

TPO Panuli 4

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., and KEREFU, J.A.)

CIVIL APPEAL NO. 20 OF 2015

MWALIMU AMINA HAMISI.....APPELLANT

VERSUS

- | | |
|--|--------------------|
| 1. NATIONAL EXAMINATION COUNCIL OF (T) | }..... RESPONDENTS |
| 2. PERMANENT SECRETARY, MINISTRY OF
EDUCATION AND VOCATIONAL TRAINING | |
| 3. NACHINGWEA DISTRICT COUNCIL | |
| 4. TEACHERS SERVICE COMMISSION | |
| 5. THE HONOURABLE ATTORNEY GENERAL | |

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania)
at Dar es Salaam

(Kalegeya, J)

dated the 11th day of May, 2009
in
Misc. Civil Case No. 111 of 2004

RULING OF THE COURT

11th & 24th June, 2019

KEREFU, J.A.:

The appellant, Mwalimu Amina Hamisi was the applicant before the High Court in *Misc. Civil Cause No. 111 of 2004* applying for orders of certiorari and mandamus against the respondents. The gist of the matter as obtained in the record of appeal is as follows: The appellant is a teacher by

profession and during the 1998 teachers' certificate verification exercise, she was found to be lacking a certificate from the National Examination Council certifying that she graduated from Nachingwea Teachers Training College. Consequently, on 8th April 2003 she was terminated from employment for lack of requisite qualifications. She thus lodged the application before the High Court challenging the termination through the prerogative orders. Specifically, the appellant prayed for the following:-

- (a) An order to call respective decisions of the first, third and fourth respondents and quash them;*
- (b) An order directing:-*
 - (i) the first respondent to accept the results sent to him in annexure AH2 and grant the certificate of teachers' education to the applicant.*

In the alternative the first respondent be ordered to accept any results of the Block Teaching Practice to be conducted by the second respondent through directing the:-

- (i) second respondent to conduct Block Teaching practice for the appellant and delivering the same to the first respondent;*
- (ii) fourth respondent to accept and register the applicant as a teacher in terms of Teachers Service Commission Regulations;*

- (iii) *third respondent to return the applicant to a continuous employment and pay her all her dues taken (sic) the date of her termination;*
 - (iv) *Costs of the proceedings to be paid for by the first, third and fourth respondents.*
-

On 10th August 2005, the second, third, fourth and fifth respondents raised a notice of preliminary objection to the effect that, '*prerogative orders cannot be sought along side or alternatively to ordinary remedies.*' The said point of objection was ordered to be argued by way of written submissions. However, it was only the second, third, fourth and fifth respondents who complied with the scheduled order. Based on the said submission, the High Court on 11th May 2009 upheld the preliminary objection and struck out the application for being incompetent. Aggrieved, the appellant sought for leave to appeal to the Court of Appeal, which was granted on 3rd May 2011 and on 9th March 2015, after lapse of almost six years, she lodged this appeal. Again, the second, third, fourth and fifth respondents raised the point of preliminary objection to the effect that, '*the appellant's appeal is untenable for abuse of court process.*'

At the hearing of the appeal, the appellant was represented by Mr. Gabriel Simon Mnyele, learned counsel, whereas the respondents had the services of Ms. Angela Lushagara, Principal State Attorney.

Prior to the commencement of the hearing of the appeal on merit, the Court, *suo motu* requested the parties to address it on the propriety or otherwise of the appeal and specifically on the validity of the certificate of delay dated 14th January 2015.

Mr. Mnyele submitted that, pursuant to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (*'the Rules'*) the Registrar of the High Court is empowered to exclude, in the certificate of delay, the time from when the appellant requested for the High Court's proceedings, ruling and the drawn order till when they become ready for collection. He said, unfortunately, in this case the certificate of delay is defective, because it referred to the date of 19th May 2009 when the appellant lodged the notice of appeal and 2nd August 2012 when she requested for a copy of the drawn order instead of 11th May 2009, when the appellant requested to be supplied with the said High Court's documents.

As for the remedy in the circumstances, Mr. Mnyele argued that, since the mistakes of indicating the wrong dates was done by the Registrar and not the appellant, this Court may disregard it. Although, Mr. Mnyele also noted that, the appellant was as well required to check if the certificate of delay issued to her was correct and in case of any errors to notify the Registrar to rectify the same. Mr. Mnyele however, urged us to invoke Rule 2 of the Rules, which require the Court in applying the Rules to have due regard to achieve substantive justice, to correct the said errors and proceed to hear the appeal on merit. To wind –up, Mr. Mnyele submitted that, should the Court find that the appellant did not comply with the provisions of Rule 90(1) and (2) of the Rules and that the appeal is time barred, it may consider the overriding objective principles introduced in the Appellate Jurisdiction Act, Cap 141 (*the AJA*) by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 and hear the appeal on merit. In addition, Mr. Mnyele referred us to Article 107A (2) (e) of the Constitution of the United Republic of Tanzania 1977 and argued that, in administering justice courts should not be unduly tied up by technicalities.

In her response, Ms. Lushagara readily conceded that the certificate of delay is defective, as it was prepared contrary to Rule 90 (1) and (2) of

the Rules. She clarified that, in the said certificate there are number of days that have been wrongly excluded. She then said, since the certificate of delay is defective it cannot benefit the appellant from the excluded period and as such, the appeal is time barred. Upon being asked if the Court has the power to rectify the errors found in the said certificate, Ms. Rushagala said, this Court has no mandate to rectify the said errors, because the certificate of delay was prepared by the Registrar of the High Court and not the Court. She then concluded by praying for the appeal to be dismissed for being time barred.

In rejoinder submission, Mr. Mnyele disputed the prayer made by Ms. Lushagara to dismiss the appeal. He said, since Ms. Lushagara is not disputing that the appeal is incompetent there is nothing to be dismissed. He referred us to the decision of this Court in **Ngoni – Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman** (1959) E.A. 577 at page 580, where it was stated that, "*...normally an order of dismissal implies that a competent appeal has been disposed of while an order for striking out an appeal implies that there was no proper appeal capable of being disposed of.*" [Emphasis added].

He then, prayed us to strike out the appeal to give chance to the appellant to rectify the detected errors.

Having examined the record of the appeal and considered the submissions made by the parties, there is no dispute that the certificate of delay is defective as it was prepared contrary to Rule 90 (1) of the Rules.

The said Rules provide that:-

"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 costs of appeal*

*Save that, where an application of the proceedings in the High Court has been made within thirty days of the date of 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 preparation and delivery of that copy to the appellant.**"*
[Emphasis added].

From the above cited Rules it is clear that, the appellant was required to lodge his appeal within sixty days from the date when the notice of appeal

was lodged. The only exception to this requirement is where he 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 date of the decision against which it is desired to appeal. Under the same Rules, the Registrar of the High Court is equally required to issue the certificate of delay indicating the number of days that were required or used to prepare and deliver that copy to the appellant in order to entitle him to the exclusion of those days in computing time within which the appeal has to be lodged.

This Court in several occasions has interpreted the applicability of the above Rules and emphasized on the importance of adhering to the mandatory requirement therein. Some of these decisions include, **Khantibhai M. Patel v. Dahyabhai F. Minstry** [2003] TLR 437; **Omary Shabani S. Nyambu v. The Permanent Secretary Ministry of Defence and 2 Others**, Civil Appeal No. 105 of 2015; **Yazidi Kassim t/a Yazidi Auto Electric Repairs v. The Hon. Attorney General**, Civil Appeal No. 215 of 2017, quoting with approval the case of **Andrew Mseul and 5 Others v. The National Ranching Company Ltd and Another**, Civil Appeal No. 205 of 2016 (all unreported), to mentioned, but a few. Specifically, in **Khantibhai M. Patel** (supra) this Court held *inter alia* that:-

"A proper certificate under rule 83(1) of the Rules of the Court is one issued after the preparation and delivery of a copy of the proceedings to the appellant and the certificate contained in the record of appeal was improper; it might have been an inadvertent error and no mischief was involved but the error rendered the certificate invalid. An error in a certificate is not a technicality which can be glossed over; it goes to the root of the document". [Emphasis supplied].

In addition in **Andrew Mseul** (supra) the Court observed that:-

"A valid certificate of delay is one issued after the preparation and delivery of the requested copy of the proceedings of the High Court. That necessarily presupposes that the Registrar would certify and exclude such days from the date when the proceedings were requested to the day when the same were delivered" [Emphasis added].

In the instant case, as clearly submitted by the counsel for the parties, the impugned decision was delivered on 11th May 2009 and on 19th May 2009 the appellant lodged notice of appeal as shown at pages 118 and 122 of the record of appeal, respectively. It is also on record that, in her letter with *Ref. No. MM/AH/2009/1* dated 11th May 2009 shown at page 124 of the record of appeal, the appellant wrote to the Registrar requesting to be supplied with copies of proceedings, ruling and the drawn order for appeal

purposes. After several reminders and correspondences, the Registrar, via his letter *Ref. No. Misc. Civ. Cause No. 111/2004* dated 13th June 2012 shown at pages 158-159 of the record of appeal informed the appellant that the requisite copies are ready for collection upon payment of court fees.

However and as eloquently argued by the counsel for the parties, in the said certificate of delay, the Registrar, instead of excluding days from 11th May, 2009 when the documents were requested and 13th June 2012 when the documents were ready for collection, the Registrar indicated completely different dates of 19th May, 2009, 2nd August 2012 and 8th January 2015 and wrongly excluded days which were not subject for exclusion as per the above Rule. It is even not certain as when exactly the appellant collected the said documents after being notified that they were ready for collection. For clarity, we find it prudent to reproduce part of the said certificate of delay herein below:-

"(CERTIFICATE OF DELAY UNDER RULE 90(1) OF THE COURT OF APPEAL RULES 2009)

This is to certify that a period from 19th day of May, 2009 when the appellant lodged notice of Appeal and 2nd day of August, 2012 as when the appellant applied for the copy of Drawn order, to 8th day of January, 2015 when the appellant was supplied with paper is to be excluded for such days were required for the preparation and delivery of the said requisite papers to the appellant."

Reading the above certificate and following the authorities in **Khantibhai M. Patel** (supra) and **Andrew Mseul** (supra) we are in agreement with the counsel for the parties that the certificate of delay is fatally defective.

As for the remedy, we are mindful of the fact that, in a bid to exonerate the appellant from the blame on the defects noted, Mr. Mnyele had beseeched us by arguing that, since the error was committed by the Registrar, who prepared and issued the invalid certificate, we can disregard or correct the errors and/ or invoke the Court powers under Rule 2 of the Rules and proceed to determine the appeal on merit. With respect, we are unable to agree with Mr. Mnyele's sentiment, because under Rule 96 (5) of the Rules,

the said certificate was prepared by the Registrar of the High Court and the appellant together with her counsel were duty bound to inspect the said certificate before filing the same in Court. For purposes of emphasis, we wish to refer to the previous decision of this Court in **Antony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 33 of 2013 (unreported) where this Court when considering a similar matter stated that:-

"Had the learned counsel taken time to verify on the correctness of the certificate of delay or any other documents for that matter before incorporating them in the record of appeal, the conspicuous defects in the certificate of delay would have been attended to before certifying on the correctness of the record, in terms of Rule 96(5) of the Rules". [Emphasis added].

Similarly, in the case at hand, if the appellant and her counsel could have checked on the correctness of the certificate of delay issued to them would have easily detected the said errors and correct them at an earliest opportune time before lodging the appeal.

Before making the final order on this matter, having taken note of another prayer by Mr. Mnyele that, if we find the appeal to be time barred to invoke the overriding objective principle contained in the provisions of section 3A and 3B of the AJA and Article 107A (2) (e) of the Constitution to

allow the appeal to be heard on merits and do away with legal technicalities. We are also aware that Ms. Lushagara did not make any comment on this prayer. With due respect, we are again unable to agree with Mr. Mnyele on this matter, because as indicated above in the case of **Khantibhai M. Patel** (supra), an error in the certificate of delay is not a technicality which can be glossed over. The said error goes to the root of the document and even the appellant cannot benefit from the excluded period to lodge the appeal. Again, the issue of invalid certificate of delay being linked to time limitation in lodging an appeal, is a mandatory requirement on the procedural law which goes to the very foundation of the appeal and it touches on the jurisdiction of this Court to entertain and determine the appeal. As such, the same cannot be a technicality envisaged under Article 107A (2) (e) of the Constitution. In this regard, we associate ourselves with what this Court had stated in **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 and **Njake Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017 (both unreported) 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.

In the circumstances, we are satisfied that the appellant cannot benefit from the excluded period indicated in the invalid certificate of delay. Now, since the appeal was lodged on 9th March 2015 after lapse of more than six years from the date of lodging the notice of appeal, beyond the prescribed period of sixty days, the same is time barred.

Eventually and for the foregoing reasons, the incompetent appeal is hereby struck out for being time barred. We make no order as to costs since this is a labour matter and the issue was raised by the Court *suo moto*. It is so ordered.

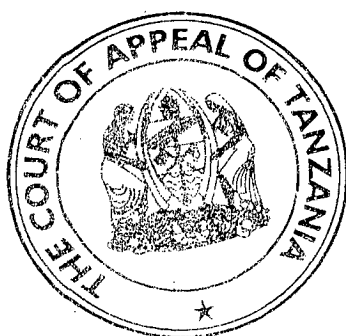
DATED at DAR ES SALAAM this 20th day of June, 2019.

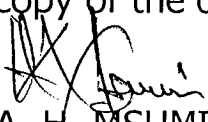
S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

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




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL