

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CIVIL APPLICATION NO. 311/02 OF 2017

**BOX BOARD TANZANIA LIMITED APPLICANT
VERSUS
MOUNT MERU FLOWERS TANZANIA LIMITED..... RESPONDENT**

**(Application for striking out the notice of appeal from the
decision of the High Court
of Tanzania at Arusha)**

(Opiyo, J.)

Dated 6th day of June, 2016

In

Civil Case No. 8 of 2016

RULING OF THE COURT

5th & 12th Dec, 2017

MWARIJA, J.A.:

The applicant, Box Board Tanzania Limited has by a notice of motion, moved the Court to strike out the notice of appeal filed by the respondent, Mount Meru Flowers Tanzania Limited, on the ground that the respondent has not taken essential steps in the proceedings.

The application which was brought under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), is supported by the affidavit of

Mr. Robert Mgoha George, the applicant's advocate. The notice of appeal sought to be struck out was filed by the respondent against the decision of the High Court of Tanzania at Arusha (Dr. Opiyo, J.) dated 6/6/2016 in Civil Case No. 8 of 2016 (the impugned decision). The application was resisted by the respondent who filed an affidavit in reply. The affidavit was sworn by its advocate, Mr. Michael Lugaiya.

At the hearing of the application, the applicant was represented by Mr. Robert Mgoha George, learned counsel while the respondent was advocated for by Mr. Michael Lugaiya, learned counsel. The respective advocates for the parties had filed written submissions in support of the application and the submission in reply in compliance with sub-rules (1) and (8) respectively of Rule 106 of the Rules. They also made oral submissions highlighting their respective submissions.

Submitting in support of the application, Mr. George argued that ever since the respondent filed the notice of appeal on 10/6/2015, it has not taken steps necessary for institution of the intended appeal. He contended that since the impugned decision is appealable with leave of the High Court

or of this Court and since the application to that effect was struck out by the High Court (Maghimbi, J.) on 3/8/2016, the respondent should have taken further steps to either bring an application before the Court by way of a second bite under Rule 45(b) of the Rules or prefer an appeal against the decision of Maghimbi, J. On the second option, he cited the Court's decision in the case of **Italafrica Transporters Ltd v. Giafar M. Beder** [1999] TLR 251 to bolster his argument. Mr. George argued further, in his written submission and placed more emphasis during his submission in Court, on the manner and the time within which an appeal should have been instituted as provided for under Rule 90(1) of the Rules and the effect of a failure to lodge it within the prescribed time as stipulated under Rule 91 of the Rules.

He contended further in his submission, that the respondent has not even applied for a certified copy of the ruling of Maghimbi, J and for that reason, he argued, the Court should find that the respondent has lost interest in the intended appeal. Relying on the case of **Airtel Tanzania**

Ltd v. Tanzania Revenue Authority, Civil Application No. 148 of 2014 (unreported), the applicant's counsel urged us to grant the application.

As stated above, the respondent resisted the application. In his brief but focused submission, Mr. Lugaiya argued that after delivery of the impugned decision on 6/6/2016, through its advocate, the respondent wrote a letter to the Deputy Registrar of the High Court, Arusha (the Registrar) applying for certified copies of proceedings, ruling and extracted order (the Copies) for the purpose of appealing to the Court. The letter was received by the Registry of the High Court on 10/6/2016. Again, according to the learned counsel, on 9/8/2016, the respondent wrote and lodged another letter Ref. No. IMB/CH/MMF/4 reminding the Registrar of the request for the Copies. Apart from the written request to the Registrar, Mr. Lugaiya submitted that he made several follow-ups but the respondent has not yet been supplied with the Copies. On the application for leave to appeal which was made by the respondent before the High Court, the respondent's counsel submitted that the same was struck out on the

ground that the same was not accompanied by a copy of the decision intended to be appealed against.

Relying on the decisions of the Court in the cases of **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd.** [1997] TLR 328 and **Deusdedit Kisisiwe v. Protaz Bilauri**, Civil Application No. 49 of 2004 (unreported), Mr. Lugaiya urged us to dismiss the application. He stressed that, after filing the notice of appeal, the respondent did not sit back and relax. Instead, he said, it took steps to obtain the Copies which have not however, been supplied despite making the above stated efforts.

From the submissions of the learned counsel for the parties, the issue for determination is whether or not the notice of intention to appeal should be struck out on the ground that the respondent has failed to take essential steps in the proceedings. We need not be detained much in determining the issue. According to the record and the submission of the learned counsel for the respondent, after the impugned decision which was handed down on 6/6/2016, the respondent, who was dissatisfied with that

decision, lodged a notice of appeal on 10/6/2016. On the same date it lodged a letter applying for the Copies.

The copies were applied for within the period of 30 days from the date of lodgment of the notice of appeal as required by the proviso to Rule 90(1) of the Rules. The letter applying for the Copies was also copied and served on the applicant in compliance with Rule 90(2) of the Rules. In paragraph 4 of the affidavit filed in support of the application, the applicant admits that it was served with a copy of the letter on 10/6/2016. As submitted by Mr. Lugaiya, having done so, the respondent could not take any further steps in the proceedings until such time that the Copies are ready for collection.

In his submission in Court, Mr. George tried to impress upon us that at the time when the application was filed, the Copies were ready for collection. He could not however, substantiate his contention with any document from the Registrar informing any of the parties that the Copies had been made available. Under the circumstances, we agree with Mr. Lugaiya that the respondent has not failed to take essential steps in the

proceedings. We therefore answer the issue in the negative. In the case of **Transcontinental Forwarders Ltd v Tanganyika Motors Ltd** [1997] TLR 328 cited by the respondent's counsel, the Court held that once the intended appellant has complied with Rule 83 of the Tanzania Court of Appeal Rules, 1979 (now Rule 90 of the Rules), unless he is supplied with the requested copies, he cannot be taken to have failed to take essential steps in the institution of an appeal. The Court stated as follows:-

*"...reminding the Registry after applying for a copy of the proceedings etc and copying the request to the other party may indeed be the practical and realistic thing to do, but it is not a requirement of the law. **Once Rule 83 is complied with the intending applicant is home and dry.**"*

[Emphasis added]

In the present case, apart from complying with Rule 90(1) and (2) of the Rules, the respondent wrote another letter reminding the Registrar of the request. It also made more efforts by making follow-ups on the

matter. Until the respondent obtains the Copies therefore, the provisions of Rule 89(2) of the Rules cannot be invoked.

On the basis of the above stated reasons, we find that the application is devoid of merit. We thus accordingly hereby dismiss it with costs.

DATED at **ARUSHA** this 11th day of December, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL