IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CIVIL APPEAL NO. 30 OF 2019

GEITA GOLD MINING LTD..... APPELLANT

VERSUS

JUMANNE MTAFUNI ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mwanza)

(Gwae, J.)

dated the 23rd day of January, 2017
in
Land Appeal No. 124 of 2015

.....

RULING OF THE COURT

28th April & 3rd May, 2021

MWAMBEGELE, J.A.:

The respondent successfully sued the appellant in the District Land and Housing Tribunal for Geita District claiming for, *inter alia*, an order that he was a lawful owner of a parcel of land situate at Katoma Village, Kalangalala Ward, Geita District in Geita Region, compensation and general damages. Dissatisfied, the appellant appealed to the High Court but his appeal, much to his chagrin, was barren of fruit, for Gwae, J., essentially,

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dismissed it on 23.01.2017, except for the quantum of compensation and general damages which were reduced to Tshs. 40,000,000/= and Tshs. 20,000,000/= respectively. Still thinking that the two courts below should not have decided the way they did, the appellant has come to this Court on second and final appeal. The appellant did so after seeking and obtaining the requisite leave in terms of section 47 (1) of the Land Disputes Courts Act, Cap. 216 of the Revised Edition, 2002 (we shall henceforth refer to it as "the Land Disputes Courts Act") which was applicable then. As the law stands now; section 47 (1) of the Land Disputes Courts Act has since been amended. In terms of section 47 (1) of the Land Disputes Courts Act as amended by section 9 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 - Act No. 8 of 2018, no leave is required in appealing against decisions of the High Court in land matters decided in its original jurisdiction.

When the appeal was called on for hearing on 28.04.2021, Mr. Silwani Galati Mwantembe, learned advocate, appeared for the appellant. Mr. Ephraem Koisenge and Mr. Philemon Msegu, also learned advocates, joined forces to represent the respondent.

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Before we could go into the hearing of the appeal in earnest, we prompted the learned advocates for either side to address us on the propriety of the Certificate of Delay appearing at p. 248 of the record of appeal. We did so because it makes reference to a notice of appeal dated 03.02.2017 and to a letter dated 13.08.2017 as the dates from which the days would be excluded.

Mr. Mwantembe addressed us conceding, first, that the Certificate of Delay ought not to have made reference to both the notice of appeal and the letter requesting documents for appeal purposes and, secondly, that the letter referred to in the Certificate of Delay was not the one used to request the documents in respect of the impugned judgment and decree for purposes of appeal. Mr. Mwantembe clarified that the letter dated 03.08.2017 bearing Ref. No GLC/LIT/2015/GGM/1561 to which reference was made in the Certificate of Delay applied for copies of proceedings in respect of Miscellaneous Land Application No.21 of 2017 which was an application for leave under section 47 (1) of the Land Disputes Courts Act to appeal to the Court. The learned counsel went on to submit that the correct letter to which the Certificate of Delay should have made reference

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is one bearing Ref. No GLC/LIT/2015/GGM/1561 dated 26.01.2017 appearing at p. 172 of the record of appeal. Failure by the Registrar of the High Court to refer in the Certificate of Delay to a correct letter from the appellant is an ailment which, he submitted, made the Certificate of Delay defective. A defective certificate of delay cannot legally be used to exclude the days it purports to, he argued.

In view of the above unhappy state of affairs, Mr. Mwantembe prayed for leave of the Court to go back to the High Court to seek and obtain a properly drawn certificate of delay; that is, one which will make reference to a letter bearing Ref. No GLC/LIT/2015/GGM/1561 dated 26.01.2017 appearing at p. 172 of the record of appeal. He made his prayer under the provisions of section 3A of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 (henceforth "the AJA") read together with rules 2 and 4 (2) (a) of the Tanzania Court of Appeal Rules (henceforth "the Rules").

Mr. Koisenge, was initially minded to resist the prayer by Mr. Mwantembe for the reason that the letter appearing at p. 172 of the record

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of appeal was not served on the respondent. However, upon mature reflection, he had no objection to the prayer.

We have dispassionately considered the uncontested prayer by Mr. Mwantembe to put in abeyance the hearing of the appeal and grant him leave to go back to the High Court so that he can obtain a properly drawn certificate of delay. Ordinarily, we would have refused the prayer and would have proceeded to declare the Certificate of Delay invalid and thus incapable of excluding the days it purported to, and, consequently, we would have struck out the appeal for being filed out of time. However, with the overriding objective principle in our midst, we find ourselves loath to take that course of action. We now proceed to demonstrate why we were hesitant to take that course.

