

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

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 54 OF 2019

LEONARD RUSUMBANYA NGWANIJE..... APPELLANT

VERSUS

FIRST NATIONAL BANK OF TANZANIA LIMITED.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania,
Commercial Division) at Dar es Salaam)
(Songoro, J.)**

dated the 22nd day of November, 2016

in

Commercial Case No. 125 of 2014

.....

JUDGMENT OF THE COURT

23rd February & 7th March, 2022

MWANDAMBO, J.A.:

The appellant Leonard Rusumbanya Ngwanije lost to the respondent in a suit for breach of loan agreement and enforcement of mortgage before the High Court, Commercial Division. Aggrieved by the decree of the trial court, the appellant preferred the instant appeal.

Initially, the appeal was called on for hearing on 15/02/2022. However, the appellant informed us that his advocate fell ill and hence his inability to appear for hearing. We thus adjourned the hearing to

23/02/2022 even though we had no proof of the advocates' illness. At the resumed hearing, the appellant informed us that his advocate was yet again not able to appear for hearing by reason of voice complications arising from the illness thus asked for another adjournment which was strongly resisted by Mr. Innocent Mushi, learned advocate representing the respondent. We refused the prayer mindful of the provisions of rule 38A (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) because we were satisfied that no sufficient cause had been shown to warrant another adjournment. In particular, there was no proof of the alleged illness and if any, we were not satisfied that the ailing advocate could have failed to agree with his client for an alternative arrangement to engage another advocate as required by Rule 38A (4) of the Rules.

Furthermore, even though the appellant informed us that his advocate asked him to be allowed to file written submissions, the record shows clearly that parties had already filed their respective written submissions in support and reply in pursuance of rule 106 (1) and (7) of the Rules. We were set to proceed with the disposal of the appeal in terms of the provisions of rule 112 (4) of the Rules considering that the appellant had filed his written submissions in

support of the appeal through the same advocate. However, for a reason which will become apparent shortly, we did not proceed towards that destination.

Upon our examination of the record of appeal we noted that even though the impugned decision was made on 22/11/2016, a notice of appeal was lodged on 07/08/2018 upon an order of the High Court extending time to do so. Subsequently, the appellant instituted his appeal on 15/02/2019 a period of over six months from the date of lodging the notice of appeal. Our curiosity was prompted by a certificate of delay appearing at page 414 of the record of appeal excluding the period of appealing from 7/08/2018 a date on which the appellant is shown to have requested for copies of proceedings, ruling and drawn order to 6/12/2018 when those documents were supplied to him. Upon asking the appellant if there was any proof of existence of any letter requesting for copies of proceedings made within 30 days from the delivery of the impugned judgment, apart from claiming that he was personally following up the matter before the High Court, he could not provide any. Neither did we have sight of any such letter in the record of appeal.

Mr. Mushi's response was that no such letter was delivered to the Registrar, Commercial Court, for had it existed, it should have been reflected in the record of appeal. At any rate, Mr. Mushi argued, the respondent was not served with a copy of such letter as required by rule 90 (3) of the Rules rendering the appeal incompetent for being time barred. Much as he was not straightforward, we understood Mr. Mushi to be arguing that the certificate of delay issued to the appellant was worthless in excluding the time limit for the institution of the appeal because the appellant did not deliver a copy of his letter to the Registrar, if any, to the respondent as required by rule 90 (3) of the Rules. He thus invited the Court to find the appeal incompetent and strike it out.

Re-joining, the appellant claimed that all necessary documents were prepared and served on the respondent and thus the appeal was instituted timeously.

As alluded to earlier, there is no dispute that the appellant lodged his notice of appeal beyond 30 days of the delivery of the impugned decision after obtaining leave to do so vide ruling of the High Court made on 9/07/2018 in Miscellaneous Commercial Application No. 66 of 2018 (pages 183 – 189 of the record). However,

there is no indication in that ruling if the applicant applied for extension of time to deliver to the Registrar his letter requesting for copies of proceedings in pursuance of the proviso to rule 90 (1) of the Rules) neither is there any indication that the High Court made any order in that regard. On the other hand, the letter referred to in the certificate of delay was written and delivered to the Registrar hopelessly beyond 30 days of the impugned decision. To be valid and of assistance to an appellant, such letter must have complied with the proviso to rule 90 (1) of the Rules which provides:

"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".

The appellant's obligation does not end with the delivery of the letter to the Registrar. A copy of that letter must be delivered on the respondent as well in terms of rule 90(3) of the Rules which stipulates:

*(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]

As seen earlier, a copy of the appellant's letter to the Registrar is conspicuously missing from the record of appeal let alone the fact that its copy was not served on the respondent's advocate. Be it as it may, as indicated earlier, it is clear in the certificate of delay that the appellant's request on 7/08/2018 was in respect of proceedings, ruling and drawn order in Misc. Commercial Application No. 66 of 2018 arising from Commercial Case No. 125 of 2014 from which the appeal has emanated. That letter had nothing to do with a request for copies of proceedings, judgment and decree in Commercial Case No. 125 of 2014. With due respect, that letter could not have formed the basis for the exclusion of days necessary for the preparation of the requisite documents for the purpose of the appeal. In effect, there was a total non-compliance with rule 90 (1) and (3) of the Rules thereby disentitling the appellant from benefiting the exemption against time limitation for the institution of his appeal within 60 days from the date of lodging the notice of appeal in terms of rule 90 (1) of the Rules.

As we have stated in various previous decisions a certificate of delay is not to be and cannot be beyond question where there are grounds for thinking as it were that it is incorrect: See for instance

D.T. Dobie & Company (Tanzania) Ltd v. N.B. Mwaitebele

[1992] T.L.R. 152 in which the Court stated:

"...A certificate 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. The Registrar had not supplied the appellant with the documents requested for, thus rendering the certificate incorrect. This is a serious error. The certificate was false and this fountain of justice cannot overlook such an error in the course of advancing justice..."

That decision was followed in other cases including; **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] T.L.R 437 and **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004 (unreported). The certificate in this appeal is incorrect because the Registrar issued it without being satisfied that the appellant had complied with the proviso to rule 90 (1) as well as rule 90 (3) of the Rules. Put it differently, by reason of the non-compliance, the Registrar had no power to issue any certificate of delay knocking off

some days from the computation of time limitation for the institution of the appeal.

The upshot of the foregoing is that the appeal was instituted after the expiry of the time limitation rendering it incompetent. Having held that the appeal is incompetent, we cannot do anything about it except to strike it out as we hereby do. As the issue resulting into our order was raised by the Court itself, we make no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 2nd day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered on this 07th day March, 2022, in the presence of appellant in person and Mr. Innocent Mushi, learned counsel for the Respondent, is hereby certified as a true copy of the original.




D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL