IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: WAMBALI, J.A., SEHEL, J.A., And GALEBA, J.A.)

CIVIL APPEAL NO. 293 OF 2019

MWATIMA SULEIMAN PETRO.....1ST APPELLANT
RAMADHANI ABDALLA SHAABAN.....2ND APPELLANT

VERSUS

HALIMA JUMA.....1ST RESPONDENT

ZAID KOMBO ZAID.....2ND RESPONDENT

MWANAID KOMBO ZAID.....3RD RESPONDENT

CHIKU KOMBO ZAID.....4TH RESPONDENT

MARYAM KOMBO ZAID.....5TH RESPONDENT

MGENI KOMBO ZAID.....6TH RESPONDENT

LELUU KOMBO ZAID.....7TH RESPONDENT

TATU KOMBO ZAID.....8TH RESPONDENT

JUMA KOMBO ZAID.....9TH RESPONDENT

(Appeal from the Decision of the High Court of Zanzibar at Vuga)

(Issa, J.)

dated the 15th day of October, 2018
in
Civil Appeal No. 70 of 2018
.....

RULING OF THE COURT

23rd November, & 2nd December, 2021

GALEBA, J.A.:

The underlying cause of action between the appellants on one hand and the respondents on the other, is a dispute over a piece of land located at Mwera Chunga area in Western District within the Western

Region of Unguja in Zanzibar. In that regard, the respondents instituted Civil Case No. 17 of 2015 in the Land Tribunal for Zanzibar (the Tribunal) alleging trespass by the appellants on the said land which they had inherited from their father, the late Kombo Zaid. The Tribunal substantially granted the reliefs that the respondents prayed in that case and declared them to be the lawful owners of the disputed land. It further ordered the appellants to vacate the land and pay the respondents TZS. 2,000,000.00 as compensation for the fallen trees. As it were, the appellants were aggrieved by the decision of the tribunal, so they lodged Civil Appeal No. 70 of 2018 to the High Court of Zanzibar. On 15th October 2018, the High Court dismissed that appeal with costs. Aggrieved with the dismissal of their appeal, the appellants have lodged the present appeal. The appeal is premised on 3 grounds, which however, for reasons that will become clear as we proceed, we will neither reproduce them in this ruling nor determine any of them.

At the hearing of the appeal on 23rd November 2021, both sides, the appellants and the respondents, entered appearance on their respective selves without legal representation. Earlier on, however, while preparing for hearing of the appeal, we had noted that there was no evidence on record that a letter requesting for a certified copy of the

proceedings from the Registrar of the High Court, was served on any of the respondents. For purposes of validating that position, at the hearing, we started with an inquiry from parties, particularly from the appellants, to find out whether after lodging the letter with the Registrar at the High Court, the same was served on each of the respondents. The statutory significance of service of the letter on the respondents, is that if it is not served, the appellants would not benefit from the exclusion of time as may certified by the Registrar of the High Court in computing the time within which the appeal is to be instituted under Rule 90(1) of the Tanzania Court of Appeal Rules, 2009 as amended (hereinafter, the Rules). This statutory warning is clearly provided for under Rule 90(3) of the Rules. We will discuss at some detail, the substance of these provisions shortly.

Upon our inquiry from the appellants as indicated above, the first appellant submitted that they prepared the record of appeal, lodged it to the Court and served copies to each respondent which, to her, was sufficient. The second appellant submitted that they had served everything to the respondents, but he admitted to have no evidence of service of the letter to any of the respondents after they lodged it with the Registrar of the High Court. That position was confirmed by the

respondents who, each informed us that he or she did not receive any such letter.

From the submission of both parties, without a flicker of doubt, we ruled out all uncertainties we previously had and confirmed that, indeed, the appellants did not serve on the respondents, the letter requesting for certified copy of proceedings from the Registrar of the High Court.

According to Rule 90(3) of the Rules, as indicated above, if the letter is not served on the respondent or the respondents, the appeal must be lodged in sixty days of lodging the notice of appeal as provided for under Rule 90(1) of the Rules otherwise the appeal will be time barred. In this appeal, the record has it that the notice of appeal was lodged on 22nd October 2018 but the appeal was lodged on 19th September, 2019 which is a period of about 11 months between the two dates.

As indicated earlier on, the relevant provisions necessary for resolution of the issue at hand, is Rule 90(1) and (3) of the Rules, which provide 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.

(2) N/A

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

[Emphasis added]

Quite clearly, the above cited law, particularly sub-Rule (1) of Rule 90 of the Rules makes it judicially imperative for an appeal from the High Court to the Court to be lodged within sixty days of the date when the notice of appeal was lodged. In case the appellant or appellants fail

to lodge an appeal within that time frame, like the scenario obtaining in the present appeal, unless, the communication requesting for certified copy of proceedings for purposes of appeal was in writing, lodged with the High Court within thirty days of the decision and served its copy on the respondents, the appellants cannot, legally, benefit from the exclusion by the Registrar of the High Court of the time beyond the sixty days. That, in our considered view, is the gist of the above provisions of the law.

In this appeal, the letter to request for the certified copy of proceedings was written and it was lodged with the Registrar of the High Court on 20th May 2019 but there was no evidence on record that it was served on the respondents which fact was admitted by the appellants. In terms of Rule 90(3) of the Rules, that omission denied the appellants an opportunity to rely on the exclusion of any time beyond the sixty days within which an appeal was supposed to be lodged. Thus, the appellants were duty bound to lodge this appeal within sixty days of the date when the notice of appeal was lodged, which they did not do. The appellants, instead, lodged the appeal about 11 months after lodging the notice of appeal, which was well out of time.

Admittedly, in this appeal the Registrar of the High Court issued a certificate of delay contained at page (v) of the record of appeal indicating an exclusion of 270 days. However, the certificate cannot be of any assistance to the appellants, for as indicated above, we are satisfied that they did not serve on the respondents the letter requesting for the certified copy of the proceedings as provided under Rule 90(1) of the Rules.

The next aspect for our consideration is the legal consequences of lodging an appeal out time in the context of this appeal. In this appeal the appellants impressed on us to hear the appeal on merits despite the anomaly. Even some of the respondents submitted that the matter be heard because the appeal has been pending in various courts for a very long time. Others however, like the nineth respondent implored us to determine a way forward of this appeal according to law, the submission we find to be a sound proposition which we will have to go by. We will therefore navigate a few authorities of this Court in order to consider and ultimately determine the legal consequences of lodging an appeal out time.

Legally, an appeal lodged out of time in the context of the Rules, is incompetent and an appeal of that status, in law, it is abortive and

futile such that it can neither be heard, withdrawn nor can it be adjourned for its worth and value can be equalled with a proceeding that is not before the Court. Briefly, an incompetent appeal is as if it is not there at all. In **Ghati Methusela v. Matiko Marwa Mariba,** Civil Application No 8 of 2006 (unreported) this Court observed that: -

> *"It is now established that an incompetent proceeding, be it an appeal, application etc, is incapable of adjournment, for the court cannot adjourn or allow to withdraw what is incompetent before it."*

Thus, we decline the invitation by the second appellant that, we proceed to hear the appeal on merit despite the omission to serve the respondents with the letter requesting for a certified copy of the proceedings from the High Court for purposes of appeal. As for the way forward, we will be guided by our previous decisions where this Court has encountered similar scenarios. One such decisions is **Mohamed Issa Mtalamile and Three Others v. Tanga City Council and Another,** Civil Appeal No. 200 of 2019 (unreported), where one of the respondents was not served with the letter requesting for the certified copy of the proceedings and the appeal was lodged beyond sixty days

after lodging the notice of appeal. In that matter, this Court made the following remark and conclusion: -

> *"In the premises, on account of the failure to serve the 1st respondent with the letter to be supplied with certified documents from the Registrar, the appellants cannot rely on the exclusion under the proviso to Rule 90 (1) of the Rules which renders the purported appeal time barred having been filed beyond 60 days from the date of filing the notice. In view of what we have endeavoured to discuss, the present appeal is incompetent and we proceed to strike it out."*

Thus, as this appeal was lodged out of time, it is incompetent and the remedy available as we have seen, is to have it struck out once and for all. Other decisions on the same subject include **Wilfred Lwakatare v. Hamis Kagasheki and Another**, Civil Appeal No. 118 of 2011 and **National Bank of Commerce Limited and Steven R. K. Shiletwa v. Ballast Construction Company Limited**, Civil Appeal No. 72 of 2017 (both unreported).

For the above reasons, we strike out this appeal with no orders as to costs because the issue of omission to serve the letter to the respondents, which has led to the termination of this appeal, was raised by the Court.

Finally, as the present appeal has been struck out, we find no point in considering or determining any of the grounds of appeal upon which it was premised.

DATED at **ZANZIBAR** this 1st day of December, 2021

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This ruling delivered this 2nd day of December, 2021 in the presence of the Appellants in person and in presence of 2nd, 3rd 4th, 5th 6th, 7th and 9th and in absence of 1st and 8th respondents, is hereby certified as a true copy of original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL