

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MUGASHA, J.A, WAMBALI, J.A And SEHEL, J.A)

CIVIL APPLICATION NO. 153/05/2017

THE REGISTERED TRUSTEES OF CHAMA CHA MAPINDUZI.....APPLICANT

VERSUS

CHRISTINA NGILISHORESPONDENT

**(Appeal for striking out notice of appeal from the decision of the High Court of
Tanzania at Moshi)**

(Munisi, J.)

dated the 17th day of March, 2015

in

Land Case Appeal No. 60 of 2013

RULING OF THE COURT

31st March, & 2nd April, 2020

SEHEL, J.A.:

By a notice of motion, the applicant seeks for an order of the Court that the notice of appeal filed by the respondent on the 31st day of March, 2015 against the judgment and decree in Land Appeal No. 60 of 2013 be struck out for failure to take essential steps in the proceedings within the prescribed time. The notice of motion is predicated under Rule 89 (2) of the Tanzania Court of Appeal Rules of 2009 (the Rules) and it was filed on

26th January, 2017. It is supported by an affidavit of Loth ole Nesele, principal officer of the applicant.

The respondent, on the other hand, resisted the application by filing an affidavit in reply sworn by the respondent.

The background to the present application is that; the respondent filed a suit against the applicant at the District Land and Housing Tribunal at Moshi (DLHT) claiming among other things, for compensation of the house she built on Plot No. PB, Block 'CCC', section III, within Moshi Municipality. That suit was dismissed.

Aggrieved by the dismissal of her suit, she unsuccessfully appealed to the High Court of Tanzania at Moshi. That appeal was dismissed on 17th March, 2015. Still aggrieved, the respondent lodged a notice of appeal on 31st March, 2015 and served it upon the applicant on 15th April, 2015. Upon receipt of the notice of appeal, the applicant filed a notice of address for service. The respondent also sought leave to appeal which was granted on 19th November, 2015.

Having seen nothing was forthcoming despite leave being granted, the applicant filed the present application seeking for striking out the notice

of appeal on the ground that the respondent has not taken some essential steps in the proceedings.

At the hearing of the application, Mr. Martin Kilasara, learned advocate, appeared for the applicant, whereas, the respondent appeared in person, unrepresented.

Mr. Kilasara commenced his submission by adopting the notice of motion and an affidavit filed in support of the application. Then he contended that the respondent was granted leave to appeal on 19th November, 2015 and by the time the applicant filed the present application fourteen (14) months had lapsed and no appeal was filed within the prescribed period of sixty (60) days and no action whatsoever had been taken to date by the respondent in filing the appeal. He added that he has seen for the first time a letter requesting for copies of proceedings, judgment, and decree that was attached to the affidavit in reply. He said, that letter was not served upon the applicant even though it is indicated that it was copied to the applicant. It was his submission that, for it to be proved that it was served upon the applicant it ought to have indicated the person who received it as it was done in the notice of appeal.

Mr. Kilasara argued that since the respondent did not serve the letter to the applicant, then she cannot benefit from the exception provided

under the proviso of Rule 90 (1) of the Rules. He further said, since there is no pending application for extension of time to file an appeal out of time, the respondent ought to have lodged her appeal within 60 days as prescribed under Rule 90 (1) of the Rules. Mr. Kilasara submitted that failure to comply with Rule 90 (1) of the Rules is a demonstration that the respondent had failed to take essential steps. It was the view of Mr. Kilasara that the consequences of such failure is for the notice of appeal to be strike out.

Mr. Kilasara also responded to paragraphs 7, 9 and 10 of the affidavit in reply where the respondent deposed that she was sick since 2014 thus failed to make a follow up of her appeal. Mr. Kilasara pointed out that during the period of the respondent's sickness; she managed to appeal to the High Court, to lodge notice of appeal and to seek leave to appeal. He therefore concluded that it is inconceivable to allege illness in respect of taking essential steps while the respondent was able to take one of the essential steps having sought and obtained leave to appeal.

With that submission, Mr. Kilasara prayed for the application to be allowed with costs by striking out the notice of appeal lodged by the respondent on 31st March, 2015.

The respondent being a layperson simply urged us to see that she is still interested to pursue her appeal and that she was prevented from making follow up of her appeal because of her sickness.

In rejoinder, Mr. Kilasara insisted his earlier submission.

We have dispassionately considered the notice of motion, affidavit in support of the motion, affidavit in reply and the oral submissions of the parties. Having done so, we find it apt to set out the undisputed facts. It is clear that the present application stems from a land dispute where the respondent lost a suit at the DLHT. She then appealed to the High Court but her appeal was dismissed on 17th March, 2015. She was aggrieved, she lodged a notice of appeal on 31st March, 2015 and served it upon the applicant on 15th April, 2015. After receipt of the notice of appeal, on 28th April, 2015 the applicant issued a notice of address for service.

Since, the dispute was a land dispute and according to section 47(1) of the Land Disputes Courts Act. Cap. 216 R.E. 2002 (before the amendment to the Land Disputes Act vide the Written Laws (Miscellaneous Amendment) Act No. 3 of 2018 (the Amendment Act) which came into force on the 24th day of September, 2018) the respondent was required to seek leave to appeal from the High Court which she did. Leave was granted on 19th November, 2015. It is thus obvious that up to 19th

November, 2015 the respondent was diligent enough in taking essential steps in prosecuting her intended appeal. Unfortunately, after obtaining the said leave to appeal no further steps were taken by the respondent.

It is argued by the respondent that she had been waiting to be supplied with the copies of proceedings, judgment and decree because she had requested to be supplied with the same as per her letter dated 19th March, 2015 attached to her affidavit in reply. That letter, Mr. Kilasara, argued was not served upon the applicant.

We had an opportunity to scrutinize the letter and we have noted that although it indicates to have been copied to the learned advocate for the applicant but there is no proof that it was received by the counsel for the applicant. We say so because it neither bears a rubber stamp of the counsel for the applicant nor the signature of the officer receiving it. We are, therefore, in agreement with Mr. Kilasara that the letter requesting for copies of proceedings, judgement and decree was not served upon the applicant.

As correctly submitted by Mr. Kilasara that, since the respondent failed to serve the applicant with a copy of the letter requesting for copies of the proceedings, judgment and decree then the respondent was not entitled to rely on the exception provided under Rules 90(1) of the Rules.

That Rule provides:-

*"90 (1) subject to the provisions of rule 128, an appeal shall be instituted by lodging in the appropriated 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 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.

(2).....Not Relevant.....

*(3) 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 is added]*

It follows then that an appeal has to be instituted in the appropriate registry by lodging a memorandum of appeal in quintuplicate, a record of appeal in quintuplicate, and security for costs of the appeal within sixty

days from the date when the Notice of Appeal was lodged. But if an intended appellant has applied in writing for a copy of the proceedings in the High Court within thirty (30) days and served that letter on the respondent, the time taken for the preparation and delivery of that copy shall be excluded by a certificate of the Registrar of the High Court

In the case of **Mwanaasha Seheya v. Tanzania Posts Corporation**, Civil Appeal No. 37 of 2003(unreported) the Court stated:

"... an appeal must be instituted within sixty (60) days of the date when the notice of appeal was lodged unless the exception under sub-rule(2) applies. ... he must have sent a copy of such application to the respondent. Under the circumstances, the appellant was not entitled to rely on the exception."

As we have observed earlier, the letter dated 19th March, 2015 was not served to the applicant. Consequently, it was incumbent upon the respondent to institute her appeal within sixty (60) days from the date when the notice of appeal was lodged as provided for under Rule 90(1) of the Rules. The notice of appeal was lodged on 31st March, 2015 but to date no appeal had been filed by the respondent. It is for that omission to file the appeal within time which prompted the applicant to file the present application under Rule 89(2) of the Rules, that no essential steps have

been taken by the respondent. In **Olivia Kisinja Ndete v. Hilda Mtunga**, Civil Application No. 4 of 2011 (unreported) we said:-

"The law is now settled, upon lodging a Notice of Appeal, the intending appellant must not sit back but is required to move the process forward by taking essential steps that have been clearly outlined by the Court of Appeal Rules. The applicant was entitled to move the Court under Rule 89(2) to strike out a notice of appeal where no essential steps have been taken beyond that notice."

We hold the same position in this application. The applicant has properly moved the Court for an order of striking out the notice of appeal on the ground that no essential steps have been taken by the respondent.

Before we conclude, we have to address the issue of sickness advanced by the respondent. The respondent argued that she was sick therefore she failed to make a follow up of her intended appeal. Hence time lapsed against her. With respect with such an excuse, if at all the respondent was sick then the best course open for her was to seek an extension of time to serve the applicant with that letter addressed to the Deputy Registrar requesting to be supplied with a copy of proceedings, judgment and decree. But she did not do so. Therefore, she has no one to

blame but herself that she did not find it necessary to ask the Court for an extension of time.

All said, we find merit in this application, which we accordingly allow. Consequently, the notice of appeal filed by the respondent on 31st March, 2015 is, hereby, struck out with costs. Ordered accordingly.

DATED at ARUSHA this 1st day of April, 2020.


S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Ruling delivered on 2nd day of April, 2020 in the presence of the Mr. Martin Kilasara, counsel for the applicant and the respondent in person is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL (T