CRESTHALE (UK) LTD. *v.* BONDENI SEEDS LTD.

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Makame, Mfalila and Samatta, JJ.A.)

CIVIL APPEAL No. 55 OF 1996

Civil Practice and Procedure – Appeal – Appeal to the Court of Appeal – Appeal lodged out of time – Whether the Court of Appeal may invoke the provision of rule 3 and proceed to entertain an appeal lodged out of time – Rules 3 and 83(1) and (2) of the Court of Appeal Rules 1979.

This appeal was lodged beyond the 60 days limit prescribed under rule 83(1) for lodging an appeal and the appellant could not rely on the exception provided under that provision in the computation of time because no copy of the letter addressed to the Registrar of the High Court asking for the record of proceedings was sent to the respondent. The appellant urged the court to invoke the provisions of rule 3 and proceed to hear the appeal because the respondent did not take any steps to strike out the Notice of Appeal under rule 82 and was therefore not prejudiced by the appellant's failure to lodge the appeal in time.

Held: (i) The provisions of rule 3 of the Court of Appeal Rules 1979 cannot be used to save an appeal that has been lodged out of time; those provisions cannot be used to circumvent mandatory provision of the rules laying down time limits within which legal steps should be taken;

(ii) The fact that the respondent did not apply under rule 82 of the rules to have the Notice of Appeal struck out did not give the appellant the right to file its appeal after the prescribed period of 60 days.

Preliminary objection upheld; appeal struck out

Cases referred to:

(1) *DP Valambhia v. Transport Equipment Ltd.* [1992] T.L.R. 246

A (2) *Nimrod Elireheman Mkono v. State Travel Ltd. and Mass Saktay* [1992] T.L.R 24

(3) *Jacobson v. Lee* [1949] 2 All ER 517

B Statutory provisions referred to:

(i) Court of Appeal Rules 1979, rules 3, 8, 83(1), (2), 100 and 122

(ii) Rules of the Supreme Court of Justice in England Order 2(1)

C *Dr Kapinga,* for the Appellant

Mr Ngalo, for the Respondent

RULING

D (Dated 17 December 1998)

SAMATTA, J.A.: This is an appeal from a ruling of the High Court
E (Munuo, J.) dated 21 June 1996, striking out with costs a suit filed by the appellant against the respondent on the ground that the plaint disclosed no cause of action. When the appeal came on for hearing, Mr Ngalo, counsel for the respondent, raised, pursuant to a notice
F he had given under rule 100 of the Tanzania Court of Appeal Rules 1979 (hereinafter referred to simply as "the rules"), a preliminary objection that the appeal is time-barred.

It is not disputed that the appeal was lodged about four weeks
G out of time. It is also not in dispute that no copy of the letter addressed to the Registrar of the High Court applying for a copy of the proceedings, ruling and decree was sent to the respondent. The appellant was not therefore entitled to rely, with regard to computation of time within
H which to lodge the appeal, on the exception to sub-rule (1) of rule 83 of the rules. Mr Ngalo submitted that, having been lodged beyond the prescribed period of sixty days, the appeal is incompetent in law and ought to be struck out with costs. The learned advocate reminded us of the following passage from the judgment of this court in *DP*
I *Valambhia v Transport Equipment Ltd.* (1) at page 259:

> ... Rules of court were created to act as vehicles to enable this court to dispense justice between parties, and the court's task in this direction is made easier if the rules are complied with. The general rule therefore is that this court will lean towards strict compliance with the rules, only to be depart from this general rule in cases where it is clear that strict application would not be in the interests of justice.

While conceding that there is no record showing that a copy of proceedings, ruling and decree was sent to the respondent or its advocates, Mr Kapinga urged us to dismiss the preliminary objection. He contended that the omission to send the copy of the letter to the respondent occasioned no miscarriage of justice and, therefore, this court should invoke the provisions of rule 3 and depart from the provisions of rule 83(2) of the rules. The learned advocate submitted that as the respondent did not take any step geared at having the Notice of Appeal in the case struck out under rule 82 of the rules it cannot be said that the respondent was prejudiced by the appellant's failure to lodge its appeal within the prescribed period of sixty days. Contending that being out of time is a technicality which falls under rule 3 of the rules, Mr Kapinga cited, in support of his submission, *Nimrod Elireheman Mkono v State Travel Service Ltd. and Masoo Saktay* (2) *in* which this court said *inter alia*:

> ... justice should always be done without undue regard to technicalities.

In his valiant effort to persuade us to hold that his client's appeal has legal feet, so to speak, on which to stand, the learned advocate drew our attention to Order 2(1) of the rules of the Supreme Court of Justice in England, which reads:

> 1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the

proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3) the court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

To do justice to the above competing arguments we think it is necessary to cite *in extenso* rules 3 and 83(1) and (2) of the rules. The former rule reads:

3(1) The practice and procedure of court in connection with appeals and intended appeals from the High Court, and the practice and procedure of the High Court in connection with appeals to the court shall be as prescribed in these rules, but the court may at any time, direct a departure from these rules in any case in which this is required in the interests of justice.

(2) Where it is necessary to make an order for the purposes of:

(a) dealing with any matter for which no provision is made by these rules or any other written law;

(b) better meeting the ends of justice; or

(c) preventing an abuse of the process of the court, the court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary.

rule 83(1) and (2) reads as follows: A

83(1) Subject to the provisions of rule 122, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the Notice of Appeal was lodged: B

(a) a Memorandum of Appeal, in quintuplicate;

(b) the Record of Appeal, in quintuplicate;

(c) the prescribed fee; and C

(d) 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 D 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.

(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 its was sent to the respondent". E

Sub-rule (3) of this rule is irrelevant to the issue before us, and rule 122 deals with relief from fees and security, and is, therefore, not of any relevance to the determination or the preliminary objection. The question which falls for determination here is a short one, namely, whether this court can invoke the provisions of rule 3 of the rules in favour of a party who has lodged an appeal out of time, and entertain G the appeal. In his interesting submission Mr Kapinga sought to distinguish *Valambhia's* case (1) and similar cases on the ground that in those cases this court was not invited by the appellants to invoke its powers under rule 3 of the rules. We have give the question before us anxious H and careful consideration and in the upshot we are satisfied, in spite of the ingenuity displayed by Mr Kapinga in presenting his argument, that the provisions of rule 3 cannot be prayed in aid to save an appeal, like the instant one, which has been lodged out of time. Those provisions, I in our opinion, cannot be used to circumvent the mandatory provisions

A of the rules laying down time limits within which legal steps should be taken. The framers of the rules no doubt realized that sometimes litigants may, for sufficient reasons, fail to comply with those provisions, and accordingly they enacted rule 8 of the rules to protect the interests
B of justice of such litigants. That rule reads:

> 8. The court may for sufficient reason extend the time limited by these rules or by any decision of the court or of the High Court for the doing of any act authorized or required by these rules, whether before
C or after the expiration of that time and whether before or after the doing of the act, and any reference in these rules to any such time shall be construed as a reference to that time as so extended.

D In our opinion, it is not correct, as was contended by Mr Kapinga, that the respondent has not been prejudiced by the appellant purporting to file an appeal against Munuo J.'s ruling out of time. When the period within which the appellant could in law lodge the appeal expired, the respondent became entitled to enjoy the fruits of that ruling. In
E this connection we wish to draw attention to the following words of Harman, J, in his judgment in *Jacobson v Lee* (3) at page 519:

> ... It is important that litigants should not be shut out from their rights but
F it is equally important that a litigant who has obtained a judgment in his favour should not have it taken away from him except in ... special circumstances. It is in the public interest that there should be an end of litigation.

The appellant, for reasons unknown to us, did not find in it necessary
G to ask this court to bring the provisions of rule 8 of the rules into play. It has no one to blame but itself if that provision proves, as it does, to be fatal to its (the appellant's) appeal. The respondent, it is true, did not apply under rule 82 of the rules to have the Notice of
H Appeal struck out, but it was not obliged to do so. No amount of inaction on the part of the respondent would give the appellant the right to file its appeal after the prescribed period of sixty days. With regard to the provisions of Order 2, rule 1 of the rules applied in England by the Supreme Court of Justice, we think it sufficient to
I observe, as we do, that there are no provisions in the rules which

are even remotely similar to those provisions. We do not find those provisions of assistance to us in the determination of Mr Ngalo's preliminary objection. With all the goodwill in the world, we are unable to find any merit in Mr Kapinga's argument.

For the foregoing reasons, we uphold the preliminary objection and strike out the purported appeal with costs.

SALEHE IBRAHIM *v.* DADIRAHIM MOHAMED

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Makame, Mfalila and Samatta, JJ.A.)

CIVIL APPEAL No. 60 OF 1996

(From the decision of the High Court of Tanzania at Dar es Salaam, Chua J., dated 7 January 1997, in Probate and Administration Cause No. 72 of 1985)

Court of Appeal Rules – Rules 83(1)(a), 89(1)(e) and 90(1) – Effect of non-compliance with.

The appellant's *caveat* to the respondent's petition for grant of probate was dismissed by the High Court. He appealed to the Court of Appeal, but the Record of Appeal did not incorporate a Memorandum of Appeal, and counsel for the respondent informed the court that the respondent had not been served with a copy thereof. Counsel for the appellant virtually admitted there were such omissions. He contended, however, that the omission was not fatal to the appeal. The court noted that the record did not include the pleadings in the probate proceedings.

Held: The document entitled "GROUNDS OF APPEAL" was not a Memorandum of Appeal; thus there has been a non-compliance with the provisions of rule 83(1)(a) of the Court of Appeal Rules. Preliminary objection is upheld.

Appeal struck out