IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, CJ., MWARIJA, J.A. And MUGASHA, J.A.)

CIVIL APPLICATION NO. 442/08/2017

1. THOBIAS ANDREW
2. ABDUL MZIRAY } **.....APPLICANTS**

VERSUS

JACOB BUSHIRI .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mwambegele, J.)

dated the 01st November, 2012
in
Land Appeal No. 27 of 2010

RULING OF THE COURT

24th & 27th September, 2018

MWARIJA, JA.:

Thobias Andrew and Abdul Mziray, the applicants herein, together with Mwanza City Council are the decree holders in Land Case No. 27 of 2010 determined by the High Court of Tanzania at Mwanza on 1/11/2012. The respondent, Jacob Bushiri, is the judgment debtor. He was dissatisfied with judgment and decree and thus lodged a notice of intention to appeal (the Notice) on 12/11/2012.

Against the Notice, the applicants have filed this application, moving the Court to strike it out on account that the respondent has failed to take essential steps to institute the intended appeal. The application which has been resisted by the respondent was brought under Rules 48(1), 89(2) and 91(a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is also supported by affidavits of both applicants.

At the hearing, the applicants appeared in person, unrepresented while the respondent had the services of Mr. Chama Matata, learned counsel. The applicants, who had earlier on filed their joint written submissions in compliance with Rule 106(1) of the Rules, adopted the same together with their affidavits. In their written submissions, they argued in essence that, the Notice has outlived its purpose because, after having obtained a certified copies of proceedings and judgment and after having been granted leave to appeal as well as the issuance by the Registrar of the High Court (the Registrar), of the certificate of delay on 16/8/2016, the respondent

ought to have filed his intended appeal within sixty days from the date of the certificate.

According to the applicants, the respondent's failure to institute the intended appeal within the prescribed period of sixty day from the date of the certificate entitles them to be granted their application under Rule 89(2) of the Rules. They added that although the respondent contends in his affidavit that he applied for copies of proceedings, the letter to that effect was not copied to them. By this argument, they intended to show that the respondent is not entitled to take the advantage of the proviso to Rule 90(1) of the Rules under which the period spent in the preparation of the copies of proceedings and judgment was excluded as certified by the Registrar.

In opposing the application, Mr. Matata, who had also filed his reply submission in compliance with Rule 106(8) of the Rules, adopted the submission and the affidavit in reply sworn by the respondent. The learned counsel submitted that the respondent does not dispute the fact that after lodging the Notice, he applied for leave to appeal and the same was granted on 13/11/2015. However, he went on to argue,

the respondent could not institute the intended appeal because he has not yet been supplied with certified copies of necessary documents including a copy of the decree.

It was the learned counsel's submission further that the documents were applied for vide a letter dated 9/11/2012, a copy of which has been attached to the respondent's affidavit. Mr. Matata submitted that, although the Registrar has issued a certificate of delay, following the respondent's request to be supplied with a copy of the decree, the period of sixty days prescribed under Rule 90(1) of the Rules would only start to run after the respondent is provided with the requested copy of the decree. To bolster his argument, the learned counsel cited the case of **D.T. Dobie & Company (Tanzania) Ltd. v. N. B. Mwatebele** [1992] TLR 152. Relying also on the case of **Juma Ibrahim Mtale v. K. G. Karmal** [1983] TLR 50, he argued that a copy of the decree is a necessary document which, if not included in the record of appeal, would render the intended appeal incompetent.

With regard to the applicants' contention that they were not served with a copy of the letter applying for certified copies of proceedings, Mr. Matata submitted that the applicants did not raise the allegation in their application. It was thus improper to do so at the stage of hearing, he stressed.

In their short rejoinder the 1st applicant reiterated the submission that the respondent has failed to take essential steps to institute the intended appeal. He stressed that the respondent had inordinately done so despite having been granted leave to appeal and after the Registrar had issued a certificate of delay. The 2nd applicant joined hands with the 1st applicant.

We have duly considered the submissions made by the applicants and the learned counsel for the respondent. There is only one issue for determination. It is whether or not, after lodging the Notice, the respondent has failed to take essential steps to institute the intended appeal.

It is not disputed that after lodgment of the Notice, the respondent successfully applied for leave to appeal. The parties agree

that the respondent has not, however, instituted the intended appeal despite the issuance by the Registrar, of a certificate of delay. It is plain from the contents of the certificate that the respondent requested for *inter alia*, certified copy of the decree on 12/11/2010. It is also on record that he made the same request vide a letter dated 9/11/2012, a copy of which has been attached to his affidavit.

In their oral submissions, the applicants complained that they were not served with a copy of the respondent's letter requesting for certified copies of proceedings, judgment and the decree. In our considered view, as submitted by Mr. Matata, the complaint is not tenable. In their application, the applicants did not rely on the ground that the respondent did not comply with the provisions of sub rule (2) of Rule 90 (2) of the Rules which provides that an appellant shall not benefit from the exception to Rule 90 (1) of the Rules unless the letter requesting for the copies of proceedings was copied to the other party; in this case, the applicants. Since this ground is based on a matter of fact, the same should have been raised in their affidavit or if they wanted to counter what was stated by the respondent in his

affidavit in reply, then they should have done so by filing a supplementary affidavit pursuant to the provisions of Rule 56(2) of the Rules. As it stands therefore, it is not disputed that the respondent requested for a copy of the decree and there is no evidence that the said copy has been supplied or that any reply had been made by the Registrar as regards the request.

A copy of the decree is one of the mandatory documents which a record of appeal must contain. That requirement, for an appeal like the intended one, which arises from the High Court in its original jurisdiction, is stipulated under Rule 96 (1) (h) of the Rules. As submitted by Mr. Matata therefore, it is necessary for the respondent to obtain that copy before he institutes the intended appeal. It is until he obtains it that, the time will start to run. In the case of **Juma Ibrahim Mtale v. K. G. Karmali** [1983] TLR 5 cited by Mr. Matata, the Court stated as follow:

> *"Where a party, on reasonable grounds, writes to the registrar asking for missing part(s) of the proceedings, the limitation period does not begin to run against*

such a party until he receives either the part of proceedings asked for or an assurance that the proceedings sent to him were complete."

The applicants have argued that the respondent ought to have taken steps by making a follow-up on his letter. We agree that the respondent's request has taken too long to be attended and that there was a need to remind the Registrar about the matter. The respondent cannot however, be punished for failing to do so because that is not the requirement of the law. In the case of **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [1997] TLR 328, the Court had this to say on position:

"...reminding the Registry after applying for a copy of the proceedings etc and copy the request to the other party may indeed be the practical and realistic thing to do, but is not a requirement of the law. Once Rule 83 [of the Tanzania Court of Appeal Rules, 1979] (now Rule 90 of the Rules) is complied with the intending applicant is home and dry."

In the circumstances therefore, we find that the respondent's failure to make a follow up on his letter of request does not entitle the applicants to invoke the provision of Rule 89(2) of the Rules.

For the foregoing reasons, we do not find merit in the application. The same is therefore hereby dismissed with costs.

DATED at **MWANZA** this 26th day of September, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL