IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 28/08 OF 2015

BETWEEN

MAPESA SAID MATAMBO ..... FIRST APPLICANT

MARIJANI SAID MATAMBO ..... SECOND APPLICANT

VERSUS

ROSE ALLY NYABANGE ..... RESPONDENT

(Application for striking out Notice of Appeal from the decision of the High Court of Tanzania, at Mwanza)

(Sumari, J.)

dated the 25th day of October, 2013
in
Civil Appeal No. 16 of 2003

RULING OF THE COURT

23rd & 25th August, 2017

NDIKA, J.A.:

By a notice of motion made under rules 48 (1), 89 (2) and 91 of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants named above apply to have the present respondent's notice of appeal lodged on 7th November, 2013 be struck out on the grounds that:

> *"The respondent here in this application has failed to lodge her appeal in time after the High Court granted her leave to*

appeal to this Court against the High Court Judgment of the Honourable Madam Justice Sumari dated 25th October 2013.

Secondly, since the respondent obtained leave to appeal in this Court on 2nd June 2015 no any application for extension of time to appeal has been filed by the respondent."

In support of the application, the applicants lodged their joint affidavit as well as written submissions. The respondent, for her part, filed her affidavit in reply along with written submissions in reply to the applicants' submissions.

It is undisputed that the respondent seeks to appeal to this Court from the judgment of the High Court at Mwanza in Civil Appeal No. 16 of 2003 that was handed down on 25th October, 2013. It is common ground that she, being aggrieved by the aforesaid decision, duly lodged her notice of appeal on 7th November, 2013 and applied for leave to appeal to this Court vide Miscellaneous Civil Application No. 120 of 2013. It is also agreed that the High Court granted the respondent the requested leave to appeal on 2nd June, 2015. Nonetheless, by 3rd December, 2015 when this matter was filed, and even at the hearing of this application on 23rd August, 2017, the respondent had not yet instituted her intended appeal.

At the hearing before us, the applicants appeared in person, unrepresented while the respondent had the services of Mr. Chama Matata, learned Advocate, who was assisted by Mr. Salum A. Magongo, learned Counsel.

Submitting in support of the application, the first applicant contended that the respondent ought to have filed her appeal within sixty days after she was granted leave to appeal. It was also his position that after leave was granted, the respondent had to apply from the Registrar of the High Court, in terms of rule 90 (1) of the Rules, for a certificate of delay but no such application had been made. As the sixty-days limitation period elapsed on or about 2nd August, 2015 without the intended appeal having been lodged, he urged us to strike out the respondent's notice of appeal for failing to institute the appeal in time after leave was granted. Alternatively, the first applicant urged that the notice of appeal be deemed withdrawn pursuant to rule 89 (2) of the Rules for the respondent's failure to lodge the intended appeal or seeking extension of time to institute the appeal.

The second applicant had nothing to add apart from indicating that he supported the position taken by his co-applicant.

Replying, Mr. Matata, at first, addressed the contention that the respondent had failed to lodge her intended appeal within sixty days after she was granted leave to appeal. Citing the respondent's deposition in Paragraph 6 of the affidavit in reply, he argued that the intended appeal could not be lodged primarily because the respondent was yet to be supplied with certified copies of the ruling and drawn order granting her leave to appeal. The respondent, it is averred, requested, vide a letter, a copy of which is annexed to the affidavit in reply, for the said copies on 8th June, 2015, which was only six days after leave was granted. In addition, he claimed that as deposed in Paragraph 8 of the affidavit in reply the respondent was yet to be supplied by the High Court with a certified copy of the decree intended to be challenged and that no communication had been received from that Court on whether the requested documents were ready for collection.

When pressed by the Court on whether the respondent had, in terms of rule 90 (1) and (2) of the Rules, duly applied for a copy of the proceedings in the High Court in Civil Appeal No. 16 of 2003 from which the intended appeal arises, Mr. Matata answered in the affirmative. However, while acknowledging that no copy of the written request for the

proceedings was annexed to the affidavit in reply, he said that the said affidavit contains an annexed counter affidavit of the applicants that they filed in the respondent's application for leave (i.e., Miscellaneous Civil Application No. 120 of 2013). He said that the applicants acknowledged, in Paragraph 3 of the said counter affidavit, that the respondent herein duly applied for a copy of the proceedings, judgment and decree in Civil Appeal No. 16 of 2003.

Arguing that time for instituting the intended appeal had not yet started running because the respondent had not yet been supplied with copies of the impugned decree as well as the ruling and drawn order granting leave to appeal, Mr. Matata placed reliance on three decisions of this Court: first, he cited **Valerian Bamanya t/a Associated Merchandise v The Attorney General and Two Others**, Civil Application No. 144 of 2004 (unreported) for the proposition that the sixty days limitation period will start running from the date when the intending appellant is notified that the required documents are ready for collection as will be certified by the Registrar. Secondly, he referred to **The Board of Trustees of the National Social Security Fund v New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004 (unreported)

for its holding that it is the duty of the High Court to supply documents applied for and supply them promptly and that parties should only exercise diligence in the conduct of their cases. Thirdly, he made reference to **Transcontinental Forwarders Ltd v Tanganyika Motors Ltd** [1997] TLR 328 for the rule that once an intending appellant had applied to the Registry for a copy of the proceedings sought to be appealed against and had not been furnished with any, he is taken to have complied with the Rules by copying the letter to the relevant parties and that he had no obligation to keep reminding the Registry to supply the proceedings.

As regards the second line of argument by the applicants that the respondent failed to seek extension of time to institute the appeal, Mr. Matata countered that there was no need to do so because the sixty days limitation under rule 90 (1) of the Rules for institution of the appeal had not yet started running. On this point, he again cited **Valerian Bamanya t/a Associated Merchandise** (supra).

Mr. Magongo added that the complaint by the applicants was mainly the contention that the respondent failed to institute the intended appeal after leave was granted. He reiterated that the said complaint had no

basis because the respondent was yet to be supplied with the certified copies of the ruling and drawn order by which she was granted leave to appeal. He was also insistent that the applicants acknowledged in their counter affidavit alluded to earlier that the respondent duly applied for a copy of the proceedings intended to be appealed against. While urging us to find that the respondent complied with rule 90 (1) of the Rules, he prayed for the application to be dismissed with costs.

Rejoining, the applicants maintained their position that the notice of appeal ought to be struck out on the ground that the respondent had failed to institute the appeal in time.

As we are mindful that this matter is mainly laid under the provisions of rules 89 (2) and 91 of the Rules, we are enjoined to discuss the applicability of the said provisions to the facts of this matter. We thus start off our discussion by examining the provisions of rule 89 (2), which state as follows:

> *"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.***"[Emphasis added].

The above provisions make two points clear: first, that the relief of striking out a notice of appeal can only be prayed for by a respondent or other person on whom such notice has been served. Secondly, a notice of appeal can only be struck out 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.

We wish to remark at this point that initially the respondent contended, on the basis of the averments in Paragraphs 2, 3, 4 and 9 of the affidavit in reply, that the applicants had not been served with the notice of appeal following their alleged refusal to accept service and therefore they were not entitled to relief under rule 89 (2). Apart from the fact that the applicants denied to have refused acceptance of service and actually claimed to have been duly served on 8th November, 2013, Mr. Matata readily conceded at the hearing that refusal of acceptance of

service amounted to valid and effective service. Accordingly, the applicants have a standing to claim for relief under rule 89 (2).

As already indicated, the applicants' main basis for seeking the striking out of the notice of appeal is that the respondent failed to institute the intended appeal within sixty days after leave was granted on 2nd June, 2015. The respondent's answer is that she could not institute the appeal primarily because she has not been supplied with the certified copies of the ruling and drawn order granting leave by the High Court after having formally requested for it on 8th June, 2015, about six days after leave was granted. A copy of that letter is annexed to the affidavit in reply. Mr. Matata clarified further that the respondent had not received any communication from the High Court on whether the requested documents were ready.

On our part, we appreciate that certified copies of ruling and drawn order of the High Court granting leave to appeal are essential documents to be made part of the record of appeal in terms of rule 96 (2) of the Rules and that without such copies, the respondent could not institute her intended appeal in accordance with rule 90 (1) of the Rules. As there is no evidence that the respondent has been furnished with the requested

documents, she cannot be blamed solely for not acting after leave was granted. On the authority of **Valerian Bamanya** (supra) and **The Board of Trustees of the National Social Security Fund v New Kilimanjaro Bazaar Limited** (supra) cited by Mr. Matata, we agree that after the respondent submitted her request for the documents, it was the duty of the High Court to supply the said documents promptly. Indeed, it would have been a different matter had she been supplied with the requested documents and taken no action in time to institute the appeal or seeking enlargement of time, if necessary.

The foregoing apart, we are wary of the fact that even if the respondent had been supplied with the requested documents granting leave to appeal, she could only have filed an appeal if she had complied with the requirements of rule 90 (1) and (2) of the Rules. Sub-rule (1) of rule 90 required the respondent, as the intended appellant, to have instituted her intended appeal within sixty days of the lodgment of the notice of appeal except in situations provided for in the proviso to that sub-rule, which stipulates as follows:

> *"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 to the appellant.****"* [Emphasis added]

It is necessary that the above sub-rule, be read together with sub-rule (2) of rule 90, which states as follows:

"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."[Emphasis added]

As mentioned earlier, it is evident that the respondent lodged her notice of appeal on 7th November, 2013 and by 3rd December, 2015 when this matter was lodged her intended appeal was yet to be lodged. In the circumstances, the respondent's notice of appeal can only be maintained if it is shown that the respondent complied with the dictates of rule 90 (1) and (2) of the Rules to be entitled to the exclusion of such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of the copy of proceedings against which the intended appeal will be lodged.

We recall that Mr. Matata, while acknowledging that no copy of the written request for the proceedings was annexed to the affidavit in reply, contended that the said affidavit contains an annexed counter affidavit of the applicants that they filed in the respondent's application before the High Court for leave acknowledging that the respondent herein duly applied for a copy of the proceedings, judgment and decree intended to be appealed against. We have examined the relevant part of that counter affidavit, which is Paragraph 3. It reads as follows:

"That, the content of Paragraph 3 of the affidavit of the applicant is not true as the applicant attached only ***copy of the letter applying for proceedings, judgment and decree in appeal*** *but the said notice of intention to appeal is a copy of which not attached in the applicant's affidavit."*

[Emphasis added]

With respect, we do not think that the above averment is a sufficient admission on the part of the applicants herein that the respondent duly complied with the requirements of rule 90 (1) and (2) of the Rules. For it is evident that the above averment does not particularly confirm that the said letter was lodged within thirty days of the date of the impugned decision of the High Court as required by rule 90 (1). We think that it was rational that the respondent ought to have annexed a copy of the said letter to her affidavit in reply to establish her compliance with the dictates of rule 90 (1) and (2) instead of placing reliance on a fairly vague averment in the applicants' counter affidavit. Mr. Matata must have appreciated that the said letter was crucial but no plausible explanation was given why it was not presented to the Court. On this basis, we find it

inescapable to conclude that the respondent did not comply with the requirement under rule 90 (1) and (2) of the Rules.

On the foregoing analysis, we hold that the respondent did not take necessary steps to institute her intended appeal within the prescribed period of time. On that basis, we grant the application and proceed to strike out the notice of appeal under rule 89 (2) of the Rules. We award costs to the applicants.

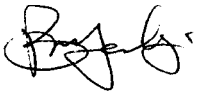
DATED at **MWANZA** this 25th day of August, 2017.

S. MJASIRI
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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



B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL