

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

**(CORAM: KOROSSO, J.A, KITUSI, J.A And KHAMIS, J.A.)**

**CIVIL APPEAL NO. 91 OF 2021**

**PROSPER LADISLAUS LYARUA.....APPLICANT**

**VERSUS**

**LEONARD SABUNI .....1<sup>ST</sup> RESPONDENT**

**DANIEL MTINGE.....2<sup>ND</sup> RESPONDENT**

(Appeal from the judgment and decree of High Court of Tanzania, Land Division,  
at Dar es Salaam)

**(Wambura, J.)**

**dated the 31<sup>st</sup> day of July, 2017**

**in**

**Land Case No. 282 of 2014**

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**RULING OF THE COURT**

7<sup>th</sup> February & 15<sup>th</sup> March, 2024

**KHAMIS, J.A.:**

Prosper Ladislaus Lyarua, hereinafter the appellant, was the first defendant in Land Case No. 282 of 2014 before the High Court of Tanzania, Land Division, which was instituted by thirteen plaintiffs, including Leonard Sabuni and Daniel Mtinge, the respondents herein. The plaintiffs had sought for a declaration that, the appellant and Rhino Investment Co. Limited who is not a party in this appeal, had trespassed onto the disputed plots of land located at Hondogo area, Kibamba area, Kinondoni, Dar es Salaam.

Upon trial, the High Court (Wambura, J) was impressed by the evidence led by the respondents herein, and declared them lawful owners of the disputed land. The appellant and Rhino Investment Co. Ltd were ordered to jointly compensate the respondents a sum of TZS. 50,000,000/= in the account of general damages and interest thereon at the court's rate from the date of judgment to the date of full and final payment.

Aggrieved, the appellant and Rhino Investment Co. Ltd issued a joint notice of appeal against the whole decision. The notice of appeal named the thirteen original plaintiffs as the respondents in the intended appeal. Subsequently, a memorandum of appeal was solely filed by the appellant against the two respondents only as shown in the title of this appeal.

At the hearing before us, Mr. Sylvester Eusebi Shayo assisted by Mrs. Bernadeta Shayo, learned advocates, appeared for the appellant. Mr. Juma Nassoro, also learned advocate, acted for the respondents.

Before hearing started in earnest, we prompted the learned counsel to address us on the competency of the appeal. We particularly invited them to submit on whether the appeal was filed within time and

whether the discrepancy found in the names of the parties affected its competency.

Responding on the first issue, Mr. Shayo contended that, the appellant was supplied with copies of the proceedings on 21<sup>st</sup> January, 2021 and the sixty days within which to file an appeal expired on 21<sup>st</sup> March, 2021. He also contended that, the appeal was formally lodged on 30<sup>th</sup> March, 2021 for a plausible reason.

The counsel invited us to take judicial notice of a procedure at the registry of the Court where documents are received by registry clerks who mark them “received” for onward transmission to the Deputy Registrar. The latter would make admission and authorise parties to pay requisite fees. He alleged that, before a formal admission, parties are not entitled to pay fees and therefore, documents are deemed not formally presented for filing.

He submitted that, the Deputy Registrar does not operate in isolation as he is assisted by registry clerks who act on his behalf. Mr. Shayo asserted that, the delay in this case was attributed to the registry clerks who failed to timely process the documents that were timely presented by the appellant on 19<sup>th</sup> March, 2021. He summed up that,

the delay was thus an internal affair of the registry which should not be blamed on the appellant.

On the second issue, Mr. Shayo conceded a discrepancy in the names of the parties. He contended that, whereas the notice of appeal listed down names of thirteen respondents, the memorandum of appeal had only two respondents. Further, he acknowledged that, despite issuing a joint notice of appeal, the memorandum of appeal had only one appellant.

The learned counsel for the appellant was quick to implore the Court to invoke the overriding objectives of the Appellate Jurisdiction Act, Cap 141, R.E 2012 [the AJA] and find the discrepancy minor and curable.

Mr. Nassoro did not sail in the same boat with Mr. Shayo. He audaciously submitted that, the appeal is time barred and moved us to strike it out with costs. He relied on the exchequer receipt and official stamp of the Court affixed on the right side of page one of the record showing the documents were presented at the registry on 30<sup>th</sup> March, 2021. He contended that, the said date was far out of time because the certificate of delay excluded 1263 days for preparation of the copies of proceedings, judgment and decree which expired on 21<sup>st</sup> March, 2021.

The learned counsel for the respondents averred that, another stamp on the left side of page 1 of the record should be disregarded for failure to disclose name of the Court and the person alleged to have received the documents on 19<sup>th</sup> March, 2021.

Recapitulating, Mr. Nassoro submitted that, the appeal was hopelessly filed out of time and faulted the appellant for failure to apply for extension of time. He contended that, if the appellant found himself blocked by a judicial process, the remedy was for him to apply for extension of time and not act in the manner that he did.

On the second issue, the learned counsel submitted that, the discrepancy renders the appeal incompetent and cautioned that other parties named in the mismatching documents are likely to be unfairly affected by the outcome of the appeal leading to a miscarriage of justice. He asserted that, by failure to formally make an application, the appellant had forgone his right of applying for leave to amend the notice of appeal as per rule 111 of the Rules. In those premises, he beseeched us to dismiss the appeal with costs.

By way of rejoinder, Mr. Shayo relied on section 59(1) of the Tanzania Evidence Act, Cap 6, R.E 2022 [the TEA] in contending that, the appellant is not required to lead evidence to prove that, the

documents of appeal were presented for filing at the Court registry on 19<sup>th</sup> March, 2021. He asserted that, to the contrary, the Court is entitled to take judicial notice of the names of its officers.

In the premises of the counsel rival submissions, we are constrained to decide whether the appeal was filed within time and if so, whether it meets the legal threshold to make it competent.

It is not disputed that in terms of rule 90 (1) of the Rules, an appeal should be instituted in the appropriate registry of this Court within sixty days from the date when the notice of appeal was lodged. It is equally the law that, where an appellant issues a notice of appeal within 30 days of the date of the decision and serves a copy thereof on the respondent, the Deputy Registrar of the High Court will be entitled to issue a certificate of delay and certify the number of days required for the preparation and delivery of the copies of proceedings, judgment and decree, be excluded for the purpose of computing the time within which the appeal is to be instituted.

In this matter, the record of appeal at page 233 – 234, show that, on 7<sup>th</sup> August, 2017 the appellant filed a notice of appeal. On the same date, through Sylvester Shayo & Co. Advocates, the appellant applied for certified copies of the proceedings, judgment, decree and exhibits. On

21<sup>st</sup> January, 2021, the Deputy Registrar of the High Court wrote to the appellant's counsel informing him that, the requested documents were ready for collection (see page 272 of the record).

Page 271 of the record reveals that, the Deputy Registrar of the High Court certified the period from 7<sup>th</sup> August, 2017 when the appellant requested for copies of the proceedings, judgment and decree to 21<sup>st</sup> January, 2021 when he was notified on availability of those documents for collection [1263 days], should be excluded in computing the time requisite for instituting the appeal in this Court.

It should also be noted that, parties were not in dispute that, the appeal ought to have been filed latest by 21<sup>st</sup> March, 2021 and that instead, it was lodged on 30<sup>th</sup> March, 2021. Mr. Shayo laid blame of the delay on the registry clerks who allegedly failed to timely process the appeal. On the other hand, Mr. Nassoro asserted that, the appeal was not exempted from the mandatory requirements of rule 90 (1) and submitted that, the appellant's failure to file the documents in time rendered it time barred.

Upon examination of the record and on consideration of the counsel competing arguments, we are in all four with Mr. Nassoro. The requirements under rule 90 (1) of the Rules are couched in mandatory

form and parties are required to comply with the dictates of the law [See **Bulyanhulu Gold Mine Limited, North Mara Gold Mine Limited, Pangea Minerals Limited v. Petrolube (T) Limited, ISA Limited**, (2021) TZCA 640], The appellant in this matter was obliged to file the record of appeal strictly within sixty uninterrupted days of counting from the period excluded by the Deputy Registrar as per the certificate of delay which lapsed on 21<sup>st</sup> March, 2021. However, the same was lodged almost nine (9) days after expiry of that period.

Having failed to comply with that mandatory legal requirement, in our view, it is too late for the appellant to crucify the registry for his own misapprehension of the Rules. The appeal was thus inexcusably filed out of time, without leave of the Court and premised on a defective memorandum of appeal that did not tally with the notice of appeal as conceded by Mr. Shayo.

Borrowing a leaf from our decision in **North Mara Gold Mine Limited v. Sinda Nyamboge Ntora**, [2022] TZCA 258, [9 May, 2022], we are of the view that, timeliness of the appeal is a fundamental issue that cannot be skated over as a mere technicality which is curable by the overriding objective principle as impressed on us by the learned counsel for the appellant.



In conclusion, we find this appeal is both time barred and defective. For the stated reasons, we struck it out with costs. It is so ordered.

**DATED at DAR ES SALAAM** this 7<sup>th</sup> day of March, 2024.

W. B. KOROSSO  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

A. S. KHAMIS  
**JUSTICE OF APPEAL**

The Ruling delivered this 15<sup>th</sup> day of March, 2024 in the presence of Juma Nasoro, learned counsel for the Respondent and also holding brief for Mr. Sylvester Shayo, learned counsel for the Appellant, is hereby certified as a true copy of the original.



A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above the name and title of the Deputy Registrar.

J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**