

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CIVIL APPLICATION NO. 10 OF 2016

JAMES Z. CHANILA.....APPLICANT

VERSUS

RAMADHAN MTUNDU.....RESPONDENT

**(Application to strike out the notice of appeal from the decision of the
High Court of Tanzania at Mwanza)**

(De-Mello, J.)

**dated the 21st day of May, 2015
in
Land Appeal No. 128 of 2013**

RULING OF THE COURT

24th & 25th October, 2016

MASSATI, J.A.:

Having lost an appeal in the High Court at Mwanza, in Land Appeal No. 128 of 2013, one of the respondents there, RAMADHANI MTUNDU, (herein "the respondent") lodged a notice of appeal to this Court to express his grievances on 2/6/2015. The intended appeal was to be preferred against JAMES Z. CHANILA (as Administrator of the Estate of

the late AGNESS PETRO) as he appeared in the High Court (herein “the applicant”).

But, by a notice of motion lodged in this Court on 25th July 2016, the applicant now seeks to dislodge the said notice of appeal for want of essential steps that should have been taken within the prescribed time. The application is taken out under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by the affidavit of JAMES Z. CHANILA.

The major ground in support of the application is that some essential steps in the proceedings have not been taken within the prescribed time.

In paragraphs 3, 4 and 5 of his affidavit, the applicant avers that after lodging the notice of appeal, the respondent filed an application No. 81 of 2015 for leave to appeal in the High Court on 4/6/2015, which, following a preliminary objection on a point of law raised by the respondent, was finally withdrawn on 1/6/2016, with leave to refile. That the applicant has never been served with any document since, hence the application.

The respondent has filed an affidavit in reply, in which he acknowledges the truth in the contents of paragraphs 1, 2, 3, and 4, and to a limited extent, paragraph 5. In paragraph 6, the respondent avers that following the withdrawal of the previous application, there is now pending in the High Court, HC Miscellaneous Land Application No. 142 of 2016 which was filed on 2/6/2016 for extension of time to file an application for a certificate on a point of law. So, it was not true that no essential steps had been taken.

Learned counsel also filed their written submissions. According to Mr. Feran Kweka, learned counsel for the applicant argued at the hearing that, as the respondent requires leave to appeal to this Court in terms of Rule 45(2) of the Rules, and has not applied for one to date, he must be taken to have failed to take essential steps, and so the notice of appeal must be struck out with costs. On the other hand, Mr. James Njelwa, learned counsel who appeared for the respondent, submitted that as the appeal originates from a ward tribunal, a certificate on a point of law was essential before instituting an appeal to this Court in terms of section 47(2) of the Courts (Land Disputes Settlements) Act Cap. 216 R.E. 2002 (the Land Disputes Act). So, since there is an application pending in the

High Court for the said certificate, there is an essential step towards the institution of the appeal and therefore the application be dismissed with costs.

Rule 89(2) of the Rules provides:

"89(2) Subject to the provisions of sub rule (1), a respondent or 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 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."

Whereas time for lodging a civil appeal has been prescribed under Rule 90(1) of the Rules as "sixty days of the date when the notice of appeal was lodged" in practice an application such as the present one often

arises when no appeal has been lodged within the prescribed time. The question in each such application is: "what is an essential step?" This Court has severally and adequately dealt with that provision before, but suffice it to refer to **ASMIN RASHIDI v. BOKO OMARI** (1997) TLR. 146; where we held:

"The essential steps in the prosecution of an appeal as envisaged by Rule 82 (now Rule 89(2)) were steps which advanced the hearing of the appeal and not explanations for delays. One of the essential steps... was to apply for leave to appeal...for there was no automatic right of appeal against that ruling."

Contrary to what Mr. Njelwa has submitted, and as it is clear from the preface of the judgment of De-Mello, J dated 21/5/2015, intended to be impugned, the matter under consideration originates from Geita District Land and Housing Tribunal, and not a ward tribunal. If it were to come to this Court, it would be a second and not a third appeal, as contended by Mr. Njelwa.

Second appeals in land disputes are governed by section 47(1) and not 47(2) of the Land Disputes Act as submitted by the learned counsel. What is required under section 47(1) of the Land Disputes Act is leave, not a certificate on a point of law.

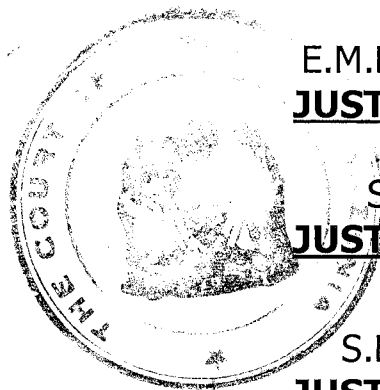
When these facts and the law were drawn to Mr. Njelwa's attention, he promptly conceded and withdrew his resistance to the application. As he put it himself, in the circumstances of the case, the application No. 142 of 2016 now pending in the High Court was misplaced. By extension, he also conceded that this was not an essential step towards the prosecution of the appeal.

We couldn't agree with Mr. Njelwa more. As a certificate on a point of law was not necessary in a second appeal under section 47(1) of the Land Disputes Act, the step taken by the respondent to seek it, could, at best be described as a sidetrack, which would not take the prosecution of the appeal an inch further. Since it is now more than one year since the notice of appeal was filed and no essential steps, have been taken and upon the submission of the learned counsel for the applicant and

concession of the learned counsel for the respondent, we find merit in this application and so we allow it.

We accordingly strike out the notice of appeal. We however, make no order as to costs.

DATED at MWANZA this 24th day of October, 2016.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL