

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

CIVIL APPLICATION NO. 3 OF 2009

JUSTINE NYARI..... APPLICANT

VERSUS

GUARDIAN LIMITED..... 1ST RESPONDENT

PRINTA AFRIQUE LIMITED..... 2ND RESPONDENT

**(Application for struck out notice of appeal from the decision of the
High Court of Tanzania at Arusha)**

(Sambo, J.)

dated the 23rd day of February, 2009

in

Civil case No. 35 of 2001

RULING

18th & 26th February, 2010

NSEKELA, J.A.

This notice of motion has been made under Rule 82 of the then Court of Appeal Rules, 1979 supported by two affidavits, the first sworn by the applicant Justine Nyari, and the second sworn by Glorie Ojare. The applicant is seeking for an order that the Notice of Appeal for the intended appeal be struck out with costs on the grounds that the respondents (i) Guardian Limited and (ii) Printa Afrique Limited have failed to serve a copy of the said Notice of Appeal on the applicant within the prescribed time.

Paragraphs 2 to 6 of the applicant's affidavit in support are in the following terms:-

"2. That I were (sic) the plaintiff in High Court of Tanzania at Arusha Civil Case No. 35 of 2001 and the respondents herein were the defendants.

3. That judgment in the said High Court of Tanzania at Arusha Civil case No. 35 of 2001 was rendered on the 23^d day of February, 2009 in my favour.

4. That on the 26th day of February, 2009, the respondents herein being dissatisfied with the said decision, lodged a Notice of Appeal in the High Court of Tanzania at Arusha Registry, intending to appeal to the Court...

5. That on the 12th day of March, 2009, the respondents through its advocates served a copy of the said Notice of Appeal upon my Advocates, whereupon Ms. Glorie Ojare, a legal officer of my Advocates law firm

endorsed her signature and date of receipt on a copy of the said Notice of Appeal.

6. That the respondents have failed to serve my advocates with a copy of the said notice of Appeal before or within seven (7) days after lodging the same."

Mr. Loomu Ojare, learned advocate appeared on behalf of the applicant. He submitted that the respondents lodged the notice of appeal in the High Court on the 26/2/2009. The applicant's advocate was duly served with the notice of appeal on 12/3/2009 outside the prescribed seven (7) days. He referred the Court to Civil Reference No. 5 of 2004, **Akbar Hassanali and Two others v Edward Anthony Mweisumo** (unreported) and submitted that the impugned notice of appeal should be struck out.

The respondents filed an affidavit in reply sworn by their learned advocate, Mr. Colman Mark Ngalo, who represented them in this application. The learned advocate confirmed the dates when the notice of appeal was filed by the respondents and when it was served on the applicant. There was no dispute on that. The reasons for the delay in serving on the applicant, a copy of the notice of appeal can

be gleaned from the following paragraphs of Mr. Ngalo's affidavit in reply:-

4. *That on 26th February 2009 I presented to the High Court Registry Arusha two documents namely a Notice of Appeal and a letter requesting for copies of judgment, decree and proceedings in the above cited case.*
6. *That upon presenting the notice of Appeal, the same was stamped by the Registry Officer who also issued an exchequer receipt for the filing fee paid.*
7. *That the Registry Officer sent the Notice of appeal to the District Registrar for signature as required by law.*
8. *That at the time the District Registrar the Hon. Mutungi was not in Arusha, and the Hon George Herbert, was acting District Registrar.*
10. *That on 11th March 2009 my Senior Legal Officer, Mr. Modest Akida collected the signed Notice of Appeal from High Court and on 12th March 2009 he served a copy on Loomu*

Ojare & Company Advocates”.

Mr. Ngalo, learned advocate, submitted that when the Notice of Appeal was lodged in the Registry, there was no Registrar to sign the same according to the requirements of the law, hence the delay. The learned advocate cited Civil Appeal No. 91 of 2003, **21st Century Food and Packaging Ltd v (i) Tanzania Sugar Producers Association (ii) The Ministry of Finance (ii) The Hon. Attorney General** (unreported). He added that in the applicant's affidavit in support, he has not complained that the delay has occasioned any prejudice to him and that the court should take into consideration Article 107 A(2)(e) of the Constitution of the United Republic and the Rule 2 of the Court of Appeal Rules 2009. He opined that the seven-day rule was oppressive and striking out the notice of appeal will cause injustice.

In reply, Mr. Ojare submitted that Article 107A (2)(e) does not do away with the mandatory provisions of the law and that non-compliance with Rule 77(1) was fatal. The respondent should have applied for extension of time to serve the notice of appeal upon the applicant.

There is no dispute that the respondents were late in serving the applicant with a copy of the notice of appeal. At the latest, a copy of the notice of appeal should have been served on the 5/3/2009. Mr. Ngalo strenuously contended that the Registrar was responsible for the delay to serve of notice of appeal within the prescribed time in signing it. He added that the Court should invoke Article 107A (2)(e) to cure non-compliance with, Rule 77(1) of the then Court of Appeal Rules, 1979. This court in Civil Reference No. 5 of 2005 **Akbar Hassanali and 2 others v Edward A Mweisumo** (unreported) when faced with a similar problem stated as follows:-

"...it is a mandatory requirement under the rule for the appellant, the applicant in this case, to serve a copy of the notice of appeal on the respondent before, or within seven days after lodging the notice of appeal. It is an essential pre-requisite step to be taken in the process of instituting an appeal. Failure to do so, as happened in this case, rendered the notice of appeal incompetent. Such failure on the part of the appellant, in our view, intitled the respondent to invoke the

provisions of rule 82 in applying for the notice of appeal to be struck out."

With respect, I subscribe to this view. The respondents were in breach of Rule 77(1) for failure to effect service on the respondent with a copy of the notice of appeal. The consequences that follow is to strike out the notice of appeal under Rule 82 for failing to take an essential step in the appeal. (See: Civil Application No, 41 of 1997, **Leonsi Silayo Ngabi v Hon. Justine Alfred Salakana and The Hon. Attorney General** (unreported). Undaunted, Mr. Ngalo submitted that the Court should invoke Article 107A (2) (e) of the constitution of the United Republic. It reads in part as follows:-

"107A (2)(e). Katika kutoa uamuzi wa mashauri ya madai ya jinai kwa kuzingatia sheria, mahakama zifuate kanuni zifuatazo, yaani:

(e) Kutenda haki bila ya kufungwa kupita kiasi na mashaarti ya kiufundi yanayoweza kukwamisha haki kutendeka"

This is now captured in Rule 2 of the Court of Appeal Rules, 2009 which reads:-

“2. In administering these Rules the court shall have due regard to the need to achieve substantive justice in the particular case”

Speaking for myself, I do not see any necessity to invoke the said Article of the Constitution. The Court of Appeal Rules themselves provide a way out. Mr. Ngalo put the blame on the Registrar for the delay to sign the notice of appeal. For the purposes of this Ruling, I do not want to engage myself in this discussion. The Court of Appeal Rules do provide for a way out of this problem. I do not see any injustice to respondents and none was pointed out to me in following prescribed rules of procedure.

In the result, I am satisfied that a copy of the Notice of Appeal was served upon the applicant outside the prescribed time. It is accordingly struck out with costs.

DATED at ARUSHA this 24th day of February, 2010.

H.R. NSEKELA
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL