IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 527 OF 2020

BULYANHULU GOLD MINE LIMITED .....1ST APPELLANT
NORTH MARA GOLD MINE LIMITED.....2ND APPELLANT
PANGEA MINERALS LIMITED.....3RD APPELLANT

VERSUS

PETROLUBE (T) LIMITED .....1ST RESPONDENT
ISA LIMITED .....2ND RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Mansoor, J.)

dated the 20th day of December, 2016
in
Consolidated Misc. Commercial Applications No. 269 & 270 OF 2016

.....

RULING OF THE COURT

22nd October & 2nd November, 2021

KIHWELO, J.A.:

The facts of this appeal are quite simple and straight forward and the sequence of events leading to this appeal can be summarized as follows: The appellants and the respondents entered into separate agreements for the supply and service of the on-site hose assembly and management facilities as well as supply of lubricants and associated services. The appellants are alleged to have wrongfully terminated the agreements without cause, which precipitated the respondents to institute two

commercial cases that were registered as Commercial Case No. 114 of 2016 and Commercial Case No. 115 of 2016 in the High Court of Tanzania (Commercial Division) at Dar es Salaam. Relying upon the Arbitration Clauses in the respective agreements subject of the dispute, the appellants elected not to lodge written statements of defence and instead petitioned the trial court through Miscellaneous Commercial Application No. 232 of 2016 and Miscellaneous Commercial Application No. 233 of 2016 seeking to stay the two suits pending reference of the matters to arbitration in terms of the dispute resolution clause in the respective agreements.

The two petitions were each scheduled for mention on 7th October, 2016 and fixed for hearing on 26th October, 2016. It occurred that when the petitions came for hearing on 26th October, 2016 the appellants did not appear and the trial court (Mansoor, J.) dismissed each petition for want of prosecution. Dissatisfied, the appellants lodged two separate applications which were later consolidated into one, Miscellaneous Commercial Application No. 269 of 2016 and Miscellaneous Commercial Application No. 270 of 2016 seeking to set aside the dismissal orders dated 26th October, 2016 and restore the petitions. Upon hearing the parties on the consolidated applications, on 20th December, 2016 the trial court (Mansoor, J.) dismissed the application. Undeterred, on 2nd January, 2017 the

appellants lodged a notice of appeal seeking to challenge the ruling of 20th December, 2016 ("the impugned ruling").

Apparently, the appellants lodged an application for leave to appeal to the Court against the impugned ruling through Miscellaneous Commercial Application No. 4 of 2017 which upon hearing, the High Court (Sehel, J.) as she then was, on 4th August, 2017, dismissed the application on account of lack of merit. Disgruntled, the appellants by way of second bite lodged an application for leave before the Court in Civil Application No. 364/16 of 2017 which was granted on 11th November, 2020 hence the instant appeal. Subsequently, on 30th December, 2020, the appellants lodged a memorandum of appeal which was predicated on two points of grievance and for reasons that will become apparent shortly we do not find it necessary to reproduce them.

When, eventually, the matter was placed before us for hearing on 22nd October, 2021 the appellants were represented by Mr. Timon Vitalis together with Mr. Fayaz Bhojani learned advocates and the respondents had the services of Mr. Jovinson Kagirwa, learned advocate.

Mr. Vitalis, first and foremost, prayed to file a supplementary record of appeal in terms of Rule 96 (7) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) in order to include the missing two pages of

the impugned ruling, the Counter Affidavit of Mr. Walter Chipeta in response to the Affidavit by Mr. Abdon Rwegasira as well as proper proceedings at page 39 and 40 of the record of appeal. Mr. Kagirwa did not oppose the prayer by the counsel for the appellants.

Before we could determine the prayer by Mr. Vitalis and go into the hearing of the appeal in earnest, we prompted the learned advocates to address us on whether the appeal before us was filed within time.

Mr. Vitalis was fairly brief in his submission in chief in response to the issue prompted by the Court. He contended that, the appeal was lodged within time upon leave to appeal being granted by the Court. He contended that leave to appeal which the appellants were granted was an automatic extension of time.

Mr. Kagirwa was not impressed and gallantly resisted the submission by Mr. Vitalis and argued that, in the absence of a certificate of delay in terms of Rule 90 (1) of the Rules, the appeal is out of time. He valiantly opposed the argument by Mr. Vitalis that leave to appeal was an automatic extension of time since an application for leave is not an application for extension of time and that the appellants did not file application for extension of time but rather, they filed application for leave to appeal which cannot operate to extend time to appeal.

In rejoinder submission, Mr. Vitalis argued that, this was a unique situation unlike in ordinary appeals where a certificate of delay is required before lodging the appeal and that the order granting the appellants leave to appeal is as good as certificate of delay. He rounded up by contending that the Rules are silent when it comes to the requirement for certificate of delay in a situation where appeals to this Court are subject to leave of the High Court or the Court. He thus, reiterated his submission that the appeal was filed within the time prescribed by the law.

From the contending submissions of the learned trained minds, we are decidedly of the considered opinion that, the Court is invited to answer the question on whether the present appeal was filed out of the time prescribed by the law. Our starting point, we think, for the better understanding of the procedural requirements in relation to institution of the appeal before the Court and the issue of certificate of delay, it is desirable to reproduce the whole of Rule 90(1) and (3) of the Rules. It reads:

> *"(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 notice of appeal was lodged*** *with-*

(a) a memorandum of appeal in quintuplicate;

(b) the record of appeal in quintuplicate;

(c) security for 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.****"*[Emphasis added]

It is a peremptory principle of law that, the provision of Rule 90(1) of the Rules makes it mandatory for the appellant to lodge record of appeal as well as memorandum of appeal within sixty days of filing of the notice of appeal. However, that requirement is subject to the proviso for exemption of time required for seeking and obtaining from the High Court a copy of

the proceedings in that court as may be certified by the Registrar where an application for such copy is made within thirty days of the delivery of the decision sought to be challenged. Furthermore, the entitlement to exemption is further conditioned under sub-rule (3) of Rule 90 above that the application for the copy of proceedings must be in writing and that a copy of it must have been served on the respondent.

Time and again we have held that failure to write a letter requesting for a copy of the proceedings or even failure to copy and serve upon the respondent that letter disentitles the appellant from relying upon the exemption under Rule 90(1) and that any certificate of delay purportedly issued to grant an exemption in the circumstances would be invalid. There is a large body of decided cases on this aspect. See, for instance the case of **D.P. Valambhia v. Transport Equipment Ltd** [1992] TLR 246 in which the Court, citing the old Rules, Rule 83(2) of the Tanzania Court of Appeal Rules, 1979 which is similar to the current Rule 90(3) of the Rules, held, at page 256, that:

> *"Since also on my finding,* ***the respondents did not send to the applicant a copy of their letter in which they applied a copy of the proceedings, as required by Rule 83 (1),*** *they are not covered by the exemption in sub-rule (1)*

and that therefore ***the Registrar issued them with a certificate of delay under sub-ruie (1) while laboring under mistake of fact.*** *Consequently, the period available to the respondents in which to institute the appeal was sixty days."* [Emphasis added]

We hasten to state that the procedure obtained under Rule 90 (1) and (3) above are couched in mandatory terms and are not exceptional to certain categories of appeals only but rather applies in equal force to every and each appeal before the Court. Mr. Vitalis argued that the present application presents a unique situation because it involves an application for leave to appeal to the Court. We wish to state more in sorrow than in fear that, with profound respect, we don't subscribe to that submission as the position of the law is long settled and clear. Expressed modestly, we would say that, this is not a novel situation where this Court is faced with analogous situation like the one in the instant appeal. The position was perfectly settled even before the inception of the current Rules as we shall demonstrate. In the case of **East Africa Mines Limited v. Christopher Kadeo**, Civil Appeal No. 53 of 2005 (unreported) the Court held that:

"We shall first deal with the issue whether the appeal was time barred. On this, the relevant provision is rule 83 which under sub-rule (1)

provides in clear terms that an appeal shall be instituted within sixty (60) days of the date of the notice of appeal. However, there is also a proviso in the sub-rule to the effect that if the letter to the Registrar of the High Court applying for copy of the proceedings is in writing and was copied to the respondent, ***the time taken for the preparation and delivery of the copy of the proceedings as may be certified by the Registrar as having been necessary for the preparation of the copy of proceedings shaii be excluded."*** [Emphasis added].

Corresponding observations were made in the case of **Mwanaasha Seheye v. Tanzania Ports Corporation**, Civil Appeal No. 37 of 2003 (unreported) in which the Court emphasized the need to institute an appeal within sixty (60) days of the date of the notice of appeal, unless the exception applies.

In the instant matter, the appellants, having duly lodged their notice of appeal on 2nd January, 2017, they did not bother to lodge a letter requesting to be supplied with a copy of the certified proceedings, what appears on the record of appeal is that, on 7th August, 2017 the appellants lodged a letter requesting for copies of certified ruling, drawn order and proceedings in Miscellaneous Commercial Application No. 4 of 2017 and not

the one related to the instant appeal that is, Consolidated Miscellaneous Commercial Applications No. 269 & 270 of 2016. Clearly, the appellants made efforts to file leave before the High Court and later upon denial, lodged an application before this Court by way of second bite which they were granted, and on 30th December, 2020 they lodged the instant appeal which is more than three (3) years beyond the sixty days limitation period.

Mr. Vitalis confidently argued that leave to appeal operates as a certificate of delay in the circumstances where an appeal involves leave to appeal. We think, with respect, that is not the correct position of the law. There are no categories of appeals when it comes to application of Rule 90 of the Rules. Luckily, this Court has had occasion to pronounce itself on a similar issue in the case of **Richard Mchau v. Shabir F. Abdulhussein**, Civil Application No. 87 of 2008 (unreported), in which the Court stated that:

> *"However, much as we may agree that endeavours by an appellant to seek leave to appeal to this Court constitute one of the essential steps towards prosecution of an intended appeal,* ***we are certain that the efforts by the respondent were efforts in futility having not fully compiied with ...rule 83 (1) and (2) of the Old Rules beforehand.****"*[Emphasis added].

This position was restated in the recent decisions of this Court in the case of **Board of Trustees of Orthodox Church v. Rogers Mashanda and Another**, Civil Appeal No. 138 of 2020 and **Arbogast Arstides and Three Others v. St. John University of Tanzania**, Civil Appeal No. 26 of 2009 (all unreported). In the latter case the Court stated that:

> *"Without such Certificate of Delay the appellants cannot be allowed to lodge their record and memorandum of appeal on 10/10/2018 which is far beyond the sixty days after they had filed their notice of appeal.*
> *We must also point out that the so many days, which Mr. Kalonga wasted, while applying for leave to appeal to this Court, did not suspend the counting of the period of sixty days prescribed by Rule 90 (1) of the Rules."*

Quite clearly, the excerpts above which presents similar situation with the instant appeal before us, speak loud and clear that even where the appellant makes effort to seek leave to appeal to the Court, he has to comply with the strict timelines and the requirements under Rule 90 (1) and (3) of the Rules within which civil appeals are lodged.

That is not optional but rather mandatory as such the appellant cannot be allowed to pick and choose what he likes and ignore what he

dislikes. To allow that will be creating chaos, public panic and unpredictability in the administration of justice. We are therefore, at one with Mr. Kagirwa that, non-inclusion of the certificate of delay in the record of appeal makes the appeal time barred.

In the upshot, we are enjoined to strike out the appeal for the reasons stated above. We consequently exercise the powers of revision vested in the Court by section 4(2) of the Appellate Jurisdiction Act [Cap.141 R.E. 2019] and hereby strike out the appeal. In fairness to the parties and equity, we make no order as to costs considering that none of the parties has had a hand in the outcome of this matter.

DATED at **DAR ES SALAAM** this 29th day of October, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered on this 2nd day of November, 2021, in the presence of Mr. William Mang'ena, learned counsel for the appellants and Mr. Jovinson Kagire, learned counsel for the Respondents is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL