IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MKUYE, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CIVIL APPEAL NO. 59 OF 2020

HAMISI MDIDA ..... 1ST APPELLANT
SAIDI MBOGO ..... 2ND APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF
ISLAMIC FOUNDATION ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Tabora]

(Mallaba, J.)

Dated the 26th day of July, 2016
in
Land Appeal No. 41 of 2015

.....

RULING OF THE COURT

8th & 17th December, 2020

WAMBALI, J.A.:

The respondent, the Registered Trustees of Islamic Foundation, sued the appellants, Hamis Mdida and Said Mbogo in Land Application No. 41 of 2015 before the District Land and Housing Tribunal for Kigoma (the DLHT). The major prayer fronted by the respondent was intended to urge the DLHT to order the appellants to vacate from the suit premises and demolish the structure that they unlawfully erected. At the end of the trial the DLHT dismissed the respondent's application for lacking legal

foundation. The DLHT went a step further since in what it described as an alternative finding, it declared that Answar Sunna Gungu was the lawful owner of the Mosque and all its properties. It further decreed that the respondent was only a sponsor of the construction of the said Mosque.

The DHLT decision seriously aggrieved the respondent who subsequently lodged Land Appeal No. 41 of 2015 before the High Court of Tanzania at Tabora. It is noteworthy that in its decision which was delivered on 26th July, 2016 the High Court allowed the respondent's appeal. Consequently, the decision of the DHLT was reversed and the respondent was declared the lawful owner of the Masjid Dubai Mosque at Gungu.

As it were, the appellants were not satisfied with the decision of the High Court as hardly after one day, that is, on 27th July 2016 they lodged a notice of appeal to this Court. Noteworthy, on 26th July, 2016 soon after the judgment was delivered the appellants' advocate wrote a letter to the Registrar of the High Court requesting to be provided with certified copies of proceedings in respect of Land Appeal No. 41 of 2015.

On the other hand, as the appellants could not have lodged an appeal to this Court without obtaining leave of the High Court, from 15th August, 2016 to 4th November 2019, they lodged several Miscellaneous Civil Applications both before the High Court and this Court seeking to be granted leave to appeal. Unfortunately, they were not successful. Ultimately, guided by the law, they successfully appealed to this Court in Civil Appeal No. 232 of 2018 against the decision of the High Court (Rumanyika, J.) in Miscellaneous Land Application No. 75 of 2016 in which leave to appeal was refused.

Notably, according to the record of appeal, up to the time the Court of Appeal delivered its decision on 4th November, 2019 in Civil Appeal No. 232 of 2018, there is no indication that the Registrar of the High Court had notified the appellants that the proceedings in respect of Land Appeal No. 41 of 2015 were ready for collection. Indeed, there is no indication that a certificate of delay was issued to that effect.

To this end, on 26th November, 2019, the learned advocate for the appellants wrote a letter to the Registrar of the High Court requesting to be issued with a certificate of delay in terms of Rule 90 (1) of the Tanzania

Court of Appeal Rules, 2009 (the Rules) concerning the period from 26th July, 2016 when they initially applied for certified copies of proceedings of the High Court until 4th November, 2019 when leave was granted by the Court of Appeal. More importantly, in that letter the learned advocate did not categorically state whether the appellants had been notified to collect the copy of proceedings or that the same had been delivered as required.

In response to the appellants' counsel letter, the Deputy Registrar of the High Court issued the following certificate of delay, which for the purpose of this ruling, we deem it appropriate to reproduce the relevant part hereunder:-

> ***"CERTIFICATE OF DELAY***
> *(Made under Rule 90 (1) and (2) of the Tanzania Court of Appeal Rules, 2009)*
> *This is to certify that Musa Kassim Advocate for the respondents herein, applied in writing letter for certified copies of proceedings, Judgment, Decree, Exhibits and all necessary Documents for appeal to the Court of Appeal of Tanzania in respect of Land Appeal No. 41 of 2015 vide letter Ref. No. RMK/Misc/16/72 dated 26th July, 2016.*

WHEREAS *Leave to appeal to the Court of Appeal was granted by the Court of Appeal on 1st November, 2019 through Civil Appeal No. 232/2018 and the Judgment were supplied to the Respondents in 1st November, 2019. There shall be in computing time within which the appeal is to be instituted, be excluded such time from 27th July, 2016 when the Notice of Appeal was lodged hand in hand with a letter requesting for certified copies of proceedings, Judgment, Decree Exhibits and all necessary Documents until 1st November, 2019 when the documents were supplied.*

Dated at Tabora this 10th December, 2019

B. R. NYAKI

DEPUTY REGISTRAR

TABORA"

Acting on the reproduced certificate of delay above, the appellants promptly on 17th December, 2019 lodged the present appeal.

When the appeal was called on for hearing on 8th December, 2020, Mr. Mussa Kassim learned counsel entered appearance for the appellants, whereas, Mr. Method R. G. Kabuguzi also learned counsel entered appearance for the respondent. Before we commenced the hearing of the

appeal, we inquired from the counsel for the parties whether the certificate of delay issued by the Registrar of the High Court is consistent with the provisions of the law to make this appeal to have been lodged within the prescribed period of sixty days.

To this question, Mr. Kassim initially sought to argue that the certificate of delay is not defective as it was issued in accordance with the provisions of Rule 90(1) of the Rules. However, when he was further prompted as to whether the Registrar of the High Court properly excluded the total number of day that covered the period in which the appellants were involved in applications and an appeal before the Court of Appeal, he readily conceded that the certificate of delay is defective to extent of making the appeal incompetent. He however hesitated to conclude that the present appeal is time barred. Nevertheless, he prayed that in view of the defect in the certificate of delay the appeal be struck out with no order as to costs.

On his part, Mr. Kabuguzi graciously welcomed the concession of Mr. Kassim on the incompetence of the appeal, but strongly pressed us to grant the respondent costs.

We have carefully examined the certificate of delay issued by the Deputy Registrar of the High Court and we are settled that it is fatally defective. Indeed, we have no hesitation to state that the defects go to the root of the appeal. We hold this unshaken stance because; firstly, the certificate of delay does not reflect the actual position as to when the appellants were notified that the proceedings they requested on 26th July, 2016 were ready for collection. This is contrary to the provisions of Rule 90 of the Rules read together with Form L provided in the First Schedule to the Rules. The said provisions of Rule 90 (1) of the Rules and Form L mandatorily require the Registrar of the High Court to exclude from computation of time the days of the date the intended appellant applied to be supplied with the certified copy of proceedings of the High Court to the date of notification that the said proceedings are ready for collection. The Registrar of the High Court is therefore, under the Rules required to indicate in the certificate of delay that a certain total number of days should be excluded in computing the time within which the appeal is to be instituted as having been required for the preparation and delivery of that copy to the appellant.

We must emphasize at this juncture, that the Registrar of the High Court is bound to notify the appellant that the copy of the requested proceedings in the High Court are ready for collection in order to comply with the provisions of Rule 90 (1) of the Rules and Form L to the First Schedule to the Rules. For the sake of clarity, we deem it prudent to reproduce the provisions of Rule 90 (1) and Form L 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 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".

FORM L

CERTIFICATE OF DELAY

(Made under Rules 4, 45,45A and 90 (1)

This is to certify that the period from ..... when the appellant requested for copies of proceedings, judgment, ruling and decree or order in this matter up to ..... ***when the appellant was notified that the documents were ready for collection****, a total number of ... days should be excluded in computing the time for instituting the appeal in the Court of Appeal.*

GIVEN under my hand and the seal of the Court this ..... day of ..... 20.....

REGISTRAR"

[Emphasis added.]

We need to emphasize that the Registrar of the High Court is required to comply fully with the reproduced provisions of Rule 90(1) and Form L when preparing and issuing the certificate of delay to the respective appellant. He must state in very clear terms that the days to be excluded in computing the period of limitation are those from the time when the appellant requested for the copies of proceedings to the date he

notified him that the documents were read for collection. Moreover, the Registrar of the High Court should only exclude a total number of days pertaining to the preparation and delivery of the copy of proceedings in the High Court. According to the Rules, the Registrar of the High Court cannot therefore purport to also exclude the days in which the proceedings relate to the applications or appeals handled by the Court of Appeal.

In the present appeal, we note that the Deputy Registrar of the High Court indicated that the date of exclusion started on 27th July, 2016 when the appellant applied for a copy of the proceedings in the High Court to 1st November, 2019 when the same were supplied. Unfortunately, he erroneously went further to exclude the days covering the period in which the appellants were pursuing several Civil Applications and Civil Appeal No. 232 of 2018 in the Court of Appeal. It is also noteworthy that the Deputy Registrar of the High Court erroneously, with respect, indicated in the certificate of delay that the proceedings in the Court of Appeal in respect of Civil Appeal No. 232 of 2018 was delivered on 1st November, 2019 and that the proceedings were supplied to the appellants on the same date. This is

contrary to the record of appeal which indicates at pages 326 and 343 respectively that the said judgment was delivered on 4th November, 2019.

Incidentally, as we have alluded to above, the certificate of delay does not indicate the date when the Deputy Registrar of the High Court informed the appellants that the copies of proceedings were ready for collection. According to the Rules, the date of notification was supposed to be the basis of calculating a total number of days to be excluded from the date the proceedings were requested by the appellants on 26th July, 2016 and not 27th July, 2016. We thus wish to urge the Registrar of the High Court to always indicate in the certificate of delay a total number of days from the date the request is made to the date of notification to the appellant that the documents were ready for collection. Unfortunately, in the present appeal, as we have alluded to above, the Deputy Registrar of the High Court did not state when the appellants were notified that the requested copy of proceedings were ready for collection concerning the proceedings in the High Court.

Secondly, the certificate of delay is fatally defective because the Deputy Registrar of the High Court erroneously computed the period within

which the appeal had to be instituted by also excluding the days concerning the proceedings when the parties were applying for leave to appeal before the Court of Appeal.

It must be pointed out that the Registrar of the High Court has no mandate, in terms of Rule 90 (1) of the Rules, to exclude the total number of days concerning the proceedings in the Court of Appeal. In the appeal before us, the Registrar of the High Court was only mandated to exclude the period in which the appellant was involved in the proceedings in the High Court both in Land Appeal No. 41 of 2015 and the subsequent proceedings involving applications for extension of time and leave to appeal to the Court.

On the other hand, we note that, according to page 325 of the record of appeal, the advocate for the appellants filed special form on 13/09/2018 in which he acknowledged to have collected the copy of proceedings in respect of Miscellaneous Land Appeal No. 9 of 2018. It seems to us that this was part of the last proceedings which the appellants collected from the Deputy Registrar of the High Court. Arguably, if these were the last proceedings to be collected by the appellants, the mandate of the Deputy

Registrar of the High Court thus, was to exclude the period from 26th July, 2016 to 13th September, 2018 when the advocate for the appellants was supplied with the respective copy of those proceedings.

Nevertheless, in the instant appeal even if the total number of days could have been excluded from 26th July, 2016 to 13th September, 2018, when the appellants' counsel collected the documents in respect of Miscellaneous Land Appeal No.9 of 2018 stated above, the appeal would still be time barred. This is so because the period from 14th September, 2018 to 17th December, 2019 when the appeal was lodged would remain unaccounted for by the appellants.

More importantly, even the period from 14th September, 2018 to 1st November, 2019 which was purportedly excluded in the certificate, was, with respect, not within the knowledge and mandate of the Deputy Registrar of the High Court. Besides, the Deputy Registrar of the High Court could not have purported, as he did, to be the one who supplied the appellants with a certified copy of proceedings in respect of applications and an appeal before the Court of Appeal.

In the circumstances, the option which was at the disposal of the appellants by then was to apply before the Court of Appeal for extension of time within which to lodge the memorandum of appeal and record of appeal as they could not benefit or take refuge under the provisions of Rule 90(1) of the Rules.

Basically, we are entitled to emphasize that a valid certificate of delay is one issued by the Registrar of the High Court after the preparation, notification and delivery of the requested copy of the proceedings of the High Court to the appellant.

Moreover, such certificate of delay must indicate and take into account, among other things, the exact number of days to be excluded from the date the proceedings are requested to the date when the appellant is notified that the respective copies are ready for collection.

It is instructive to note that in terms of the Rules, the Registrar of the High Court is only empowered to issue two kinds of certificates of delay concerning the proceedings in the High Court, namely, under Rules 90 (1), 45 (b) and 45A (2) of the Rules. The certificate of delay issued under Rule 90(1) of the Rules concern proceedings in the High Court pertaining to the

decision sought to be challenged on appeal and incidental proceedings being the subject of the said decision. On the other hand, the certificate of delay issued in terms of Rules 45 (b) and 45A (2) relates to the proceedings in the High Court concerning application for leave to appeal or for certificate of point of law and application for extension of time where such applications respectively are refused by the High Court. For clarity, Rules 45 (b) and 45A (2) provide as follows:-

> *"45 (b) - Where an appeal lies with the leave of the Court, application for leave shall be made in the manner prescribed in rules 49 and 50 and within fourteen days of the decision against which it is desired to appeal or, where the application for leave has been made to the High Court and refused, within fourteen days of that refusal;*
>
> > *provided that, in computing the time within which to lodged an application for leave in the Court of Appeal under paragraph (b), there shall be excluded such time as may be certified by the Registrar of the High Court as having been required for preparation of a copy of the decision subject to the provisions of rule 49 (3)".*

"45A (2) In computing the time within which to lodge an application under this rule, there shall be excluded such time as may be certified by the Registrar of the High Court as having been required for preparation of a copy of the decision and the order".

It is in this regard that the provision of Rule 90 (2) of the Rules provides that:-

"The certificate of delay under rules 45, 45A and 90 (1) shall be substantially in the Form L as specified in the First Schedule to these Rules and shall apply mutatis mutandis".

Based on our deliberation above, we are settled that the certificate of delay issued by the Deputy Registrar contains defects which cannot be rectified for the purpose of determining the timeliness of the appeal before us. We are further settled that, as it is, the certificate of delay in the present appeal cannot be relied upon so as to benefit the appellant in terms of Rule 90 (1) and (2) of the Rules in excluding the time within which the appeal ought to have been filed in Court (see the decision of the Court in **Omary Shabani S. Nyambu v. The Permanent Secretary of**

Ministry of Defence and Two Others, Civil Appeal No.105 of 2015, unreported).

We are however aware of the current jurisprudence of the Court to the effect that a defective certificate of delay can be rectified by the Registrar of the High Court upon a request by the appellant depending on the nature of the error or defect. For this position see for instance the decisions in **Eco Bank Tanzania Limited v. Future Trading Company Limited**, Civil Appeal No. 82 of 2019 and **M/S Flycatcher Safaris Ltd v. 1. The Hon. Minister for Lands and Human Settlements Development 2. The Hon. Attorney General**, Civil Appeal No. 142 of 2017 (both unreported), among others.

However, in the present appeal considering the nature of the defects in the certificate of delay, even if we order the appellant to approach the Registrar of the High Court to apply for the rectification of the said certificate of delay, no purpose will be saved as the appeal would still be time barred. As we have amply demonstrated above, the period from 14th September, 2018 to 17th December, 2019 cannot be accounted for by the Deputy Registrar of the High Court. This is because it is not within his

mandate to exclude the period in which the appellants were pursuing the proceedings in the Court of Appeal.

To this end, we urge the Registrar of the High Court to ensure that the certificate of delay which is issued to a party is free from errors. As we plainly stated in **Kantibhai Patel v. Dulyabhai F. Ministry** [2003] T.L.R. 437:-

> *"The very nature of anything called a certificate requires that it be free from error and should an error crop into it, the certificate is vitiated. It cannot be used for any other purpose because it is not better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over; it goes to the very root of the document. You cannot sever the erroneous part from it and expect the remaining part to be perfect certificate; you can only amend it or replace it altogether as by law provides".*

In the event, considering the position of the law we have discussed above, in the present appeal, we have no hesitation to state that it is no wonder that both counsel for the parties agreed that the certificate of delay is fatally defective. There is no doubt that the pointed out defects render

the appeal incompetent for being lodged out of the prescribed time of sixty days contrary to the provisions of Rule 90 (1) of the Rules.

Consequently, we strike out the appeal. However, considering the circumstances and nature of this appeal, we respectively decline the invitation of Mr. Kabuguzi to grant costs to the respondent. On the contrary, we order that parties shall bear their respective costs.

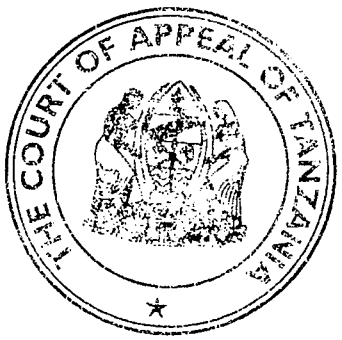
DATED at **TABORA** this 16th day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 17th day of December, 2020 in the presence of Mr. Musa Kassim, Counsel for the Appellant and Mr. Amos Galise holding brief of Mr. Method Kabuguzi, Counsel for the Respondents, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL