

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A, MWAMBEGELE, J.A And SEHEL, J.A)

CIVIL APPLICATION NO. 525/11 OF 2017

HABI SAIDAPPLICANT

VERSUS

JOHA SALUMRESPONDENT

**(Application from judgment of the High Court of Tanzania
at Tabora)**

(Songoro, J.)

**dated the 1st day of September, 2014
in**

Land Case No. 33 of 2012

RULING OF THE COURT

28th November & 6th December, 2019

LILA, J.A.:

In this application preferred in terms of Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), Habi Said, the applicant, is seeking an order striking out a notice of appeal lodged by Joha Salum, the respondent, on 15th September, 2014 against the decision of the High Court (Songoro, J.) in Land Appeal Case No. 33 of 2012.

The essence of the present application can briefly be summarized thus, the applicant unsuccessfully instituted an application before the District Land

and Housing Tribunal for Tabora at Tabora (the Tribunal) claiming vacant possession over Plot No. 111 Block "A" Ng'ambo Area within Tabora Municipality alleged to have been initially known as House No. 12 Rehani Street (henceforth the suit premises). Having realized that there was a High Court decision, in which the respondent was not a party, declaring the applicant to be a lawful heir of the suit premises instead of House No. 24 along Mwanza Road as per the will, the Tribunal found its hands tied hence dismissed the application leaving the matter for the High Court to resolve it through review. That finding aggrieved the respondent who rushed to the High Court and instituted an appeal. That was Land Appeal Case No. 33 of 2012. Again, the applicant was unsuccessful. In her quest to challenge the High Court decision, she lodged a notice of appeal on 15/09/2014, the subject of this application. Since then till the 4/7/2017, the applicant noted, no appeal was ever lodged by the respondent which fact prompted her to lodge the present application seeking the notice of appeal the respondent had filed to be struck out.

Mr. Kelvin Kayaga, learned advocate, entered appearance at the hearing of the application representing the applicant. The respondent appeared in person and unrepresented.

Briefly but focused, Mr. Kayaga after duly adopting the contents of the notice of motion and the supporting affidavit as part of his submission, urged the Court to strike out the appellant's notice of appeal arguing that the respondent had failed to take necessary steps to pursue her intended appeal. He contended that after she had lodged the notice of appeal, she applied for and was granted leave to appeal to the Court way back on 17/6/2015 a copy of which was annexed to the affidavit in support of the application affirmed by Habi Said, the applicant (HS-3). Ever since, he charged, till when the present application was lodged, the respondent took no steps to institute the intended appeal.

The respondent, in the first place, admitted being dully served with the application. She, initially, contended that she had already filed an appeal but failed to avail the Court with a copy of the said appeal. Even when the Court patiently allowed her time to sort out from the bundle of documents she had carried, she could not find it. She, on reflection, asserted that after she was served by the High Court with the requisite documents for appeal purposes, she consulted a lawyer who had all along been assisting her in drafting various documents, but was told that she was time barred and could not

assist her any more. Explaining further, she said, she remained helpless till when she was served with the present application.

On our prompting whether after being served with the present application she filed a reply affidavit, the respondent, again, kept lamenting that she filed a certain document after she was served with the application. She could yet not produce any document to support her contention. Again, she later threw blames to the one who served her the copies of the present application that he told her to wait for the summons to appear in Court. In sum, she was not ready for her notice of appeal to be struck out.

After our careful consideration of the parties' contending arguments, we find it compelling that we should first expound the legal position obtaining in applications of this nature.

This application has been brought under rule 89(2) of the Rules. That Rules states:-

"(2). 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."

As intimated above, in the instant application, the applicant is desirous to have the respondents notice of appeal struck out on account of failure to lodge an appeal on time despite being served with requisite documents for appeal and being granted leave to appeal.

The provisions of Rule 90(1) of the Rules regulates the time for lodging an appeal. That Rule imperatively requires the appeal to be lodged in Court within sixty days of the date the notice of appeal was lodged. However, that time is subject to the exclusion by the Registrar of the days spent in the preparation of the documents applied by the intending appellant as will be reflected in a certificate of delay. Time is reckoned immediately after the period of time excluded in the certificate of delay.

Carefully considered, the respondent's oral arguments before us, in no uncertain terms, amount to a concession that she neither lodged an appeal nor an affidavit in reply thereby failing to take essential steps in the

institution of the intended appeal. She attributed that inaction with other people she interacted with.

The importance of the provisions of Rule 89(2) of the Rules was lucidly expounded by the Court in the case of **Amina Aden Ally vs Gavita Mohamed**, Civil Application No. 4 of 2009 (unreported) that:-

"It is settled that Rules of the Court must be respected and adhered to least it leads to miscarriage of justice. He who comes to Court to prosecute a case or an appeal must see to it that essential steps are taken within time as prescribed by the relevant law. Applying delaying tactics leads to nothing less than causing unnecessary harm to the adverse party."

It is indeed apparent that the respondent had failed to comply with the requirements of Rule 90(2) of the Rules. The record speaks out loudly and clearly that the High Court rendered its decision in Land Appeal Case No. 33 of 2012 on 01/09/2014 and the respondent lodged in Court a notice of appeal on 15/9/2014. In addition, she sought and obtained leave to appeal to the Court on 17/6/2015. The present application was filed on 4/8/2017, which is close to three years from the date the notice of appeal was lodged and over two years from when she was granted leave to appeal to the Court.

Thereafter, apparently, no steps were taken by the respondent to lodge an appeal. Plainly, a long time had passed without the applicant seeing any efforts from the respondent to quench her desire to appeal despite being armed with all the requisite appeal documents and leave to appeal. In consequence, the applicant was justified to lodge the instant application.

We have duly considered the reasons assigned for the delay by the respondent. In the first place, as indicated above the respondent did not file a reply affidavit to controvert the applicant's averments. She is taken to have agreed with the applicant's affidavital evidence and cannot therefore be heard controverting such facts in support of the application from the bar. [see **Irene Temu vs Ngasa M. Dindi and Two Others**, Civil Application No. 278/17 of 2017 (unreported)]. Secondly, we are certain, if anything, worthiness of the reasons for the delay in lodging an appeal advanced by the respondent deserved a consideration by the Court in an application for extension of time to lodge an appeal. This is not the right forum. They are, to say the least, irrelevant in the determination of the application before us.

In the final analysis, we are inclined to agree with the learned counsel for the applicant that the respondent has failed to take necessary steps to initiate the intended appeal. We accordingly grant the application. The

respondent's notice of appeal lodged in Court on 15/9/2014 is hereby struck out with costs.

DATED at TABORA this 5th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 6th day of December, 2019 in the presence of Mr. Kelvin Kayaga, learned counsel for the applicant and Respondent in person is hereby certified as a true copy of the original.



A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL