

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 78 OF 2013

**HASSAN JAMBIA (by his Legal Personal
Representative SHAFII ALI NURU).....APPLICANT**

VERSUS

TANESCO.....RESPONDENT

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

(Mihayo, J.)

dated the 6th day of October, 2005

in

Civil Appeal No. 6 of 2004

RULING OF THE COURT

4th & 11th March, 2016

MASSATI, J.A.:

This is a second attempt by the Applicant, HASSAN JAMBIA to dislodge the Respondent's Notice of Appeal from the annals of this Court for reasons that the Respondent has failed to take some essential steps towards instituting the appeal. His first attempt was in Civil Application

No. 97 of 2008, which Mjasiri, J.A. dismissed on 10th October, 2008, for want of merit. The present application was lodged on 17th May, 2013.

The Notice of Motion was taken out on the ground that:

"Despite being served with record of appeal inclusive Certificate of Delay, the respondent todate, has failed to take any essential steps towards instituting the intended appeal."

The Notice of Motion was backed by the Applicant's own affidavit, who, unfortunately, did not live long enough to be present at the hearing of the application. He expired on 22/7/2015, and his friend, SHAFII ALI NURU, who was appointed as a personal legal representative of his estate, was on 23rd February 2016, duly substituted as a party in the present application. On that day he also applied for and was granted leave to file a supplementary affidavit, to which the Respondent was also granted leave to file a supplementary affidavit in reply.

At the hearing of the application, the Applicant (by his legal personal representative/ appeared in person. Mr. Richard Rweyongeza,

learned Counsel, represented the Respondent who resisted the application.

The Applicant has alleged in paragraphs 4, 5 and 6 of the affidavit in support of the Notice of Motion that:

- (i) the respondent was served with all the necessary documents required for the intended appeal on 17/12/2010. They were collected by one Advocate Johnson Jamhuri.*
- (ii) the respondent has also obtained a certificate of delay*
- (iii) despite being in possession of all the relevant documents, the respondent has not taken any steps towards filing the intended appeal.*

The Applicant has essentially repeated those averments in paragraphs 4, 5, 6 and 7 of the supplementary affidavit, except that this time enclosed in the supplementary affidavit, were also copies of the Notice of Appeal, the Applicant's letter of 12th July, 2010, the letter from the District Registrar of the High Court, Dar es Salaam Registry, dated 4th February 2013, the Certificate of Delay, the letter from the Permanent

Secretary Ministry of Energy and Minerals, of 24th July, 2014, and lastly, a letter from the District Registrar advising the Applicant to proceed with the process of execution. We shall refer to those documents in the course of our deliberations, whenever they are relevant.

However, all the above allegations are refuted by the Respondents. They filed three affidavits in reply; from Jamhuri Johnson, Hawa Hiro Msefya and Richard Karumuna Rweyongeza. From these affidavits in reply, we gather that:

- (i) *Mr. Jamhuri Johnson refuted the contents of paragraph 4 of the affidavit and categorically denies the contents of Annexure C of the affidavit, where it is alleged contained a letter from the District Registrar dated 17/12/2010 to inform him that he was served with all the necessary documents.*
- (ii) *Mr. Howa Hiro Msefya also disputed the contents of paragraph 4 of the affidavit and further that as Mr. Jamhuri's office colleague, he had never seen any documents relating to the said appeal.*

(iii) Mr. Rweyongeza's affidavit in reply is that upon perusal of the respective Court file he discovered that although there was a copy of a letter addressed to Mr. Johnson Jamhuri, there was no evidence that the said Johnson ever collected that letter, but instead the copy of the Exchequer Voucher Receipt showed that it was the Applicant who had collected the said documents. He also went on to say that despite numerous reminders he was yet to receive the requisite documents.

As intimated, there wasn't anything new in the supplementary affidavit filed by the parties.

At the hearing, the Applicant repeated his assertions that despite the lapse of over 10 years now, and receipt of all the necessary documents, the Respondent was yet to file the intended appeal. He urged the Court to find that it was not sufficient for the Respondent to have kept on writing, requesting for the same documents over and over again, when he knew that they were ready. Instead, the Respondent

should have taken more positive steps towards achieving that goal. So, he prayed that the appeal be struck out.

Mr. Rweyongeza, learned counsel, posed the issue to the Court, as to whether the Respondent has obtained all the necessary documents to enable him institute the appeal? His answer was in the negative. He pointed out that both the letter of the District Registrar dated 30/9/2010, and the Certificate of Delay dated 4/10/2010 were problematic as the dates shown therein were out of reality, and the information contained therein completely distorted and misleading. He also reminded the Court that both Mr. Johnson and Mr. Msefya, officers of the Respondent have denied the alleged receipt of the said documents. He finished his submission by saying that despite his constant follow up, he himself has not yet managed to receive the necessary documents. As long as he has not received those documents, the Respondent could not be faulted, he argued, relying on the decision of this Court in **TRANSCONTINENTAL FORWARDERS LTD v TANGANYIKA MOTORS LTD** (1997) TLR 328. He thus prayed for the dismissal of the application with costs.

In reply, the Applicant, while acknowledging in principle that, the documents in question were problematic and that the Registrar was to blame for the defects therein, went on to submit that the Respondent should not be absolved from blame, because the TANESCO officers had been notified about the availability of these documents by the deceased's Advocate, Mr. Ukwong'a and should have been able to do something about them. So, he reiterated his prayer that the Notice of Appeal be struck out.

This application is brought under Rule 89(2) of the Court of Appeal Rules, 2009 (the Rules). The Rule in question reads as follows:

"(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 of appeal, as the case may be, on the ground that no appeal lies, or that some essential steps in the proceedings has not been taken or has not been taken within the prescribed time."

From the wording of this Rule, we think that, there are two major grounds on which the application to strike out a notice of appeal could be brought. The first is where **no appeal lies**. This, in our view, is a question of law. A simple illustration is where, the order or decision sought to be appealed against is not appealable. The second one is **failure to take essential steps to institute the appeal**. Essentially, these could either be procedural or evidential. An example would include omission to apply for leave to appeal or a certificate on a point of law, where one was required; or failure to collect copies of proceedings, judgment or order necessary for the institution of an appeal; or failure to lodge an appeal within the prescribed time, where the documents are ready.

The present application is based on the ground of failure to take essential steps to institute an appeal, in that, according to the Applicant, although all the necessary documents are ready, the Respondent has failed to collect them in order to institute the intended appeal. The Respondent, on the other hand is alleging that he has not been served with those documents. The issue is therefore whether the Respondent

has received the necessary documents. This is a question of evidence, one of whose rules is that, he who alleges, must prove.

In paragraph 4 of his affidavit, the Applicant has sought to rely on a copy of a letter from High Court (Annexure C) wherein it is indicated that one Johnson Jamhuri was informed that the documents were ready. But as shown above Mr. Jamhuri has refuted this information. It is true that Annexure C to the affidavit of **HASSAN JAMBIA** is a copy of the letter dated 30/9/2010 from the Registrar, High Court, addressed to Mr. Jamhuri Johnson, informing him that the proceedings, decree and judgment are ready. But there is no dispatch book or any other evidence in the record to show that he received that letter. In paragraph 5 of his affidavit, the deceased Applicant also claimed that Mr. Johnson was served with a certificate of delay. That allegation is also refuted by Mr. Johnson, in paragraph 6 of his affidavit in reply. No further evidence to the contrary was proffered by the Applicant. In the light of this evidence on record, we conclude that the Applicant has failed to discharge his burden of proof, that the Respondent was notified by the court that the documents were ready for collection and thus deliberately failed to collect the same and institute the intended appeal.

As this Court stated in **TRANSCONTINENTAL FORWARDERS LTD. vs TANGANYIKA MOTORS LTD.** (supra), once the respondent has shown that he had applied to the Registrar for a copy of the proceedings sought to be appealed against, and as demonstrated in the present case, despite several reminders, he had not been furnished with any, he had complied with the Rules,. We appreciate the Applicant's anxiety because he believes he himself has already collected the "documents", but we also understand the Respondent's predicament that some of the documents, such as the certificate of delay and the letter from the District Registrar inviting him to collect the documents were not free from difficulties. So in the circumstances, unless something is done he cannot be regarded as having failed to take essential steps in instituting the appeal and, in such a case Rule 89(2) of the Rules cannot be resorted to. We would have ended this ruling by dismissing the present application but, for some disquieting features which we have noted in the present matter.

First, this matter has taken too long. It is almost 11th years since the decision which is sought to be appealed against was delivered. Secondly, the alleged Certificate of Delay issued by the District Registrar

on 4th day of October, 2010, excludes the period from 8th February, 2008 *"when the applicant lodged notice of appeal and applied for copies of judgment, and 27th September, 2010, when the appellant was supplied with the papers"*. This Certificate is defective because the situation on the ground is that first the notice of appeal was filed on 19/10/2015, and not 08/02/2008. Second, the Respondent applied for copies of the documents by its letter dated 11th October, 2005, and not one shown in the certificate of delay. This is evidenced by Annexures "B" and "B1" of the Applicant's own affidavit. Then it is also strange that having certified that the Appellant had already been supplied with the necessary documents, by another letter dated 30/9/2010, the District Registrar informed the Respondent that "the proceedings, decree and judgment" (which according to the certificate of delay had already been collected) "were now ready for collection" on payment of the necessary court fees. This unsatisfactory state of affairs caused by the office of the District Registrar, Dar es Salaam, was the cause of the present confusion and should not be left to continue, nor to oppress any party. As the maxim of law goes, an act of the court should oppress no one.

We therefore order that, the District Registrar, should proceed to prepare a new set of proceedings, judgment and decree, and another certificate of delay, which should immediately be supplied to the parties to enable them take the essential steps.

We make no order as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 8th day of March, 2016.




S.A. MASSATI
JUSTICE OF APPEAL

A.G. MWARIJA
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