

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT DODOMA fCORAM: LILA. 3.A.. MURUKE. 3.A. And MDEMU. J.A.T CIVIL APPEAL NO. 268 OF 2022 M/S SKY PACKAGING (T)

LTD.....APPELLANT VERSUS M/S BANJI LOGISTICS

LTD.....RESPONDENT (Appeal from the decision of the High Court of Tanzania, at Dodoma) (Sehel, 3.1 dated the 8th day of October, 2015 in Civil Case No. 10 of 2014 JUDGMENT OF THE COURT 4th &. 12th December, 2024 MDEMU. J.A.: This appeal emanates from the decision of the High Court of Tanzania, sitting at Dodoma, which recorded and ultimately issued a decree arising from a deed of settlement amongst the parties. In the instituted suit, the respondent claimed specific damages amounting to USD 20,800.00 and general damages of TZS 50,000,000.00 for breach of a hire contract. In that contract, the respondent was hired to transport the appellants goods from Dar es Salaam to Bujumbura. The respondent did, and invoiced the appellant for payment of USD 30,800.00 being charges for execution of the alleged agreement. The appellant paid USD. 10,000.00, instead. As the balance was not paid, a demand note was issued to the appellant forthwith, hence, a suit giving raise to the instant appeal, was filed. The appellant, on the other hand, did not file a written statement of defence. On 8th October, 2015 Mr. Deus Nyabiri, learned advocate who represented the respondent at the trial court, informed the court that the parties had entered into a deed of settlement and prayed for it be recorded so as to mark the suit settled. The appellant, on that date, neither appeared through a principal officer nor by an advocate. That notwithstanding, the trial court, as seen at page 45 through 46 of the record of appeal, made the following order in response to Mr. Nyabiri's prayer: "ORDER In terms o f the Deed o fSettlement reached between the parties and duly filed to this court on day o f October, 2015, the matter is hereby marked settled as follows:

1. The defendant shallpay to the plaintiff the sum o f US dollars 20,800.00 being the principal claim plus US dollars 1,500.00 being costs o f the case making a total sum o f US dollars 22,400.00 only as full and finalpayment
2. That, the sum of US dollars 22,400.00 shall be paid in six monthly instalments o f US dollars 3,733.30 (or round figure o f US dollars3.734.00) only each month commencing from 31st October, 2015 until the whole agreed amountis finalpaid.

3. That, the settlement is subject to default clause. It is so ordered. B.M.A.Sehe! JUDGE 8th October, 2015" This decision aggrieved the appellant, thus instituted the instant appeal by filing a memorandum of appeal comprising of three grounds. At the hearing of the appeal on 4th December, 2024, Mr. Derick P. Kahigi, learned advocate who represented the appellant, abandoned the second and third grounds of appeal. The survived first ground of appeal reads as follows: " That, the trial court erred in law and fact by recording the settlement deed and hold that the suit was marked settled without according the appellant with the right to be heard" The respondent appeared through its Principal Officer one Mr. Erick P. Magati, Assistant Mineral Manager. This followed a notice of withdrawal from representing the respondent filed by Mr. Nyabiri, learned advocate. Mr. Kahigi submitted in support of the appeal that, on 8th October, 2015 when the settlement deed was recorded, neither the principal officer of the appellant nor its advocate entered appearance. It is only the respondent who entered appearance, as said, through Mr. Nyabiri, learned advocate. He argued further that, both the law and rule of practice require presence of all parties to the case during the recording of a settlement deed. He cited to us the case of John Morris Mpaki v. NBC Ltd & Ngalagila Ngonyani, Civil Appeal No. 95 of 2013 (unreported), reported with approval in the case of David Nzaligo v. National Microfinance Bank PLC (Civil Appeal No. 61 of 2016) [2019] T7CA 540 (9 September 2019; TanzLII) arguing that, the proceedings and the resultant order are a nullity, thus invited us to hold so. When probed by the Court regarding the competence of the appeal encored on the delay to request for copies of proceedings and the impugned decision, Mr.' Kahigi replied that, the request letter was lodged and served in time on the respondent. His stance was pegged on Miscellaneous Civil Application No. 33 of 2019 in which, on 24th February, 2021 the High Court extended the time within which a notice of appeal to appeal to this Court be lodged. He eventually referred the Court to pages 115'through 120 of the record of appeal in which, he argued, since.the appellant was given fourteen days from 24th February, 2021 when the application was granted, a letter requesting for proceedings filed on 8th March, 2021 was well within the prescribed time. He further added that, the letter would not have been filed prior to an order extending time to lodge the notice of appeal. He finally argued that, the practice requires both the notice of appeal and a letter requesting for proceedings to be lodged at the same time. He thus said, rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) was duly complied with. To him therefore, the appeal is competent and thus urged us to allow it. Mr. Erick Magati did not submit anything in reply, both in the substantive ground of appeal and further on the ground we raised suomotu regarding the competence of the appeal in terms of rule 90 (1) of the Rules. We were not surprised because both the substantive ground of appeal and in the ground we raised suo motu, involves legal points and the Principal Officer of the respondent in attendance was a lay person. This marked the end of submissions from the parties. Before we resolve the complaint in the ground of appeal as raised by the appellant, we find it necessary to begin with the ground we raised suo moth regarding the competence of the instant appeal. We note in the record of appeal, and parties are with us that, until the expiry of thirty (30) days ■from 8th October, 2015 when the High Court recorded the settlement deed, neither the notice of appeal nor a letter requesting for copies of proceedings were ever

lodged to the Court registries in terms of rule 83 (1) and the proviso to rule 90 (1) of the Rules respectively. We further note, and again, parties are in agreement that, Miscellaneous Civil Application No. 33 of 2019 between M/S Sky,Packaging (T) Ltd. and M/S Bhanji Logistics Ltd., the appellant and the respondent respectively, was in respect of an application for enlargement of time within which the applicant be permitted to lodge the notice of appeal. . For that matter, the contentious legal point that calls for our resolution is whether, in circumstances where the notice of appeal is filed after enlargement of time by the High Court, a letter requesting for requisite proceedings should be filed after the notice of appeal has been lodged and or synonymous. Essentially this is the route which Mr. Kahigi implored us to take, as proper. We decline to do so because, it is clear in the Rules that, a letter requesting for proceedings must be lodged within thirty (30) days of the date of the impugned decision. The proviso to rule 90 (1) of the Rules is categorical on this that: "90 (1) Subject to the provisions o f rule 128, an appeal shaii be instituted by lodging in the appropriate registry, within sixty days o f the date when the notice o f appeal was lodged with-

- a) A memorandum o f appeal in quintupiicate;
- b) The record o f appeal in quintupHcate;
- c) Security for the costs o f appeal, save that where the application for a copy of the proceedings in the High Court has been made within thirty days of the date o f 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 o f the High Court as having been required for the preparation and deiivety o f the copy to the appellant" [emphasis supplied] It is clear therefore in the quoted rule above that, the request letter for proceedings must be filed within thirty days of the date of the impugned decision and not otherwise. The said letter should also be served to the respondent. There are numerous decisions of this Court regarding this requirement. See for example Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia [1992] T.L.R.387 and Elizabeth Jerome Mmassy v. Edward Jerome Mmassy & Six Others (Civil Appeal No. 390 of 2019) [2020] TZCA 30 (28 February, 2020;TanzLII). In the latter, at page 8 of the judgment, this Court held that: "Asper the record o f appeal, the impugned decision was delivered on 6/8/2018 and the appellantlodged the notice o f appeal on 14/8/2018, which means that, the notice o f appeal was lodged in time, however, the letter requesting for the certified copies o f proceedings and judgment was filed on 23/8/2019, almost 382 days from the date when the impugnedRuling was pronouncedThere is no doubt that the letter lodged contravened the above aforementioned Rule." [Emphasis ours] In the record before us, as we also demonstrated above, the impugned decision of the High Court which recorded the deed of settlement was delivered on 8th October, 2015. The letter requesting for copies of the judgment, decree and proceedings was lodged on 8th March, 2021 and served on the respondent the same day it was lodged. That means, the said letter appearing at page 123 of the record of appeal, was lodged after almost nine (9) years. Mr. Kahigi said that they could

not have lodged the request letter in the absence of the notice of appeal which they had filed after the High Court granted the appellant extension of time. With respect to the learned counsel, that is not the requirement of the law. We therefore hold that, the letter lodged by the appellant on 8th March, 2021 contravened the proviso to rule 90 (1) of the Rules prescribing a thirty days period within which to lodge a request letter. The effect of failure to lodge a letter requesting for proceedings was, stated by this Court in the case of Elizabeth Jerome Mmassy v. Edward Jerome Mmassy and Six Others (supra) just one to mention, at page 9 of the judgment, in the following version: "In order therefore for an appellant to benefit with the certificate of delay, he/she must lodge the letter requesting for copies of proceedings and judgment to the Registrar and the same has to be served upon the respondent. In the instant case, as rightly submitted by Mr. Mujungu, the certificate of delay failed to exclude the days from the time the judgment was delivered i.e on 6/8/2018 to the date of applying for the copies of the proceedings and judgment, which was almost 382 days, hence the appeal was hopelessly out of time." In the instant appeal, as we said, the letter applying for proceedings was filed out of time. For that matter, the appellant cannot benefit from the certificate of delay found at page 126 of the record of appeal which excluded 451 days between 8th March, 2021 and 2nd June, 2022. On that account, the appeal is therefore incompetent for being filed out of time. We think this ground alone disposes of the entire appeal, thus we find it not necessary to deliberate on the substantive part of the appeal raised by the appellant. In the end, we strike out the appeal before us for being incompetent as it was filed out of time. We direct further that, parties to the appeal to bear own costs. DATED at DODOMA this 11th day of December, 2024. S. A. LILA JUSTICE OF APPEAL Z.G. MURUKE JUSTICE OF APPEAL G. 1 MDEMU JUSTICE OF APPEAL The Judgment delivered this 12th day of December, 2024 in the presence of Mr. Derick Kahigi, learned counsel for the appellant via virtual court and Mr. Erick Magati, the Principal Officer of the respondent appeared in person, is hereby certified as a true copy of the original. W. A. HAMZA DEPUTY REGISTRAR COURT OF APPEAL

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