

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A, MWANGESI, J.A. And MWAMBEGELE, J.A)

CIVIL APPLICATION NO. 375 OF 2018

SOPHIA AMIR MRISHOAPPLICANT

VERSUS

1. OMAR AMIRI MRISHO
2. ANSELINE AMIRI MRISHO
3. NAIMA AMIRI MRISHO
4. MARIAM AMIRI MRISHO
5. REHEMA AMIRI MRISHO
6. RAHELI AMIRI MRISHO
7. JUMA AMIRI MRISHO
8. SAID AMIRI MRISHO
9. ZAINAB AMIRI MRISHO
10. MRISHO AMIRI MRISHO
11. NAHLA DEVELOPMENT LTD.

.....RESPONDENTS

(Application for an order that the notice of appeal lodged by the respondents on 18.1.2018 is deemed withdrawn)

(Mkasimongwa, J.)

dated the 11th day of January, 2018

in

Civil Revision No. 33 of 2015

.....

RULING OF THE COURT

19th Feb & 25th March, 2019

MMILLA, J.A.:

By a notice of motion made under Rule 91 (a) of the Court of Appeal Rules, 2009 (the Rules) the applicant, Sophia Amiri Mrisho, is requesting the Court to make an order that the respondents' notice of appeal lodged on 18.1.2018 should be deemed to have been

withdrawn for the reason that the respondents failed to serve her with a letter applying for proceedings at the High Court. The notice of motion is supported by an affidavit sworn by the applicant of which paragraphs 4 and 7 thereof state that the applicant was not served with the notice of appeal and the letter applying for proceedings.

On the other hand, the first to tenth respondents filed a joint affidavit in reply whereby, generally, they deny the applicant's complaint that she was not served with those crucial documents.

When the matter came up for hearing, the applicant was represented by Mr. Samson Mbamba, learned advocate. On the other hand, while the first to tenth respondents were represented by Mr. Amini Mshana, learned advocate, Mr. Deougratius Ringia, learned advocate, represented the eleventh respondent.

Upon being given the opportunity to submit in respect of the application, Mr. Mbamba asked the Court to adopt his written submission filed on 9.10.2018, and opted to say nothing more.

On the other hand, Mr. Mshana too asked the Court to adopt his written submissions filed on 29.10.2018 and signified that he had

nothing more to add. Meanwhile, Mr. Ringia informed the Court that he did not file written submissions because he was not contesting the application.

In his written submission, Mr. Mbamba stated briefly that according to Rule 90 (1) of the Rules, the respondents were supposed to have lodged their appeal within 60 days from the date they lodged the notice of appeal. He added that, although there is an exemption under sub rule (1) of the same Rule to exclude the days of applying for necessary documents, the respondents are not entitled to rely on such exception because they did not serve her with a copy of the letter applying for those documents as required by sub rule (2) of Rule 90 of the Rules. He referred the Court to the case of **Mrs. Kamiz Abdullah M. D. Kermal v. The Registrar of Buildings & Another** [1988] T.L.R. 198. Relying on the cases of **Samwel Kimaro v. Hidaya Didas**, Civil Application No. 20 of 2012 CAT, **Elias Marwa v. Inspector General of Police & another**, Civil Application No. 11 of 2012 CAT and **Expert Trading Company Ltd. v. MZARTC Trading Co. Ltd.**, Civil Application No. 10 of 2014 CAT (all unreported). Mr. Mbamba probed the Court to invoke the

provisions of Rule 91 (a) of the Rules and find that the respondents' notice of appeal is deemed to have been withdrawn.

On the other hand, Mr. Mshana submitted that, contrary to the applicant's complaint, they served the applicant with the letter applying for the necessary documents. Nevertheless, he said, an appeal to the Court is not automatic because the respondent should seek leave to appeal before lodging the intended appeal. According to him, the application for leave is pending at the High Court and that the applicant is aware of that fact. He insisted that the delay to lodge the appeal within the required 60 days was never their fault but rather the process of the Court to which they have no control. He contended further that the cases cited by Mr. Mbamba are all distinguishable to the circumstances of the present matter. He therefore, urged the Court to dismiss the application with costs.

On our part, we wish to begin by restating the law regarding the timeframe in instituting an appeal to the Court.

Rule 90 (1) of the Rules requires a party intending to appeal to this Court to do so within a period of 60 days from the date of lodging the notice of appeal. That Rule provide that:-

"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 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, there **shall 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.**" [Emphasis added]*

However, an exception to that requirement under the above quoted Rule exists where such person applied for necessary documents from the High Court of which a certificate of delay should be issued excluding the days spent in preparation for those documents. Nevertheless, the appellant will not be entitled to rely on

the said exception provided under the proviso of sub rule (1) unless he served on the respondent a letter applying for those necessary documents as instructed by sub rule (2) of that Rule thereof. Sub-rule (2) of Rule 90 of the Rules states 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."

In the present matter, the applicant maintains that she was not served with a copy of the letter applying for those necessary documents. As such, she is asking the Court to find that since the respondents have failed to lodge their appeal within 60 days as required by law, there is no viable appeal as it is obviously out of time.

As aforesaid, the respondents' advocate says he served the same on the applicant. However, he did not adduce evidence in proving the same. We think he ought to have done so. We have taken note of the contents of paragraph 5 of the affidavit in reply to the effect that they served the letter to Mr. Mbamba; as aforesaid

however, Mr. Mshana ought to have attached evidence in that regard.

On the other hand, while we agree with Mr. Mshana that an appeal to the Court requires a number of processes including leave, that does not in our view, exclude the duty to serve the applicant with a letter applying for the necessary document as required by rule 90 (2) of the Rules. Thus, we agree with the applicant that the respondent has failed to lodge his appeal within 60 days after lodging the notice of appeal.

Rule 91 (a) of the Rules provides that:-

"If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time:-

*(a) **He shall be deemed to have withdrawn his notice of appeal** and shall unless the court orders otherwise, be liable to pay the costs of any person on whom the notice of appeal was served arising from the failure to institute the appeal."* [Emphasis added]

Since we have said that the respondent failed to lodge his appeal within the required 60 days, on the basis of the provisions of

Rule 91 (a) quoted above, we are constrained to find and hold that the respondents' notice of appeal should be deemed to have been withdrawn - See the case of **Samwel Kimaro v. Hidaya Didasi** (supra). In that case, the Court stated that:-

"In this case, the respondent, through his learned counsel, has unreservedly conceded the fact that a copy of a letter applying for copies of proceedings, judgment and decree was not served on the applicant. Thus, in terms of Rule 90 (2) of the Rules, an exception to the sixty days rule within which to lodge the notice of appeal, cannot avail the respondent. As matters stand, we are settled in our minds that the respondent was supposed to conform with the dictates of rule 90 (1) of the Rules by filing the appeal within sixty days from the lodgement of the Notice of appeal, which he did not. The consequences attending the non-compliance with rule 90 (1) are found under Rule 91 (a) of the Rules which we have quoted hereinabove.

In the light of the foregoing brief discussion and on the strength of Rule 91 (a) of the Rules, we are constrained to find, as we hereby do, that the respondent's notice of appeal should be deemed to

have been withdrawn after the expiry of sixty days of its lodgement."

That said and done, we are firm that the application before us has merits. We accordingly invoke the provisions of Rule 91 (a) of the Rules on the basis of which we rule that the notice of appeal lodged by the respondent on 18.1.2018 is deemed to have been withdrawn. We also award costs of the matter.

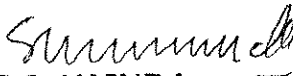
DATED at DAR ES SALAAM this 20th day of March, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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


S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL