IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 273 OF 2020

JUMA BUSIYA.....APPELLANT

VERSUS

ZONAL MANAGER, SOUTH TANZANIA POSTAL CORPORATION..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya)

(Levira, J.)

dated the 3rd day of March, 2016
in
Mics. Civil Application No. 20 of 2014

.....

RULING OF THE COURT

24th & 27th September 2021

GALEBA, J.A.:

Juma Busiya, the appellant had been employed by the respondent, but was terminated on 10th October 1994. There was an appeal to the Labour Conciliation Board, but relevant to this ruling is that on 26th February 1996 the Minister responsible for labour ordered his reinstatement under the provisions of the Security of Employment Act, No. 62 of 1964 (now repealed) (the SEA). Subsequent to the order of the Minister, there were correspondence between the parties, but believing that the order of the Minister was not complied with by the

respondent, the appellant filed Miscellaneous Civil Application No. 4 of 1998 in the Resident Magistrates' Court at Mbeya (the RM's court) to enforce the order of the Minister.

On 25th September 1998, the RM's court (Karua, SRM) (as he then was) dismissed that application on grounds that, as the respondent had complied with section 40A(5) of the SEA by paying the appellant statutory compensation, then the matter before it had no substance. This order aggrieved the appellant but his efforts and attempts to get any tangible results from the High Court had, on many occasions and for various reasons, that are however, not relevant to this appeal, failed all along from 1998 to 2014. Finally, the appellant managed to get to the High Court in 2014 but, he was already late because, as indicated above his determination was to fight the decision of the RM's court of 1998.

Following the delay of about 16 years, the appellant filed Miscellaneous Civil Application No. 20 of 2014 before the High Court, seeking for orders of extension of time within which to file an appeal challenging the order of the RM's court. The High Court, (Levira, J.), (as she then was), dismissed that application with costs on 3rd March 2016. That dismissal aggrieved the appellant and he decided to contest it by

lodging the present appeal to the Court, predicating it on two grounds of appeal, which, following what transpired after lodging the appeal, we will not be able to determine them in these proceedings.

On that very day, that is on 3rd March 2016 along with lodging a Notice of Appeal, the appellant wrote and lodged a letter with the Deputy Registrar of the High Court requesting to be supplied with the certified proceedings, the ruling and the drawn order in respect of the application which had just been dismissed by the High Court. That letter is reflected at page 161 of the record of appeal. As the letter will have a bearing on how this ruling ends, it is, appropriate, we think, to make one point in relation to it. Although the letter is shown to be copied to counsel for the respondent at that time, Mwakolo and Company Advocates, the same bears no stamp or signature or any indication from the said Mwakolo law firm confirming that indeed the letter was actually served to the law firm. We will come back to this letter at an appropriate time in this ruling.

The other issue we find to be of profound legal significance is that although the ruling of the High Court was delivered on 3rd March 2016,

the appeal itself was lodged on 2nd February 2020, without there being a certificate of delay excluding any period of time between the two dates.

At the hearing of the appeal, the appellant had the services of Mr. Justinian Mushokorwa learned advocate and the respondent was represented by Ms. Grace Lupondo assisted by Ms. Leonia Maneno and Joseph Tibaijuka, all learned State Attorneys.

At the outset, Ms. Lupondo drew our attention to the notice of preliminary objection that had been lodged under the provisions Rule 107(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), which had as well been served on Mr. Mushokorwa. The point of law raised in the said notice was to the effect that:

> *"The appeal is unmaintainable and bad in law for being preferred out of the prescribed time contrary to Rule 90(1) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended."*

Before even Ms. Lupondo could argue the objection, Mr. Mushokorwa readily conceded to the objection, that indeed the appeal was incompetent but was quick to argue that it should not be struck out as per the law, because it can be saved by Rule 96(7) of the Rules read together with Section 3A of the Appellate Jurisdiction Act, [Cap 141 R.E.

2019], (the AJA). He prayed for leave to lodge a supplementary record of appeal to include a certificate of delay which is missing in the record of appeal.

In a brief rejoinder, Ms. Lupondo submitted that Rule 96(7) of the Rules could be invoked only before lodging the notice of preliminary objection and that section 3A of the AJA is not applicable in the circumstances. She argued further that the objection raised is based on the appellant's omission to comply with Rule 90(1) and (3) of the Rules because the letter which was written to the Deputy Registrar of the High Court was not served on the respondent. With that argument we understood the learned State Attorney to mean that, even if the appellant was to be permitted to file a supplementary record of appeal including a valid certificate of delay, still, he could not rely on it to exclude any period because of the omission to serve the letter on the respondent as required by Rule 90(3) of the Rules.

On this aspect of the letter, Mr. Mushokorwa was permitted a brief opportunity to address the Court. His response was that, although the letter in the record of appeal had no indication that it was received by the respondent, he had in his hands the correct letter on which the

respondent acknowledged its receipt. He pleaded with the Court to permit him to include the letter he had in the supplementary record of appeal he had just prayed for leave to lodge in relation to the certificate of delay.

With the advantage of the submissions of counsel, we think the single issue for our determination is therefore whether the appeal is competent and properly before the Court.

We will start with the law upon which the objection was predicated, Rule 90(1) and (3) of the Rules. It provides:

> *"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.

(2) N/A

(3) 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."

In our view, the above cited law, particularly sub-Rule (1) of Rule 90 makes it mandatory for an appeal from the High Court to the Court to be lodged in sixty (60) days counting from the day that the notice of appeal was lodged. 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. That is the point that Ms. Lupondo was driving home which point we think is the right interpretation of Rule 90(1) and (3) of the Rules.

In this appeal, the omission to serve the letter denied the appellant an opportunity to rely on the exclusion of any time beyond the sixty (60) days within which an appeal was to be lodged. Thus, the appellant was duty bound to lodge an appeal sixty (60) days counting from the date of lodging the notice of appeal. However, the appeal was lodged close to 4 years later on 2nd February 2020.

Mr. Mushokorwa nonetheless, implored us to invoke the provisions of Rule 96(7) of the Rules and section 3A of the AJA in order to permit him to lodge a supplementary record to include the letter which he alleged to be in his possession. We will start with Rule 96(7) which provides as follows;

> *"(7) Where the case is called on for hearing, the Court is of opinion that document referred to in rule 96(1) and (2) is omitted from the record of appeal, it may on its own motion or upon an informal application grant leave to the appellant to lodge a supplementary record of appeal."*

With respect to Mr. Mushokorwa, the above provision may have come to his refuge only if the letter subject of this discussion would have been omitted from the record of appeal. In this case, the letter is

in the record, but there is no evidence that it was ever served on the respondent.

Ordinarily, which is the position we will adopt in a moment, where the omission to serve a letter on the respondent is proved, and the appeal is lodged after sixty (60) days after filing a notice of appeal, the appeal is time barred, see this Court's decisions in **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 (both unreported).

As for section 3A of the AJA, Mr. Mushokorwa beseeched us to invoke the Principle of Overriding Objective envisaged in that section so as to save his appeal. With due respect to learned counsel, we cannot invoke that principle. The Principle of Overriding Objective is not the ancient Greek goddess of universal remedy called Panacea, such that its objective is to fix every kind of defects and omissions by parties in courts. The principle cannot be invoked where the proceeding subject of determination of a dispute before the court was filed or lodged out time. That is so because, where a proceeding is lodged out of time the court

or forum before which it is pending, has no jurisdiction to entertain the proceeding. So, for the court to invoke any powers, not only the Principle of Overriding Objective, it must first have jurisdiction to preside over the matter. If it does not have jurisdiction to resolve a dispute or determine a matter before it, the only jurisdiction or power that court has, is to strike out the proceeding. In the case of **District Executive Director, Kilwa District Council v. Bogeta Engineering Limited**, Civil Appeal No. 37 of 2017 (unreported), this Court observed on the same subject as follows:

> *"On the other hand, before we make the final order, we wish to state that we have taken note of the prayer by Mr. Baraza that if we find, as we have found, that the appeal is time barred, we should invoke the overriding objective principle obtained in the provisions of section 3A (1) and (2) of the AJA to allow the appeal to be heard on merits. We are also aware that Mr. Stola did not make any comment on this prayer."*

Then the Court continued when refusing the prayer by Mr. Baraza:

> *"The Court cannot have jurisdiction to entertain an appeal which is time barred and no extension of time has been sought and granted. We think the issue of*

time limit is not a technicality which goes against the just determination of the case or undermines the application of the overriding objective principle contained in sections 3A (1) and (2) and 3B (1) (a) of Act No. 8 of 2018."

See also **Mandorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others**, Civil Appeal No. 66 of 2017 and **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (both unreported) where this Court observed that the principle of overriding objective cannot be applied blindly to cure every failure to comply with mandatory provisions of law. That is why we cannot agree with Mr. Mushokorwa that, although the appeal is time barred, we can invoke the overriding objective to rescue him from the lawful predicament his client's appeal is liable to suffer.

For the foregoing reasons, we think determination of only one aspect of failure to serve the letter requesting to be supplied with certified copies of the impugned ruling, drawn order and the proceedings to the respondent is sufficient to dispose of the appeal. In

the event, we uphold the preliminary objection and strike the appeal with costs.

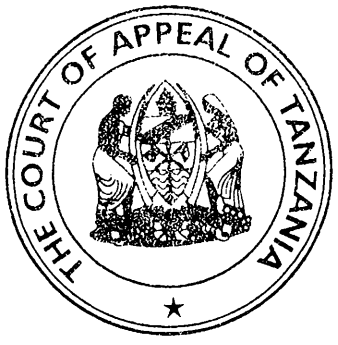
DATED at **MBEYA**, this 24th day of September, 2021

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 27th day of September, 2021 in the presence of Mr. Justinian Mushokorwa, learned counsel for the appellant and Mr. Joseph Tibaijuka, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL