IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CIVIL APPLICATION NO. 319/02/ OF 2017

CHRISTOPHER OLE MEMANTOKI.....APPLICANT

VERSUS

JUN TRADE AND SELLERS (T) LTD .....RESPONDENT

(Intended appeal from the decision of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated the 9th day of August, 2012

in

Civil Appeal No. 9 of 2011

RULING OF THE COURT

31st March, & 2nd April, 2020

MUGASHA, J.A.:

In this application by notice of motion lodged on 10/3/2017 under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), Christopher Ole Memantoki, the applicant is moving the Court to strike out with costs the respondent's notice of appeal on the ground that, *the respondent has failed to take some essential steps in pursuing the intended appeal.* The application is accompanied by the affidavit sworn by Ms. Magdalena Sylister, the applicant's counsel. In order to appreciate the propriety or otherwise of

this application in law, we deem it crucial to reproduce paragraphs 2 to 5 of the applicant's affidavit as follows:

> *"2. On the 09th day of August, 2012, the High Court of Tanzania at Arusha dellvered judgment and decree in Civil Appeal Number 9 of 2011 between Jun Trade and Sellers (T) Ltd versus Christopher Ole Memantoki.*
>
> *3. The aforesaid decision was in favour of the applicant and so the respondent was aggrieved.*
>
> *4. On 23rd day of August 2012, the respondent filed a notice of appeal before this Court in respect of an intended appeal against the decision disclosed above.*
>
> *5. Whereas more than four years now have lapsed, the respondent has not yet filed the intended appeal without any good reason."*

The application has been opposed by the respondent through the affidavit in reply sworn by Mr. John Faustin Materu, the respondent's advocate. In the said affidavit, it is deposed to the effect that the applicant has taken essential steps to pursue the intended appeal and as such it should not be barred from prosecuting the appeal for the wrong which is not of the respondent's making.

To bolster their arguments parties filed written submissions in accordance with Rule 106 of the Rules. In order to appreciate what underlies

this application, it is crucial to have a brief background underlying the present application which is as follows: The respondent was unsuccessful in Civil Appeal No. 9 of 2011 before the High Court of Tanzania (Sambo, J.) that was determined on 9/8/2012. It is noteworthy that, the matter originated from Civil Case No. 16 of 2008 before the Resident Magistrate' Court of Arusha. Aggrieved with the High Court decision, to challenge the same on 23/8/2012 the respondent lodged a notice of appeal in accordance with Rule 83(1) of the Rules. Then, in accordance with the dictates of the proviso to Rule 90(1) of the Rules, on 9/8/2012 the respondent wrote a letter to the Deputy Registrar of the High Court requesting to be supplied with certified copies of the proceedings which was copied and served to the applicant. Since the intended appeal is a second one because the matter originates from the Resident Magistrates' Court, the respondent sought and was granted leave to appeal on 18/5/2016 vide Miscellaneous Civil Application No. 203 of 2014. It is also on record that; the respondent wrote a letter to the Registrar of the High Court reminding him on the earlier request to be supplied with certified copy of proceedings. However, to date the Deputy Registrar has not availed the requested proceedings to the respondent who has not instituted an appeal. In sum this is what precipitated the present application.

At the hearing of the application, the applicant had the services of Ms. Magdalena Sylister, learned counsel whereas the respondent was represented by Mr. John Faustin Materu and Mr. Ombeni Kimaro, learned counsel. Parties adopted their respective affidavits and written submissions for and against the application.

To cement on what is deposed by the applicant in paragraph 5 of the affidavit, Ms. Sylister submitted that, after having filed the notice of appeal the respondent abandoned the appeal process which has in turn impeded the applicant to enjoy the fruits of the decree vide execution process. In addition, she contended that failure by the respondent to follow up to the Deputy Registrar the letter in which proceedings were requested, is a demonstration on failure to take essential steps to pursue and institute an appeal. As such, she asked the Court to apply the retrospectivity principle, invoke Rule 90 (5) of the Rules and find the applicant to have contravened the said Rule having failed to follow up the matter to the Registrar after the expiry of 90 days from the date of the coming into force of Rule 90 (5) of the Rules.

Moreover, attacking the contents in paragraph 6 of the affidavit in reply whereby the respondent has deposed to the effect that, the case file before the High Court is lost and thus untraceable, she submitted such

account is not substantiated in the absence of a requisite affidavit from the Registry Office of the High Court who is alleged to have given such position to the respondent. She thus urged the Court to strike out the notice of appeal with costs.

On the other hand, as earlier intimated, the respondent opposed the application contending to have taken essential steps including the request to be supplied with certified copy of proceedings within the prescribed time which was followed by a reminder letter which has hitherto not yet responded to by the Registrar whilst the requested certified proceedings are yet to be supplied to the respondent. Besides, it was further argued that, without being supplied with the requested proceedings which are vital documents to be included in the record of appeal in terms of Rule 96 (2) of the Rules, the respondent is not in a position to institute an appeal.

Regarding the deposition in the affidavit in reply with information whose source is not verified on the case file being lost, on being probed by the Court, Mr. Materu opted to abandon the same and urged the Court to strike out the offensive portion in paragraph 6 of the affidavit in reply. On that concession, we agree and accordingly strike out the same.

Mr. Materu opposed the applicability of Rule 90 (5) of the Rules pleading that the applicant should not be penalised for not having followed

up the written request to be supplied with the proceedings after the expiry of 90 days after the coming into force of that Rule. On this he argued that, the complaint raised by the applicant's counsel in the course of hearing is not one of the grounds upon which this application is sought and besides, at the time of filing of this application, the respondent already had taken essential steps to institute an appeal.

Ultimately, he urged the Court to dismiss the application on account of being baseless because the respondent has demonstrated to have taken essential steps to institute an appeal. To back up his proposition he cited to us the cases of **FOREIGN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION VS. ALEXANDER PANOMARITIS** (1984) TLR, 146; **TRANS CONTINENTAL FOWARDERS LTD VS. TANGANYIKA MOTORS** (1997) TLR 328 and **GEORGIO ANARTOGLOU AND ANOTHER VS. EMMANUEL MARANGAKIS AND ANOTHER**, Civil Application 464/01 of 2018 unreported.

In rejoinder, Ms. Sylister repeated what she earlier on submitted. In addition, she argued that cases relied upon by the respondent are not relevant in the matter at hand because Rule 90 (1) of the Rules was not yet in existence.

After a careful consideration of the submission of learned counsel, the issue for determination is whether the respondent has taken essential steps to institute an appeal to necessitate the striking out of the notice of appeal.

We begin with the position of the law. The application of this nature is governed by Rule 89(2) of the Rules which stipulates as follows:

> *"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 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."*

It is glaring that, the striking out a notice of appeal of a respondent is a remedial relief available to the person on whom a notice of appeal has been served on ground that, no appeal lies or that some essential step has, not been taken to lodge an appeal within prescribed time. See – **ELIAS MARWA VS. INSPECTOR GENERAL OF POLICE**, Civil Application No. 11 of 2012 (unreported), **GRACE FRANK NGOWI VS. DR FRANK ISRAEL NGOWI** (1984) TLR, 120 and **BIRR COMPANY LTD VS C-WEED CORPORATION, ZNZ** Civil Application No. 7 of 2003 (unreported). In the latter case, the applicant

had applied to have the respondent's notice of appeal struck out on account that there was no evidence in writing to the effect that, the respondent was actively following up the matter with the Registry of High Court in Zanzibar. Apart from the Court observing that the applicant's counsel had failed to establish the existence of those facts in terms of section 110 (1) of the Evidence Act, it stated as follows:

> *"Dr. Lamwai has not refuted that the respondent wrote a letter to the Registrar applying for a copy of the proceedings and that a copy of that letter was sent to the applicant. Consequently, the respondent can rely on the exception to Rule 83 (1) of the Court Rules to discount the time taken to prepare the records in computing the sixty days required to institute an appeal...However, since the respondent has not obtained as yet the copy of proceedings from the Registrar, the computation of sixty days has not commenced as yet."*

In the application at hand, it is not in dispute that, the respondent sought and obtained leave, he as well requested to be supplied with the certified copy of proceedings of the High Court within the prescribed 30 days from the date of the impugned decision. However, the applicant viewed that the respondent has not demonstrated efforts to pursue the requested

proceedings in order to institute an appeal which has prevented the applicant to execute the decree for over four years. At the outset we wish to point out that, apart from the applicant's failure to execute a decree not being a ground warranting the striking out of the notice of appeal, the applicant's counsel has not established existence of facts to the effect that the respondent has not made a follow up on the request to be supplied with the proceedings. Instead, the respondent has established to have been prevented to institute an appeal because of the Deputy Registrar's inaction to supply the requisite proceedings. It taxed our minds if it is prudent to make the respondent a sacrificial lamb to shoulder the blame on the inaction of the Registrar and we think the same not proper having reflected what transpired in the case of **FOREIGN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION VS. ALEXANDER PANOMARITIS** (supra). The Court had the opportunity to consider circumstances whereby the Registrar though requested to furnish the respondent with certified proceedings did not oblige until after the filing of the application seeking to have the notice of appeal struck out. Apart from the Court observing the situation to have been beyond the control of the respondent since the copy of proceedings were not ready for collection, it held thus:

> *"Since the inordinate delay in furnishing a certified copy of the proceedings of the High Court cannot be*

blamed on the respondent no cause of action existed on his part to bar him from instituting and prosecuting his appeal."

In the case at hand, when the applicant lodged this matter on 10/3/2017, the respondent had more than two years earlier requested to be furnished with certified proceedings within the prescribed thirty (30) days from the date of impugned decision and the letter was copied and served to the applicant which was not at all contested by the applicant's counsel. It is vivid that, after lodging the notice of appeal the respondent took steps to keep live a pursuit of an intended appeal. However, as the proceedings have not yet been supplied, this was indeed beyond the control of the respondent who cannot be blamed for not instituting the appeal as suggested by Ms. Sylister. Besides, this being a second appeal, in terms of Rule 96(2) the record of proceedings is one of the essential documents to be included in the record of appeal without which the respondent cannot institute an appeal or else risk to bear the adverse consequences of lodging an incomplete record of appeal.

Furthermore, we decline the invitation by Ms. Sylister to invoke the current Rule 90(5) of the Rules which came into being vide Government Notice No. 344 of 2019, to conclude that, the respondent did not follow up

the requested proceedings to the Registrar after the expiry of 90 days from the date of coming into force of the said amendment. We have taken such stance having found the applicant's argument wanting and misplaced because that is not a ground upon which the motion is sought. This is the essence of Rule 48 of the Rules which categorically stipulates as follows:

> *"48. -(1) Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit.* ***It shall cite the specific rule under which it is brought and state the ground for the relief sought."***

[Emphasis supplied]

The bolded expression emphasises on the essence of the notice of motion disclosing the grounds for the relief sought so as not to catch the adverse party unaware and not being in a position to make requisite response in the affidavit in reply. Besides, since at the time of lodging this application the respondent had already taken essential steps to institute an appeal but as earlier pointed out, was impeded by the inaction of the Registrar to supply the requested proceedings, it will be absurd to invoke the retrospectivity principle to invoke Rule 90(5) of the Rules to penalise the respondent. In a

nutshell, for now the said Rule is inapplicable given the circumstances of the application.

In view of what we have endeavoured to demonstrate, as it stands, the respondent has done its part having taken essential steps to institute an appeal and cannot be blocked to pursue it. Finally, there being no evidence that the respondent failed to take essential steps to lodge an appeal, we find the present application not merited. In the result, we dismiss it with costs.

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 Ms. Magdalena Sylister, learned counsel for the Applicant and Mr. Ombeni Kimaro,c learned counsel for the Respondent/Republic is hereby certified as a true copy of the original.

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