IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 58 OF 2018

ARDHI UNIVERSITY .....APPELLANT
VERSUS
KIUNDO ENTERPRISES (T) LIMITED.....RESPONDENT

(Appeal from the ruling and drawn order of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Mwambegele, J.)

dated the 15th day of February 2017
in
Miscellaneous Commercial Cause No. 272 OF 2015
.....

RULING OF THE COURT

24th August & 21st September, 2021

KIHWELO, J.A.:

In this appeal, the appellant Ardhi University, is appealing against the decision of the High Court of Tanzania, Commercial Division (Mwambegele, J.) (as he then was) in Miscellaneous Commercial Cause No. 272 of 2015. The appellant got wind of that decision and the attendant orders. It was aggrieved. So, on 17th April, 2018 it lodged the present appeal through the services of FK Law Chambers, Advocates. When the appeal was due for hearing, Mr. Roman Masumbuko, learned advocate for the respondent, raised two preliminary points of objection a notice of which was filed on 18th

August, 2021 under rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 as amended ("the Rules") to the effect that:

"(a) *The appeal is improperly filed for containing a defective Certificate of Delay and the appeal is, therefore, hopelessly time barred.*

(b) *That the appeal is incompetent for having contained the defective ruling and decree (sic)"*

As it is a customary practice of this Court that where there is a notice of preliminary of objection raised in an appeal or application, the Court hears the preliminary objection first before allowing the appeal or application to be heard on merit. Hence, we allowed the preliminary objection to be argued first, before the hearing of the appeal on merit.

At the hearing before this Court, Mr. Hangi Chang'a, learned Principal State Attorney together with Ms. Ansila Makyao and Ms. Adelaide Masaua, learned State Attorneys appeared for the appellant, whereas the respondent had the services of Mr. Roman Masumbuko and Mr. Heriel Obedi Munisi, learned Advocates.

At the very outset, Mr. Chang'a conceded to the preliminary points of objection in that the certificate of delay is defective. He further elaborated that the ruling and the drawn order too do not bear the same date which was also an anomaly that affects the present appeal. However, Mr. Chang'a,

in terms of rule 4(2) (b) of the Rules read together with section 3A (1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the "AJA"), prayed that the appellant be allowed to approach the Registrar of the High Court to rectify the certificate of delay and therefore file supplementary record of appeal with valid certificate of delay in terms of rule 96 (7) of the Rules. To facilitate the appreciation of the proposition put forward, he referred us to the decisions of this Court in **M/S Universal Electronics and Hardware Tanzania Limited v. Strabag International GmbH (Tanzania Branch),** Civil Appeal No. 104 of 2015; **M/S Flycatcher Safaris Ltd v. Hon. Minister for Lands and Human Settlements Development and Another**, Civil Appeal No. 142 of 2017; and **Geita Gold Mining Ltd v. Jumanne Mtafuni**, Civil Appeal No. 30 of 2019 (all unreported). He went further to submit that there have been two schools of thought regarding the consequence of a defective certificate of delay. Whereas one school of thought advocates that the effect of a defective certificate of delay is to strike out the appeal, the other school of thought is of the view that a defective certificate of delay may be rectified through filing supplementary record of appeal with a properly and valid certificate of delay. He therefore implored this Court to follow the most recent decision of this Court in **Geita Gold Mining** (supra) as the beacon on the way forward in the circumstances like

the one faced by the Court and prayed that the appellant should not be condemned to costs.

On the adversary, Mr. Masumbuko, appreciated the gross concession by Mr. Chang'a of the anomalies in the certificate of delay and the variance on the date between the ruling and the drawn order; he submitted that for generosity purposes its client will not press for costs. However, as to the way forward Mr. Masumbuko thinks otherwise. The learned advocate forcefully submitted that the effect of the concession by Mr. Chang'a is to make the appeal incompetent and therefore, there is no appeal before the Court. To this end, Mr. Masumbuko contended spiritedly that the cumulative effect of the invalid certificate of delay and the invalid drawn order makes this appeal incompetent and therefore there is no appeal before the Court and thus the Court has no jurisdiction. He argued that, the cited case of **Geita Gold Mining** (supra) is distinguishable and in his view section 4(2)(b) of AJA and in particular the overriding objective brought by section 3A (1) of the AJA cannot be applied blindly in total disregard of the mandatory procedural rules. To bolster his argument, he referred this Court to the case of **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited,** Civil Appeal No. 16 of 2004; **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of

2018; and **Mondorosi Village Council and Others v. Tanzania Breweries Limited and Others,** Civil Appeal No. 66 of 2017 (all unreported). He rounded up his submission by urging this Court to strike out the appeal for being incompetent and added that the appellant did not formally apply to file supplementary record.

In rejoinder, Mr. Chang'a was fairly brief. He contended that all the cases that were cited by Mr. Masumbuko were decided earlier than the recent case of **Geita Gold Mining** (supra). He further distinguished the case of **Geofrey Kabaka v. Farida Hamza (Administratix of the Estate of the late Hamza Adam),** Civil Appeal No. 28 of 2019 (unreported) in which the certificate of delay was not in the record unlike in the present case; and also the case of **Consolate Mwakisu v. The Director General NSSF**, Civil Appeal No. 325 of 2019 (unreported) in which there was no letter requesting for judgment, decree and proceedings unlike in the present appeal. Winding up his submission, he reiterated his prayer for the appellant to be allowed to rectify the anomaly by filing a supplementary record of appeal.

From the counsels' submissions, it is no longer in dispute that the appeal before us is incompetent because the certificate of delay is defective and therefore the said defect vitiates the certificate of delay. Similarly, the

drawn order is defective for being in variance with the date of the ruling. The only crucial issue that requires our determination is the consequences which should follow.

It is instructive to interject a remark, by way of a postscript that, in the present appeal, there is no dispute that the Registrar of the High Court did not comply with the proviso to the provisions of rule 90(1) of the Rules. Furthermore, the Registrar in preparing the certificate of delay did not comply to the current Form L which is referred to in rule 90(2) and the Schedule to the Rules. All in all, as we said in **M/S Flycatcher Safaris Ltd** (supra) a party who receives a defective certificate of delay and acts on it without seeking rectification is equally to blame and cannot apportion full responsibility on the respective authority.

We will now address the issue before us. As rightly submitted by Mr. Chang'a there have been two schools of thought when it comes to the consequences of what should follow in the event that the certificate of delay is found to be defective or invalid. Whereas one school advocates that a defective or invalid certificate of delay goes to the root of the matter and therefore cannot be rectified and hence the appeal has to be struck out, the other school of thought is to the effect that a defective or invalid certificate

of delay may be rectified with a view to quickly giving life to an appeal which would otherwise be struck out and therefore determine on merit the dispute between the parties. The latter school of thought is based upon the overriding objective principle, sometimes referred to as the oxygen principle which was entrenched in our laws vide the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018, Act No. 8 of 2018.

We find considerable merit in Mr. Chang'a proposition in regards to the way forward in this matter and luckily, the Court has had an occasion to discuss at some considerable lengthy these two schools of thought in the case of **Geita Gold Mining** (supra) by referring to its numerous previous decisions and particularly the case of **Mwalimu Amina Hamisi v. National Examination Council of Tanzania and Four others,** Civil Appeal No. 20 of 2015 (unreported) in which we relied on our previous decision in **Kantibhai Patel v. Dahyabhai Mistry** [2003] TLR 437 hook, line and sinker despite the overriding objective principle; and the case of **Ecobank Tanzania Limited v. Future Trading Company Limited**, Civil Appeal No. 82 of 2019 (unreported) in which aware of the overriding objective principle we were reluctant to rely on our earlier decision in **Kantibhai Patel** (supra). In the case of **Geita Gold Mining** (supra) we found guidance on how to address a situation where there is apparent conflict in the decisions of the

Court and relied on our earlier decision in **Arcopar (O.M) S.A v. Harbert Marwa and Family & 3 Others,** Civil Application No. 94 of 2013 (unreported) in which this Court discussed at lengthy what appears to be an established pattern of circumstances in which, there are conflicting decisions of equal weight and held:

> *"...where the Court is faced with conflicting decisions of its own, the better practice is to follow the more recent of its conflicting decisions unless it can be shown that it should not be followed for any of the reasons discussed above."*

It is convenient here to point out that, we equally find guidance on the principle above which was followed in the recent case of **Geita Gold Mining** (supra) which also followed the decision in **Ecobank Tanzania Limited** (supra) in the same spirit enunciated under **Arcopar (O.M) S.A** (supra) that, following the most recent decision, makes a lot of legal common sense, because it makes the law predictable and certain and the principle is timeless in the sense that, if, for instance, a full Bench departs from its previous recent decision that decision would prevail as the most recent.

In the result, we accede to Mr. Changa's prayer and in terms of rule 96 (7) of the Rules, we grant leave to the appellant to file a supplementary record of appeal to include a properly drawn order and a certificate of delay.

The supplementary record of appeal should be filed within thirty days from the date of delivery of this ruling.

In the meantime, hearing of this appeal stands adjourned to a date to be fixed by the Registrar. We make no order as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 10th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered on 21st day of September, 2021 in presence of Ms. Debora Mcharo, learned State Attorney for the appellant and Mr. Heriel Munisi, learned counsel for the respondent, is hereby certified as true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL