

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR
(CORAM: WAMBALI, J.A., SEHEL, J.A. And GALEBA, J.A.)
CIVIL APPEAL NO. 241 OF 2020

ATTORNEY GENERAL ZANZIBAR..... APPELLANT

VERSUS

JAKU HASHIM AYOUB.....1ST RESPONDENT

ZANZIBAR PETROGAS LIMITED.....2ND RESPONDENT

**(Appeal from the judgment and decree of the High Court of Zanzibar
at Vuga)**

(Sepetu, J.)

Dated the 23rd day of February, 2017

in

Civil Case No. 3 of 2016

.....

RULING OF THE COURT

22nd & 30th November, 2021

WAMBALI, J.A.:

Jaku Hashim Ayoub and Zanzibar Petrogas Limited, the first and second respondents respectively, jointly instituted a suit (Civil Case No. 3 of 2016) before the High Court of Zanzibar at Vuga against the Attorney General Zanzibar, the appellant and Ahmed Rashid (not a party to this appeal) in which they claimed several reliefs.

Notably, upon being served with the plaint, the appellant lodged a notice of preliminary objection against the suit in which three points

were raised against the suit. **One**, the suit is bad in law for the failure of the respondents to comply with the Government Proceedings Act, No. 3 of 2010. **Two**, the respondents have no locus standi and **three**, the suit did not disclose the cause of action against the appellant and Ahmed Rashid. The High Court heard the parties and ultimately in its ruling dated 10th October, 2016, it dismissed the three points of objection for being baseless.

More importantly, after the appellant filed the Written Statement of Defence and served it on the respondents, they prayed the High Court of Zanzibar to enter judgment on admission on the contention that the appellant generally and evasively denied the claims. The prayer was heeded by the learned High Court Judge who was of the settled view that the appellant contravened the provisions of Order VIII Rules 3, 4 and 5 of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar (Cap. 8). Consequently, he concluded that the Written Statement of Defence left no doubt that the appellant had constructively admitted all material facts in the case as pleaded in the plaint. Hence he entered judgment on admission in favour of the respondents.

Equally important, the learned High Court Judge entered a default judgment against Ahmed Rashid on the finding that he failed to file the

Written Statement of Defence in contravention of Order VIII Rule 10 of Cap 8.

It is against the Judgment and Decree of the High Court of Zanzibar that the appellant has approached the Court seeking its intervention by premising his complaints on four grounds of appeal. However, for the reason which will be apparent shortly, we do not intend to reproduce the respective grounds of appeal herein below.

On 18th November, 2021, the respondent lodged in Court a notice of preliminary objection comprising two points of law. **First**, that the appeal is incompetent in that the Drawn Order over the ruling of the preliminary objections and the order of payment of decretal amount are missing as they are not included in the record of appeal. **Second**, that the appeal is time barred for having a defective certificate of delay because the letter dated 28th February, 2017 requesting for certified copy of the proceedings was not served upon the respondents' advocates.

Before the hearing of the appeal, it therefore became apparent that we should in the first place dispose of the preliminary points of objection. This ruling is thus intended to determine the submissions of

the parties with regard to the objections on points of law raised by the respondents.

Mr. Ali Ali Hassan, learned Principal State Attorney assisted by Mr. Juma Msafiri Karibona and Mr. Ali Issa Abdalla learned Principal State Attorney and State Attorney respectively, entered appearance for the Attorney General Zanzibar, the appellant. On the adversary side, Mr. Salum Hassan Bakari Mnkonje and Mr. Abdulkhaliq Mohamed Aley learned advocates represented the respondents.

Noteworthy, before Mr. Mnkonje addressed the Court on the substance of the preliminary points of law, Mr. Hassan who initially intimated to the Court that he was not able to proceed because he had not been served with the notice of preliminary objection, changed his stand after it was revealed that the notice of objection was duly served through the office of the appellant. He agreed to respond after the respondents' counsel submission. However, upon being shown the points of objection and after a brief dialogue with the Court he readily conceded to the second point of law. He acknowledged that though the appellant wrote a letter to the Registrar of the High Court of Zanzibar on 28th February, 2017 requesting for certified copy of proceedings, that letter was not copied and served upon the respondents as required by

Rule 90 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In the circumstances, he admitted that the appeal is time barred as the certificate of delay which was issued by the Registrar of the High Court of Zanzibar cannot assist the appellant since the provisions of Rule 90 (3) of the Rules was contravened. In the event, he urged the Court to strike out the appeal with no order as to costs.

The concession of the appellant's counsel on the second preliminary point of objection was graciously welcomed by Mr. Mnkonje. Nevertheless, though he agreed that the appeal is time barred, he strongly contested Mr. Hassan's prayer to have the appeal struck out with no order as to costs. On his part, despite his inability to refer to us any authority in support of his firm position, he adamantly urged us to dismiss the appeal with costs instead of striking it out.

Having heard the submissions of the counsel for the parties for and against the second point of preliminary objection, we entirely agree with them that the instant appeal is time barred. There is no dispute that the trial court's decision was delivered on 23rd February, 2017 and the notice of appeal to this Court was lodged on 6th March, 2017. Therefore, in terms of Rule 90 (1) of the Rules, the appeal was supposed to be lodged in this Court within sixty days from the date of

the notice of appeal. On the contrary, as per the record of appeal, the instant appeal was lodged on 21st October, 2019 which is almost after more than two years and six months.

On the other hand, we are aware that in terms of the proviso to Rule 90 (1) of the Rules, once the intended appellant has written a letter to the Registrar of the High Court requesting to be supplied with certified copy of proceedings, he is entitled to a certificate of delay excluding such time as having been required for the preparation and delivery of that copy to the appellant.

However, in the instant appeal, as correctly conceded by the appellant's counsel, though the Registrar of the High Court of Zanzibar issued the certificate of delay excluding a total of 932 days from computation of time, the same cannot be relied upon by the appellant to take refuge under the proviso to Rule 90 (1) of the Rules as she did not serve upon the respondents the letter requesting for certified copy of proceedings contrary to the requirement of Rule 90 (3) of the Rules. For this stance, see for instance the decisions of the Court in **Machano Hamisi and 17 Others v. Commissioner of Police and 2 Others**, Civil Appeal No. 43 of 2010, **Filon Felician Kwesiga v. Board of Trustees of the National Social Security Fund (NSSF)**, Civil Appeal

No. 136 of 2020, **Tobacco Traders Company v. Ufuluma AMCS Ltd and 2 Others**, Civil Appeal No. 93 of 2016 and **Mohamed Issa Mtalamile and Three Others v. Tanga City Council and Another**, Civil Appeal No. 200 of 2019 (all unreported), among several decisions.

More particularly, though in **Simon Lanya v. The Permanent Secretary Ministry of Public Safety and Security and Three Others**, Civil Appeal No. 40 of 2010 (unreported), the Court dealt with Rule 83 (2) and Rule 90 (2) of the old Rules which is currently Rule 90 (3) of the Rules, we think the following observation is important for purpose of guidance: -

"Under the proviso to Rule 90 (1) of the Rules, the appellant cannot shield himself under the exception of sub rule (1) of Rule 90 unless a copy of the letter addressed to the Registrar of the High Court asking for the record of proceedings was sent to the respondent.

*This Court in the case of **D.P. Vallambia v. Transport Equipment Limited** [1992] T.L.R. 246 citing Rule 83 (2) of the old Court of Appeal Rules, 1979 which is parimateria with the current Rule 90 (2) of Rules held that if the respondent does not serve upon the applicant a copy of their*

letter in which they apply for a copy of the proceedings as required under Rule 83 (2) they are not covered by the exception in sub rule (1).

Thus, if the Registrar issued them with a certificate under sub rule (1) of Rule 83 such certificate was issued under a mistake of fact. Consequently, the period available in which to institute the appeal was sixty days”.

Thus, applying the above sound observation to the instant appeal, we are settled that the purported appeal which was instituted on 21st October, 2019 in contravention of Rule 90 (1) of the Rules, is undisputedly time barred. We therefore, sustain the uncontested second point of preliminary objection. Given the circumstances, we do not find it is necessary to determine the first preliminary point of objection as the former suffices to dispose of the fate of the appeal.

The next question for our consideration is whether the purported appeal should be struck out with no order as to cost as urged by the appellant’s counsel or dismissed with costs as strongly stressed by the respondents’ counsel.

At this juncture, we are compelled to remark that upon numerous decisions of this Court and its predecessor, the law is settled as to when

it comes to the Court taking a decision whether to dismiss or strike out an application or appeal before it. Instructively, in **Ngoni Matengo Cooperative Marketing Union Ltd v. Ali Mohamed Osman** [1959] EA 577, the defunct Court of Appeal for Eastern Africa pronounced as follows: -

"This Court, accordingly, had no jurisdiction to entertain it, what was before the Court being abortive and not a properly constituted appeal at all. What this Court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it, for the latter phrase implies that a competent appeal had been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of".

We have no hesitation to state that the position expressed above has been consistently followed by the Court in a number of its decisions, including: **Nationl insurance Corporation and Another v. Shengena Limited**, Civil Application No. 20 of 2007; **Hashim Madongo and Two Others v. The Minister for Industry and Trade and Two Others**, Civil Appeal No. 27 of 2003; **Abdallah Hassan v. Vodacom (T)**, Civil Appeal No. 18 of 2008 and **Mabibo**

Beer Wines & Spirits Limited v. Fair competition Commission and Three Others, Civil Application No. 132 of 2015 (all unreported).

More particularly, in **Mabibo Beer Wines & Spirits Limited** (supra) faced with an akin prayer, we made the following pertinent remarks: -

"We should pause here to observe, albeit en passant, that it will turn differently if the relevant Legislation or Rules of the Court imposes, on the Court a duty or discretion to give a dismissal order with respect to a matter which has not been heard on the merits. A case in point is, for instance, Rule 63 (1) of the Rules which gives the Court a discretion to dismiss an application in the wake of the non-appearance of the applicant".

In the circumstances, with respect, we unhesitantly decline the invitation by the respondents' counsel to dismiss the appeal instead of striking it out. Equally important, having carefully scrutinized the circumstances of the instant purported appeal, we think it will not be in the interest of justice to grant costs to the respondents.

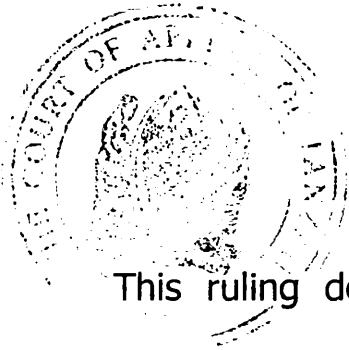
Consequently, for the reasons we have belabored to canvass, we strike out the appeal with an order that parties shall bear their respective costs.

DATED at **ZANZIBAR** this 30th day of November, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL



This ruling delivered this 30th day of November, 2021 in the presence of Mr. Juma Msafiri Karibona, learned Principal State Attorney assisted by Ms. Sarah A. Khatau, learned State Attorney, for the appellant and Mr. Abdulkhaliq Aley, learned counsel for the respondents, is hereby certified as a true copy of original.

A handwritten signature in black ink, appearing to be "G. H. Herbert", written over a faint circular stamp.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL