IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: RAMADHANI, J.A. LUBUVA, J.A., And MUNUO, J.A.)

CIVIL APPEAL NO. 45 OF 2003

BETWEEN

1. MANENO MENGI LIMITED.....1ST APPELLANT
2. VERENA KNIPPER.....2ND APPELLANT
3. LARS JOHANSSON.....3RD APPELLANT
4. DOMINIC DE WAAL.....4TH APPELLANT

AND

1. FARIDA SAID NYAMACHUMBE.....1ST RESPONDENT
2. THE REGISTRAR OF COMPANIES.....2ND RESPONDENT

(Appeal from the Judgment of the High Court for Zanzibar at Vuga)

(Dourado, J.)

dated the 19th day of July, 2002
in
Misc. Civil Cause No. 1 of 2001

RULING

LUBUVA, J.A.:

In High Court Miscellaneous Civil Cause No. 1 of 2001, the respondent, Farida Saidi Nyamachumbe, petitioned for the winding up of the company, Maneno Mengi Limited. She was one of the three other directors of the company, namely the second, third and fourth appellants. In the petition, the ground advanced for the winding up of the company was that the first respondent's

directorship was illegally terminated by the second, third and fourth appellants. The learned judge apparently accepted this ground but he declined to order for the winding up of the company. The appellants were ordered to pay the respondent a total of U$ 13,700 compensation and allowances. The appellants were aggrieved, hence the appeal to this Court.

In this appeal, the appellants were represented by Mr. Nassoro, learned advocate. At the commencement of hearing of the appeal, a preliminary objection on behalf of the respondent was raised notice of which had been filed under rule 100. In support of the preliminary objection, three grounds were advanced. First, that the appeal is time barred, second, that the second certificate of delay of 8th July, 2003 is incompetent as it was issued after the first certificate of 20th June, 2003 and third, that the record of appeal is wanting for not including the address of service of the parties.

Grounds one and two were argued together. Mr. Mbwezeleni and Mnkonje addressed the Court in turns. The thrust of their

submission on these grounds was that the appeal instituted on 9.7.2003 was out of time. In terms of the provisions of rule 83 (1) an appeal shall be instituted within sixty days of the date when the notice of appeal was lodged. In this case, if the time certified in the certificate of delay of 8.6.2003 as necessary for the preparation of the copy of proceedings and delivery of the copy to the appellant is excluded, in the absence of any extension of time, the appeal should have been lodged at the latest by 13.5.2003. That is within the period of 60 days from 14.3.2003 when the appellant was supplied with a copy of the proceedings. The second certificate of delay which purported to extend the time in which to institute the appeal is of no legal consequence because the Registrar does not have the power to do so.

Mr. Mbwezeleni and Mr. Mnkonje, learned advocates appeared for the first respondent and Mr. Jadi Simai, Assistant Registrar of Documents, represented the Registrar of Companies, the second respondent. Mr. Jadi Simai, did not wish to address the Court. He

left it for Mr. Nassoro to address the Court on the legal issue raised in the preliminary objection.

Mr. Nassoro ardently maintained that if the time is computed on the basis of the second certificate of delay of 8th July, 2003, the appeal was timeously instituted on 9.7.2003. He urged that as counsel for the first respondent, he diligently pursued the matter from the very beginning until the second certificate of delay of 8.7.2003 was issued. According to him, the second certificate was the valid one because with its issuance the first certificate of 20.6.2003, was cancelled. He also said that from the beginning when he applied for a copy of the proceedings, he had made it clear to the Registrar that the copy of proceedings was required for purposes of appealing. As such, he said it is common knowledge to the registrar what documents are required under rule 89 (1) to be contained in a record of appeal. He blamed the Registrar for not supplying a copy of the drawn order of the decree together with the copy of the proceedings and judgment on 14.3.2003, until the Registrar was reminded by letter of 11.6.2003. As to why he did not

follow up the matter soon after receiving a copy of the proceedings on 14.3.2003, Mr. Nassoro maintained that he was constantly reminding the Registrar either by letters or by sending someone from his office.

The institution of appeals is provided for under rule 83 (1) of the Court Rules, 1979. It provides:

> 83 (1) – Subject to the provisions of Rule 122, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –
>
> (a) -
> (b) -
> (c) -
> (d) -

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 certified by the Registrar of the High Court as having been required for the preparation and delivery of the copy of the appellant.

In this case, it is not disputed that a copy of the proceedings was received on 14.3.2003. In that situation and as correctly submitted by Mnkonje, from this date, the period of 60 days within which the appeal should have been instituted expired on 13.5.2003. We agree with Mr. Mnkonje that there cannot be two certificates concurrently applicable in respect of the same matter. In this case, the certificate of 8.6.2003 was the valid one because the second certificate of 8.7.2003 was of no legal consequence. It seems to us that the second certificate of 8.7.2003 issued by the Registrar upon the request by Mr. Nassoro by letter of 11.6.2003 amounted to extending the time in which to file the appeal. This, the Registrar had no power to do. It is the Court which has the power to extend the time in which to institute the appeal. Furthermore, the Registrar was also wrong in issuing a second certificate when the first one had not been withdrawn. If the intention was to withdraw the first

certificate, then the Registrar should have indicated so when the second certificate was issued.

In the circumstances, and as already observed, there is no gainsaying that the time expired on 13.5.2003. It follows therefore that from the time when Mr. Nassoro applied for the drawn order of the decree on 11.6.2003, the matter was already time barred. His plea that he had diligently been following the matter with the Registrar or that it was the mistake of the Registrar in not supplying a copy of the decree is also of no avail. The Registrar supplied documents which were asked for, the drawn order of the decree was not requested for until 11.6.2003. So, the Registrar cannot be blamed for not supplying a document which was not asked for. On the other hand, if Mr. Nassoro had exercised a modicum of diligence, he would have discovered that a drawn order of the decree was not included soon after 14.3.2003 when a copy of the proceedings was received. Had he done so he would have taken necessary steps to rectify the position before the expiry of 60 days by seeking extension of time from the Court. As happened in this case, the appeal is

clearly time barred in terms of rule 83 (1) apparently because of counsel's failure to take action in time. It is now settled that an advocate's lack of diligence and inaction is no ground for circumventing the clear provisions of the rules.

This ground alone is sufficient to sustain the preliminary objection. However, we wish to briefly touch on the third ground in which Mr. Nassoro raised a rather interesting point in his submission in reply to the preliminary objection. On ground three, it was the submission of Mr. Mnkonje that the appeal was incompetent because the mandatory provisions of Rule 89 (1) were not complied with. He stated that under Rule 89 (1) (b) the record of appeal shall contain a statement showing the address for service of the respondent. In this case, he further contended that the record did not contain a statement of the address of the respondents and as a result hearing of the appeal had to be adjourned because the second respondent had not been served.

[illegible] prescribed under rule 89 (1) for furnishing the statement of address in the record.

We find no merit in this submission by Mr. Nassoro regarding the format of the statement of the address for service on the respondent. This is so because rules 79 and 89 read together with

format is clearly spelled out. Otherwise we need not be delayed in dealing with the fact that rule 89 (1) (b) was breached. It is an aspect which Mr. Nassoro conceded.

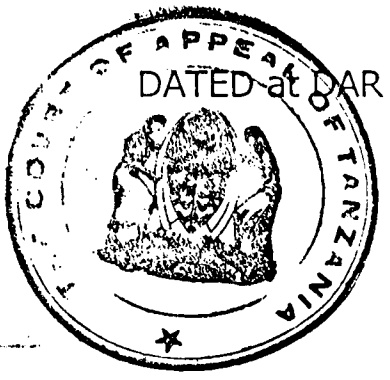
The issue is the effect of such non-compliance with the rule in the circumstances of the case. Mr. Mnkonje for the first respondent was firmly of the view that as the record of appeal did not contain a statement of the address for the second respondent, the appeal was rendered incompetent. According to him the requirements of rule 89 (1) (b) are mandatory because the word "shall" is used in the rule. Suffice it for us to observe that not in every situation that an irregularity or non-compliance with a rule renders the appeal incompetent simply because the word "shall" is used in the rule. As held by a Single Judge of this Court in **VIP Engineering and Marketing Limited v Said Salim Bakhressa Limited,** Civil Application No. 47 of 1996 (unreported) irregularities or non-compliance which do not go to the root or substance of the matter can be overlooked provided there is substantial compliance with the rule read as a whole and no prejudice is occasioned. In this case

having regard to the fact that the respondents were served with the memorandum and record of appeal in terms of rule 90 (1), we do not think that in the circumstances of the case, failure to furnish the statement of address in the record was fatal to the appeal and that prejudice was occasioned to the respondents.

Finally, we wish to observe on what the appellant is expected to do in order to comply with rule 79 when the respondent does not respond to the notice of appeal. In the instant case, as the respondents had not furnished full and sufficient address for service in response to the notice of appeal, the record should have shown the last known address, namely the address used in the notice of appeal. This again, as already shown was not done. So, in this regard, there was non-compliance with the rule which, nonetheless we have held was not in the circumstances of the case fatal to the appeal.

All in all therefore, for the foregoing reasons we are satisfied that ground one of the preliminary objection is well founded, the

appeal was instituted out of time, it is incompetent. The preliminary objection is sustained and the notice of appeal is struck out under rule 82 with costs.



DATED at DAR ES SALAAM this 10th day of December, 2003.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

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

(F. L. K. WAMBALI)
DEPUTY REGISTRAR