

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

(CORAM: MBAROUK, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPLICATION NO. 384/15/2018

SALEH ABDI MOHAMED.....APPLICANT

VERSUS

**1. KATIBU WA BARAZA LA MAPINDUZI
2. KATIBU MKUU KIONGOZI ZANZIBAR }RESPONDENTS**

**(Application for striking out Notice of Appeal from the decision of
the High Court of Zanzibar,
at Vuga)**

(Sepetu, J.)

dated the 28th day of September, 2016

in

Civil Appeal No. 3 of 2015

RULING OF THE COURT

27th November & 11th December, 2018

MKUYE, J.A.:

By a Notice of Motion made under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant Saleh Abdi Mohamed applies for an order that the Notice of Appeal filed by the Respondents on 4th October, 2016 to the Court be struck out on the following grounds:

"1. That, the appellant has not taken some

essential step (sic) in the proceeding.

2. *That, the appeal failed to be instituted within prescribed time.*
3. *And for an order that the costs of and incidental to this application be borne by the respondent."*

The application is supported by an affidavit deposed by Mr. Saleh Abdi Mohamed, the applicant, in which in paragraphs 2 – 7 he has averred as follows:

- "2. *That, I filed an Appeal No. 03 of 2015 against the Respondents before the High Court challenging the dismissal order from employment done by the Respondents.*
3. *That, the said appeal was heard and finally determined on 28th day of September, 2016 after the High Court (sic) satisfied that the termination of the Applicant was unfair.*

4. *That, the Respondent being dissatisfied with the said decision, tried to file a Notice of appeal to the Court of Appeal of Tanzania on 04th day of October 2016.*

[A copy of the said Notice of Appeal is hereby attached and marked as Annexure (sic) "S1" and leave of this Court is craved to form part of this Affidavit].

5. ***That, Applicant also on 28th of October 2016 filed a letter to the Registrar of the High Court seeking for satisfied (sic) copy of the Proceeding, Judgment and Decree and on 17th of January 2018 the applicant was supplied a copy of the said proceedings, Judgment and Decree. [A copy of the said Proceeding, Judgment and Decree is hereby attached and mark (sic) as***

***Annexure (sic) "S2", "S3" and "S4"
and leave of this Court is craved to
be part of this Affidavit].***

6. *That, it is four months now since the Applicant has been in possession of the copy of the decision that the Respondents intended to appeal against but no essential steps has (sic) been taken by the Respondents to facilitate the intended appeal.*

7. *That, the existence of Notice of Appeal to this Court while there are no steps taken to facilitate the intended appeal is (sic) abuse of the Court and lost (sic) the applicant's time which result to psychological toured (sic) to the Applicant."*

[Emphasis added].

The respondents filed their affidavit in reply on 12th June 2018. Part of the said affidavit reads as follows:

"6. *That, the contents of paragraph 5 of the Applicant's affidavit are noted since the Respondent is not in a position to admit or deny that, **but surprisingly, the applicant fails (sic) to attach and even mention the dates and reference numbers of both seeking and supplying letters of Judgment, Decree and Proceedings.***

7. *That, the contents of paragraph 6 of the Applicant's affidavit are partly noted on the issue of the Applicant having in possession of the copy of the decision, and the rests (sic) are denied on the ground that the **Respondent took essential steps by writing different letters starting on 29th of September, 2016 with reference***

number L.D 21 VOL: XLII. Followed by letters dated 17th February 2017, reference L.D 21 VOL: LIV/28, 24th of August, 2017 reference L.D 21 VOL: LVII/37, 5th February, 2018 reference L.D 21 VOL: LIV/16 and 8TH June 2018 reference L.D 21 VOL: LIX/27. Copies of those letters are hereby attached and marked as annexure (sic) "AG1", "AG2", "AG3", "AG4", "AG5" and "AG6" and leave of this Court is craved to be part of this reply.

- 8. That, the contents of paragraph 7 of the Applicant's affidavit are denied on the ground that there is neither abuse of Court nor time lost on the Applicant's side since **the Respondent has not yet received or supplied with the certified copies of Judgment,***

Decree and Proceedings that can be used to continue with the intended appeal...”

[Emphasis added].

When the application was called on for hearing on 27th November, 2018, the applicant entered appearance through Mr. Haji Suleiman Tetere, learned counsel; whereas the respondents had the services of Mr. Ali Ali Hassan, learned Principal State Attorney who was assisted by Mr. Juma Msafiri, learned State Attorney.

In elaboration to the application, Mr. Tetere who initially sought to adopt the contents of the affidavit in support of the application deponed by the applicant, urged the Court to strike out the respondents’ notice of appeal because the respondents have failed to take necessary steps. He added that, since the applicant has already been furnished with similar documents, it means that the respondents were not serious enough to make a follow up of the alleged documents. He also prayed for costs.

On their part, the respondents through Mr. Juma vehemently resisted the application. While adopting the affidavit in reply deposed by Mr. Mbarouk Suleiman Othman, learned State Attorney, he submitted that their efforts to obtain copies of proceedings, Judgment and Decree as averred in para 7 proved futile and until todate they are yet to obtain them so that they can be in a position to comply with Rules 90 and 96 of the Rules. He wondered as to how the applicant claims to have obtained the copies of the said documents without annexing the letters used to apply for them and the receipt thereof. In that regard, he implored the Court to find the application without merit and dismiss it accordingly. As to the issue of costs, he prayed for each party to bear its own costs.

In rejoinder, Mr. Teterere stressed that so long as the applicant was able to obtain the said documents, it means the respondents are not serious to pursue their appeal. He reiterated that the application be granted and the notice of appeal be struck out.

The issue for determination by this Court is whether the application is meritorious.

Rule 89(2) of the Rules which has been invoked by the applicant to move the Court provides 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."

According to the above provision, the notice of appeal may upon an application of the opposing party, be struck out if two conditions are met. **One**, if the respondent or other person has been served with such a notice of appeal which is sought to be struck out. **Two**, where the person intending to appeal fails to take essential steps in the proceedings. In this case with regard to the first condition, we note that the notice of appeal was served on the applicant on 4th October 2016 as shown in Annexure "S1" to the affidavit of the applicant. It can be said that the first condition has been met. As regards the issue of

failure to take essential steps in the first place, we think, its list may not be exhaustive but may include instituting the appeal within the prescribed time - (See: **Mufungo Leonard Majura & 12 Others v. Tanesco Limited**, Civil Application No. 76 of 2016 (unreported); filing of application for leave, if required - (See **Tahera Somji v. National Housing Corporation**, Civil Application No. 18 of 2014 (unreported); **Ezekiel Fanuel Mushi v. NBC Ltd.**, Civil Application No. 4 of 2015 (unreported), while citing with approval the case of **Peta Kempap Ltd. v. Mohamed I. A. Abdulhusein**, Civil Application No. 140 of 2004 (unreported) etc.

As to the applicant's claim that the respondents failed to take essential steps in pursuing his appeal or rather they did not seriously follow up the documents, the respondents have averred in paragraph 7 of the affidavit in reply that they had taken a step by writing several letters in their endeavour to follow up for the documents for purpose of appeal. They have explained about writing to the Registrar of the High Court a number of letters such as a letter with Ref. No. L. D. 21 VOL: XLII/ dated 29th September, 2016 seeking to be supplied with

copies of proceedings for appeal purposes. Apart from that, they wrote several letters such as a letter with Ref. No. L.D 21 VOL: LIV/28 dated 17th February 2017; a letter with Ref. No. L.D 21 VOL: LVII/37 dated 24th August 2017; letter with Ref. No. L.D 21 VOL: LIV/16 dated 5th February 2018 and a letter with Ref. No. L.D 21 VOL: LIX/27 dated 8th June 2018 with a view of reminding the Registrar to supply them with the said documents but in vain. The copies of all such letters have been attached as "Annexures "AG1", "AG2", "AG3", "AG4", "AG5" and "AG6".

Though the applicant in a manner that seems to blame the respondents for being negligent as he has already been supplied with the documents since 17th January 2018 after having allegedly applied for the same on 28th October 2016, he has not annexed such letters which were used for applying or supplying of such documents. Neither were such letters nor receipts thereof copied to the respondents to ensure that he had, indeed, applied for, and supplied with the same. Even the applicant's learned advocate did not offer any explanation as to their whereabouts. No wonder the respondents were surprised as to how the applicant could have been supplied with such

documents on 17th January 2018 while their reminder letters written 19 days and almost 5 months respectively, thereafter (5th February 2018 and 8th June 2018 thereafter) are still awaiting for response thereof and to be supplied with the said documents.

With what the respondents have explained, we are not prepared to agree with the applicant that the respondents have not taken steps in pursuing the appeal. In our view, we think, they did more than what they were required to do. This is so because, reading between the lines of Rule 90(1) of the Rules, in our view does not require the respondent to remind the Registrar of the supply of copies of proceedings, judgment and decree. On this aspect, the Court in the case of **Transcontinental Forwarders Ltd. v. Tanganyika Motors Ltd.**, [1997] TLR 328 at page 330 through a single Justice of Appeal stated as follows:

"I wish to say only that reminding the Registrar after applying for a copy of the proceedings etc. and copying the request to the other party may indeed be the practice and realistic thing to do, but it is not a requirement of the law. Once rule 83 [now Rule 90] is

*complied with the **intended applicant is home and dry.***"

[Emphasis added]

On our part, we subscribe to that stance. Similarly, as the respondents had since 29th September, 2016 lodged a letter applying for the requisite documents for purposes of preparing the appeal, they were home and dry. They were not under any obligation to send reminder letters to the Registrar of the High Court.

Ordinarily, in terms of Rule 90(1) and (2) of the Rules, the respondents ought to have filed the appeal within sixty days from the lodgement of the notice of appeal, or within the same period if issued with a certificate of delay excluding the number of days required for the preparation and supply of the copies of proceedings, judgment and decree to them.

In the matter at hand, there is no appeal which has been filed by the respondents as was contended by Mr. Teterere. However, since the respondents have taken steps and they are still awaiting to be supplied with such documents in the process

of taking essential steps which will enable them file the appeal, we do not see merit in the application. We find the applicant's claim that the respondents failed to take essential steps in pursuing the appeal to be unsubstantiated.

In the event, the application fails and hence, it is accordingly dismissed with costs in the main cause.

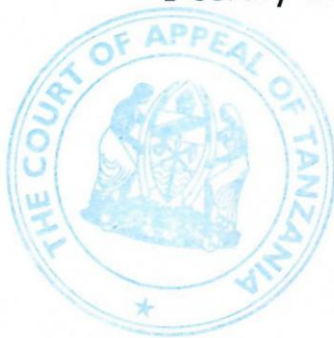
DATED at **ZANZIBAR** this 11th day of December, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL