IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MKUYE, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 400/16 OF 2017

SAMWEL MGONJA ..... APPLICANT

VERSUS

TOTAL (T) LIMITED ..... RESPONDENT

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

(Songoro, J.)

Dated the 24th day of November, 2015
in
Commercial Case No. 157 of 2013

RULING OF THE COURT

6th & 19th February, 2018

MWAMBEGELE, J.A.:

Samwel Mgonja, the applicant herein, lodged the present application by a Notice of Motion taken out under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules) seeking to strike out a Notice of Appeal lodged by the respondent Total (T) Limited against the decision of the High Court

(Commercial Division) in Commercial Case No. 157 of 2013. The Notice of Motion is supported by an affidavit deposed by the applicant. It is resisted by an affidavit in reply deposed by Dr. Onesmo Kyauke; the respondent's counsel and an advocate of the High Court and courts subordinate thereto, save for the Primary Court.

At the hearing of the application before us on 06.02.2018, both parties were represented. While Mr. Leonard Manyama, learned advocate, appeared for the applicant, Dr. Onesmo Kyauke, also learned advocate, appeared for the respondent. Both parties had earlier on filed their written submissions in support and opposition of the application, respectively, which they sought to adopt together with the affidavit and affidavit in reply, as the case may be, as part of their oral arguments. Both parties, having adopted the documents they earlier filed, had very little to add in their oral arguments.

In the written submissions of the applicant, it is argued that by virtue of Rule 90 (1) of the Rules, the respondent ought to have lodged the appeal in the appropriate registry within sixty (60) days of the date the Notice of Appeal was filed. The applicant argues that the proceedings, judgment and decree were ready for collection by 06.03.2017 and the respondent had not lodged the appeal by the time the present application was lodged. In the premises, the applicant argues, the respondent has failed to take essential steps in the prosecution of the appeal and thus the Notice of Appeal lodged on 30.11.2015 should be struck out under Rule 89 (2) of the Rules.

For her part, the respondent, through Dr. Kyauke, argues that on 30.11.2015, the respondent wrote the court requesting copies of proceedings, judgment and decree as well as exhibits tendered during the trial and a Certificate of Delay for appeal purposes. That, in addition to following-up the matter orally, the respondent wrote a reminder letter on 07.05.2016 having received no response to the first letter. The respondent adds that since

then, she has been following up the matter but the documents have not been supplied to her yet.

Dr. Kyauke argues that he received no letter from the Registrar to notify the respondent that the documents were ready for collection. He relies on **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [1997] TLR 328 followed in **Juma Omary and 6 Others v. the Director, Mwanza Fishing Industry**, MZA Civil Application No. 14 of 2014 (unreported) for the proposition that the respondent was not under any legal duty to remind the court after applying the documents for appeal purposes as required by Rule 90 of the Rules. On this premise, the respondent urges us to dismiss the application with costs.

Having stated the above, we should now be in a position to determine the point of contention the subject of the present application. It is common ground that the judgment sought to be appealed against was pronounced on 24.11.2015. It is also not disputed that the respondent lodged a Notice of Appeal thereof on

30.11.2015. Also not in dispute is the bare fact that the respondent applied for copies of proceedings, judgment and decree as well as exhibits and a certificate of delay on the same date; that is, 30.11.2015. That letter was copied to the applicant and the applicant does not dispute this fact. The documents, it is averred, have not been supplied to the respondent despite several follow-ups.

We have subjected the arguments of the learned counsel for the parties to proper scrutiny and accorded them proper weight they deserve. The ball is now in our court.

Dr. Kyauke's line of argument is basically that having applied for the documents for appeal purposes, the respondent was under no legal duty to keep on reminding the High Court to avail the same. He relies on the **Transcontinental** case (supra) for that stance. The second holding in the case reads:

> *"That the present respondent, who had applied to the Registry for a copy of the*

proceedings sought to be appealed against and had not been furnished with any, had complied with the Rules by copying his letter to the relevant parties - there was no legal provision requiring him to keep reminding the Registry to forward the proceedings and once Rule 83 [now Rule 90] was complied with the intending applicant was home and dry."

However, Dr. Kyauke submits that the respondent went an extra mile by once reminding the court in writing without any response and on several occasions the respondent orally asked the court clerks on whether the documents were ready for collection, they have been telling them that they were not ready.

We must admit that the point of controversy in the present application has, ostensibly, exercised our minds, particularly the fact that the respondent got an order for stay of execution of the

decree intended to be challenged on 14.02.2017; about twelve (12) months back. No appeal has been lodged ever since. According to the written submissions opposing the application as well as the affidavit in reply, as already alluded to above, the respondent kept on following up the matter once in writing and several times orally. And that the respondent was being told by the registry officers that they were not ready.

We should state at this juncture that we are not prepared to go along with Dr. Kyauke's averment that he was making a follow-up orally now and then and was being told that the documents were not ready. We find this averment not plausible. We say so because this is a very serious allegation against the court registry personnel. In the circumstances, we think, as Mr. Manyama argues and to our mind rightly so, the respondent ought to have required the registry officers concerned to swear affidavits to that effect short of which the averment remains unsubstantiated.

An akin situation was the case in **Yusuph Salim Kamota v. Mwamvita Abdallah Kamota**, Civil Reference No. 4 of 2015 (unreported). In that case; an application for extension of time, there was an allegation levelled against a registry officer of the Court to the effect that he did not receive the documents for appeal purposes on the ground that they, *inter alia*, lacked the High Court original order for leave to appeal to the Court of Appeal and the original certificate of delay thereby causing the applicant to be out of time. That officer did not swear any affidavit to substantiate what was alleged by the applicant against him. The Court observed that it was not ready to accept the averment in the absence of an affidavit of the registry officer concerned to that effect. We think the same stance should apply in the case at hand. For this reason, we are not prepared to accept Dr. Kyauke's averment that he has been following the matter up orally and was being told that the documents were not ready.

Be that as it may, we do not think the respondent can legally be blamed for the documents not being supplied to her after they

were ready for collection. We say so because, as a single Justice of the Court stated in the **Transcontinental** case (supra) and reiterated by the Full Court in **Juma Omary** (supra); the cases relied upon by Dr. Kyauke, a person who has complied with Rule 90 of the Rules, is under no legal duty to keep on reminding the registry to forward the documents to him. The Court, however, stated that reminding the registry on the status of documents being applied for appeal purposes would be "the practical and realistic thing to do". The Court observed at p. 330:

> *"... 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 [now Rule 90] is complied with the intending applicant is home and dry."*

Mr. Manyama argues that the above cases are distinguishable from the present in that in the present case, the documents were ready for collection while in the two cases they were not. With due respect to Mr. Manyama, having read the cases, we are not ready to go along with him. We have found nothing in those cases to unveil the fact that the documents were not ready for collection. What is evident in both cases is the fact that the respondents, like in the present, were being blamed for not following the matter up with the court registry to see whether or not the documents were ready for collection. If anything, the facts in the **Transcontinental** and **Juma Omary** cases (supra) fall in all fours with the present case.

Flowing from the above, the respondent in the case at hand, having complied with Rule 90 of the Rules by timely writing a letter to the court applying for documents for appeal purposes and copying that letter to the applicant, was "home and dry" and therefore cannot be legally blamed that she has failed to take essential steps to prosecute the intended appeal. It was the duty

of the court to furnish the respondent with the documents for appeal purposes once they were ready or inform her that they were so ready for collection. On the material before us, that was not done. For this reason, we find ourselves loathe to engage Rule 89 (2) of the Rules.

For the reasons stated above, we find this application lacking in merit and, consequently, dismiss it with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 8th day of February, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
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