

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

(CORAM: MBAROUK, J.A., MKUYE, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 79 OF 2017

ABDALLAH MBARAKA NAHDI APPELLANT

VERSUS

MANSOUR INDUSTRIES LTD RESPONDENT

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

(Shangwa, J.)

dated the 19th day of May, 2015

in

Civil Case No. 7 of 2009

RULING OF THE COURT

16th February & 1st March, 2018

MWAMBEGELE, J.A.:

Against this appeal filed by Abdallah Mbaraka Nahdi, the respondent, through Mr. Constantine Mutalemwa of a Law Firm going by the name Mutalemwa & Co. Advocates, lodged a notice of preliminary objection. The preliminary objection is predicated upon a single point challenging the Certificate of Delay as being misleading, problematic and invalid.

When the appeal was called on for hearing before us on 14.02.2018, the appellant was represented by Mr. Daniel Haule Ngudungi, learned advocate and the respondent had the services of Mr. Constantine Mutalemwa, also learned advocate. As the practice of the Court dictates, we thought it prudent to allow the learned counsel for the parties to argue the preliminary objection before we could delve into the hearing of the appeal on its merits.

Mr. Mutalemwa for the respondent had a three-pronged submissions to reinforce his objection to which Mr. Ngudungi, for the appellant conceded on the very first. On the point to which Mr. Ngudungi conceded, Mr. Mutalemwa argued that the Certificate of Delay appearing at page 345 of the Record of Appeal is referring to the plaintiff instead of referring to the first defendant who was aggrieved by the decision and who is therefore the appellant in the present appeal and in whose favour the certificate was meant. In the circumstances, it was Mr. Mutalemwa's view that the certificate is invalid and cannot be relied upon to exclude the period indicated in it. Without the Certificate of Delay, he submitted, the appeal, which ought to have been filed by

22.11.2016 but was filed on 22.03.2017, becomes incompetent for being filed out of time. On this ailment, the learned counsel beckoned the Court to dismiss the appeal with costs.

Mr. Mutalemwa argued two more points to bolster up the preliminary objection but for reasons that will be clear shortly, we do find it expedient to make a determination on them.

To the point above, as already alluded to above, Mr. Ngudungi for the appellant readily conceded. Conceding, he submitted that the Certificate of Delay excluded time in favour of the plaintiff who was not aggrieved by the decision and who is the respondent in the present appeal. In the circumstances, the learned counsel argued, there was technically no Certificate of Delay to be relied upon and without it the appeal becomes incompetent for being filed out of time. However, Mr. Ngudungi was quick to pray that in view of the ready concession, the incompetent appeal should be struck out with no order as to costs.

Rejoining, Mr. Mutalemwa had no qualms with Mr. Ngudungi's concession. As a consequence, he stated, the appeal should be dismissed for being filed out of time and therefore incompetent.

With regard to costs, Mr. Mutalemwa stuck to his guns, stating that he lodged the preliminary objection and prepared for its hearing on the date slated and therefore he was entitled to costs.

The learned counsel for the parties are at one that the Certificate of Delay is invalid. We agree. The way it is couched, it refers to the plaintiff; the respondent herein who was not aggrieved by the decision and in whose favour the impugned decision was made. The aggrieved person in the impugned decision was the first defendant; the appellant herein. The Certificate of Delay is therefore patently wrong to refer to the respondent herein as the one who is supposed to benefit by the exclusion of days in the computation of time in filing the present appeal. The Certificate is therefore invalid and, for that reason, cannot be used to exclude the days intended to in favour of the appellant. As we observed in **National Social Security Fund v. New Kilimanjaro Bazaar Limited** [2005] TLR 160 and reiterated in **Godfrey Nzowa v.**

Seleman Kova & Another, Civil Appeal No. 3 of 2015 (unreported), an error in a Certificate of Delay goes to the root of the document, it is not a technicality which can be glossed over.

In **Godfrey Nzowa** we quoted the following excerpt from **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] TLR 437 which we think merits recitation here. We restated:

"The very nature of anything termed a certificate requires that it be free from error and should an error crop into it, the certificate is vitiated. It cannot be used for any purpose because it is no better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over but it goes to the very root of the document."

In the case at hand, without the Certificate of Delay, the appeal before us which was filed on 22.03.2017 but ought to have been filed

by 22.11.2016 becomes incompetent. We say so because the amended Notice of Appeal, having been lodged on 22.09.2016 (see pp 324-325 of the Record), within the dictates of Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009, the Memorandum and Record of Appeal ought to have been filed within sixty days of its lodgment; that is, by 22.11.2016. The present appeal was filed on 22.03.2017 well out of time. The present appeal is therefore incompetent for being filed out of time and must be struck out.

Regarding costs we go along with Mr. Mutalemwa that it is the respondent's entitlement. Indeed, the respondent filed the notice of the preliminary objection and paid the requisite fees. The respondent also prepared for the hearing of the preliminary objection. In all these endeavours, the respondent must have spent time and resources to which, having succeeded in the preliminary objection, is entitled to recoup from the losing party. We, despite Mr. Ngudungi's ready concession, find no sound reason why we should deprive the respondent of costs. The fact that Mr. Ngudungi readily conceded to the preliminary

objection is not sufficient enough in the circumstances to deprive the respondent of costs.

We should remark here that this is not the first time we are holding this view. In **Godfrey Nzowa** (supra) whose material facts fall in all fours with the present case, we relied on our earlier decision of **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co. Ltd.** [1995] TLR 205 to state:

"... it has long been settled by the courts that, as a general rule, costs follow the event; unless the awarding court in its discretion, finds good reasons for ordering otherwise."

We have already stated that we find no good reason to order otherwise. We are certain that the respondent spent time and resources in filing the preliminary objection, researching for it and entering appearance when the same was fixed for hearing.

As Mr. Ngudungi for the appellant readily conceded to this point, we do not find it necessary to determine on the other two arguments

brought to the fore by Mr. Mutalemwa, for, that course will not make any value addition to the outcome of the present appeal.

For the reasons stated, we strike out the present appeal with costs to the respondent.

Order accordingly.

DATED at DAR ES SALAAM this 20th day of February, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL

