

**THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: RAMADHANI, J. A.; NSEKELA, J. A.; And KAJI, J. A.)

CIVIL APPEAL NO. 16 OF 2004

BETWEEN

**THE BOARD OF TRUSTEES OF THE
NATIONAL SOCIAL SECURITY FUND.....APPELLANT**

AND

NEW KILIMANJARO BAZAAR LIMITED.....RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of
Tanzania at Moshi)**

(Mchome, J.)

dated the 27th day of January , 2003

in

Civil Case No. 1 of 1999

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R U L I N G

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NSEKELA, J. A.:

In this appeal, the appellant the Board of Trustees of the National Social Security Fund, is appealing against the decision of the

High Court (Mchome, J.) in High Court (Moshi District Registry) Civil Case No. 1 of 1999. When the appeal was due for hearing, Mr. Mwaluko, learned advocate for the respondent, raised a preliminary objection to the effect that –

“The Certificate of Delay at page 453 of the Record of Appeal is incorrect, improper and erroneously certified. Therefore the appeal is time – barred and liable to be dismissed with costs.”

Not to be outwitted, Prof. J. T. Mwaikusa, learned advocate for the appellant also filed a preliminary objection of his own seeking the dismissal of the respondent’s objection. After a brief discussion between the Bar and the Bench, Prof. Mwaikusa saw the futility of trying to pre – empt hearing of the objection already before the Court.

The certificate which is being challenged by the learned advocate for the respondent reads –

“This is to certify that the period from 10 February, 2003 when Mkono & Co. Advocates, applied for copies of proceedings, judgment and decree and lodged notice of appeal to the Court of Appeal to 23 May 2003 when a copy of the final part of the proceedings was obtained from the Court, is to be excluded from the computation of time within which to appeal against the decision in this case as the said period was required for the preparation and delivery of the said proceedings, judgment and decree.”

Relying on this certificate, the learned advocates for the appellant filed the appeal on the 21.7.2003. If reckoned from the 23.5.2003 as certified by the Registrar, the appeal was filed on time.

However, Mr. Mwaluko thinks otherwise. The learned advocate forcefully submitted that this certificate is incorrect because it states that a copy of the final part of the proceedings was obtained from the Court on the 23.5.2003 when in fact none of those proceedings or any part thereof were delivered to the appellants.

On the 10.2.2003 Prof. Mwaikusa, wrote a letter to the Registrar requesting for certified copies of proceedings; judgment; extracted decree and certificate under Rule 83 (1) of the Court Rules. This was followed by a reminder dated 3rd June, 2003. This is an important letter and we take the liberty to quote it in extenso. It reads:

"We wish to refer your Honour to the case cited in the captioned (sic) above and our letter to you dated 10th February 2003 similarly titled and referring to the same subject.

In that letter we requested your Honour to supply us with copies of the proceedings as well as the judgment and decree in the cited case, all of which we needed for purposes of lodging an appeal. We also asked for the Certificate of Delay under Rule 83 (1) of the Tanzania Court of Appeal Rules.

Unfortunately our letter has remained unanswered to date. All the same, we wish to confirm that on Friday 23rd May, 2003 our Prof. J. T. Mwaikusa was able to obtain from Civil registry a copy of the final part of the proceedings which until then we had not been given. All that now remains unobtained in our list of requested items is the certificate under r. 83 (1).

In view of that, we would humbly request your Honour to supply us with the said Certificate specifically specifying that the period from 10th February, 2003 when the judgment was delivered and the Notice of Appeal was filed, to 23rd May, 2003 when we obtained the completed record is to be excluded from the computation of time as it was required for the preparation and delivery of the proceedings."

Mr. Mwaluko complained that according to the tenor of this letter, the certificate of delay was issued at the instance of the appellant's advocate. He was of the view that it was the duty of the Registrar to make the necessary computation of the period to be excluded in terms of Rule 83 (1) and then issue a certificate to that effect. The learned advocate added that the certificate was incorrect since on the 11.10.2004 when he made an official search of the court file, there was no copy of the final proceedings that was given to

Prof. Mwaikusa. The required court fees had not been paid and so the documents in question could not have been delivered and collected. Consequently, the exclusion period under Rule 83 (1) was not at that date available to the appellant. The certificate was therefore erroneously certified.

We granted to Prof. Mwaikusa a short adjournment to enable him to peruse the court file. At the resumed hearing, Prof. Mwaikusa with deep conviction, submitted that the last part of the proceedings were collected on the 23.5.2003, but he candidly admitted that court fees had not been paid as required by law. However, he was of the settled view that the appeal was not filed out of time. He appeared to be throwing the blame on the Registrar for not supplying the remaining part of the record and not computing the court fees. The learned advocate implored the Court not to strike out the appeal since this will be tantamount to punishing the appellant for following up the record and reminding the Registrar to issue the certificate.

It is not in dispute that the learned advocates for the appellant on the 10.2.2003 made an application to the Registrar for certified documents as enumerated therein. This was followed by a reminder dated the 3.6.2003. These two letters did not evince a response from the Registrar. Instead, Prof. Mwaikusa in his second letter informed the Registrar that –

“All the same, we wish to confirm that on Friday 23rd May, 2003 our Prof. J. T. Mwaikusa was able to obtain from Civil registry a copy of the final part of the proceedings which until then we had not been given.”

It has now turned out that there was no payment of court fees. This means that there was no official delivery of the documents to the appellants on the 23.5.2003. There should have been, in our view, an official communication from the Registrar to the learned advocates for the appellant that the documents requested in their

letter dated 10.2.2003 were now ready for collection, and after that the Registrar would issue a certificate in terms of Rule 83 (1). We deprecate what appears to be the clandestine obtaining of court documents and we cannot give our blessing to such conduct. We must discourage it at any cost. With respect, we subscribe to the observations made by the late Lugakingira, J. A. in Civil Application No. 100 of 1999 between Mohsin Mohamed Taki Abdallah and Tariq Mirza and 4 Others (*unreported*) that it is the duty of the High Court to supply documents applied for and supply them promptly and that parties should exercise diligence in the conduct of their cases. The Registrar did not respond to the letter dated the 10.2.2003. Nor did the Registrar inform the learned advocates for the appellant that the copy for the last part of the proceedings was ready for collection. The learned advocates it would seem informally obtained the said copy from the court as is evident from their letter of 3.6.2003 confirming having obtained the missing documents from the Court, not that it was given to them! We say informally because Prof. Mwaikusa admitted that no court fees was paid when he obtained the document on the 23.5.2003. This date has assumed importance

because the limitation period would start to run from this date in filing the appeal under Rule 83 (1). In the case of D. T. Dobie & Company (Tanzania) Ltd. v. N. B. Mwaitebele (1992) TLR 152 this Court at page 154 made the following observations:-

"We have to point out at once that the Registrar's certificate is not and cannot be, beyond question. It is true that the Registrar has power to issue the certificate under the proviso to rule 83 (1) of the Court of Appeal Rules. But we are quite clear in our minds that if there are grounds for thinking that the certificate is incorrect or otherwise improper, that would justify interfering with it."

This takes us to Section 122 of the Evidence Act, 1967 which provides –

"122. The Court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

This provision deals with presumptions of fact and therefore the court may presume that judicial and official acts have been regularly performed. In the case at hand, there is a presumption that the Registrar issued a proper certificate under Rule 83 (1). In the case of The Commissioner of Income Tax v. C. W. Armstrong (1963) E. A. 505, Newbold, J. A. stated at page 513 that –

"This section authorizes the presumption that an official act, which is proved to have been performed, has been performed regularly; and

this is a presumption which is not lightly overridden." (*emphasis supplied*).

The presumption under section 122 of the Evidence Act, 1967 is rebuttable; it is not a conclusive presumption. The words "may infer" in the section leave it to the court to make or not to make the presumption depending upon the circumstances of the particular case. (see: Civil Reference No. 14 of 1997 between African Marble Company Limited v. Tanzania Saruji Corporation (*unreported*). A question we ask ourselves, is this a proper case in which to disregard a certificate given by the Registrar under Rule 83 (1) of the Court Rules?

We know that the notice of appeal was filed on the 10.2.2003 and so the appeal had to be instituted within sixty days of the notice of appeal. Since, this was not the case, it was essential for the appellant to rely on the exception to Rule 83 (1) which is to the effect that in computing the sixty days, the time taken to obtain a copy of the proceedings from the Registrar shall be excluded as

certified by the Registrar. We hope we have amply demonstrated that the certificate issued by the Registrar was incorrect. It was misleading since by the 23.5.2003, there was no evidence that part of the proceedings or for that matter the documents the appellant had requested from the Registrar had been supplied to him. What the Registrar's certificate purported to certify was factually untrue.

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 cause of advancing justice as Prof. Mwaikusa so eloquently urged us to do.

In the result, we uphold the preliminary objection and strike out with costs the certificate of delay dated the 14.7.2003.

DATED at ARUSHA this 27th day of October, 2004.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. M. RUMANYIKA
DEPUTY REGISTRAR