But before demonstrating why we have opted to take this course, we wish to state that, ordinarily, the prayer by Mr. Mwantembe being uncontested, we would have simply proceeded to make a simple order to that effect. However, when we retreated to compose the simple order we had in mind, we discovered that the question as to what should the Court do in case of a defective certificate of delay, has featured prominently

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during this ongoing sessions of the Court at Mwanza. We noticed a feeling within the minds of the officers of the Court to the effect that the Court is making conflicting decisions with regard to the way forward. There are two schools of thought; one which advocates the position that a defective certificate of delay goes to the root of the document and therefore it cannot be used to exclude the time it purports to and thus the appeal will not escape the wrath of being struck out. The other school of thought is that which holds that to give prominence to the overriding objective principle, a defective certificate of delay may be rectified with a view to quickly determining the dispute between the parties. In these premises, we thought it was incumbent upon us to clarify the position so as to inject predictability of our decisions within the minds of stakeholders.

The overriding objective principle, sometimes referred to as the oxygen principle was entrenched in our laws vide the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 - Act No. 8 of 2018. The main purpose behind its enactment was to, *inter alia*, serve substantive justice. In a number of our decisions, we have hesitated to strike out appeals on a mere fact that a certificate of delay excluding the days in

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terms of rule 90 (1) of the Rules is defective or invalid. In its stead, more often than not, we have been granting leave to appellants to go back to the High Court where they could seek and obtain a properly drawn certificate of delay to put life to an appeal which would otherwise have been struck out on account of the defective or invalid certificates of delay. We have painstakingly taken that course time and time again in a number of our recent decisions - see: **M/S Universal Electronics and Hardware (T) Limited v. Strabag International GmbH (Tanzania Branch)**, Civil Appeal No. 122 of 2017, **Ecobank Tanzania Limited v. Future Trading Company Limited**, Civil Appeal No. 82 of 2019, **Abdurahman Mohamed Ally v. Tata Africa Holding (T) Limited**, Civil Appeal No. 58 of 2017 and **M/S Flycatcher Safaris Ltd v. Hon. Minister for Lands and Human Settlements Development and Another**, Civil Appeal No. 142 of 2017 (all unreported), to mention but a few. In all these cases, the certificates of delay were defective or invalid for one reason or the other and the appellants prayed for leave to go back to the High Court to seek and obtain properly drawn ones. The Court, relying on the oxygen principle, granted the prayers. In **M/S Flycatcher**

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Safaris Ltd (supra), for instance, we grappled with an identical scenario and granted the prayer in the following terms:

> *"... in terms of Rule 4 (2) (a) and (b) of the Rules, we accede to the prayer of the appellant to seek a rectification of the certificate of delay to make it to be in conformity with the requirement of the law and in accordance with the relevant materials which were placed before the Registrar of the High Court. Consequently, we order that a rectified version of the certificate of delay, if secured, be lodged ... within thirty (30) days from the date of delivery of this Ruling."*

Likewise, in **Abdurahman Mohamed Ally** (supra), confronted with a similar circumstance, we held:

> *"On our part, we agree with both learned counsel that the defect in the certificate of delay renders the appeal incompetent for being time barred. Ordinarily, that would have the effect of causing it to be struck out. However, given the fact that the mistake was made by the court and although on his part, the appellant's counsel had the duty of ensuring that a properly drawn certificate was sought and included in the record of appeal, going*

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by the spirit of the overriding objective, we allow the prayer made by the appellant's counsel.
We therefore adjourn the hearing and in terms of Rule 2 of the Rules, we allow the appellant to secure and include in the record of appeal, a correct certificate of delay."

For the avoidance of doubt, we are alive to the fact that in some few isolated instances, we refused such prayers. Some of the cases falling in this category are: **Livingstone Enock and Three Others v. Serge Smolonogov and Another**, Civil Appeal No. 33 of 2019 (unreported), a decision we rendered on as recent as the 20th ultimo in the ongoing sessions of the Court here at Mwanza and **Mwalimu Amina Hamisi v. National Examination Council of Tanzania and four others**, Civil Appeal No. 20 of 2015 (also unreported). However, we haste the remark that the ailments in the two cases are distinguishable. We shall demonstrate.

In the former case; that is, **Livingstone Enock and Three Others**, the certificate of delay referred to a date of the letter which was even before the delivery of the judgment sought to be assailed and a preliminary

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objection was raised by the respondent to the effect that the certificate of delay was invalid. The appellant conceded to the preliminary objection and had no qualms if the appeal would be struck out on account of an invalid certificate of delay. For the obvious reason that we could not preempt the uncontested preliminary objection by the respondent, we held that the certificate of delay was erroneous which could not be used to salvage the appeal in terms of rule 90 (1) of the Rules and proceeded to strike out the appeal with costs.

Similarly, in **Mwalimu Amina Hamisi** (supra), we relied on our previous decision in **Kantibhai Patel vs Dahyabhai Mistry** [2003] T.L.R. 437 to observe that an error in a certificate of delay is one that cannot be glossed over as it goes to the root of the document. We proceeded in **Mwalimu Amina Hamisi** (supra) to strike out the appeal.

To clinch it all, after the pronouncement of **Mwalimu Amina Hamisi** (supra) on 24.06.2019, we were confronted in **Ecobank Tanzania Limited** (supra) with a similar scenario. In the decision we rendered on 18.11.2019, we discussed at some considerable length the position we took in **Kantibhai Patel** (supra). We made ourselves clear

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that with the overriding objective principle in our midst, the position we took in **Kantibhai Patel** (supra), ought to have been looked at rather askance. Without making reference to **Mwalimu Amina Hamisi** (supra) but in line with it, we stated in no uncertain terms that upon numerous decisions of the Court, a conspicuous error in the certificate of delay goes to the root of the document and vitiates it. We made reference to the case of **Kantibhai Patel** (supra) and reproduced the following excerpt therefrom:

> *"The very nature of anything termed 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 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 but it goes to the very root of the document You cannot sever the erroneous part from it and expect the remaining part to be a perfect certificate;* ***you can only amend it or replace it altogether as by law provided.***"
>
> [Emphasis supplied in **Ecobank Tanzania Limited** (supra)].

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Relying on the above excerpt reproduced from **Kantibhai Patel** (supra), we went on in **Ecobank Tanzania Limited** (supra) to observe that the certificate of delay was invalid. However, we did not accede to the prayer by counsel for the respondent therein that on account of that defect, the appellant was automatically barred from benefitting the exclusion of time provided under rule 90 (1) of the Rules. We relied on the provisions of sections 3A and 3B of the AJA and rule 2 of the Rules to observe that there was room for the appellant to approach the Registrar of the High Court with a view to rectifying the defect. Following **Ecobank Tanzania Limited** (supra) we took the same position in **M/S Flycatcher Safaris Ltd** (supra).

It is obvious that **Mwalimu Amina Hamisi** (supra) followed **Kantibhai Patel** (supra) hook, line and sinker amidst the overriding objective principle. Equally obvious is the fact that **Ecobank Tanzania Limited** (supra) was aware of the existence of the case of **Kantibhai Patel** (supra) but was hesitant to follow it hook, line and sinker because of the existence of the overriding objective principle recently introduced in our laws. A conflict of our two decisions is apparent here. Which decision,

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then, should be followed by the Court? As good luck would have it, this is not the first time we are faced with this predicament. We grappled with an akin situation in **Arcopar (O.M.) S.A v. Harbert Marwa and Family & 3 Others**, Civil Application No. 94 of 2013 (unreported). In that case, having addressed our mind to the doctrine of precedent and stare decisis in our jurisdiction and beyond at some considerable length, we 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."*

We find guidance on the principle we stated in **Arcopar (O.M.) S.A** (supra). We respectfully think, we should take the position we took in **Ecobank Tanzania Limited** (supra) and a string of authorities cited above as the position to guide the courts in this jurisdiction in situations where a certificate of delay is invalid. In such eventualities, we respectfully think, it should all along be strived to inject oxygen to an appeal so that it is not terminated on account of a defective or an invalid certificate of delay but resuscitated by allowing an appellant to seek and obtain a proper

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certificate of delay with a view to determining the disputes between parties on their merits.

In view of the above guiding authorities, we think the appellant still has room to benefit the exclusion of time provided for under rule 90 (1) of the Rules in terms of sections 3A, 3B and rule 2 of, respectively, the AJA and the Rules. The respondent, in our considered view, will not be prejudiced by this course of action. After all, he did not resist the prayer by the appellant. In the circumstances, we find ourselves constrained to allow Mr. Mwantembe's uncontested prayer so as to inject oxygen to the appeal which would otherwise have been struck out on account of the defective or invalid certificate of delay. This position we have taken, we respectfully think, and as stated above, will augur well with the overriding objective in the resolution of disputes which is provided under sections 3A, 3B and Rule 2 of, respectively, the AJA and the Rules.

In the upshot, we grant Mr. Mwantembe's prayer and order that the appellant is accorded time within which to seek and obtain from the Registrar of the High Court a correct Certificate of Delay. The same, if obtained, to be lodged in the Court within thirty (30) days reckoned from

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the pronouncement of this ruling. In the meantime, hearing of this appeal stands adjourned. As the matter leading to this outcome was raised by the Court *suo motu*, no order is made as to costs for the adjournment.

It is so ordered.

DATED at **MWANZA** this 3rd day of May, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 3rd day of May, 2021 in the presence Mr. Silwani Galati Mwantembe, learned counsel for the appellant, and Mr. Erick Muta holding brief for Mr. Philemon N. Msegu learned counsel for the respondent, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL

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