

**IN THE COURT OF APPEAL OF TANZANIA**

**AT BUKOBA**

**(CORAM: MMILLA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)**

**CIVIL APPLICATION NO. 360/04 OF 2019**

**EDWIN KIGATO ..... APPLICANT**

**VERSUS**

**DICKSON KEMANZI ..... RESPONDENT**

**(Application to strike out Notice of Appeal in respect of an intended Appeal against the judgment and decree of the High Court of Tanzania at Bukoba)**

**(Kairo, J.)**

**dated the 17<sup>th</sup> day of March, 2017**

**in**

**Misc. Land Case Appeal No. 15 of 2016**

**.....**

**RULING OF THE COURT**

10<sup>th</sup> & 12<sup>th</sup> December, 2019

**KWARIKO, J.A.:**

Before the Ward Tribunal of Kanyigo, the applicant as administrator of the estate of the late Melania Byemerwa, sued the respondent over a piece of land which he claimed was owned by the late Melania Byemerwa. The respondent unsuccessfully appealed against that decision at the District Land and Housing Tribunal of Bukoba. Undaunted by the double failure, the respondent appealed before the High Court of Tanzania at Bukoba where he lost the appeal on 17/3/2017.

Aggrieved by that decision, the respondent filed a notice of appeal to this Court on 30/3/2017 which was served to the applicant on 11/5/2017.

Presently, the applicant has filed this application by way of a notice of motion taken under Rule 89(2) of the Court of Appeal Rules, 2009 (the Rules), as amended, on the ground that the respondent's notice of appeal be struck out on the ground that no essential steps have been taken in the proceedings.

The notice of motion is supported by the affidavit of the applicant. He essentially deponed that, since the respondent filed the notice of appeal and served it to him, no any essential steps have been taken towards instituting the appeal.

On his part, the respondent resisted this application by filing an affidavit in reply. In the affidavit in reply, the respondent deponed that he filed the notice of appeal on 30/3/2017 and duly served it to the applicant on 11/5/2017. That he took step to apply for necessary documents wherein he was supplied with the copy of judgment on 9/5/2017.

Thereafter, he went to Arusha to nurse a close sick relative who has since died.

At the hearing of the application on 10/12/2019, both parties appeared in person, unrepresented. When he took the stage to argue the application, the applicant argued that, since the respondent filed the notice of appeal on 30/3/2017, he has not taken any essential step towards filing the appeal. He prayed for this notice of appeal to be struck out and the application be granted with costs.

On the other hand, the respondent argued that, after he was supplied with a copy of judgment, he went to Arusha to attend his sick relative in the same year. He also had no funds to prepare the appeal. He therefore found it proper to wait for the instant application to be finalised for him to apply to file his appeal out of time.

In rejoinder, the applicant challenged that, the respondent never travelled to Arusha as they live in the same locality. He also argued that, the respondent has not proved the death of his relative.

We have considered the applicant's affidavit and the affidavit in reply together with the submissions by the parties. The issue for consideration is whether the applicant has taken essential steps towards filing the appeal following the notice of appeal which he lodged on 30/3/2017. Rule 89 (2) of the Rules provides that:-

*Subject to the provisions of sub-rule (1), **any other person on whom a notice of appeal was served** or ought to have 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 or has not been taken within the prescribed time.** (Emphasis supplied).*

The cited provision gives a right for any other person upon whom a notice of appeal has been served, to apply for striking out of the notice of appeal 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. This provision of law has been interpreted by the Court in its previous decisions, some of which are; **National Housing Corporation v. Miss Lazim Ghodu Shekhe**, Civil Application No. 134 of 2005, **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 and **Martin D. Kumaliya & 117 Others v. Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (all unreported).

In the present case, the respondent lodged his notice of appeal on 30/3/2017. He also applied to the Registrar for a copy of the proceedings on 17/3/2017. However, he did not serve the application letter to the applicant as required under Rule 90 (2) of the Rules, for him to benefit from exclusion of the time required for the preparation and delivery of the copy of proceedings from sixty days limitation for instituting an appeal under the exception to Rule 90 (1) of the Rules. In that case, the respondent ought to have filed the appeal within sixty (60) days from the date of lodgment of the notice of appeal. This period expired on 29/5/2017.

Even assuming that the limitation ought to start running after the respondent was supplied with the copy of judgment on 9/5/2017, the sixty days expired on 8/7/2017. No appeal has been filed since then or any other step being taken towards instituting the appeal.

The respondent has fronted the reason for his inaction to be the alleged sickness of his relative. We are of the view that, this could have been a ground in an application for extension of time to file the appeal. Even for the sake of argument, we find this ground barren of merit. This is because; **firstly**, the respondent has not proved the sickness and then the death of his relative. **Secondly**, he has not indicated the dates in which he attended to his relative. Since he said this misfortune befell him in 2017, he ought to have shown what he has been doing all this while. It is our considered view that, the respondent could have used this period to apply for extension of time to file his appeal.

Consequently, we are settled in our minds that, the respondent has failed to institute the appeal within the prescribed time and no any essential steps have been taken towards filing the appeal.

We therefore order, in terms of Rule 89 (2) of the Rules that, the respondent's notice of appeal lodged on 30/3/2017 be struck out. The application is therefore granted with costs.

**DATED** at **BUKOBA** this 12<sup>th</sup> day of December, 2019.


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

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

The Ruling delivered this 12<sup>th</sup> day of December, 2019 in the presence of both parties appeared in person, unrepresented is hereby certified as a true copy of the original.



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