

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

(CORAM: MUSSA, J.A., MUGASHA, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 18 OF 2014

TAHERA SOMJI APPELLANT

VERSUS

NATIONAL HOUSING CORPORATION RESPONDENT

**[Application to Strike out Notice of Appeal from the Judgment of
the High Court of Tanzania (Land Division) at Dar es Salaam]**

(Nchimbi, J.)

Dated the 24th day of January, 2014

in

Land Case No. 59 of 2006

RULING OF THE COURT

23rd August & 5th September, 2017

MWAMBEGELE, J.A.:

The applicant Tahera Somji has filed this application by a Notice of Motion taken out under, *inter alia*, rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (hereinafter "the Rules") seeking to strike out the Notice of Appeal filed by the respondent National Housing Corporation against the decision of the High Court

(Land Division) in Land Case No. 59 of 2006. The application is supported by an affidavit affirmed by Mr. Mustafa Chandoo; the applicant's counsel and an advocate of the High Court and courts subordinate thereto save for the Primary Court. It is resisted by an affidavit in reply sworn by Mr. Seni Songwe Malimi, also an advocate of the High Court and courts subordinate thereto save for the Primary Court.

The application was argued before us on 23.08.2017 during which both parties were represented. While Mr. Mustafa Chandoo, learned advocate, appeared for the applicant, Mr. Tarzan Mwaiteleke, also learned advocate, appeared for the respondent.

At the very outset, Mr. Chandoo for the applicant rose to tell the Court that the respondent did not file reply submissions and thus he applied to proceed *ex parte* despite the presence of the learned counsel for the respondent. On perusal of the record, we unveiled the fact that the respondent, contrary to Mr. Chandoo's assertion,

had filed her reply submissions on 10.04.2014 but, as it transpired later, there was no proof that the same had been served upon the applicant. In view of that, and considering the circumstances of the matter as exceptional, and minded to expedite the hearing of the application in the interest of justice, we exercised our discretion bestowed upon us by rule 106 (19) of the Rules and waived compliance with the provisions of this rule and allowed the respondent to respond to the applicant's written submissions orally.

In addressing the Court, Mr. Chandoo for the applicant sought to adopt the affidavit and written submissions in support of the application as part of his oral submissions. He had nothing useful to add at that stage. Likewise, Mr. Mwaiteleke for the respondent adopted the contents of the affidavit in reply. He orally submitted in answer to the applicant's written submissions that the application was devoid of merit because the respondent had taken essential steps to prosecute the appeal. He submitted that the respondent had successfully applied for extension of time to file an application

for leave to appeal to the Court which was granted and consequently, again successfully, applied for leave to appeal. Upon the application being granted, the appeal was filed in the Court on 10.06.2016 and was christened Civil Appeal No. 79 of 2016. The learned counsel stated that the respondent is in possession of an Exchequer Receipt Voucher (ERV) which, however, is not in the record of the present application. The respondent's counsel thus urged the Court to dismiss the application with costs.

In a short rejoinder, Mr. Chandoo, upon being prompted by the Court, conceded to Mr. Mwaiteleke's submissions and offered a lucid explanation from the bar that the respondent filed an application for extension of time to apply for leave to appeal to this Court and which application was served on the applicant on 04.04.2014. That application, he elucidated, was granted and consequent upon which the respondent filed an application for leave to appeal to this Court on 12.05.2014 which was also granted on 20.08.2014. However, Mr. Chandoo was quick to state that all that

was done after he had filed the present application. To him, all those endeavours by the respondent were inconsequential as he had already filed the present application. In any case, he submitted, the ERV has not been incorporated in the record of the present application. He thus reiterated his prayer that the respondent has failed to take essential steps to prosecute his appeal and therefore the notice of appeal thereof should be struck out with costs.

We have considered the rival arguments by the learned counsel for both parties. The question which this ruling must answer is whether or not the respondent has not taken essential steps to prosecute her appeal as complained by the applicant.

We have combed through the record of the present application and found out that the respondent has deposed in the affidavit in reply; at para 7, that he filed an application for extension of time to file an application for leave to appeal to this Court. That detail has not been challenged by affidavit by the applicant. We, on our part,

are of the firm view that if the applicant had intention to challenge it by affidavit, she had an avenue to do so by seeking leave of the Court so to do. That was not done and the detail remains unchallenged.

Despite the fact that the relevant the Chamber Summons, affidavit and ERV stated at para 7 of the affidavit and purported to have been appended with the affidavit in reply are not evident in the record of the present application, we take judicial notice that the appeal the subject of the present matter is indeed pending in this Court as Civil Appeal No. 79 of 2016 which was lodged on 10.06.2016. In any case, Mr. Chandoo, upon being prompted by the Court, conceded that the respondent had applied for extension of time to file an application for leave as well as the application for leave to file an application for leave to appeal to the Court both of which were granted. In the circumstances, we think, the present application has been overtaken by events.

We respectfully think, the respondent's course of action of filing in the High Court an application for extension of time to file an application for leave to appeal to this Court and, thereafter, filing an application for leave and ultimately filing the relevant appeal after the said applications were granted, constitutes essential steps in prosecuting her appeal. As the Court stated in **Asmin Rashidi v. Boko Omari** [1997] TLR 146 the essential steps in the prosecution of an appeal as envisaged by rule 82 [now rule 89 (2)] are steps which advanced the hearing of the appeal. The same is the position in the present case.

Likewise, the Court has held, times without number, that filing an application for leave to appeal to the Court constitutes an essential step towards the prosecution of the intended appeal. In **Ezekiel Fanuel Mushi v. NBC Limited**, Civil Application No. 4 of 2015 (unreported), for instance, we relied on our earlier decisions in **Protazi B. Bilauri v. Deusdedit Kisisiwe**, Civil Application No. of 73 of 2003 and **Peta Kempap v. Mohamed I.A Abdulhussein**,

Civil Application No. 140 of 2004 (both unreported) to observe that filing a Notice of Appeal and filing an application for leave to appeal to the Court (where leave is necessary) constitute essential steps towards the institution of the intended appeal. In the case at hand, as already stated above, the respondent pursued all the essential steps and finally filed the intended appeal which is pending in this Court.

Mr. Chandoo, we respectfully think, acted so fast and prematurely and, in our view, to his detriment in filing the present application. We state so because, having lodged the Notice of Appeal on 07.02.2014, the respondent had sixty days thereafter within which to file his appeal as provided for by rule 90 (1) of the Rules. On 14.02.2014, just a week after the notice was lodged, and therefore before the expiry of the time within which the respondent could have timely filed his appeal as dictated by the law, the applicant filed the present application under the pretext that the

respondent ought to have applied for leave to appeal to the Court within fourteen days of the decision intended to be challenged.

Much as we agree with Mr. Chandoo that an intended appellant in a land case must mandatorily apply for leave to appeal to this Court within fourteen days of the decision intended to be challenged as dictated by the provisions of section 47 (1) of the Land Disputes Courts Act, Cap. 216 of the Revised Edition, 2002 and rule 45 (b) of the Rules, we think, by any stretch of reasoning, the applicant had no justification whatsoever, in lodging the present application before the expiry of sixty days within which the respondent ought to have filed his appeal as per rule 90 (1) of the Rules.

As already alluded to above, the respondent has taken essential steps to prosecute the appeal which is pending in this Court. Striking out the notice of appeal as suggested by the applicant in the present application will be tantamount to erasing the said appeal which course, we think, will leave justice crying. We

want justice to smile and for that reason, we decline the invitation extended to us by Mr. Chandoo.

For the reasons stated, this application must fail. The same stands dismissed with costs.

Order accordingly.

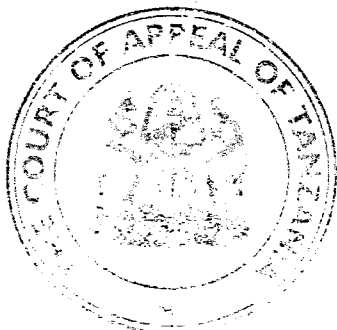
DATED at DAR ES SALAAM this 31st day of August, 2017.


K. M. MUSSA
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.




E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL