Court since they cannot rely on the exception

under Rule 90 (1) of the Rules because as earlier pointed out the certificate of delay is invalid. As the present appeal was filed on 8th January, 2016 is hopelessly out of time and it is incompetent.

All said and done we find the first preliminary point of objection on account of the invalid certificate of delay merited and sufficient to dispose the matter and we shall not dwell on the second ground of preliminary objection. As such, we are constrained to strike out the incompetent appeal with costs.

DATED at DAR ES SALAAM this 13th day of June, 2019.

S.E.A. MUGASHA
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

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




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL