

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

**(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)**

**CIVIL APPLICATION NO.35 OF 2014**

**NDERINGO ELISANTE NGOWI ..... APPLICANT**  
**VERSUS**

1. JOSEPHINE JOSEPH MESHACK }  
2. DOMINIC JOSEPH MESHACK } ..... **RESPONDENTS**  
3. DANIEL MESHACK SAMBAI }

**(Application to strike out Notice of Appeal against the Judgment and Decree  
of the High Court of Tanzania at Arusha)**

**(Mansoor, J.)**

**Dated the 11<sup>th</sup> day of March, 2013**

**In**

**Land Appeal No. 16 of 2013**

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**RULING OF THE COURT**

**8<sup>th</sup> & 15<sup>th</sup> October, 2015**

**KILEO, J.A.:**

The applicant, Nderingo Elisante Ngowi, with the services of his learned counsel, Mr. John Materu, filed an application by way of Notice of Motion pursuant to Rules 89(2) 4(2) (b) (c) and 90(1) and (2) of the Court of Appeal Rules, 2009 (the Rules). The application is for the striking out of the Notice of Appeal filed by the Respondents on 19/3/2014 against the Judgment and Decree of the H/C in Land Appeal No. 16 of 2013, on the following grounds:-

1. **THAT,** the Respondents have failed to institute the Appeal within 60 days as required by Rule 90 (1) of the Court of Appeal Rules, 2009 as the letter applying for proceedings was neither copied nor served on the Applicant.
2. **THAT,** the Notice of Appeal was not served on the Applicant within 14 days as required by Rule 84 (1) of the Court of Appeal Rules, 2009.

The Notice of Motion is supported by the affidavit of the applicant, Nderingo Elisante Ngowi.

The facts as avowed to in the affidavit show that on 11/3/2014 Land Appeal No. 16 of 2013 of the High Court at Arusha was decided in favour of the applicant. On 19/3/2014 the respondent's counsel filed a Notice of Appeal to the Court of Appeal and applied for a copy of judgment.

The applicant was served with the Notice of Appeal on 4/4/2014 which was outside the period of 14 days prescribed by law for service upon the other party as per Rule 84(1) of the Rules. Until the time the affidavit was sworn to on 6/11/2014 the applicant had not been served with the letter applying for the copy of judgment.

Mr. Materu filed a written submission in support of the Notice of Motion. The respondents did not file any affidavit in reply nor was there any written submission.

Submitting before us, Mr. Materu asked us to adopt the affidavit and his written submission. He urged us to allow the application as no affidavit in reply had been filed. Mr. John Shirima, learned counsel for the respondents made a vain attempt, orally, for extension of time to file necessary documents.

Obviously, the prayer for extension of time by Mr. Shirima could not be properly before us.

The matter is straight forward. The law requires that an intended appellant before or within fourteen days after lodging a Notice of Appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal (Rule 84(1) of the Rules). The respondent did not comply with this Rule. According to the applicant he was served with the Notice of Appeal on 4<sup>th</sup> April 2014. Mr. Materu claimed that the applicant ought to

have been served with the notice, latest by 3<sup>rd</sup> April, 2014. There was no affidavit in reply to controvert what the applicant stated in his affidavit.

We are of the considered view that when an affidavit is sworn to as to certain facts and that affidavit is served on the other party, and that other party does not swear an affidavit in reply to deny the facts sworn to, then the facts in the affidavit should be taken not to have been challenged.

The applicant also stated in his affidavit that the letter applying for copy of judgment was never copied nor served upon him till the time of swearing the affidavit – i.e 6<sup>th</sup> November 2014. Mr. Materu, referring to **Mkombozi Centre for Street Children & two others v. The Hon. Attorney General** (Civil Appeal No. 30 of 2014 – unreported) argued that since the letter was not copied nor served upon the applicant, then the respondent was not entitled to rely on the exception to Rule 90(1) of the Rules. The appeal had to be filed within 60 days of the date of decision, he argued. The Court in the Mkombozi Centre (supra) held:-

*"since the letter applying for copy of proceedings is not shown to have been copied to the other party as per the dictates of Rule 90(2) of the Rules the appeal was filed outside the prescribed time of sixty*

*days..... The appellant therefore cannot benefit from the certificate of delay issued by the Registrar of the High Court. The Appeal is time barred"*

Rule 90 (1) & 2 provide:-

*"90-(1) Subject to the provisions of Rule 128 an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged with*

- (a) A memorandum of appeal in quintuplicate;*
- (b) The record of appeal in quintuplicate*
- (c) 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 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 of 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 it was served on the Respondent."*

In short, the Notice of Appeal having been served upon the applicant outside the time prescribed by law, coupled with the respondent's failure to serve the applicant with the letter applying for copy of judgment, we have no other option to take but to strike out, as we hereby do, the notice of Appeal filed on 19/3/2014.

In the event, the application is granted. The applicant shall have his costs.

**DATED at ARUSHA** this 13<sup>th</sup> day of October, 2015.

E. A. KILEO  
**JUSTICE OF APPEAL**

I. H. JUMA  
**JUSTICE OF APPEAL**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

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

  
E.Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**