

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MWAMBEGELE, J.A., MASHAKA, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 86/12 OF 2022

CASMIR RICHARD SHEMKAIAPPLICANT

VERSUS

THE BISHOP ROMAN CATHOLIC

DIOCESE OF TANGARESPONDENT

**(Application to strike out Notice of Appeal from the decision of the High
Court of Tanzania
at Tanga)**

(Khamis, J.)

dated the 29th day of November, 2016

in

Misc. Civil Application No. 9 of 2016

RULING OF THE COURT

29th April & 8th May, 2024

RUMANYIKA, JA.:

By way of notice of motion, the applicant is moving the Court under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") to strike out a notice of appeal lodged in the Court by the respondent on 13/ 12/2016 challenging the decision of the High Court of Tanzania, at Tanga, dated 29/11/2016. In that decision, the High Court granted the applicant extension of time to file an appeal against the

former's decision in DC Civil Appeal No. 12 of 2011. However, it is alleged, since then, the respondent did not take any essential step in the proceedings to file an appeal. The application is supported by an affidavit sworn by Casmir Richard Shemkai, the applicant. The respondent did not file an affidavit in reply to oppose the application.

Briefly, on 29/11/2016 vide Misc. Civil Application No. 9 of 2016, the applicant was granted extension of time to file a notice to appeal against the High Court's decision, as hinted above. Being dissatisfied by the said extension of time, on 13/12/2016 the respondent filed the notice of appeal to challenge it. At first, he was refused leave to appeal vide Misc. Civil Application No. 77 of 2016. However, he obtained it on 25/02/2019 vide Civil Application No. 507/12 of 2017, on a second attempt. It is the applicant's complaint therefore, that, since the respondent filed the notice of appeal on 13/12/2016, he has not taken any essential step to lodge the intended appeal, the notice of appeal is liable to be struck out.

At the hearing of the application, the applicant appeared in person, unrepresented. The respondent did not enter appearance, although his Advocate one Ezra J. Mwaluko, learned counsel was duly

served on 17/04/2024, as deposed in the affidavit sworn by Kiremu Kivuyo, the Court Process server. It is appended to copy of the returned notice of hearing. However, we note from the record of the application, a written notice of absence, which is a letter with Ref. Number EJM/BISHOP/2024/01 dated 25/04/2024 authored by Mr. Mwaluko. He informs the Court that he was injured in a road accident so, could not appear in Court, as he is nursing the injuries sustained. On that account, he urged us to determine the application basing on the respondent's written submission filed on 04/10/2021, in terms of rule 106(1) of the Rules. To that prayer, the applicant had no qualms, and we granted it.

Upon taking the floor, the applicant adopted his written submission filed on 02/07/2021, in terms of rule 106(2) (a)-(d) of the Rules. He contended that, indeed there is such High Court decision which granted him extension of time to file notice of appeal. That decision aggrieved the respondent and he lodged the notice of appeal on 13/12/2016. Then he sought leave to appeal, which the High Court granted on 25/02/2019. However, the applicant further asserted, since then, the respondent has not taken any further step in the proceedings to file appeal.

Opposing the application for the respondent, it was submitted that this application was filed prematurely and without sufficient cause. Because on 12/12/2016, the respondent wrote a letter to the Registrar requesting for a copy of the proceedings necessary for filing an appeal, in compliance with rule 90(3) of the Rules and that, a copy of that letter was served on the applicant. The respondent thus, seeks to take refuge under rule 90(1) of the Rules, as he is yet to be supplied with copy of the documents requested. He cited the Court's decisions in **Julius Singoyan Kuly v. Lazaro Karisian**, Civil Application No. 1 of 2013 and **Khalid Bakari Kolewo v. John Ackley Matoyi**, Civil Application No. 6 of 2013 (both unreported) to bolster his proposition.

The pertinent issue for determination is whether the respondent has failed to take essential step in the proceedings to warrant the Court strike out the notice of appeal, under rule 89 (2) of the Rules. For ease of reference, the rule reads as follows;

"Rule 89(2)- Subject to the provisions of sub rule (1), any other person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice... on the ground that no appeal lies or that some essential

*step in the proceedings has not been taken or
has not been taken within the prescribed time."*

From the rule cited above, it is imperative that, striking out a notice of appeal comes at the instance of a person to whom the non-progressive notice was served, that no appeal lies, or, if any, the step was taken belatedly in the proceedings. Luckily, this is not our first time to test rule 89(2) of the Rules. See, for instance- **Grace Frank Ngowi v. Dr. Frank Israel Ngowi** [1984] T.L.R. 120, **Birr Company Ltd v. C-Weed Corporation**, Civil Application No. 7 of 2003 (unreported) and **Elias Marwa v. Inspector General of Police**, Civil Application No. 11 of 2012 (unreported).

Moreover, being faced with a similar situation and were called upon to state what constitutes essential step, in **Asmin Rashidi v. Bako Omari** [1997] T.L.R. 146, we stated it to be that action taken by the intending appellant to institute an appeal or in furtherance of the appeal hearing. Also, see- **James Bernado Ntambala v. Furaha Denis Pashu**, Civil Application No. 178/11 of 2016 (unreported).

We note from the record of this application, as agreed by the parties that, being aggrieved by the decision of the High Court, the

respondent filed the notice of appeal on 13/12/2016. However, from there and then, the respondent became home and dry taking no further remarkable step in the proceedings for the furtherance of the intended appeal. It is equally on record that on 25/02/2019, the respondent was granted leave to appeal against the said granting of extension of time.

We note that, since then, the respondent became home and dry. It is so, because he does not seem to have followed up the matter further within fourteen days of the Registrar's failure to supply him the requested copy, in terms of rule 90(5) of the Rules.

At least it is clear to us that, until on 20/05/2021 when the present application was lodged, the respondent had not filed appeal. He may have not served the applicant with copy of a letter to the Registrar requesting for the copies. However, without running a risk of jumping into competence of the intended appeal prematurely, we note that, serving a copy of the letter to the applicant is one of the essential steps required of the respondent which is stipulated under rule 90(5) of the Rules. Also, we note that, gone are the days that the moment the intending appellant writes a letter requesting the Registrar to supply him with the documents, he is done. In terms of the proviso to rule 90(1)

and (5) of the Rules, he is no longer home and dry. He needs to be militantly committed to seeing the appeal filed, instead of just subjecting his notice of appeal to natural course.

However, by any measures, the above finding of the Court should not be taken as condoning the inaction by Registrars who may abdicate their official duties. We hasten to hold that, in terms of rule 89(2) of the Rules, it is intended that, where there is no order of stay, a notice of appeal filed in Court should not be left unattended forever, rendering the impugned decree redundant and inconsequential. To avoid what would be endless litigation therefore, we wish to stress that, the earliest a party can access the Court to challenge decision or enjoy the fruits of his decree the better. Confronted with a similar situation in **Salim Mohamed Marwa @ Komba And Another v. R.**, (Criminal Application 1 of 2020) [2021] TZCA 317 (6 July 2021; TanzLII) and **Tanganyika Land Agency Ltd And Seven Others v. Manohar Lal Aggrwal**, Civil Application No. 17 of 2008 (unreported), from a plethora of the Court's decisions, which we follow, it has been reiterated that, like life, litigation must go to end.

In conclusion, we find the application to be merited and grant it. Consequently, in terms of rule 89(2) of the Rules, we hereby strike out the notice of appeal lodged in the Court by the respondent on 13/12/2016. We make no order as to costs because the application emanates from a labour dispute where, ordinarily we do not award costs.

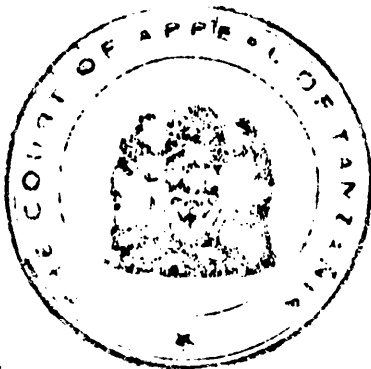
DATED at TANGA this 8th day of May, 2024.


J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 8th day of May, 2024 in the presence of the Appellant in person, and in the absence of the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL