IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MWARIJA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 87 OF 2008

RICHARD MCHAU ..... APPLICANT

VERSUS

SHABIR F. ABDULHUSSEIN ..... RESPONDENT

(Application to strike out the Notice of Appeal against the decision of the High Court of Tanzania at Dar es Salaam)

(Mlay, J.)

dated the 8th day of February, 2006
in
Civil Appeal No. 20 of 2004

RULING OF THE COURT

3rd May & 15th June, 2017

MWAMBEGELE, J. A.:

Before us is an application by Richard Mchau for striking out a Notice of Appeal filed on 21.02.2006 by the respondent Shabir F. Abdulhussein. For a better understanding of the present application, we find it appropriate to narrate the background facts giving rise to it. The dispute between the parties to this application, as far as the present record can take us, stems from a suit filed in the District Court of Ilala on 14.02.2001. That suit was later transferred to the Dar es

Salaam Regional Housing Tribunal which consequently adjudicated upon it. After that adjudication, the Housing Appeals Tribunal of Tanzania at Dar es Salaam vide Miscellaneous Application No. 28 of 2003 (Kajeri, Chairman), due to some procedural irregularities which left justice crying, ruled that the matter be remitted to the Regional Housing Tribunal of Dar es Salaam for re-adjudication and that the applicant herein; Richard Mchau would be the applicant.

The decision of the Appeals Tribunal irked the respondent. He thus appealed to the High Court. On 08.02.2006, the High Court (Mlay, J.) struck out the appeal for want of jurisdiction in the light of the Land Disputes Courts Act, Cap. 216 of the Revised Edition, 2002. On 21.02.2006 the respondent filed in this Court a Notice of Appeal against the decision of Mlay, J. Vide Miscellaneous Civil Appeal No. 20 of 2004, the respondent had successfully applied for and obtained in the High Court (Shaidi, J.) the requisite leave to appeal to this Court.

By a Notice of Motion taken under the provisions of rules26, 36, 45, 46, 55 and 82 of the Tanzania Court of Appeal Rules, 1979 – GN No. 102of 1979, which were then in place (hereinafter referred to as "the Old Rules"), the applicant Richard Mchau seeks an order of the Court to strike out the Notice of Appeal filed by the respondent for the reason that essential steps have not been taken to prosecute the appeal ever since the notice was lodged. The Notice of Motion is

supported by an affidavit deposed by Richard Mchau; the applicant and resisted by an affidavit in reply duly affirmed by Shabir F. Abdulhussein; the respondent.

It is worth noting at this stage that vide a ruling dated 09.10.2008 which was pronounced on 22.10.2008, a single Justice of Appeal granted the previous application and consequently struck out the Notice of Appeal. However, through Civil Reference No. 21 of 2008 filed by the respondent herein, that ruling was quashed and set aside by a Full Court on 19.05.2011 for the reason that the Court composed the same and handed it down without hearing the parties. What had transpired was that the single Justice of the Court, upon request of the learned counsel for the parties, had ordered that the application be disposed of by way of written submissions and had slated the submissions schedule with which both parties did not comply. The Court thus proceeded to compose the ruling basing on the affidavit and affidavit in reply earlier filed for and against the application, respectively.

The Full Court observed that it was legally inappropriate to write a ruling basing on the affidavit and affidavit in reply without hearing the application *inter partes* or *exparte*. The Full Court thus quashed and set aside the ruling of the Court of 19.10.2008 and ordered that the application should be set for hearing during the then next sessions of the Court. The record does not show why the application was not set for hearing in the sessions that immediately followed after

the pronouncement of the ruling but here it is before us; some six years after the order.

When the application was called on for hearing on 03.05.2017, both parties were represented. While Mr. Aggrey Teemba, learned counsel, appeared for the applicant, Mr. Protace Kato Zake, also learned counsel, advocated for the respondent. Before hearing could commence, Mr. Teemba for the applicant rose to pray that the hearing of the application should be heard by written submissions as previously ordered before varying Civil Application No. 87 of 2008. The prayer was not objected by Mr. Zake for the respondent. As the learned counsel for the parties were at one that the application should be disposed of by written submissions, we granted the prayer. We thus proceeded to fix the submissions schedule with which both parties have timeously complied.

Arguing for the application, Mr. Teemba for the applicant has been brief but to the point. He submitted that on 21.02.2006, the respondent lodged into the Court a notice of appeal against the decision of the High Court (Mlay, J.) but that that notice was not served to the respondent; the applicant herein, within seven (7) days as stipulated under rule 77 of the Old Rules. Instead, he submitted, the same was served upon him on 21.03.2007. Mr. Teemba added that the respondent has failed to file a Memorandum of Appeal within sixty (60) days of the date of the lodgment of the Notice of Appeal; neither did he seek an extension

of time to do so. He argued that since the applicant was served hopelessly out of time, he could not make any response in terms of rule 79 of the Old Rules as that would mean conferring legality on the Notice of Appeal filed out of time. That is the reason why the applicant filed the present application, he stated.

The learned counsel for the applicant submitted further that after the decision of the High Court he sought to challenge, the respondent lodged a "perfunctory" application in the High Court seeking leave to appeal to the Court. That was an abuse of the court process and contrary to the direction given by Mlay, J. on how such kind of appeals should be handled, he argued. He argued further that even after being granted leave by the High Court, the applicant did not apply for copies of proceedings, judgment and drawn order to enable him file the intended appeal. He therefore argued that since both the Notice of Appeal and the letter applying for certified copies of proceedings, judgment and drawn order were never served on the applicant or not served in time, the notice of appeal should be struck out with costs.

Responding, Mr. Zake for the respondent started the onslaught by challenging the second prayer in the Notice of Motion. The second prayer referred to by the respondent seeks leave of this Court to allow the applicant to file his suit in the High Court (Land Division) as previously ordered by the defunct Housing Appeals Tribunal of Tanzania at Dar es Salaam.

On the foregoing prayer, the learned counsel argued that the Court has not been properly moved in that no provision of the law under which it is made has been cited. Mr. Zake thus submits the same should be struck out for non-citation of an enabling provision of the law under which it is made as was the case in **Edward Bachwa & 3 others v. the Attorney General and another**, Civil Application No. 128 of 2006 (unreported).

The learned counsel has also challenged the affidavit supporting the application to the effect that it is defective in that it is not dated in its verification. That is a serious error, he submitted. However, Mr. Zake did not state what the consequence should be in the eventuality of that ailment.

Mr. Zake also attacked the "Rejoinder to the Affidavit in Reply" filed by the applicant. He submitted that the document was filed without leave of the Court and that it should therefore be expunged from the record.

Reverting to the gist of the application, Mr. Zake submitted that the applicant was served with the Notice of Appeal on 21.03.2006 and not 21.03.2007 as alleged. That, in the affidavit the applicant admits to have been served on 21.03.2006 but at para 5 (b) of the rejoinder affidavit which was filed on 10.09.2008 without leave of the Court and meant to mislead the Court that he was served on 21.03.2007. The learned counsel adds that vide his letter bearing Ref. No. RCA/CIV.APPL.87/08/01 dated 06.10.2008, the respondent wrote the

Registrar to complain over the same. The learned counsel stressed that the applicant was served on 21.03.2006 through the Legal and Human Rights Centre - Legal Aid Unit, Magomeni which was his address for service then; as evidenced in Annexture SFA3 appended with the affidavit in reply. He added that the Notice of Appeal on the rejoinder is phony as the genuine one is Annexture SFA3.

Adverting to the "perfunctory" application in the High Court, Mr. Zake submitted that the complaint was not raised in the affidavit supporting the Notice of Motion; it should therefore be disregarded.

Referring to the letter applying for necessary documents; a letter bearing Ref. No. RCA/MISC.CIV.APPL.20/04/6/1 of 20.02.2006, Mr. Zake stated that the same was saved upon the applicant on 21.02.2006 as evidenced by Annexture SFA2 of the affidavit in reply.

Having stated the above, the learned counsel submitted that the respondent has not failed to take necessary steps as alleged by the applicant. He cited and relied on the decision of the Court in **Hassan Jambia (by His Legal Personal Representative Shafii Ali Nuru) v. TANESCO**, Civil Application No. 78 of 2013 (unreported) to buttress this argument.

He added that having applied for the documents and the letter thereof served on the applicant, he had never been supplied with the same so that he could lodge an appeal and that the applicant has not proved that the respondent

has been informed that the documents are ready for collection. He relied on **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [1997] TLR 328 to state that after asking for the documents by a letter and serving the same upon the relevant parties, he was not legally bound to keep reminding the Registry. The learned counsel quoted the second holding in the **Transcontinental** case which reads:

> *"That the present respondent, who had applied to the Registry for a copy of the proceedings sought to be appealed against and had not been furnished with any, had complied with the Rules by copying his letter to the relevant parties - there was no legal provision requiring him to keep reminding the Registry to forward the proceedings and once Rule 83 was complied with the intending applicant was home and dry."*

On the basis of the above, the learned counsel submitted that the application was without merit and prayed to have it dismissed with costs.

The applicant did not file any rejoinder submissions.

We have subjected the arguments of the learned counsel for the parties to proper scrutiny and accorded them proper weight they deserve. The ball is now in our court to determine upon the same.

We start our determination by, firstly, addressing the complaints leveled by the learned counsel for the respondent against the second prayer in the Notice of Motion and the verification in the affidavit supporting the application.

In the second prayer of the Notice of Motion the applicant prays as follows:

> *"The applicant be granted leave to file his application/suit in the High Court (Land Division) persuant (sic) to the orders of the defunct Housing Appeals Tribunal of Tanzania at Dar es Salaam."*

Mr. Zake for the respondent argues that the prayer is not backed by any provision of the law under which it is made. We agree. It is true that the prayer has not been backed by any provision of the law under which it is made. It is a cardinal principle of this Court that it should be properly moved by citing an enabling provision or provisions under which a prayer is made. Failure to do so is a fatal irregularity and such application will be rendered incompetent and consequently struck out. That this is the law in our jurisdiction has been stated in a string of cases. One of such cases is **Edward Bachwa**; a case cited and supplied by Mr. Zake. In an unreported case of ***Chama cha Walimu Tanzania***

v. the Attorney General Civil Application No. 151 of 2008, the Court, referring to **Chama cha Walimu**, made the following pertinent remark:

> "Non-citation and/or wrong citation of an enabling provision render the proceedings incompetent. Decisions by this court in which this principle of law has been enunciated are now legendary. Most of them are cited in the case of ***Edward Bachwa & 3 others v. the Attorney General &Another*** [Civil Application No. 128 of 2006]. To that list may be added:
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> i. ***Fabian Akoonay v. Mathias Dawite***, civil Application No. 11 of 2003 (unreported) and
>
> ii. ***Harish Jina By His Attorney Ajay Patel v. Abduirazak Jussa Suleiman*** [ZNZ Civil Application No. 2 of 2003] "

It is no gainsaying that the applicant has not cited any enabling provision to back up this prayer. Neither did he address the Court on this prayer in his written submissions nor did he make a rejoinder submission to counter Mr. Zake's submissions on the point. He might have taken that course knowing full well that he might be treading on very thin ice. We must state at this juncture that we were also surprised to see the learned counsel raise this prayer, for it does not fall within

the empire of our jurisdiction. We think, the learned counsel for the respondent was just pulling our legs to make the trial-and-error tactic which he perhaps realized later would not bear any fruits hence deserting it in his written submissions. The prayer is struck out for not being backed by any provision of the law on which it could stand in Court.

We now turn to the complaint on the verification clause to the effect that it is not dated. This complaint will not detain us. As we understand the law, want of date in the verification clause of an affidavit will never invalidate the affidavit. We have read literature books and case law on the point and have found nowhere suggesting that lack of date in the verification clause of an affidavit is an irregularity let alone a fatal irregularity. We dismiss this complaint.

On Rejoinder to the Affidavit in Reply, we agree with Mr. Zake that it ought to have been filed with leave of the Court. The Old Rules under rule 46 (1) and 53 (1) envisaged, respectively, an affidavit or affidavits in support of the application and an affidavit or affidavits in reply. Supplementary affidavits and supplementary affidavits in reply are filed with leave of the court or with the consent of the other party - see: rule 46 (2) and 53 (2). Rules 46 and 53 of the Old Rules are in *pari materia* with rules 49 and 56 of the Rules. The position is therefore the same in the Rules. Taking inspiration from the position that supplementary affidavits or affidavits in reply must be filed with leave of the court

or with the consent of the other party, the same would be the position in filing the rejoinder to the affidavit in reply. In the premises, we expunge from the record the rejoinder to the affidavit in reply filed by the applicant without leave of the Court, and, apparently, without the consent of the respondent.

The foregoing takes care of the preliminary matters raised by the respondent's counsel. That done, we now turn to the first prayer in the Notice of Motion. We find it apt to start with rule 82 of the Old Rules under which the prayer has, *inter alia*, been made. The provisions of rule 82 of the Old Rules read:

> "*A 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 or the appeal, as the case may be, 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*".

In the case at hand, the respondent, having filed the Notice of Appeal, ought to have taken necessary steps of, *inter alia*, instituting the appeal within sixty (60) days of the date when the notice of appeal was lodged. That was the tenor and import of the provisions of rule 83 (1) of the Old Rules. It is the same position

today under rule 90 (1) of the Rules which in *pari materia* with rule 83 (1) of the Old Rules.

It is not disputed that the respondent lodged the Notice of Appeal in time. The only snag emanating from the applicant's submissions, but for reasons that will be apparent shortly, we are not able to agree, is that it was not served upon him in requisite time. According to the applicant, it was served upon him on 21.03.2007. It should be noted here that the applicant deposed in the affidavit supporting the Notice of Motion that he was served on 21.03.2006. However, in his written submissions, the applicant states that the year "2006" in the affidavit was a typing error; it should read "2007". This averment is strenuously opposed by Mr. Zake for the respondent stating that the "2007" was but an afterthought intended to mislead the Court.

We have considered these contending arguments by the learned counsel for the parties. We have scanned the record of appeal as well. The respondent shows through Annexture SFA3 to the Affidavit in Reply that the applicant was served on 27.02.2006 while the applicant submits that the same Notice was served upon him on 21.03.2007. We have closely examined the documents on record. Having so done, we find the averment by the counsel for the respondent highly plausible. Annexture SFA3 to the affidavit in reply shows that the applicant was served through the Legal and Human Rights Centre – Legal Aid Unit Magomeni. The

document has the signature and date (27.02.2006) of the recipient beside the applicant's address with the rubber stamp impression on it which reads:

"LEGAL AND HUMAN RIGHTS CENTRE – LEGAL AID

UNIT

MAGOMENI

BOX 75254

D' SALAAM."

On the other hand, the applicant's claim seems less plausible. We say so because, the affidavit supporting the Notice of Motion shows at para 5 (ii) that he was served on 21.03.2006 and there is no complaint therein to the effect that he was served out of time. It is our considered view that if the applicant was served out of time, he would not have failed to raise such an alarm in the affidavit. Having not done so, we think, the respondent's contention to the effect that the applicant's assertion of being served out of time is but an afterthought holds a lot of water. That is the reason why we find the respondent's explanation more plausible and dismiss the applicant's complaint to this effect. On the evidence available on the record, we are satisfied that the applicant was served with the Notice of Appeal within the stipulated time.

Next for consideration is the applicant's complaint to the effect that he was not served with the letter applying for documents for appeal purposes. We have

closely examined the letter appended as Annexture SFA2 to the Affidavit in Reply through which the respondent claims to have served the applicant. It is a two-page letter with the address of the applicant appearing on the second page thereof. The second page has no signature to verify any receipt. Instead, there is a signature at the bottom of the first page and adjacent to the signature, there is a date; 21.02.2006. No rubber stamp has been impressed thereon. We highly doubt that the signature verifies with certainty that it was the respondent or his representative who received it. We say so because the signature is very much different from the one appearing in the Affidavit. And, further, if it was received by the applicant's representative as was the case with the Notice of Appeal, we do not see any reason why that representative could not put its rubber stamp impression as it was in respect of the service of the Notice of Motion. We therefore find and hold that, on the evidence on record, it is enormously doubtful if the applicant served the applicant with the letter to the District Registrar requesting certified copies of proceedings, judgment and drawn order.

We wish to underline here that under the provisions of rule 83 (1) of the Old Rules, a litigant intending to appeal and who has filed a Notice of Appeal, must lodge such appeal within sixty (60) days of the lodging of the notice. However, he could be entitled to exemption appearing in a proviso to the sub-rule upon satisfaction that he applied to the High Court for a copy of proceedings within

thirty days of the decision intended to be challenged. The proviso to the sub-rule provided:

> *"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 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."*

However, the person intending to appeal will not be entitled to that exemption unless and until the conditions under sub-rule (2) of the rule have been satisfied to the letter. Let sub-rule (2) speak for itself:

> *"An appellant* ***shall not be entitled to rely on the exception to subrule (1)*** *unless his application for the copy was* ***in writing and a copy of it was sent to the respondent."***
>
> [Emphasis mine].

From our reading of the foregoing sub-rules of rule 83 it becomes apparent that to enjoy the exemption provided for in the proviso to sub-rule (1) an appellant

must satisfy two conditions; first, he must make his application for documents of appeal in writing within thirty (30) days of the pronouncement of the decision intended to be challenged and, secondly, he must serve the respondent with a copy thereof. These are conditions with which the respondent herein ought to have mandatorily complied so as to enjoy the exemption appearing in the proviso to sub-rule (1). These conditions are mandatory as the sub-rule has been so couched. What then should be the way forward? This is the question to which we now turn.

We have already found and held that the respondent has not proved that he copied the letter to the applicant. This means that he (the applicant) cannot enjoy the exemption under the proviso to sub-rule (1) of rule 2. It follows therefore that the respondent ought to have filed his appeal within sixty days of lodging the Notice of Appeal on 21.02.2006. The time within which he could legally lodge his appeal elapsed on or about 19.04.2006. He did not do that within time. Neither did he make any effort to do that even after obtaining leave on 08.02.2008. He was still on comfort zone even up to the moment the present application was lodged on 20.06.2008; some four months after he obtained leave. In these circumstances, the applicant is quite right to engage rule 82 of the Old Rules.

For the avoidance of doubt, we are very much alive to the fact that the respondent sought and obtained leave of the High Court to appeal to this Court.

That, we are certain, constitutes one of the essential steps in prosecuting his appeal - see: **Solemn Rajab Mizino v. Shabbir Ebrahim Bhaijee & 2 others,** Civil Application of 80 of 2007, **Protazi B. Bilauri v. Deusdedit Kisisiwe**, Civil Application No. 73 of 2003, **Pita Kempap Limited v. Mohamed I. A. Abdulhussein**, Civil Application No. 140 of 2004 and **Ezekiel Fanuel Mushi v. NBC Limited**, Civil Application No. 4 of 2015 (all unreported) and **Asmin Rashid v. Boko Omari** [1997] TLR 146. In **Pita Kempap**, for instance, it was stated by the Court:

> *"... an appeal is a process in which a number of steps are involved in its institution. A notice of appeal and leave (where necessary) are two different steps in the process leading to one major goal of instituting an appeal".*

However, much as we may agree that endeavours by an appellant to seek leave to appeal to this Court constitutes one of the essential steps towards prosecution of an intended appeal, we are certain that the efforts by the respondent were efforts in futility having not fully complied with the letter of rule 83 (1) and (2) of the Old Rules beforehand.

The foregoing said and done, we are positive that the respondent has failed to take essential steps in the prosecution of his intended appeal. In the circumstances, we think it will be in all fairness if we allow this application.

In the final analysis, we allow this application. The Notice of Appeal which was filed by the respondent on 21.02.2006 is hereby struck out with costs to the applicant.

Order accordingly.

DATED at **DAR ES SALAAM** this 12th day of June, 2017.

B.M. LUANDA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL