

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)**

**CIVIL APPLICATION NO. 12/8 OF 2016**

**NYACHIRO BITURO ..... APPLICANT**

**VERSUS**

**KHAMIS NDURWE ..... RESPONDENT**

**(Application for striking out Notice of Appeal in respect of an intended  
appeal against the decision of the High Court of Tanzania  
at Mwanza Registry)**

**(Kalombola, J.)**

**dated the 10<sup>th</sup> day of October, 2013  
in  
Land Appeal No. 92 of 2010**

**.....**

**RULING OF THE COURT**

3<sup>rd</sup> & 11<sup>th</sup> July, 2018

**MWANGESI, J.A.:**

By way of notice of motion made under Rule 89 (2) of the Court of Appeal Rules, 2009 hereinafter, **the Rules**, supported by an affidavit sworn by one Nyachiro Bituro, the applicant is moving the Court to strike out the notice of appeal which was lodged by the respondent on the 23<sup>rd</sup> day of October, 2015 to challenge the decision of the High Court (Kalombola, J.). The notice of motion is premised on the grounds that, some essential steps in the proceedings have not been taken within the prescribed time. And in terms of the provisions of Rule 106 (1) of **the**

**Rules**, the applicant lodged written submissions in support of the application. On the other hand, the application has been resisted by the respondent as reflected in the written submission in reply to the written submission by the applicant, which has been filed in terms of the provisions of Rule 106 (10) of **the Rules**.

When the application was called on for hearing, Mr. Mussa Mhingo learned counsel, entered appearance for the applicant, whereas, the respondent appeared in person unrepresented and hence, fended for himself. In his submission before us to amplify the grounds of the notice of motion wherein he adopted the affidavit in support of the notice of motion as well as the written submission, the learned counsel submitted that, the application at hand has been prompted by the inaction which has been exhibited by the respondent from when he lodged his notice of intention to appeal against the decision of the High Court to the time of lodging this application.

Mr. Mhingo submitted to the effect that, the decision sought to be impugned emanates from Civil Case No. 155 of 2003 in the primary court of Ilemela of which its decision was delivered on the 20<sup>th</sup> November, 2003. Dissatisfied by the said decision, the respondent lodged a fresh suit in the

ward tribunal of Nyamanoro that is, Land Application No. 98 of 2008 involving the same parties on the same matter. The same was decided ex parte in favour of the respondent. In the course of the attempt by the respondent to execute the decision entered ex parte and at the same time, the applicant attempting to stay the execution, it came to the attention of the District Land and Housing for Mwanza that, Land Application No. 98 of 2008 was res judicata.

The decision by the High Court in the appeal which was preferred by the respondent to challenge the decision of District Land and Housing tribunal, which was delivered on the 10<sup>th</sup> day of October, 2013, led to the lodgment of the notice of appeal to this Court on the 23<sup>rd</sup> October, 2015, which is the subject of the application at hand. At the same time, the respondent lodged Miscellaneous Land Application No. 190 of 2015 wherein, he was seeking for certification of a point of law in the appeal which he was to lodge to the Court. The said leave was granted by the High Court vide a ruling that was delivered on the 19<sup>th</sup> day of February, 2016 (Maige, J.)

However, since then, the learned counsel went on to submit, nothing has been done by the respondent to make his appeal to proceed. He

argued further that ordinarily, following the lodgment of the notice of appeal, the law required the respondent to write to the Registrar of the High Court, requesting for copies of proceedings and certified copies of judgment and decree, for purposes of preparing the record of appeal of which, a copy would have to be served to the applicant. Nonetheless, nothing was done to that effect by the respondent. And his search in the Court registry did confirm that, such a thing was never done by the respondent. In the circumstances, the learned counsel submitted that, the requirement of the law under the provisions of Rule 90 of **the Rules** has been infringed, which entitles the Court to strike out the notice of appeal.

In view of the failure by the respondent to comply with the requirement of law, it was a clear indication that, the respondent is no longer interested to proceed with his pursue for the intended appeal. The learned counsel therefore, implored us to strike out the notice of appeal lodged by the applicant, he however did not press for costs.

On his part, the respondent did also adopt his written submissions wherein he argued that, he failed to take the essential steps to have his intended appeal lodged because he fell sick of a prolonged cardiac illness and got ridden for a number of months. Even though he indicated in his

written submission that there were copies of the medical chits to establish the same, they were nowhere to be seen in the record. And even after the Court had taken the trouble of giving him time during the hearing of the application to exhibit such documents in Court, still they were nowhere to be seen. Such fact notwithstanding, the respondent still insisted that, he was interested to pursue his appeal.

In the light of the submissions made above, the issue for determination by the Court is whether the respondent in the instant matter has indeed failed to take essential steps. The wording of Rule 89 (2) of **the Rules** under which the application by the applicant has been preferred bears the following wording:

*"Subject to the provisions of sub rule (1), a respondent or any 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 of appeal 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 within the prescribed period."*

The subsequent question that crops up from the wording of the provision above is, what does it mean by essential steps? The holding in

**Asmin Rashid Vs. Boko Omari** [1997] TLR 146, gives the answer to the question where it was stated that:

*"The essential steps in the prosecution of an appeal as envisaged by Rule 82 (now Rule 89 (2)), were steps which advanced the hearing of the appeal and not explanation for the delays. One of the essential steps --- was to apply for leave to appeal --- for there was no automatic right of appeal."*

Upon going through the records of the case file before us, we are in agreement with the learned counsel for the applicant that, indeed the notice of motion to challenge the decision of the High Court which was delivered on the 10<sup>th</sup> day of October, 2013, was lodged on the 23<sup>rd</sup> day of October, 2013. We have also managed to see that, the respondent applied for extension of time which was granted by the High Court on the 19<sup>th</sup> February, 2016. In so doing the respondent complied with one of the essential steps as held in **Asmin Rashid** (supra). However, the respondent was not yet done in view of the wording of Rule 90 (1) of **the Rules**, which sets out the time limit within which an appeal has to be lodged subsequent to the lodgment of the notice of appeal. In its own words the Rule reads:

*"90 (1) Subject to the provisions of Rule 128, **an appeal shall be instituted** by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with-*

*(a) a memorandum of appeal in quintuplicate:*

*(b) the record of appeal in quintuplicate:*

*(c) security for the costs of the appeal.*

*Save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant."*

It is further provided under sub rule (2) of that Rule that:

*"An appellant **shall not be entitled** to rely on the exception to sub rule (1) unless his application for the copy was in writing and a copy of it was served on the respondent."*

[Emphasis supplied]

Through Rule 90 of **the Rules**, we note that there is another essential step which ought to have been taken by the respondent in addition to applying for leave. The respondent was required to apply for copies of proceedings, judgment and decree for purposes of preparing the record of appeal. The same has two conditions that have to be met that is, **firstly**, it has to be made within thirty days of the date of the decision sought to be impugned; **secondly**, a copy of the application has to be made to the adversary party. Compliance with this requirement would also serve to notify the adversary party as well as the Court that, considering the question of limitation of time on the part of the respondent.

The complaint by the applicant in his application is that, the applicant did not apply for copies of proceedings judgment and decree within the prescribed time of thirty days from the decision of the High Court, and served a copy of the application to him, a fact which has been established to be correct. In the circumstances, the applicant has managed to demonstrate that, the respondent has indeed failed to take essential steps to make his intended appeal to be lodged. See: **Suzana Msigala Vs. Eric Msigala**, Civil Application No. 68 of 2012, **Awaki Sauri Vs. Christopher Gwambay and Another**, Civil Application No. 27 of 2013, **Hassan**

**Abdallah Vs. Tanzania Telecommunication Company Limited (TTCL)**, Civil Application No. 176 of 2014 and **James, Z. Chanila Vs. Ramadhani Mtundu**, Civil Application No. 10 of 2016 (all unreported).

In the event, we are constrained to and we hereby strike out the notice of appeal with costs.

Order accordingly.

**DATED** at **MWANZA** this 9<sup>th</sup> day of July, 2018

B. M. MMILLA  
**JUSTICE OF APPEAL**

S.E.A. MUGASHA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

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

  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**