IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MWARIJA, J.A., MUGASHA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 45 OF 2017

PAULINA SAMSON NDAWAVYA.....APPELLANT

VERSUS

THERESIA THOMAS MADAHA.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

Dated the 22nd day of August, 2014
in
Land Case No. 44 of 2012

.....

RULING OF THE COURT

8th & 12th October, 2018.

MWARIJA, J. A.:

The appellant, Paulina Samson was the plaintiff in the High Court of Tanzania (Mwanza District Registry) in Land Case No. 44 of 2012. She instituted the suit seeking *inter alia*, to be declared the lawful owner of a plot of land No. 202 Block 'U' in Rwegasore area within Mwanza city (hereinafter "the property"). According to the record, the property was formerly owned by the National Transport Corporation vide a Certificate of Occupancy No. 033041. Later on, by the decision of the Resident Magistrate's Court of Mwanza in Civil Case No. 102 of 1996, the respondent was declared the lawful owner of the property.

In the High Court, the appellant claimed that she acquired a title to the property from the respondent, Theresia Thomas by purchasing it vide a deed of conveyancing executed between them on 3/8/1998. Having heard the evidence of five plaintiff's witnesses and three defence witnesses, the learned High Court Judge, Mwangesi, J, (as he then was), found that there was no enforceable contract of sale between the appellant and the respondent and that therefore, the appellant did not have the right of ownership of the property. As a result, the suit was dismissed with costs.

The appellant was aggrieved by the decision of the High Court hence this appeal which is based on three grounds as follows:-

> *"1. That the learned trial judge found that there was a contract between Appellant and Respondent but erred in law and fact where he held that there was no offer and acceptance.*
>
> *2. That, the learned trial judge erred in law and fact for giving judgment in favour of the Respondent whose credibility was discredited during cross examination.*
>
> *3. That, Hon. Trial judge erred in law and fact for his failure to properly evaluate the evidence and thus failing to hold that the appellant's case was proved (sic) to the balance of probability."*

When the appeal was called on for hearing on 8/10/2018, the appellant was represented by Mr. Elias Hezron, learned counsel while the respondent had the services of Mr. Mashaka Tuguta, also learned counsel.

Before the appeal could proceed to hearing, Mr. Tuguta applied for leave under Rule 4(2) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to raise a preliminary point of law challenging the competence of the appeal. He contended firstly, that the appeal is time barred and secondly, that the appeal is incompetent for the appellant's failure to comply with Rule 84(2) of the Rules. That Rule requires a notice of appeal to be served through the address for service of the advocate given during the proceedings in the High Court even when that advocate may not have been subsequently retained for the purpose of an appeal.

Mr. Hezron did not object to the prayer. He however asked for a short adjournment to prepare himself and come with his response as regards the points of law raised by the appellant's counsel. We granted a short adjournment as prayed.

When the hearing resumed, Mr. Tuguta informed the Court that he had decided to abandon the 2nd ground of his preliminary objection and went ahead to argue the first ground; that the appeal is time barred. His

arguments on that ground centred on the certificate of delay issued by the Deputy Registrar of the High Court on 9/11/2016 (hereinafter "the Certificate").

The learned counsel submitted that the Certificate is invalid because it contravenes the provisions of Rule 90(1) of the Rules. Reciting the sequence of the events, he said that, although the appellant applied for certified copies of the proceedings, judgment and decree on 10/9/2014, the documents which were thereafter received by the appellant on 10/11/2016 as evidenced by the cash deposit slip appearing at page 252 of the record, in the Certificate, the Registrar excluded the period between 4/9/2014 and 9/11/2016.

The learned counsel argued that for that reason, the Certificate was prepared before the appellant was supplied with the copies and thus, a transgression against Rule 90(1) of the Rules. To bolster his argument, he cited the case of **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] TLR 437. In conclusion, Mr. Tuguta contended that; since the Certificate is invalid, the appeal is time barred because the appellant cannot rely on the exemption under the proviso to Rule 90(1) of the Rules.

In reply, Mr. Hezron opposed the contention that the Certificate is invalid. He argued that, the same would have been so if it had exempted the period which exceeds the time of its issue hence giving advantage to the appellant. On the decision of **Kantibhai Patel** (*supra*) cited by the learned counsel for the respondent, Mr. Hezron submitted that the facts in that case are different because unlike in the present case, the excluded period went beyond the date on which the Certificate of delay was issued.

The appellant's counsel argued further that exclusion of the period required for preparation and supply of the copies is computed from the date when the copies are ready for collection, not on the basis of a receipt evidencing that the same were paid for. He argued therefore that, since the appeal was filed within 56 days from the date when the copies were ready for collection, it was filed within the prescribed time. He thus prayed that the objection be overruled.

Having heard the submissions of both counsel for the parties, the only issue for determination is whether or not the Certificate is invalid thus rendering the appeal time barred. Before its amendment by the Tanzania Court of Appeal Rules (Amendment), 2017, GN No. 362 of 22/09/2017,

Rule 90 (1) of the Rules, which was applicable at the time of the appeal, provided as follows:

> *"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 were 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."*

In this appeal the Registrar excluded the period between 4/09/2014 when the appellant applied for the copies were ready for collection. The appellant collected the copies on 10/11/2016. This is evidenced by the Cash Deposit Slip showing that the appellant paid for the copies on that

date. Mr. Tuguta's argument is that on that sequence of the events, the Registrar issued the Certificate before the appellant had been supplied with the copies and for that reason, he said, the Certificate was rendered invalid.

After having given due consideration to the issue, we are, with respect of the view that the preliminary objection has been based on misinterpretation of the proviso 90(1) of the Rules. The provision does not impose a duty on the Registrar to physically deliver the copies to the appellant who has applied for them for appeal purpose. It does not also require the Registrar to issue the Certificate only after the appellant has collected the copies upon payment of the requisite fees. If that would have been the position, then the certificate would be issued at the whims of the appellants. The procedure is that, once the copies have been prepared, the Registrar informs the appellant to collect them from the registry. The Registrar then proceeds to issue the Certificate. As for computation of time, it is from the date when the appellant becomes aware that the copies are ready for collection that the time starts to run. That position is clearly stated in the case of **Birr Company Ltd v. C- Weed Corporation,** ZNZ Civil Application No. 7 of 2003 (unreported).

In that case, the respondent applied to the Court to strike out the notice of appeal on the ground that the appellant had failed to take essential steps to institute the intended appeal. Having found that the applicant had failed to establish the date when the respondent became aware that the proceedings were ready for collection, the Court held that the application was devoid of merit. It stated as follows as regards the time when the appellant is made aware of the readiness of the copies:

> *"This is when time starts to run for the institution of the appeal (See: Civil Reference No. 10 of 1993,* ***Tanzania Uniform & Clothing Corporation v. Charles Mosses*** *(unreported)."*

That procedural mode of supplying the copies to the appellant was also stated in the case of **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited,** Civil Appeal No. 10 of 2014 (unreported). In that case, the appellant unofficially collected the documents before being notified by the Registrar that the same were ready for collection. It later asked for the Certificate which exempted the period between the date when the appellant asked for the copies and the date on which it unofficially collected the last part of the applied copies. Declaring the Certificate invalid, the Court stated as follows:

"It has now turned out that there was no payment of court fees. This means that there was no official delivery of the documents to the appellants on 23.5.2003. there should have been, in our view, ***an official communication from the Registrar to the learned advocate for the appellant that the documents requested in their letter dated 10.7.2003 were now ready for collection, after that the Registrar would issue a certificate*** *in terms of Rule 83(1)." [Emphasis added].*

In our considered view, as submitted by Mr. Hezron, the case of **Kantibhai Patel** (supra) did not lay down the principle that the certificate is issuable upon receipt by the appellant, of the copies as argued by Mr. Tuguta. In that case, the certificate which was issued on 30/9/1997 excluded the period between 8/7/1997 when the appellant applied for the copies and 10/10/1997 when he was supplied with the documents. The certificate was found to be invalid because it excluded the period above the date of its issue. It is for that reason that the Court held that:

"A proper Certificate under the rule is, therefore, one issued after the preparation and delivery of a copy of the proceeding to the appellant .... The certificate on record purports to operate futuristically..."

In the present case, as stated above, the appellant applied for the copies on 4/9/2016. The same were ready for collection on 9/11/2016 and on the same day, she was duly informed to collect them. On these facts, the Certificate was properly issued. We do not therefore, find merit in the preliminary objection. As a result, the same is hereby overruled. Costs to abide the outcome of the appeal.

DATED at **MWANZA** this 11th day of October, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL