

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SEHEL, J.A., FIKIRINI, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 56 OF 2021

**GLORIA PETER KOMBE (MINOR) BY PETER
ALPHONCE her NEXT FRIEND AND GUARDIAN.....APPELLANT**

VERSUS

MAUREEN ERNEST ULIMALI.....1st RESPONDENT

**MAUREEN ERNEST ULIMALI (As Legal Personal Representative of
ERNEST DESIDERY MASSAWE ULIMALI (Deceased))..... 2nd RESPONDENT**

IZADINI JUMA KALOKOLA.....3rd RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Ndunguru, J.)

dated the 11th day of December, 2020

in

Land Case No. 298 of 2017

.....

RULING OF THE COURT

26th September & 18th October, 2023.

FIKIRINI, J.A.:

Civil Appeal No. 56 of 2021 was scheduled for hearing on 26th September, 2023. However, the hearing could not proceed due to existence of a notice of preliminary points of objection filed on 18th May, 2021.

According to the practice of this Court, when a notice of preliminary objection is raised in an appeal or application, the Court is to hear the preliminary objection first before allowing the appeal or application to be heard on merits. We, thus, allowed the parties to address us on the two points of objection raised, namely:-

1. That, the appeal before the Court is hopelessly time barred.
2. The appellant is not entitled to rely on exclusion of period required for preparation and delivery of the copies of proceedings to the appellant for contravening the requirement of Rule 90 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Present before the Court were Messrs. Silvester Eusebi Shayo; Gabriel Aloyce Munishi and Mashaka Ngole, all learned advocates, appearing for the appellant and the respondents, respectively.

Addressing the Court upon inquiry as to the appellant's position regarding the existing notice of preliminary objections, Mr. Shayo outrightly conceded to the points of objection raised. However, he urged the Court to invoke the overriding objective principle provided under

sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) and permit the appellant, pursuant to Rule 96 (6) & 96 (7) of the Rules, to file a supplementary record of appeal which will include an affidavit of service proving that the letter dated 14th December, 2020 was served on the respondent. He premised his prayer on the contention that, the appellant had initially informally approached the Registrar of this Court to be permitted to file the missing documents and upon refusal by the Registrar he preferred an application for extension of time on 23rd August, 2023 registered as Civil Application No. 606/17 of 2023. However, upon reflection, the application was withdrawn.

Fortifying his submissions Mr. Shayo referred us to decisions of the Court in the cases of **David Joseph Mahende v. Afriscan Group T. Ltd**, Civil Appeal No. 200 of 2016 and **Attorney General & Another v. Fatma Amani Karume**, Civil Application No. 694/01 of 2021 (both unreported). In the latter case, the Court invoked the overriding objective principle in deciding and permitting the applicant to file the overlooked drawn order. On the strength of the said decisions, the

learned advocate prayed to be granted leave within which to file a supplementary record of appeal in seven (7) days.

Replying to the submission, Mr. Ngole was brief and straight to the point that the respondent had not been served with a copy of the letter reflected on page 172 of the record of appeal as required by Rule 90 (3) of the Rules. He contended that in view of the omission, the appellant cannot enjoy the benefit of exclusion provided under Rule 90 (1) of the Rules. He further contended that since the intended appeal was not lodged within sixty (60) days prescribed by Rule 90 (1) of the Rules, the present appeal was thus filed out of time and consequently moved the Court to strike it out.

Furthermore, the counsel contended that Rules 96 (6) and 96 (7) of the Rules intended to be relied on could not salvage the situation, allegedly because there was no document omitted as envisaged by the Rules referred to. To buttress his proposition, he cited to us the case of **Elizabeth Jerome Mmassy v. Edward Jerome Mmassy & 6 Others**, Civil Appeal No. 390 of 2019, in which the Court declined to blindly apply the overriding objective principle.

Briefly rejoining, Mr. Shayo distinguished the **Mmassy** (supra) case in which the letter to the Deputy Registrar was filed out of time, to the issue prevailing in the present application. He went on contending that the basis of the appellant's application is that, if this appeal is struck out, it would require the appellant to start all over again, hence the invitation to the Court to invoke the overriding objective principle.

We are invited to determine whether the overriding objective principle can be invoked in the present situation as suggested by Mr. Shayo. Even though there was compliance on the mandatory requirement of the law and the notice of appeal was served to the respondent under Rule 84 (1) of the Rules, there is however, no proof of service on the respondent of the appellant's letter to the Registrar requesting to be furnished with copies of certified proceedings and impugned judgment as dictated by Rule 90 (3) of the Rules.

In the circumstances, we find the proposition by Mr. Shayo unsuitable and inapplicable to the situation currently before us. This is because, the principle we are invited to invoke is not a panacea for all ills. In the case of **Mondorosi Village Council & 2 Others v.**

Tanzania Breweries Limited & 4 Others, Civil Appeal No. 66 of 2017 (unreported), which was cited to us by Mr. Ngole, the Court in deliberating on the invitation to apply the principle, apart from clearly declining the invitation to invoke the principle, it emphatically affirmed that the principle cannot be applied hastily, specifically, where there is a mandatory provision of the procedural law in place. We associate ourselves with the legal stance. The Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 which introduced the said principle, despite pointing out that courts should focus more on substantial justice rather than technicalities, it did not completely do away with the requirement of following and abiding with the procedural law. Referring to the Bill to the amending Act, the following can be fathomed, thus:-

"The proposed amendments are not designed to blindly disregard the Rules of procedure that are couched in mandatory terms..."

Similarly, in the case of **Njake Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017 (unreported), the Court faced with akin situation and reiterated the position it held in

Mondorosi (supra) that, once the certificate of delay is defective, it renders the appeal lodged time barred. What is exhibited in the two cited cases, is quite different and distinguishable from what took place in the case of **Fatma Karume** (supra). In that case, the applicant inadvertently omitted to attach the drawn order, that was referred to in paragraph 15 of the affidavit in support of the notice of motion. The Court considered the omission as sheer accident and a fitting situation warranting the invocation of the principle of overriding objectives. Consequently, the Court relying on the overriding objective principle granted the prayer and allowed for the filing of the supplementary record of appeal. With due respect, that is not the position in the present appeal. As correctly contended by Mr. Ngole, in the present appeal there was no omission as insinuated. Instead, there is a letter on page 172 of the record of appeal addressed to the Registrar of this Court dated 14th December, 2020 requesting to be supplied with copies of impugned proceedings.

Evidently, the records did not reflect that service of the said letter was effected on the respondent. We are saying so, due to the fact that

the letter found on page 172 of the record of appeal was neither signed by the respondent or their legally authorized representative or advocates nor stamped with official stamps of the law firm representing the respondents. Such omission has two effects: **one**, it violates Rule 90 (3) of the Rules and **two**, it denies the appellant the liberty to rely on period excluded under Rule 90 (1) of the Rules which warrants issuance of the valid certificate of delay. There is a long list of our decisions on the point such as; **Elly Mwambungu & Another v. Tanzania Buildings Agency & 2 Others**, Civil Appeal No. 214 of 2020, in which other cases were cited including **Augustino Mkalimoto (As Administrator of Estate of the Late Miamsitembo Mkalimoto) v. Village Schools of Tanzania & 2 Others**, Civil Appeal No. 154 of 2019 and **Filon Felician Kwesiga v. Board of Trustees of NSSF**, Civil Appeal No. 136 of 2020 (all unreported), to name a few.

The case of **Fatma Karume** (supra) referred to us by Mr. Shayo, though relevant on entreating the overriding objective principle, it is not apposite in the context of the present appeal. We also had an opportunity of canvassing through **David Joseph Mahende's** case

(supra), whose facts are again distinguishable. What was before the Single Justice was an application for extension of time in terms of Rule 10 of the Rules, which upon grant would have allowed the applicant to file the missing documents. The application could not sail through for two reasons: **one**, such application is usually determined by the Court and not a Single Justice, and **two**, the application to file a supplementary record of appeal so as to include the missing or omitted documents was to be made under Rules 96 (6) and 96 (7) of the Rules and not otherwise. The situations exhibited in the two cases are thus completely different to the one before us.

We have been consistent in our previous decisions that when there is a concession of preliminary point of objection its effect is to struck out the appeal or application. More so, in the present case the allegedly missing document complaint was unfounded, as the appellant attempted to add a new document in terms of Rules 96 (6) and 96 (7) of the Rules, which we do not think augur well with the dictates of the law.

For the aforesaid reasons, we firmly find the invitation by Mr. Shayo to invoke the overriding objective principle and allow the appellant

to file a supplementary record of appeal which will include an affidavit proving service on the respondent of the letter to the Registrar dated 14th December, 2020, is misplaced and thus declined.

For the foregoing, we uphold the preliminary point of objection raised and proceed to struck out the appeal for being incompetent with costs. It is so ordered.

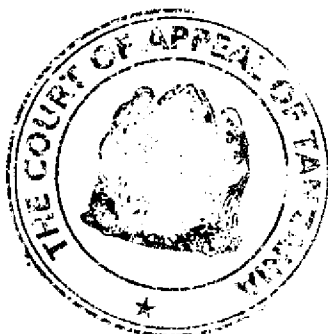
DATED at DAR ES SALAAM this 17th day of October, 2023.


B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 18th day of October, 2023 in the presence of Mr. Gabriel Aloyce Munishi, learned counsel for the Appellant and Ms. Jackline Mruma, learned counsel for the Respondents, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL