IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., SAMATTA, J.A., And MROSSO, Ag. J.A.

CIVIL APPEAL NO. 50 OF 1996

BETWEEN

STEPHEN MASATU WASIRA. . . . . APPELLANT

AND

JOSEPH SINDE WARIOBA . . . . . RESPONDENT

(Appeal from the Judgement of the
High Court of Tanzania at Musoma)

(Lugakingira, J.)

dated the 30th day of August, 1996

in

Misc. Civil Cause No. 25 of 1995

R U L I N G

KISANGA, J.A.:

During the 1995 general election Mr. Stephen Masatu Wasira had been elected Member of Parliament for the Bunda constituency, but his election was subsequently nullified by the High Court (Lugakingira, J.) following an election petition filed by one of his opponents, Mr. Joseph Sinde Warioba. Dissatisfied with the nullification of his election Mr. Wasira sought to appeal to this Court, but before the appeal was heard Counsel for Mr. Warioba, the respondent, filed two preliminary objections to the appeal alleging two grounds: The first ground alleges non-compliance with rule 77 of the Court of Appeal Rules in that no copy of the appellant's notice of appeal was served on the respondent or his Counsel. In the second ground it is alleged that the appeal has been instituted out of time and without prior leave to do so.

At the hearing of this preliminary objection, the respondent was represented by Mr. J.S. Rweyemamu and Dr. J.T. Mwaikusa, learned

.../2

advocates while Dr. M.R.M. Lamwai and Mr. Marando, learned advocates appeared for the appellant. Before the hearing of the preliminary objection commenced, Dr. Lamwai informed the Court that there was pending before this Court Civil Application No. 29 of 1997 in which the appellant is applying for extension of time to serve the notice of appeal on the respondent. He further disclosed that that application was filed under a certificate of urgency but the Chief Justice by an administrative decision directed that the preliminary objection which was filed earlier be heard first. Dr. Lamwai, therefore, at first urged us to review the administrative decision of the Chief Justice and to hear that application first, but after some preliminary observations by the Court he conceded that the preliminary objection has to be heard first.

It was common ground that the judgement of the High Court giving rise to this appeal was delivered at Musoma on 30.8.96, and that the appellant promptly filed his notice of appeal on 2.9.96. However the question whether the appellant served a copy of that notice on the respondent, as required by rule 77 of the Court of Appeal Rules, is seriously in dispute and is the subject matter for determination in this proceeding. The appellant asserts that a copy of that notice was duly served on the respondent, but the respondent vehemently denies it. Each side adduced evidence by affidavit in support of their respective claims.

The appellant filed two affidavits. One of them is dated 16.6.97 and the other, being a reply to the respondent's counter-affidavit, is dated 29.7.97. In both affidavits the appellant says in effect that on 2.9.96 he went to the Mwanza High Court registry where he found Mr. Rweyemamu, the advocate who had acted for the respondent in the High Court. He sought to serve the copy

.../3

of the notice of appeal on him but Mr. Rweyemamu declined service on the ground that his instructions were limited to representing the respondent in the High Court only. Whereupon the appellant decided to go to serve the respondent at the New Mwanza Hotel where he, the respondent, was staying. He arrived at the hotel at about 9 a.m. and upon inquiring he was informed by one John Natay, a receiptionist at the hotel, that the respondent was around. He then left the copy of the notice with John Natay with instructions to deliver it to the respondent. The appellant made no follow up on the matter after that.

The said John Natay filed an affidavit in support of the appellant's case. He said in effect that on 2.9.96 he delivered notice of appeal to the respondent on the instructions of the appellant.

The respondent in his counter-affidavit said that he was staying at the New Mwanza Hotel but checked out of the hotel at 8.30 a.m. on 2.9.96 to catch a flight to Dar es Salaam that day. He produced the carbon copy of the coupon of his used ticket which shows that the take off time of his plane that day was 10.05 a.m. He also produced a copy of the passenger manifest which bears his name as being one of the passengers travelling from Mwanza to Dar es Salaam on 2.9.96. For the respondent, therefore, it was contended that having checked out of the hotel at 8.30 a.m. he could not have been served with the said notice of appeal which was allegedly brought to the hotel by the appellant at about 9 a.m. In response to this, however, the appellant in his reply to the appellant's counter-affidavit maintained that the respondent was still at the hotel by 9 a.m. that day because John Natay confirmed this to him.

.../4

Thus it amounts to one man's word against that of another. It is the word of the respondent who claims that he checked out of the hotel at 8.30 a.m. as against that of the appellant who maintains that the respondent was still at the hotel at 9 a.m. We now have the task of assessing the material before us and to decide which of the two stories is to be accepted.

To start with, it is to be observed that the appellant himself did not see the respondent at Mwanza Hotel. He depends entirely on what Natay told him. But Natay does not say what time he delivered the notice to the respondent. So that when the respondent says that he checked out of the hotel at 8.30 a.m. there is nothing to contradict him on that. The appellant's statement that according to Natay the respondent was still at the hotel at 9 a.m. that day is not enough; it required Natay himself to confirm it on oath, which he has not. As it is now one cannot assume that if Natay were asked he would necessarily have confirmed it. Indeed Natay might very well have come up with his own version; he might have said that he delivered the notice to the respondent at 11 a.m. which could not be true because by then the respondent, whose flight departure time was 10.05 a.m., would have already left Mwanza for Dar es Salaam.

In the course of submissions by Counsel, it appeared to be common ground that for domestic flights passengers are required to report for checking in at the airport one hour before departure time. According to the respondent's used ticket then he had to be at the airport at about 9.05, and given that it takes some 20 to 30 minutes to drive to the airport, it seems less likely that the respondent would still be at Mwanza Hotel at 9 a.m. by which time he ought to be at the airport. On the

.../5

other hand the respondent's version that he checked out of the hotel at 8.30 a.m. appears more likely because that would give him allowance of about 30 minutes drive to reach the airport in time for checking in at about 9.05 a.m.

Dr. Lamwai came up with suggestions that the respondent's departure time for his flight may have been re-scheduled in such a way which made it possible for him to leave the hotel later than 8.30 a.m. Counsel also contended that the respondent, as a former Prime Minister, travels in style whereby someone would check him in and he does not have to stand in the queue. So that he could have left the hotel late and therefore he need not have left the hotel so early in order to beat the scheduled time for reporting. However all this was mere speculation. No evidence whatsoever was adduced to show or suggest that there were any changes in the scheduled times for reporting or take off, or that someone checked the respondent in while the respondent could remain behind at the hotel for some time. What is more, it was apparent from the passenger manifest that the respondent was travelling in a group of not less than five passengers, most of them members of his family. No evidence was adduced to show that he severed himself from this group and remained behind at the hotel while the rest proceeded to the airport for checking in on schedule.

On the other hand there are some aspects in the appellant's story which tend to render that story less probable. First of all when this notice of preliminary objection was served on him, his first reaction was to go to Court and apply for extension of time to serve the notice of appeal on the respondent. He did this in Civil Application No. 29 of 1997 which was referred to

.../6

at the beginning of this Ruling. Paragraph 7 of the affidavit in support of that application is reproduced word for word in paragraph 10 of the affidavit dated 16.6.97 which the appellant is relying on in this proceeding. That paragraph says:-

> "Further that non-service of the notice upon the 1st Respondent is not out of my negligence but out of the fact that I reposed too much confidence upon the New Mwanza Hotel staff."

The paragraph appears to be a clear admission by the appellant that the respondent was not served with the notice of appeal, and that is why he says in paragraph 3 of the said affidavit of 16.6.96 that he applied to the Court for enlargement of time to serve the respondent accordingly. It is only in that way that the appellant's story can make sense. His subsequent claim that Natay informed him that he duly served the notice of appeal on the respondent sounds more of an afterthought. For, when confronted with this allegation of non-service of the notice on the respondent, one would normally expect that the first thing the appellant would have done was to turn to John Natay and ask him to confirm whether or not he had delivered the notice to the respondent as instructed. And if the answer was in the affirmative then the natural thing to do was for the appellant to place that information before the Court in answer to the preliminary objection. It is only if John Natay confirmed non-service that the appellant would be expected to move the Court, as he did, for leave to do so out of time. But to say that the appellant would go to Court to ask for such leave when he already knew that the respondent had been duly served sounds odd, to say the least. In our view the more likely thing is that

.../7

the appellant went to Court to apply for leave to serve the respondent with the notice of appeal out of time after he had satisfied himself that the respondent had not been served with such notice.

There is yet another aspect of the appellant's conduct which raises some concern. A copy of the notice of appeal is directed to the respondent through his advocate, Mr. J.S. Rweyemamu at Mr. Rweyemamu's address in Bukoba. This raises a number of questions. First, the case was decided at Musoma. Now, since it is undisputed that both the appellant and the respondent are living in Dar es Salaam, why was it necessary to route the notice through the respondent's advocate in Bukoba instead of sending it direct to the respondent through his address for service in Dar es Salaam which was well known to the appellant? More so especially as the appellant himself travelled to Dar es Salaam shortly after preparing the notice of appeal on 2.9.96 because he held press conference in Dar es Salaam on 8.9.96.

Again the appellant, appreciating the importance of serving the respondent with the notice, says that he went personally to serve the respondent with the notice at the New Mwanza Hotel. If this is so then why did he not ascertain that the respondent was in fact served either by himself effecting the service or by waiting for John Natay to return to him and confirm the service on the respondent? Why did the appellant not seek to have the respondent's signature against the receipt of such an important document? Worse still the appellant says in his affidavit that after leaving the notice with John Natay with the instructions to serve it on the respondent, he went away and

.../8

never made a follow up on the matter until the notice of preliminary objection was served on him. It is most strange that the appellant would fail to make a follow up on such an important matter. These are some of the additional matters which in our view, serve to make the appellant's story increasingly less likely.

Considering all the circumstances of the case, therefore, we are satisfied that it is more likely than not that the respondent was not served with a copy of the appellant's notice of appeal. That renders the appeal defective. Since the appellant did not take steps to remedy the defect until only after he was prompted by the respondent's notice of this preliminary objection, the appeal cannot now be saved. We shall make the final order after considering the other ground of objection.

As stated earlier, the second leg of the objection alleges that the appeal has been instituted out of time and without leave to do so. The notice of appeal was lodged in Court on 2.9.96, and in terms of rule 83(1) of the Court of Appeal Rules the appeal ought to have been instituted within 60 days of that date. That is to say, the dead line for instituting the appeal was on 2.11.96, but the appeal was lodged in Court only on 15.11.96. That was clearly out of time unless the appellant could rely on the exception to the 60 days rule provided for in the proviso to rule 83(1). Mr. Rweyemamu submitted that the appellant could not rely on that exception because he had not satisfied one condition for invoking it. Learned Counsel went on to say that contrary to what the law requires, the appellant did not send to the respondent or his advocate a copy of the letter to the Registrar applying for proceedings in the case;

.../9

and that indeed there was no evidence that the appellant had written any such letter to the Registrar.

Refuting all this, Dr. Lamwai cited a letter in the original Court case file, addressed to the Registrar by the appellant and dated 2.9.96 by which the appellant applied for proceedings in the case, with a copy of that letter to the respondent in the care of his advocate, Mr. J.S. Rweyemamu at his address in Bukoba. Dr. Lamwai, therefore, contended that not only was the letter applying for proceedings written to the Registrar, but that a copy of that letter was also sent to the respondent through his advocate. Learned Counsel further submitted that proof of service was evidenced by the fact that the letter was copied to the respondent in the care of his advocate, and for this submission he relied on the decision of a Single Judge of this Court (Mfalila, J.A.) in the case of Alluminium Africa Ltd. v. Adil Abdallah Dhiyebi Civil Application No. 6 of 1990. In that case the learned Single Judge had expressed the view that all that an appellant need show is that he sent to the respondent a copy of his letter to the Registrar applying for proceedings, and that the fact that such letter was copied to the respondent was enough proof (the emphasis is supplied.)

With due respect, however, Dr. Lamwai overlooked the fact that this decision of the Single Judge was reversed upon a reference to the full Court, vide Reference Civil Application No. 6 of 1990. In the course of hearing that reference the Court found that, upon his own admission, the appellant had not sent to the respondent a copy of his letter to the Registrar even though the letter itself was shown to have been copied to

.../10

the respondent. Thus the Court did not decide on what constitutes "sending" within the meaning of sub-rule (2) of rule 83 of the Rules which requires that a copy of such letter be sent to the respondent. Happily, however, Dr. Mwaikusa cited a statutory provision which supplies the answer. It is rule 20(7) of the Court of Appeal Rules which says:-

> "20 (7) Where any document is required to be sent to any person, the document may be sent by hand or by registered post to that person or to any person entitled under Rule 28 to appear on his behalf and notice of the date fixed for the hearing of an application or appeal or for the deliver of judgement or the reasons for any decision may be given by telephone or telegram."

For the appellant in the instant case it was merely shown that the letter in question was copied to the respondent's advocate, and nothing more. It is quite clear that that was no proof of service within the meaning of the above rule. We therefore find that the letter in question was not sent to the respondent and, consequently the appellant is not entitled to rely on the exception of rule 83 (1).

Upon further examination of the original court case file Dr. Mwaikusa brought to our attention the fact that the carbon copy of the appellant's letter to the Registrar was still in the file. The learned Counsel submitted that since the said letter to the Registrar is shown to have been copied to the respondent only, it follows that the carbon copy found in the

.../11

file is the one which was supposed to be sent to the respondent but was not in fact sent. We have no good reason to differ from that view.

There is yet another point which reinforces our finding that the copy of the said letter to the Registrar was not sent to the respondent. The appellant, in his application No. 29 of 1997 referred to in paragraph 3 of his affidavit in this proceeding, is applying to this Court for leave to appeal out of time. It seems plain that he took that step because he was satisfied that he could not rely on the exception to rule 83(1) as he had not sent to the respondent the copy of his letter to the Registrar. His subsequent claim that the copy was duly sent to the respondent was an afterthought. It was a desperate attempt to save the situation after the administrative decision by the Chief Justice that the preliminary objection be heard first before the appellant's application. It therefore follows that the appeal which was filed only on 15.11.96 was time barred and hence bad in law as it was so filed without prior leave to do so.

In the result the preliminary objection is sustained on both grounds of the appellant's failure to serve the respondent with a copy of the notice of appeal, and of instituting the appeal out of time. Accordingly the appeal is struck out with costs.

at DAR ES SALAAM this 21st day of August, 1997.

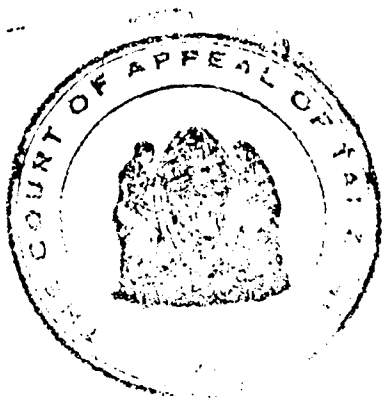
.../12

R.H. KISANGA
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

J.A. MROSO
Ag. JUSTICE OF APPEAL

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



(M.S. SHANGALI)
DEPUTY REGISTRAR