

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., MZIRAY, J.A. And KWARIKO, J.A.)

CIVIL APPLICATION NO. 42/08 OF 2018

RAYMOND COSTA APPLICANT

VERSUS

MANTRAC TANZANIA LIMITED RESPONDENT

**(Application to strike out a notice of appeal from the decision of the
High Court of Tanzania
at Mwanza)**

(Gwae, J.)

dated the 16th day of March, 2017

in

Miscellaneous Civil Application No. 101 of 2016

RULING OF THE COURT

02nd & 8th April, 2019

KWARIKO, J.A.:

The respondent filed Misc. Civil Application No. 101 of 2016 before the High Court of Tanzania at Mwanza, (Gwae, J.) for extension of time to appeal against the decision of the District Court of Nyamagana in Civil Case No. 14 of 2006 dated 10/9/2008. That application was dismissed on 16/3/2017.

The respondent was aggrieved by that decision hence lodged a notice of appeal to appeal against that decision on 24/3/2017.

Now, the applicant by a notice of motion has filed this application in terms of Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) praying for striking out the notice of appeal lodged by the respondent on 24/3/2017. The following grounds flank the notice of motion: -

- 1. That up to today – the 23rd day of December, 2017 that is, nine months from 24.3.2017 when the Notice of Appeal was lodged, the respondent has not lodged an appeal;*
- 2. That on 16/3/2017 the High Court informed the parties that the ruling, drawn order and the proceedings in respect of Miscellaneous Civil Application No. 101 of 2016, which the respondent seeks to appeal against, were ready for collection 'subject to application and related process' and the Respondent admitted in its letter of 6/4/2017 to have received the proceedings on 16/3/2017 but it lodged a request on 16/3/2017 to be supplied with*

proceedings on the contention that the proceedings supplied were incomplete without specifying what was missing from the proceedings supplied or explaining the insufficiency of the proceedings supplied to it;

3. That 60 days from the date of filing the Notice of Appeal expired on 24/5/2015 with neither the appeal being filed nor any reminder for the requested proceedings being made, and no appeal has been filed to date nor has there been any reminder to date;

4. That the Respondent was, through the decision of the High Court dated 25/8/2017 in Miscellaneous Civil Application No. 40 of 2017, also granted with leave to appeal but it applied on 6/9/2017 to be supplied with only a copy of the ruling and order and it was not until on 7/11/2017 that it served a copy of that letter on the applicant.

The notice of motion is also supported by the affidavit of Audax Kahendaguza Vedasto, advocate of the applicant.

In opposition to this application, the respondent filed an affidavit in reply sworn by its advocate Faustin Anton Malongo. Both parties filed written submissions to support their respective stance.

At the hearing of the application, Messrs. Audax Vedasto and Anton Faustin Malongo, learned advocates appeared for the applicant and respondent respectively.

Mr. Vedasto elaborated the grounds raised in the notice of motion which amounts to the respondent's failure to take essential steps after he lodged the notice of appeal on 24/3/2017.

Firstly, Mr. Vedasto argued that when the impugned decision was delivered on 16/3/2017, the court informed the parties that, a copy of the ruling, extract order and proceedings were ready and actually the parties were supplied with the same on that date. He argued that despite being supplied with the copy of proceedings, the respondent did not file his appeal whose limitation time of sixty (60) days expired on 24/5/2017, hence contravening Rule 90 (1) of the Rules.

As regards the second ground, Mr. Vedasto contended that, although the respondent wrote a letter to the Registrar on 6/4/2017 to be supplied with missing proceedings, she did not specify what was

missing therefrom. That, it was not enough to say in that letter that the missing proceedings were those prior to 22/11/2016. He argued that the failure to be specific made it difficult for the Registrar to decide what was missing. After all it is not necessary that the proceedings must have started before 22/11/2016, Mr. Vedasto argued.

In the third ground, the learned counsel argued that, the respondent did not make a follow-up to the Registrar for the missing proceedings until the time for appealing expired on 24/5/2017. To bolster his position, Mr. Vedasto cited the decision of this Court in **Mohsin Mohamed Taki Abdallah v. Tariq Mirga & 4 Others**, Civil Application No. 100 of 1999 (unreported). The learned counsel also made reference to new sub-rule 4 of Rule 90 of the Rules added by The Tanzania Court of Appeal Rules (Amendments) GN 362 of 2017 which came into effect on 22/9/2017. He submitted that, the new sub-rule has imposed a duty to the appellant to take steps including reminding the Registrar about the requested proceedings. He contended that the amending law is applicable retrospectively in this case in terms of section 31 of The Interpretation of Laws Act [CAP. 1 R.E. 2002] (the Act).

Regarding the fourth ground, Mr. Vedasto contended that the respondent was granted leave to appeal on 25/8/2017 vide Misc. Civil Application No. 40 of 2017 and applied to be supplied with the ruling and order on 6/9/2017. On this, the learned counsel complained that the application letter was served on the applicant on 7/11/2017 being outside thirty (30) days as per Rule 90 (1) of the Rules. To bolster his contention the learned counsel referred us to the decisions of this Court in **Francis Itengeja v. Kampuni ya Kusindika Mbegu** [1997] T.L.R 148, **Kantibhai Patel v. Dahyabhai** [2003] T.L.R 437 **D.P. Vallambia v. T.E LTD** [1992] T.L.R 246 and **Mrs. Kamiz v. Registrar of Buildings** [1988] T.L.R 199, **Cresthale Ltd v. Bondeni Seeds Ltd** [2000] T.L.R 1.

Further, it was Mr. Vedasto's contention that the respondent did not apply for a copy of proceedings in respect of the application for leave to appeal which is essential document in the record of appeal. In reference was the decision of this Court in **Barclays Bank (T) Ltd v. Tanzania Pharmaceutical Industries Limited**, Civil Appeal No. 87 of 2015 (unreported).

In his reply, Mr. Malongo argued that the proceedings which were supplied to them on 16/3/2016 were not complete because they commenced on 22/11/2016. That, the defect took them to write a letter on 6/4/2016 to the Registrar to request for the missing proceedings. That was within thirty days from the date of the decision. In that letter they specified that the missing record was prior to 22/11/2016. He cited the case of **African Marble Company Ltd v. Tanzania Saruji Corporation** [1999] T.L.R 309 to bolster his argument. That the Registrar could not have had difficulty to sort out the requested record because the case commenced on 18/7/2016 and then 28/9/2016.

It was Mr. Malongo's further argument that, the Registrar informed the respondent on 3/1/2018 that the requested proceedings were ready for collection. They collected the same and filed the appeal on 19/2/2018 which is still pending. He added that at the time the instant application was filed, the appeal had not yet been filed because the record was not complete and the respondent enjoyed the exclusion under Rule 90 (1) (2) of the Rules.

As for the complaint that the respondent did not make a reminder to the Registrar for the requested proceedings, Mr. Malongo argued

that, that is not a requirement of the law. He argued that, the Registrar was duty bound to inform the respondent once the proceedings were ready for collection. He referred us to the decisions of this Court in **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [1997] T.L.R 328, **Foreign Mission Board of Southern Baptist Convention v. Alexander Panomaritis** [1984] T.L.R 146 and **Samwel Mgonja v. Total (T) Limited**, Civil Appeal No. 400 of 2017 (unreported). He also distinguished **Mohsin Mohamed Taki Abdallah's** case (supra), that contrary to the instant case the respondent in that case had neglected to collect the copy of the ruling even though he was aware that it was ready.

Additionally, the learned counsel argued that the letter dated 6/4/2017 was sent to the Registrar before the enactment of sub-rule 4 of Rule 90 of the Rules and the ninety days expired even before the law became operative. He contended that section 31 of the Act favours the respondent's side than that of the applicant.

Lastly, Mr. Malongo argued that, the respondent is not appealing against the ruling on an application for leave to appeal, Misc. Civil Application No. 40 of 2017. Therefore, he was not legally bound to

serve the letter applying for a copy of those proceedings on the applicant within thirty (30) days as per the proviso to Rule 90 (1) of the Rules. He argued that, the requirement of the cited time limit is in relation to the decision appealed against. That, the complaint is premature because the complete record of that application ought to be one of the documents to accompany the appeal, which task they have complied with. The learned counsel urged us to find that the application is misconceived which is fit to be dismissed with costs.

In the rejoinder submission, Mr. Vedasto maintained that the respondent did not take essential steps after he filed the notice of appeal. That, the respondent ought to have complied with the amended Rule 90 (4) of the Rules after 22/9/2017. He also contended that in the **Samwel Mgonja's** case (supra) it was not indicated when the application was filed. Further, because the proceedings in the application for leave are essential documents to accompany the appeal as per Rule 96 of the Rules, the letter applying for them should have been served to the applicant in accordance with the law. He finally urged us to read section 62 of the Act for inspiration.

Having heard and considered the opposing submissions from the counsel for the parties, we are tasked to decide whether the respondent has not taken essential steps after she filed the notice of appeal on 24/3/2017. Rule 89 (2) of the Rules provides: -

"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, before or after the institution of the appeal, apply to the Court to strike out the notice of appeal or 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."

In the first ground raised by the applicant, we agree with both parties that the copies of the impugned proceedings were ready and supplied to the parties on 16/3/2017 when the ruling was delivered. However, the respondent could not file appeal within sixty (60) days which expired on 24/5/2017, because he found the supplied proceedings incomplete. On 6/4/2017 he wrote a letter to the Registrar

requesting to be supplied with the missing proceedings prior to 22/11/2016. Hence, this ground of complaint has no merit.

The foregoing brings us to the second complaint regarding the letter dated 6/4/2017. Contrary to the applicant's complaint, we agree with the respondent that, in that letter it was specified that the missing proceedings were those prior to 22/11/2016. This statement is not ambiguous at all. It is clear that the Registrar was to prepare and supply to the respondent the proceedings of that case prior to 22/11/2016. Of course, being party to the case the applicant was well aware that the proceedings did not commence on 22/11/2016. We are of the considered view that, if the letter was not self-explanatory, it was the Registrar who was better placed to complain and he would have definitely written to the respondent to seek for clarification knowing that he was duty bound to supply the requested proceedings, if any. This ground too fails.

Mr. Vedasto complained in the third ground that, the respondent did not make a follow-up for the supply of the missing proceedings after he wrote the letter to the Registrar. First, by 6/4/2017 there was no law which would have obliged the respondent to make a follow-up to

the Registrar of the requested proceedings. That law came operative on 22/9/2017 vide GN No. 362 of 2017 (supra) which amended Rule 90 of the Rules by adding sub- rule (4). It provides: -

*"Subject to sub-rule (1), the Registrar shall strive to serve a copy of the proceedings is ready for delivery within 90 days from the date the appellant requested for such copy, **and the appellant shall take steps to collect a copy on being informed by the registrar to do so, or after expiry of 90 days.**"*

(Emphasis supplied).

Even this provision obliges the appellant to take steps to collect the copy of proceedings after being informed by the Registrar that it is ready for collection; or otherwise to make a follow-up after the expiry of 90 days within which the Registrar is obliged to ensure that the copy is ready.

Also, we have read section 31 of the Act referred to by Mr. Vedasto. Having so done, with respect, we are not in agreement with Mr. Vedasto's contention. We say so because, it is irrelevant in this case as it relates to various institutions and their officials retaining their

existence and status upon repeal or re-enactment of legislations. For clarity, we undertake to reproduce it. It says: -

"Where a written law repeals and re-enacts, with or without modification, any enactment—

(a) all districts or other local divisions or areas;

(b) all councils, corporations, boards, tribunals, commissions, trusts, or other bodies constituted, and all elections and appointments of members made; and

(c) all offices constituted and appointments of officers made;

(d) all subsidiary legislation, warrants, certificates, and documents made; and

(e) all other acts, matters, and things, which, at the commencement of the repealing law, are respectively in existence, or in force or operation, under or for the purposes of such provision, shall, in so far as is consistent with the repealing law, subsist and ensure for the purposes of such law and shall continue as if the repealing law had been in operation when they respectively originated or were constituted, made or

done and they had originated or been constituted, made or done under that law."

In the same vein, section 62 of the Act concerns a situation where no time limit is provided for doing a certain act; that the same ought to be done with convenient speed. Although, one can take inspiration from this provision in doing things, but in the present case, the respondent was waiting for the Registrar to inform him that the copy was ready for collection. This is what the Court held in the case of **Transcontinental Forwarders Ltd** (supra), this Court said: -

"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."

For the avoidance of doubt, we feel pressed to state at this stage that we are alive to the principle that once an amendment has been effected to the legislation, if such amendment is on matters of procedure, it would apply retrospectively. The High Court of Tanzania when confronted with similar situation in **Benbros Motors Tanganyika Ltd v. Ramanlal Haribhai Patel** [1967] HCD 435 had this to say: -

"When a new enactment deals with rights of action, unless it is so expressed in the Act, and existing right of action is not taken away, but when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act."

The Court took the same position in **Makorongo v. Consiglio** [2005] 1EA 247 and **The Director of Public Prosecutions v. Jackson Sifael Mtares and 3 Others**, Criminal Appeal No. 2 of 2018 (unreported). In **Makorongo** for instance, the Court had this to say: -

"One of the rules of construction that a court uses to ascertain the intention behind the legislation is that if the legislation affects substantive rights it will not be

construed to have retrospective operation, unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary."

(See also the decision of this Court in **Rebecca Wegesa Isaack v. Tabu Msaigana and Another**, Civil Application No. 444/08 of 2017).

In the case at hand, we are positive that if the principle stated above is applied, the respondent will certainly be prejudiced. In the premises, we find the present case as falling within the scope and purview of the phrase "*unless there is good reason to the contrary*" in the case of **Consiglio** (*supra*). That is to say, there exist in the present case good reason not to adhere to the retrospective application of the procedural amendment under consideration.

Further, as rightly argued by Mr. Malongo the decision of **Mohsin Mohamed Taki Abdallah** (*supra*) is distinguishable from the case at hand as in that case the respondent failed to apply for leave to appeal for three years, and failed to collect a copy of proceedings even after he knew that it was ready for collection. This ground has no merit.

Lastly, the Court is in further agreement with Mr. Malongo that because the respondent is not appealing against Misc. Civil Application no 40 of 2017 being for leave to appeal, he was not obliged to serve the letter applying for the copy of those proceedings to the applicant as required under Rule 90 (1) (2) of the Rules.

We agree that the proceedings in respect of the application for leave to appeal are necessary document to accompany the appeal as required under Rule 96 (1) (d) of the Rules. However, the complaint concerning them at this stage is, in our opinion, prematurely made. The applicant can wait until they reach the appeal stage to raise the complaint, if any. The cases of **Francis Itengeja** (supra), **Kantibhai Patel** (supra) **Mrs. Kamiz** (supra) **Cresthale Ltd** (supra) cited by Mr. Vedasto are distinguishable from the case at hand because they related to the service on the respondent of the application for a copy of the decision appealed against.

Equally, even if the respondent did not apply for a copy of the proceedings in relation to the application for leave to appeal as complained by Mr. Vedasto, the complaint is, we think, premature at

this stage. This is the matter ought to be reserved when the appeal, if any, is being dealt with. The fourth ground also fails.

Conclusively, we have no shadow of doubt that the applicant has failed to show that the respondent has failed to take essential steps in the proceedings within prescribed time after he filed the notice of appeal on 24/3/2017. The application is devoid of merit and we hereby dismiss it with costs to the respondent.

DATED at MWANZA this 6th day of April, 2019.


M. S. MBAROUK
JUSTICE OF APPEAL

R.S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL