IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: KOROSSO, J.A., KIHWELO, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL No. 202 OF 2020

LUCY THERESIA KUNDI ..... FIRST APPELLANT

NICOLAOUS JOHN KUNDI ..... SECOND APPELLANT

VERSUS

ALOYCE CLEMENCE KUNDI.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 14th day of November, 2018

in

Land Case Appeal No. 7 of 2018

.....

RULING OF THE COURT

12th & 17th July, 2023

KIHWELO, J.A.:

The epicenter of this matter is the ownership of a piece of land measuring about three acres situated at Sumi Area, Kirua Vunjo in Moshi Rural District ("the suit land"). Aloyce Clemence Kundi, the respondent herein, knocked the doors of the District Land and Housing Tribunal (the Tribunal) in Application No. 191 of 2012 suing the appellants claiming that they had trespassed into the suit land. He therefore, prayed among others, for declaration that the suit land is the property of the respondent and that

the appellants be evicted from the suit land and the foundation which was built by the appellants on the suit land be demolished. The tribunal, upon analyzing the evidence which was presented before it by the witnesses of both the appellants and the respondent, came to the conclusions that, the evidence of the appellants was more credible than that of the respondent and therefore, it dismissed the application with costs.

Undeterred, the respondent on 04.04.2018 lodged an appeal before the High Court of Tanzania (Land Division) at Moshi in Land Case Appeal No. 7 of 2018, and the crux of the appeal was that the learned Chairman misdirected himself in disregarding the overwhelming evidence of the respondent that the suit land was given to the respondent by his late father Clemence Mrio in 1958 and that by so doing the learned Chairman misapprehended the evidence. He therefore, prayed that the appeal be allowed with costs.

Upon consideration of the written arguments by the appellants and the respondent, as the matter was disposed by way of written submissions, the High Court Judge (Fikirini, J. as she then was) having thoroughly considered the rival arguments presented before her by the appellants herein and the respondent herein, she was of the considered view that, having closely

examined the evidence presented before the Tribunal and weighing it, the respondent had more credible evidence than the appellants. She consequently, found out that, the appeal before her was meritorious and proceeded to allow it with costs. Undeterred, the appellant knocked the doors of the temple of justice before this Court, armed with four points of grievance which for reasons that will become apparent shortly we shall not make a painstaking exercise of reproducing them.

When the matter came up for hearing before us on 12th July, 2023, the appellants appeared in person, unrepresented whereas Mr. Faustine Materu, learned counsel, appeared for the respondent. Initially, the matter was cause listed on 11th July, 2023 but we were compelled to adjourn it until on 12th July, 2023 to enable the appellants trace records proving that the appellants served upon the respondent the notice of appeal and the letter requesting for a copy of the proceedings in the High Court as required by the law.

Ahead of hearing of the appeal on merit, we prompted the parties to address us on whether the notice of appeal as well as the letter requesting for a copy of the proceedings in the High Court were served upon the respondent and what should befall if service was not done.

The appellants being lay persons, they were very brief in their responses. The first appellant admittedly argued that, the letter requesting

for a copy of the proceedings was not served upon the respondent and that was due to appellants' ignorance as mere lay persons without means to secure legal representation. As regards to the notice of appeal, she contended that, it was duly served upon the counsel for the respondent within fourteen (14) days and showed us the letter indicating that it was dully stamped and signed by someone from Materu & Co. Advocates. The first appellant insistently argued that the Court is not there to favour those who know the law and therefore, she impressed upon us to ignore legal technicalities and proceed to determine the appeal. On his part, the second appellant had nothing useful to add, apart from subscribing to what the first appellant submitted.

On the adversary side, Mr. Materu, in response was fairly brief, he appreciated the gross concession by the appellants that they did not serve the letter requesting for a copy of the proceedings in the High Court. The learned counsel zealously submitted that the effect of the concession by appellants is to make the appeal time barred and therefore, there is no appeal before the Court. The learned counsel, denied having been served with the notice of appeal as alleged by the appellants and assigned three reasons. One, the signature in the said letter was not his, two, the said letter was not dated apart from being signed and stamped, and therefore it does

not provide concrete proof that service was done within fourteen (14) days as prescribed by the law and, three, the authenticity of the said letter was questionable because the notice of appeal found on page 248 and page 255 of the record of appeal do not indicate that the respondent was served and the record of appeal was lodged in court on 27.05.2020 while the alleged notice of appeal was lodged on 11.12.2018 which leaves a lot to be desired why the appellants did not include in the record of appeal the letter which was dully signed and stamped. The learned counsel therefore emphasized that, the failure to serve the notice of appeal upon the respondent nullifies the notice which was lodged by the appellants on 11.12.2018 citing the case of **Salim Sunderji & Capital Development Authority v. Sadrudin Shariff Jamal** [1993] T.L.R. 224 to facilitate his proposition.

In rejoinder submission the appellants had nothing useful to submit but they reiterated their earlier submissions and the prayer for the Court to determine the appeal on merit and not to be tied up with unnecessary technicalities.

We have dispassionately considered the submissions by both the appellants and the learned counsel for the respondent on issues which were prompted by the Court on the competence of the instant appeal, on account of failure to serve upon the respondent both the letter requesting the

proceedings to the High Court and the notice of appeal and we think, for reasons that we shall assign in due course, and without mincing words that, this appeal can be conveniently disposed of within a narrow circumference of failure by the appellant to serve on the respondent a copy of the letter applying for a copy of the proceedings in the High Court in contravention of rule 90 (3) of the Tanzania Court of Appeal Rules 2009 (the Rules).

Our starting point, we think, should involve a reflection of the relevant provisions of the law, in this regard, rule 90(1) and (3) of the Rules which provides as follows:

> *"(1) Subject to the provisions of Rule 128, an appeal shall be institute by lodging in the appropriate registry,* ***within sixty days of the date when notice of appeal was iodged*** *with-*
>
> *(a) a memorandum of appeal in quintupiicate;*
>
> *(b) the record of appeal in quintuplicate;*
>
> *(c) security for 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."*

(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]

It is instructive to recapitulate that the provisions of rule 90(1) of the Rules, makes it mandatory for the appellant to lodge the record of appeal as well as memorandum of appeal within sixty days of filing the notice of appeal. However, that requirement is subject to the proviso for exemption of time required for seeking and obtaining from the High Court a copy of the proceedings in that Court as may be certified by the Registrar, provided an application for such copy is made within thirty days of the delivery of the decision sought to be challenged. Furthermore, the entitlement to exemption is further conditioned under sub-rule (3) of rule 90 above that the application for the copy of proceedings must be in writing and that a copy of it must have been served on the respondent.

We have on several occasions held that failure to copy and serve on the respondent the written request for a copy of the proceedings disentitles the appellant from relying upon the exemption under rule 90(1) and that any certificate of delay purportedly issued to grant an exemption in the

circumstances would be invalid. There is, in this regard, a long line of authority to that effect, if we may just cite the case of **D.P. Valambia v. Transport Equipment Ltd** [1992] T.L.R. 246, in which this Court, citing the old Rules, rule 83(2) of the Tanzania Court of Appeal Rules, 1979 which is similar to the current rule 90(3) of the Rules, held, on page 256, that:

> *"Since also on my finding,* ***the respondents did not send to the applicant a copy of their letter in which they applied a copy of the proceedings, as required by Rule 83 (1),*** *they are not covered by the exemption in sub-rule (1) and that therefore* ***the Registrar issued them with a certificate of delay under sub-rule (1) while laboring under mistake of fact****. Consequently, the period available to the respondents in which to institute the appeal was sixty days."* [Emphasis added]

In the instant appeal, the appellants, lodged the notice of appeal on 11.12.2018 this is evident on page 248 and page 255 of the record of appeal, they also lodged on 18.12.2018 a letter dated the same day requesting to be supplied with a copy of the certified ruling, proceedings and drawn order, and this is evident on page 249 of the record of appeal. However, the

respondent was neither copied nor served and the appellants have admitted to that. It follows therefore, that, the letter of 18.12.2018 was in total violation of the provisions of rule 90(3) of the Rules, and that the appellant was not entitled to rely upon the exemption under sub-rule (1). Furthermore, the purported certificate of delay on page 300 of the record of appeal that the appellants sought to rely upon was mistakenly handed out by the Registrar and therefore, it is invalid. That being the case, the appellants ought to have instituted their appeal within sixty days from on 11.12.2018 when they lodged their notice of appeal in terms of rule 90(1) of the Rules, if we assume for the sake of arguments that the said notice of appeal is valid which is another questionable issue. Thus, since the instant appeal was lodged on 27.05.2020 more than one year and five months beyond the sixty days' limitation period, it is time-barred.

We took similar position in the case of **Filon Felician Kwesiga v. Board of Trustees of NSSF,** Civil Appeal No. 136 of 2020 (unreported), where we reproduced the following excerpt from our previous unreported decision in **Victoria Mbowe v. Christopher Shafurael Mbowe and Another**, Civil Appeal No. 115 of 2012 (unreported) which excerpt we think merits recitation here:

"...Similarly, Rule 90(2) [Now 90(3)] lays it down that an appellant cannot rely on the exception clause in Rule 90 (1) unless his application for a copy is in writing and served on the respondent."

Corresponding observations were made in the case of **Basilisa Thomas Sawere v. Onest Philip and Others**, Civil Appeal No. 276 of 2018.

We are alive to the fact that, the appellants implored us not to be tied up by undue technicalities in dispensing justice. However, it bears reaffirming that failure to serve the letter requesting the proceedings to the High Court cannot be cured by the overriding objective principle enshrined in our laws through the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 (Act No. 8 of 2018) which amended section 3 of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, by introducing section 3A and section 3B, as the anomaly is not one that can be glossed over. The reason is not farfetched, the overriding objective principle cannot be applied blindly in total disregard of mandatory provisions of the law. See, for instance, the case of **Njake Enterprises Limited v. Blue Rock Limited and Another,** Civil Appeal No. 69 of 2017 (unreported) in which this Court succinctly stated the above principle.

As we restated in **Basilisa Thomas Sawere** (supra) after citing an array of our previous decisions, institution of an appeal within sixty days is a jurisdictional issue and a mandatory requirement which cannot be salvaged by the overriding objective principle which was not meant to allow parties to circumvent the mandatory rules of the Court or turn blind to the mandatory provisions of the procedural law which go or have the effect of going to the foundation of the case. In this case failure to serve a letter requesting to be supplied with a copy of the proceedings in the High Court is incurable. There is no way this anomaly can be saved by the overriding objective principle because in the first place the Court cannot invoke the overriding objective where the Court has no jurisdiction in the first place, the only jurisdiction that the Court has is to strike out the appeal.

In our considered opinion, it will be pretentiously academic to deliberate on the failure to serve notice of appeal which parties were at issue as doing so will not serve any useful purpose, having deliberated on the issue of failure to serve the letter requesting to be supplied with a copy of the proceedings in the High Court.

In the upshot, we are enjoined to strike out the appeal for the reasons stated above. In fairness to the parties and equity, we make no order as to

costs considering that none of the parties has had a hand in the outcome of this matter.

It is so ordered.

DATED at **MOSHI** this 17th day of July, 2023.

W.B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 17th day of July, 2023 in the presence of the 1st appellant in person unrepresented, Mr. Materu, learned Counsel for the respondent and in the absence of the 2nd appellant though duly informed is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL