

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM**

(CORAM: MBAROUK, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 197 OF 2016

**THE BOARD OF TRUSTEES OF
NATIONAL SOCIAL SECURITY FUND..... APPLICANT**

VERSUS

MBOWE HOTELS LIMITED RESPONDENT

**(Application for an order that the Notice of Appeal filed against the Decision of the
High Court be deemed withdrawn)**

(Chipeta, J.)

Dated the 31st day of July, 2001

in

Civil Case No. 277 of 1996

RULING OF THE COURT

9th & 17th October, 2017

MUGASHA, J.A.:

By notice of motion, the applicant is moving the Court for orders that the notice of appeal lodged by the respondent on 12th April, 2011 be deemed withdrawn with costs on account of the respondent's failure to institute an appeal within sixty days prescribed by Rule 90(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The application is accompanied by an affidavit deposed by Mr. Yassin Membar, the learned advocate for the applicant. The respondent did not file an affidavit in reply to oppose the application.

To understand what precipitated this motion and what the parties were engaged in since the impugned judgment was handed down, we have deemed it pertinent to give a brief background of the matter as gathered from the affidavital evidence. The application under our consideration originates from Civil Case No 227 of 1996 which was instituted and determined in the High Court by the late Chipeta, J. In that suit, in the ex parte decision dated 31st July, 2001, the applicant succeeded in her claim against the respondent for non-payment of a total sum of Tshs. 80,141.878.45 plus interest and incidental costs as at 30th June, 1996. The sum accrued from loan advanced to the respondent pursuant to an agreement entered by the parties dated 10th March, 1990.

Subsequently, several execution proceedings ensued at the High Court where the initial one was struck out for wrong citation and non joinder of the guarantor; the late **AIKAEL MBOWE** or his legal representative. Ultimately, the applicant successfully filed against the respondent alongside with its Directors namely: **MANASE MBOWE, FREEMAN**

MBOWE and **DR. LILIAN MTEI MBOWE** seeking their arrest to show cause as to why they should not be detained for failure to honour judgment and decree dated 15th October, 2001. The determination was rendered on 5th December, 2006 where the High Court issued a warrant of arrest of the Directors of the respondent. Apparently, before the determination of the application in respect of the warrant of arrest, the said Directors on 30th October, 2006 instituted before the Court Civil Revision No 152 of 2006. Thereafter, the respondent sought and obtained extension of time to file the notice of appeal. On 12th April, 2011 she filed the notice of appeal to the Court in which she desired to appeal against the impugned decision of the High Court. However, the respondent did not proceed with further processes in pursuing the appeal and neither has she filed any appeal to the Court.

At the hearing, the respondent did not enter appearance though he was duly served through Advocate Nyange who declined service according to the affidavit of the process server Leonard Kuhanga. The applicant's counsel prayed that, we proceed in the absence of the respondent and intimated to the Court that, Advocate Nyange who filed the notice of appeal in question and has all along been the respondent's advocate.

Since the respondent's appeal process was initiated by the notice of appeal drawn and filed by Nyange Advocates, in the absence of any other special directions such as notice on change of advocate, in terms of Rule 22(2) of the Rules, we are satisfied that the respondent was duly served through her advocate. As such, we proceeded to hear the application in the absence of the respondent in terms of Rule 63(2) of the Rules.

At the hearing, the applicant's advocate adopted the notice of motion and the supporting affidavit to constitute an integral part of his submission. He added that, since the appeal has not been filed to date, the notice of appeal is deemed to have been withdrawn. He urged us to deem such notice withdrawn.

As it can be gathered in both the notice of motion and the supporting affidavit, it is the applicant's contention that the respondent has failed to file an appeal within the prescribed 60 days as spelt out under Rule 90 (1) of the Rules which provides as follows:

"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 to the appellant” .

Relying on the above cited provision and Rule 91(a) of the Rules, the applicant’s counsel urged us to find the respondent’s notice of appeal deemed withdrawn.

Rule 91 (a) of the Rules provides as follows:

“ If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time

*(a) **he shall be deemed to have withdrawn his notice of appeal** and shall, unless the Court orders otherwise, be liable to pay the costs of any persons on whom the notice of appeal was served arising from that failure to institute the appeal.”*

[Emphasis supplied]

We are aware that, this is not the first time this Rule is coming under scrutiny in this Court. It was a subject of discussion in the case of **ELIAS**

MARWA VS THE IGP AND THE ATTORNEY GENERAL. Civil Application No. 11 of 2012 (unreported). The applicant therein was moving the Court to strike out a notice of appeal under Rules 89 (2) and 91(a) of the Rules. Having rejected the relief predicated on Rule 89 (2) of the Rules because the applicant had not been served with the notice of appeal, in relation to Rule 91(a) of the Rules the Court made a following observation:

"Since the effect of default in instituting the appeal is provided under Rule 91(a) we find that the respondent's notice of appeal should be and it is hereby deemed to have been withdrawn sixty days after its lodgment."

Thus the Court did not proceed to strike out the appeal since there was none in existence to be struck out.

In **EXECUTIVE SECRETARY, TRUST WAKF AND COMMISSION (Administrator of Mtendeni Wakf) versus MUSSA SALLEH ABDALLA ZNZ**, Civil Application No. 4 of 2006 (unreported) the Court was faced with a similar situation whereby the respondent did not file an appeal beyond sixty days of the date of filing the notice of appeal. Consequently, and having invoked Rule 84(a) of the Old 1979 Rules which is similar to the current Rule 91(a) of the Rules, the Court thus held:

" The respondent has no desire to pursue the appeal and so in terms of Rule 84 (a) of the Court Rules, he is deemed to have withdrawn the appeal..."

This reasoning which we fully subscribe to, was followed in the case of **WILSON DAUD AND ANOTHER VS TANZANIA POSTAL BANK**, Civil Application No. 163 of 2008 (unreported) where the Court among other things, considered the rationale of giving full effect to the deeming provision under rule 84 (a) of the old Rules now Rule 91(a) of the Rules, as a statutory fiction which should be carried to its conclusion. Thus the Court held:

" Rule 84 (a) was included in the Rules to protect successful litigants from the machinations of unscrupulous parties to litigation. So when an intended appellant fails to institute an appeal within prescribed period, he must be assured that the notice of appeal has been withdrawn for even equity treats as done, that which ought to have been done. The notice of appeal ceased to exist on the sixty first day."

Therefore, if the intending appellant has not filed an appeal beyond the prescribed sixty days, even if the Court is not moved by parties, the Court would be minded to exercise its powers under Rule 91 (a) of the Rules whose purpose is to flush out those notices of appeal which have outlived their usefulness. (See **RAMADHANI MAABADI AND ANOTHER VS MAKI SERAFINI**, Civil Application No. 12 of 2015). In this regard, it is pertinent to point out here that, even if an application for failure to take essential steps to process the appeal under Rule 89(2) of the Rules is unsuccessful for one reason or the other, the Court can still invoke Rule 91(a) of the Rules to deem the notice of appeal withdrawn if satisfied that the notice of appeal has ceased to exist for failure to file an appeal beyond the prescribed period. We say so because, it is in the public interest that there should be an end to litigation so that a decree holder may enjoy the fruits of the decree as soon as possible or else the mischievous judgment debtor targeting to frustrate the decree holder, would simply lodge a notice of appeal and take no further action. [See **EMIR WILSON DAUD AND ANOTHER VS TANZANIA POSTAL BANK** (supra)].

In the light of the stated position of the law, we are in agreement with the applicant's counsel that the respondent's notice of appeal filed on 12th April, 2011 appeal ceased to exist on the sixty-first day on 13th June, 2011 (12th June 2011 being a Sunday) upon expiry of the prescribed period of instituting the appeal. Therefore, since the respondent's notice of appeal is no longer in existence and it is hereby deemed to have been withdrawn. We thus, accordingly grant the application with costs.

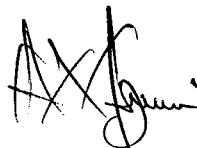
DATED at DAR-ES-SALAAM this 13th day of October, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL