

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MBAROUK, J.A., LUANDA, J.A., And KAIJAGE, J.A.)

CIVIL APPEAL NO. 30 OF 2014

**MKOMBOZI CENTRE FOR STREET CHILDREN.....1ST APPELLANT
THE EAST AFRICAN LAW SOCIETY.....2ND APPELLANT
LEGAL AND HUMAN RIGHTS CENTRE.....3RD APPELLANT
VERSUS
THE HON. ATTORNEY GENERAL..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Arusha)**

(Sambo, J.)

Dated 20th day of November, 2009

in

Misc. Civil Cause No. 24 of 2007

RULING OF THE COURT

16th & 30th October, 2014.

LUANDA, J.A.:

Before us is an appeal lodged by the above named appellants who are dissatisfied with the decision of the High Court (Arusha Registry).

A day before a hearing date, the respondent through Ms. Alesia Mbuya, learned Principal State Attorney assisted by Mr. Abubakar Mrisha, learned State Attorney filed a notice of a preliminary objection.

The filing of the notice, consisting of two points, goes contrary to Rule 107 (1) of the Court of Appeal Rules, 2009 (the Rules) which requires such notice to be given to the appellant within three clear days. And the points raised read as follows:-

- (1) The service of written submissions to the Respondent is contrary to Rule 106 (7) of the Court of Appeal Rules, 2009, Government Notice Number 368 of 2009.*
- (2) The records of Appeal is defective for being incomplete contrary to the Court of Appeal Rules, 2009.*

Ms. Mbuya dropped the first point and argued the second one. As to the second point we were eager to know what is not complete in the record of appeal. Ms. Mbuya informed the Court that their copy of the record of appeal does not contain the following pages namely (ii), 12, 46 and 91. The Court record contained all the missing pages save page 46. And the missing page 46 is from the written submissions of the appellant. Ms. Mbuya urged us to strike out the appeal as the appellants failed to comply with Rule 96 (1) (a) (b) and (f) of the Rules.

Mr. Alex Mgongolwa who advocated for the appellants resisted the application to strike out the appeal for the missing page as the omission is not fatal. He prayed that the preliminary objection be dismissed.

First, we wish to point out that the respondents did not raise the preliminary objection properly as per Rule 107 (1) of the Rules. Not only did they fail to serve the notice of preliminary objection within a requisite period of three clear days before the hearing of the appeal, but they did not also cite the relevant Rule. Furthermore, even when submitting Ms. Mbuya did not cite the proper paragraphs of Rule 96 (1) of the Rules as paragraphs (a), (b) and (f) have nothing to do with the missing pages. In view of the above, the preliminary objection raised ought not to have been entertained by the Court.

That apart, there is a serious point of law which we raised *suo motu* which deserve entertaining it. And the point of law is whether the Court is clothed with jurisdiction to entertain the appeal which appeared to have been filed outside the prescribed time of sixty days. We raised that issue because the letter written by the advocate for the appellants

appearing on page 155 of the record of appeal dated 4/12/2009 requesting to be supplied with copies of proceedings, which incidentally is the date when the Notice of Appeal was lodged, does not indicate to have been copied to the respondent; whereby the appeal was filed on 20/9/2013 after almost a period of four years.

Mr. Mgongolwa said they had served the copy to the respondent. And this is a matter of evidence. In any case it is the respondent who was supposed to complain. Ms. Mbuya had nothing to contribute.

Rule 90 (1) of the Rules provides in clear words that an appeal shall be instituted within sixty days of the date of the notice of appeal. However, there is a proviso in the sub-rule read together with sub-rule 2 of the same 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 proceedings as may be certified by the Registrar as having been necessary for the preparation of the copy of the proceedings shall be excluded.

In our case Mr. Mgongolwa is of the view that it is not a legal requirement copying the request to the other party. What is required is simply sending a copy to the other party.

Sub-rule 2 of Rule 90 provides:-

2. 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 **Mr. Kermal Vs. Registrar of Buildings** [1988] TLR 199; **Transcontinental Forwarders Ltd. Vs. Tanganyika Motors Ltd.** [1997] TLR 327 and **East Africa Mines Ltd Vs. Christopher Kadeo**, Civil Appeal No. 53 of 2005 (CAT unreported) which the then Rule 83 (1) and (2) of the Court of Appeal Rules, 1979 had similar wording as our current Rule 90 (1) and (2) of the Court of Appeal Rules, 2009, the Court insisted *inter alia*, the need to copy the letter applying for copy of proceedings to the other party. In other words the Rule has been

construed to contain two parts. First, the letter applying for copy of proceedings must be copied to the other party. Second, it must be served on the respondent. It does not make sense to ignore the first limb indicated above simply because it is not stated in the sub-rule. To indicate in the letter will enable the Court to know whether the intended appellant has taken step to prosecute his appeal. Indeed in the ordinary course of events a copy of a letter intended to be sent to a third party normally is indicated in the original letter. With due respect to Mr. Mgongolwa, we are unable to go along with him. The letter applying for the copy of proceedings ought to have been copied to the respondent.

Since, the letter applying for copy of the proceedings is not shown to have been copied to the other party as per the dictates of Rule 90 (2) of the Rules, the appeal was filed outside the prescribed time of sixty days. The appellant therefore, cannot benefit from the certificate of delay issued by the Registrar of the High Court. The appeal is time barred.

In fine, the appeal is struck out with no order as to costs.

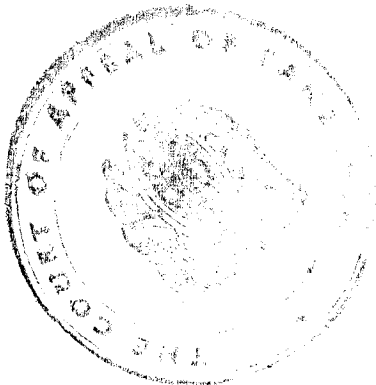
DATED at ARUSHA this 30th day of October, 2014.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



A handwritten signature in black ink, appearing to read "F. J. Kabwe".

F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL