IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A., And MAIGE, J.A.)

CIVIL APPEAL NO. 321 OF 2019

OLEPASU TANZANIA LIMITED t/a MAXAM EAST AFRICA.....APPELLANT

VERSUS

HEINEKEN BROUWERIJEN B.V.....1st RESPONDENT
HEINEKEN INTERNATIONAL B.V.....2nd RESPONDENT

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

(Fikirini, J.)

dated the 29th Day of August, 2019
in
Commercial Case No. 5 of 2018

RULING OF THE COURT

19th & 23rd September, 2022

KEREFU, J.A.:

The High Court of Tanzania, Commercial Division (Fikirini, J. as she then was) sitting at Dar es Salaam, partly allowed the appellant's claims in Commercial Case No. 5 of 2018. In that suit, the appellant sued the respondents jointly and severally in respect of the breach of agreement for distribution of Heineken Lager Beer brand in Tanzania executed between the appellant and the first respondent. It was the appellant's claim that, the said agreement commenced as an oral agreement sometimes in April, 2012 and later, through a letter dated 11th August, 2014, it was reduced

into writing. However, on 27th January, 2016, the second respondent, un-procedurally and on behalf of the first respondent, issued a notice of termination of the said agreement with effect from 1st May, 2016. The appellant claimed further that the said termination exposed her to substantial loss and damages.

On that basis, the appellant sought for the following reliefs; (i) a declaration that the letter of appointment dated 11th August, 2014 between the appellant and the first respondent was still effective until such time when will be lawfully terminated; (ii) a declaration that the notice of termination dated 27th January, 2016 issued by the second respondent to the appellant was unlawful and therefore *null* and *void*; (iii) a declaration that the appellant is the sole distributor of Heineken Lager Beer brand in Tanzania and restraining the respondents or any of its agents whatsoever from appointing any other person for purposes of distribution of Heineken Lager Beer brand in Tanzania; (iv) alternatively, the appellant prayed for the respondents to be ordered to pay special damages at the tune of TZS 124,463,369,000.00 being compensation for investment, loss of business, expected profits and damages as a result of unlawful termination of the agreement; (v) the appellant also prayed for the respondents to be ordered to pay TZS 697,356,548,000.00 per month being the margin loss

from mid-September, 2017 until determination of the suit; (vi) interest of the total amount claimed at the rate of 24% per annum from the date of filing of the suit to the date of judgment; (vii) interest of the decretal sum at the rate of 7% per annum from the date of judgment to the date of full satisfaction of the decree; (viii) payment of punitive damages at the tune of TZS 5,000,000,000.00; (ix) payment of general damages and (x) the costs of the suit.

In their written statement of defence, the respondents resisted almost all claims advanced by the appellant save for the contents of the letter dated 11th August, 2014 confirming that the appellant was the then approved importer and distributor of Heineken Lager Beer in Tanzania. That, the said letter provided for the mode of importation and distribution of the Heineken Lager Beer in Tanzania for ninety (90) days credit facility without affecting the respondents' intellectual property rights. Thus, the respondents prayed for the appellant's suit to be dismissed with costs.

Having heard the evidence of the witnesses for both sides, the learned High Court Judge partly entered judgment in favour of the appellant by ordering the respondents to pay general damages to her at the tune of TZS 1,125,000,000.00, interest at the rate of 12% per annum from the date of filing of the suit to the date of judgment, interest on the

decretal sum at the rate of 7% per annum from the date of judgment to the date of full payment and costs of the suit.

The decision of the High Court prompted the appellant to lodge the current appeal to express her dissatisfaction. The appeal comprises eleven grounds of complaint. However, for reasons which will be apparent shortly, we do not deem it appropriate, for the purpose of this ruling, to reproduce them herein.

At the hearing of the appeal, Messrs. Salim Juma Mushi and Joseph Sylvester Ndazi, both learned advocates, appeared for the appellant and respondents, respectively.

However, before we could embark on hearing of the appeal, we wanted to satisfy ourselves on the propriety or otherwise of the appeal before us on account of; **one**, absence of the Registrar's letter in the record of appeal notifying the appellant that the requested High Court proceedings were ready for collection in reply to the appellant's letter lodged in the High Court on 13th September, 2019 and **two**, validity of the certificate of delay which erroneously exempted days from 11th September, 2019 to 20th September, 2019 as the period used to prepare the requested

documents. As such, we invited the counsel for the parties to address us on those issues.

Upon taking the floor, apart from conceding that the respective Registrar's letter is missing from the record and that the certificate of delay referred to erroneous dates, Mr. Mushi argued that the appeal was properly before the Court. He advanced the following reasons: **One**, it was not necessary to include, in the record of appeal, the letter of the Registrar as it has no connection with the validity of the certificate of delay, because pursuant to the proviso under Rule 90 (1) of the Tanzania Court of Appeal Rules (the Rules) as amended by the G.N. No. 344 of 2019, the time required to be excluded is the time used for preparation of the documents to the time of delivery. According to him, the certificate of delay suffices as it bears the date when the certified copy of the High Court proceedings was requested and delivered to the appellant. To support his argument, he referred us to our previous decision in **Continental Services Limited v. China Railway Jianchang Engineering Co. (T) Limited,** Civil Appeal No. 184 of 2018 (unreported). **Two,** that, since the mistakes of indicating wrong dates in the certificate of delay was done by the Registrar and not the appellant, this Court may wish to invoke the overriding objective principles introduced in the Appellate Jurisdiction Act, Cap 141 R.E. 2019

(the AJA) by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 and consider it as a minor clerical error and proceed to hear the appeal on merit.

Upon further reflection and in the alternative, Mr. Mushi argued that, if the Court finds that the record of appeal is incompetent for non-inclusion of the Registrar's letter and that the certificate of delay is invalid, may remedy the omission by invoking Rule 96 (7) of the Rules and grant leave to the appellant to approach the Registrar of the High Court, obtain a valid certificate of delay and then lodge a supplementary record of appeal to include the same in the record of appeal.

On the other hand, Mr. Ndazi argued that, since, Mr. Mushi had readily conceded that the Registrar's letter is missing in the record of appeal and that the certificate of delay referred to the wrong dates, then the said certificate is invalid and could not support the appeal. He clarified that the absence of the Registrar's letter in the record of appeal had rendered the certificate of delay invalid as it is not certain on when the appellant was notified that the requested certified copy of proceedings was ready for collection. He emphasized that the date of notification forms the basis of the last date to be reckoned in calculating the number of days to

be excluded in computing the period of limitation, that is, sixty (60) days from the date of the notice of appeal within which to lodge an appeal. Besides, he added, the proper date to be considered is that of notification and not when the appellant collected the certified copy of proceedings as suggested by Mr. Mushi. On that basis, Mr. Ndazi urged us to find that, as the appeal is supported by an invalid certificate of delay, it is time barred and consequently, should be struck out with costs. In a brief rejoinder, Mr. Mushi reiterated his earlier submission and prayers.

On our part, having examined the record of appeal and the submissions advanced by the learned counsel for the parties, the issue for our consideration is whether the appeal is properly before the Court. We shall preface our discussion under Rule 90 (1) of the Rules which regulates the timelines of instituting an appeal in this Court. It categorically states 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 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."

It is clear from the above cited provision that, the appellant is required to lodge an appeal within sixty days from the date of filing notice of appeal. The only exception to this requirement is where an appellant has not obtained a copy of the proceedings from the High Court and has applied for the same, in writing, within thirty days of the impugned decision and served a copy thereof on the respondent. That, the Registrar may issue a certificate of delay excluding the period or number of days required or used to prepare and deliver the certified High Court proceedings. As to when and the mode of supplying certified proceedings, Rule 90 (5) of the Rules gives the following direction:

"Subject to the provisions of sub rule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date of the appellant requested for such copy and the appellant shall take steps to collect copy

upon being informed by the Registrar to do so, or within fourteen (14) days after expiry of the ninety (90) days."

The above Rule imposes obligation on the Registrar to (i) ensure that the proceedings are ready for delivery within ninety (90) days from the date when the appellant applied to be supplied with the proceedings and (ii) notify the appellant on the readiness of the requested documents. It cements the earlier settled position that, the documents for the purpose of an appeal should be secured after the appellant has obtained the Registrar's official notification that the requested documents are ready for collection.

In the instant appeal, there is no dispute that the decision sought to be challenged was handed down on 29th August, 2019 and the notice of appeal was lodged on 13th September, 2019. It is also on record that, on 11th September, 2019 the appellant wrote a letter to the Registrar requesting for certified copies of proceedings, judgment and decree. The said letter was lodged in the High Court on 13th September, 2019. However, and as readily conceded by both learned counsel for the parties the record is silent on when exactly the appellant was notified by the Registrar of the High Court that the requested documents were ready for collection because the Registrar's letter to that effect is not included in the

record of appeal. In the case of **Eveline J. Ndyetabula v. Star General Insurance (T) Limited,** Civil Appeal No. 189 of 2019 (unreported), this Court while addressing the rationale and the importance of Registrar's notification letter and its consequences when it is not included in the record of appeal stated as follows:

> *As this ruling is written essentially because of the* ***absence of that letter from the Registrar,*** *before proceeding to determine counsel's contending positions at this stage, it is, we think, instructive to briefly make a point or two on the use value of the letter in question in the context of the provisions of Rule 90(1) of the Rules, and consequences of its absence to the certificate of delay, specifically and the appeal, generally."*

Then, the Court, after making reference to several authorities on the subject matter, it went on to state that:

> *"In the instant appeal,* ***it is not in dispute that the letter of the Registrar of the High Court which informed the appellant that the documents were ready for collection was not in the record of appeal.*** *In the absence of that letter, the respondent argued that the certificate of delay is defective since it mentioned 4th June, 2019 the date the appellant was supplied with the copy of proceedings but not borne out of the record. This is because*

the date upon which the Registrar informed the appellant that the documents were ready for collection is the one upon which the time limit to lodge the appeal ought to start counting." [Emphasis added].

Consequently, the Court struck out the appeal for being time barred on the account of non-inclusion of the Registrar's letter in the record of appeal. Furthermore, in **Hamisi Mdeda and Said Mbogo v. The Registered Trustees of Islamic Foundation,** Civil Appeal No. 59 of 2020 (unreported), the Court described the role of the Registrar of the High Court in preparing the certificate of delay that:

"He must state in very dear terms that the days to be excluded in computing the period of limitation are those from the time when the appellant requested for copies of proceedings to the date ***when he notified him that the documents are ready for collection****". [Emphasis added].*

[See also our decision in **Continental Services Limited** (supra) cited to us by Mr. Mushi and **District Executive Director Kilwa District Council v. Bogeta Engineering Limited,** Civil Appel No. 37 of 2017**; LRM Investment Company Ltd and 5 Others v. Diamond Trust Bank Tanzania Limited,** Civil Appeal No. 111 of 2019 (both unreported) and **Eveline J. Ndyetabula** (supra)]. In all these cases, the Court, among

other things, struck out the appeal for being time barred as they were supported by an invalid certificate of delay on the account of non-inclusion of the Registrar's letter in the record of appeal.

In the circumstances, we find the argument by Mr. Mushi that it was not necessary to include, in the record of appeal, the letter of the Registrar as it has no connection with the validity of the certificate of delay to have no legal basis. We further find his interpretation of our decision in **Continental Services Limited** (supra) to be misconceived.

We thus wish to emphasize that the presence of the letter of notification is important for ascertaining the period between the date of request to the date of notification. The said letter is intended to facilitate the issuance of a certificate of delay that reflects a verifiable and definite latest cut-off date from which the sixty days within which to lodge an appeal under Rule 90 (1) of the Rules, starts to run. Therefore, in the instant appeal, since the dates indicated in the certificate of delay is not borne out of the record, we agree with Mr. Ndazi that the said certificate cannot be relied upon for containing unverifiable information.

The other ailment which undermines the validity of the certificate in this appeal is the period exempted therein. It is on record and as conceded

by both learned counsel for the parties that the appellant's letter which requested to be supplied with certified copies of proceedings, judgement and decree was lodged in the High Court on 13th September, 2019 but the period exempted in the certificate of delay is from 11th September, 2019 to 20th September, 2019. To appreciate this point, we find it prudent to reproduce the material part of the said certificate herein below:

> *CERTIFICATE OF DELAY*
>
> *This is to certify that the period from* ***September 11, 2019*** *when the defendant's advocate requested copies of proceedings, Judgment and Decree up to* ***September 20, 2019 when those documents were supplied to them,*** *a total number of 9 days should be excluded in computing the time for instituting the appeal to the Court of Appeal of Tanzania, as such time was spent* ***for preparation of the court documents****." [Emphasis added].*

It is patently clear from the wording of the certificate that it erroneously excluded the period from the date of the letter (11th September, 2019) and not 13th September, 2019 when the said letter was lodged in the High Court to 20th September, 2019 when the documents were supplied to the appellant and not when he was notified that the said documents were ready for collection. As intimated above, the days to be

excluded in the certificate of delay are those from the time when the appellant requested for copies of proceedings to the date when the Registrar notify the appellant the documents are ready for collection. In **CRDB PLC v. True Colour Ltd and Another,** Civil Appeal No. 29 of 2019 (unreported), the Court emphasized that:

> *"It is obvious that the certificate of delay is defective ...as it* ***reckons the date of supply of the documents to the appellant as the last date in the computation of time to be excluded instead of the date of notification that the documents are ready for collection."*** *[Emphasis added].*

Similarly, in the instant appeal we agree with Mr. Ndazi that the certificate is invalid as it does not reflect the truth of the matter and excluded the period which was not subject for exemption. Therefore, same cannot be relied upon by the appellant in this appeal. In addition, and in the wake of missing of the Registrar's letter in the record of appeal, it is even not certain when exactly the appellant was notified that the said documents were read for collection. Thus, the appeal is time barred.

We are of the further view that the circumstances obtained in this appeal, cannot be cured by the principle of overriding objective as the same cannot be blindly applied on such an omission which goes to the root

of the appeal. The Court cannot have jurisdiction to entertain an appeal which is time barred and where the certificate of delay is invalid. See the cases of **Njake Enterprises Limited v. Blue Rock Limited and Another,** Civil Appeal No. 69 of 2017 and **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others,** Civil Appeal No. 66 of 2017 (both unreported) where we categorically stated that, the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case.

Furthermore, and for the avoidance of doubt, we have refrained from invoking the provisions of Rule 96 (7) of the Rules, to which we often resort to inject oxygen to a defective certificate of delay by granting leave to the appellant to lodge a supplementary record to include a valid certificate of delay in the record. This is so, because, in this case, as indicated above, the Registrar's letter to justify the period excluded in the certificate is not part of the record. In addition, there is nowhere in the record of appeal that the appellant has indicated to have been supplied with such letter. In his submission, Mr. Mushi clearly indicated that the said letter was not necessary as, according to him, it has no connection with the validity of the certificate of delay. That is the reason why we have

found and held that, in the circumstances, the appeal cannot be resurrected by the principle of overriding objective.

In the premises, we are of the settled view that the appeal before us is incompetent for being time barred. Consequently, we strike it out with costs.

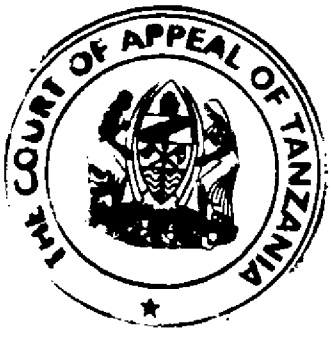
DATED at **DAR ES SALAAM** this 22nd day of September, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of September, 2022 in the Presence of Ms. Glory Venance holding brief for Mr. Salim Mushi, learned counsel for the appellant and Ms. Glory Venance holding brief for Mr. Joseph Ndazi, learned counsel for the Respondents, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL