

**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**(CORAM: MKUYE J.A., KIHWELO, J.A., And MGEYEKWA, J.A.)**

**CIVIL APPEAL NO. 415 OF 2020**

**EDWARD JAPHET MBANGALA ..... 1<sup>st</sup> APPELLANT**

**EDWIN CASSIAN ..... 2<sup>nd</sup> APPELLANT**

**VERSUS**

**TENENDE MWAKAGILE ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
at Iringa)**

**(Shangali, J)**

**dated the 11<sup>th</sup> November, 2016**

**in**

**Land Appeal No. 08 of 2015**

**.....**

**RULING OF THE COURT**

8<sup>th</sup> & 15<sup>th</sup> December, 2023

**MGEYEKWA, J.A.**

In the High Court of Tanzania (Land Division), Tenende Mwakagile, the respondent, instituted a suit against Edward Japhet Mbangala and Edwin Cassian, the appellants, over ownership of Plots No. 337 and 338 Block "Z" (the suit land) situated at Mjimwema area within Njombe Region. The sequence of events leading to the instant appeal can be summarized from the record of appeal as follows: The original owner of the suit land was the late Yoram Japhet Mbangala. After his demise Jonathan Japhet Mbangala

was appointed as an administrator of the estate of the late Yoram Japhet Mbangala. Unfortunately, the said administrator passed away before executing his duties. Later, Janeth Yoram Mbangala, the wife of the late Yoram Japhet Mbangala sold the suit land to the respondent. It turned out that the first appellant, the purported administrator of the estate of the late Yoram Japhet Mbangala sold the suit land to the 2<sup>nd</sup> appellant. The respondent after noting that the 2<sup>nd</sup> respondent is in the process of developing the suit land, lodged a suit before the District Land and Housing Tribunal (the DLHT) for Njombe at Njombe. At the height of the trial, the DLHT found that the 2<sup>nd</sup> appellant was the legal owner of the suit land. In the result, the suit filed by the respondent was dismissed with costs.

Aggrieved, the respondent challenged the DLHT decision before the High Court at Iringa (Shangali, J.) vide Land Appeal No. 9 of 2013 which proceeded *ex parte* against the appellants. In the *ex parte* judgment, the learned High Court judge did not agree with the DLHT's findings, hence, overturned the decision of the DLHT, and declared the respondent the lawful owner of the suit land.

Undeterred, the appellants unsuccessfully lodged a Miscellaneous Land Appeal No. 08 of 2015 at the High Court to set aside the *ex parte* judgment of the High Court.

The appellants were aggrieved by the High Court's decision hence this appeal. In their memorandum of appeal, they raised six (6) grounds of appeal. However, for the reasons which will be apparent shortly, we deem appropriate not to reproduce them.

When the matter was called on for hearing, Mr. Jally Mongo, learned advocate who was holding brief for Mr. Erick Nyato, learned advocate appeared for the respondent. The second appellant was not in attendance but the notice of hearing shows that he was duly served on 21<sup>st</sup> November, 2023 at Njombe, we, thus, proceeded with hearing *ex parte* against him.

Concerning the first appellant, Mr. Mongo informed the Court that he passed away on 25<sup>th</sup> August, 2020 and the Court on 25<sup>th</sup> October, 2022 ordered any interested party to join the appeal as a legal representative of the late Edward Japhet Mbangala. However, it appears that nothing has been done. He thus prayed under rule 105(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to mark his appeal to have abated which prayer was granted and we marked the first appellant's appeal abated under the said rule.

Before the hearing began in earnest, we wanted to ascertain ourselves from Mr. Mongo, whether or not the appeal, in its present form, is properly

before the Court. He seemed to agree that the appeal before us was incompetent.

In his erudite submission, Mr. Mongo was brief and focused. At the outset, he submitted that the instant appeal is incompetent before the Court for two reasons. First, the appellants did not serve the notice of appeal on the respondent within fourteen (14) days in terms of rule 84(1) of the Rules. Second, although the appellant wrote a letter to the Deputy Registrar of the High Court requesting to be supplied with copy of the High Court proceedings, again, he did not serve the same on the respondent. It was his view that, failure to do so rendered the appeal incompetent.

Mr. Mongo further submitted that failing to serve the respondent with the said copies rendered the appeal before us out of time in terms of rule 90(1) of the Rules. He clarified that, the impugned ruling of the High Court was delivered on 11<sup>th</sup> November, 2016 and the appellants lodged the notice of appeal on 16<sup>th</sup> November, 2016. In this regard, Mr. Mongo submitted that in terms of rule 90(1) of the Rules, the appellants were required to lodge the instant appeal within 60 days after the delivery of the impugned ruling. However, the appellants lodged the instant appeal on 20<sup>th</sup> May, 2020 which is more than three (3) years from the date when the appellants lodged the notice of appeal.

On the strength of the above submission, Mr. Mongo asserted that the pointed-out defects rendered the appeal incompetent and thus liable to be struck out. Accordingly, he prayed that the matter be struck out.

We have duly considered the submissions made by the learned counsel for the respondent. As correctly submitted by Mr. Mongo, the impugned ruling of the High Court was delivered on 11<sup>th</sup> November, 2016 and the notice of appeal was lodged on 16<sup>th</sup> November, 2016 which was within the prescribed period. However, the same was not served upon the respondent as prescribed under rule 84(1) of the Rules. For ease of reference, we find it apposite to cite it in extenso thus:

*" 84(1) An intended appellant shall, before or within fourteen days after lodging a notice of appeal serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex-parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court".*

In the light of the above provision of law, the appellant had the duty to serve a copy of the notice of appeal on the persons who seemed to be directly affected. In the case at hand, it is indisputable that the appellants did not serve the said copy to the respondent within fourteen (14) days from the date when the notice of appeal was lodged. Thus, there is no gainsaying

that the appellants contravened the provisions of Rule 84(1) of the Rules, the effect of which is to render the appeal incompetent.

We are also in accord with the learned counsel for the respondent that the appellants wrote a letter to the Deputy Registrar of the High Court requesting to be supplied with a copy of the High Court proceedings, however, he did not serve the same on the respondent. This requirement is articulated in rule 90(3) of the Rules.

As alluded to above, in reckoning days when the appellants lodged a notice of appeal on 16<sup>th</sup> November, 2016 after the impugned ruling was delivered on 11<sup>th</sup> November, 2016 which was within time, the appellants were required to institute the appeal within 60 days from the date they lodged the notice of appeal in terms of rule 90(1) of the Court of Appeal Rules. For the sake of clarity, we find it apposite to cite it in extenso thus:

*"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.***

The above-cited law makes it mandatory for an appeal from the High Court to the Court to be lodged within sixty (60) days counting from the day when the notice of appeal was lodged. Except where an application requesting for a copy of proceedings in the High Court has been made within thirty (30) days of the date of decision against which it is desired to appeal, there shall be an exclusion of time spent in preparation and delivery of that copy to the appellants as may be certified by the Registrar of the High Court. However, the exception provided under sub-rule (1) of Rule 90 of the Rules is subject to the condition that a copy of the said letter must be served on the respondent. This is provided under Rule 90(3) of the Rules in the following terms:

***"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]***

In the instant appeal, though the appellants vide a letter dated 16<sup>th</sup> November, 2016 requested from Deputy Registrar of the High Court of Tanzania at Iringa to be supplied with a copy of proceedings, a certified copy of the ruling, and a decree in Misc. Land Appeal No. 08 of 2015, we have perused the record of appeal and noted that the letter which was intended to be served on the respondent, does not indicate if the same was served on him. This was in contravention of rule 90(3) of the Rules, thus, the appellants cannot benefit from the exclusion of time under rule 90(1) of the Rules. In **Juma Busiya v. Zonal Manager, South Tanzania Corporation**, Civil Appeal No. 273 of 2020 we held that:

*"In case the appellant fails to lodge an appeal within that time frame, like the scenario obtaining in the present appeal, unless, the letter requesting for the necessary documents to appeal was lodged with the High Court in thirty (30) days of the decision as per the proviso to Rule 90(1), and served on the respondent, the appellant cannot seek to benefit from the exclusion of time beyond sixty (60) days unless the letter in question is served on the respondent as per Rule 90(3) above."*

In light of the above authority, it is clear that, the omission to serve the letter to the respondent could not benefit the appellants from the exclusion of time beyond the sixty (60) days within which an appeal was to



be lodged. See also the cases of **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. Since the appellants did not benefit from the exclusion for failure to serve the respondent with the copy of said letter, henceforth, the period to lodge an appeal started to run from the date when the appellants lodged the notice of appeal. The instant appeal, speaks for itself that the notice of appeal was lodged on 16<sup>th</sup> November, 2016 and the instant appeal was filed on 20<sup>th</sup> May, 2020. Reckoned from 16<sup>th</sup> November, 2016 when the appellants lodged the notice of appeal to 20<sup>th</sup> May, 2020 when the appellants instituted the instant appeal, there is a delay of more than three (3) years.

In our respectful opinion, we hold that the instant appeal which was lodged on 20<sup>th</sup> May, 2020 in violation of rule 90(1) of the Rules is, undisputedly, time barred. See **Victoria Mbowe v. Christopher Shafurael Mbowe & 10 Another**, Civil Appeal No. 115 of 2012, [2016] TZCA 847 (22 July 2016, TanzLII) and **National Bank of Commerce Limited and Steven R. K. Shiletwa** (supra).

In the upshot, we proceed to strike out the incompetent appeal with no orders as to costs.

It is so ordered.

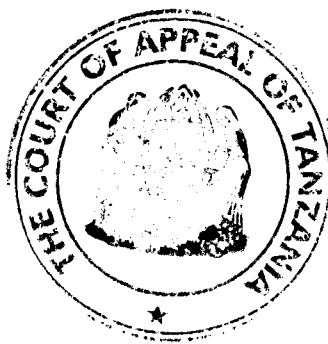
**DATED at IRINGA** this 14<sup>th</sup> day of December, 2023.

R. K. MKUYE  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

The Ruling delivered this 15<sup>th</sup> day of December, 2023 in the absence of the 1<sup>st</sup> & 2<sup>nd</sup> Appellants and in presence of Mr. Erick Nyato, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR  
COURT OF APPEAL**