

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

**(CORAM: JUMA, C.J., MKUYE, J.A., And WAMBALI, J.A.)**

**CIVIL APPLICATION NO. 511/03 OF 2019**

**EMERESIANA METHEW.....APPLICANT**

**VERSUS**

**LUCIA M. WARIOBA .....RESPONDENT**

**(Application for an order to strike out the notice of appeal from the decision  
of the High Court of Tanzania at Dodoma)**

**(Kitusi, J.)**

**Dated the 8<sup>th</sup> day of October, 2018**

**in**

**(PC) Probate Appeal No. 6 of 2017**

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**RULING OF THE COURT**

**18<sup>th</sup> & 21<sup>st</sup> September, 2020**

**WAMBALI, J.A.:**

In its decision in respect of Probate Cause No. 11 of 2016, the Urban Primary Court of Dodoma appointed Emeresiana Mathew, the applicant and Lucia M. Warioba, the respondent as administrators of the estate of the late Mathew Edward Maya who died intestate on 6<sup>th</sup> March, 2016.

The decision of the Urban Primary Court was contested in the District Court of Dodoma in Probate Cause No. 11 of 2016 by the present

respondent, who contended that as the same court had previously appointed her as administrator of the deceased's estate in its judgment delivered on 20<sup>th</sup> June, 2019, the subsequent proceedings which led to the joint appointment of the present applicant and herself as administrators were invalid.

The District Court heard the parties, and as it were, in the end, it overturned the Urban Primary Court's judgment and decided in favour of the respondent.

As the applicant was aggrieved by the decision of the District Court, she successful appealed to the High Court in PC Probate Appeal No. 6<sup>th</sup> of 2017. In its decision delivered on 8<sup>th</sup> October, 2018, the High Court quashed the decision of the District Court and restored the Urban Primary Court's decision. Aggrieved, the respondent on 6<sup>th</sup> November, 2018 lodged a notice of appeal against the High Court's decision to this Court. The notice of appeal was served on the applicant who on 19<sup>th</sup> September, 2019 through the services of Mr. Fred Peter Kalonga learned advocate, lodged a notice of address of service in compliance with the provisions of Rule 86 (1) (a) of the

Tanzania Court of Appeal Rules, 2009 (the Rules) and served it upon the respondent.

On the other hand, according to the record of the application, since the respondent lodged the notice of appeal on 6<sup>th</sup> November, 2018 she has never taken essential steps to lodge the appeal. It is in this regard that the applicant was prompted to lodge the present application. The application is premised on the provisions of Rule 89 (2) of the Rules seeking the order of the Court to strike out the notice of appeal for failure of the respondent to take essential steps to lodge the appeal within the period of sixty (60) days prescribed under Rule 90 (1) of the Rules.

The application which is through the notice of motion is supported by the affidavit deposed by Fred Peter Kalonga. Unfortunately, until the application was called on for hearing on 18<sup>th</sup> September, 2020, the respondent had not lodged an affidavit in reply as required in terms of Rule 56 (1) of the Rules.

When the application was called on for hearing, the applicant was represented by Mr. Fred Peter Kalonga, whereas the respondent appeared in person unrepresented.

Submitting in support of the application Mr. Kalonga adopted his affidavit and briefly stated that apart from lodging a notice of appeal on 6<sup>th</sup> November, 2018, the respondent has not taken any essential step to lodge the appeal. He explained that the respondent did not comply with the provision of Rule 90 (1) of the Rules by lodging the appeal within sixty days and even if she intended to rely on the proviso to that Rule, there is no indication that she wrote a letter to the Registrar of the High Court to request copies of proceedings and served it upon the applicant as required by the Rules. The learned advocate submitted further that there is no indication that the respondent has applied to the High Court to be granted leave to appeal and certificate on point of law as the dispute between the parties originated from the Primary Court. In the circumstances, Mr. Kalonga urged us to strike out the notice of appeal with costs for failure of the respondent to take essential steps to lodge the appeal within the prescribed period.

On her part, the respondent did not dispute the fact that she has not taken any steps required by the law to lodge the appeal within the prescribed period. However, she attributed the failure to her financial constraints to engage an advocate to lodge the appeal. As a result, she

submitted, she has greatly depended on the non-governmental organization offering legal aid to assist her to lodge the appeal. Unfortunately, she stated, even the said assistance has not enabled her solve her predicament as she has not managed to take essential steps to lodge the appeal within the prescribed period. In addition, she stated that her delay has also been caused by the fact that she has been sick for long time and thus, she has not been able to follow up the relevant processes to lodge the appeal to this Court. In the event, the respondent implored us to find that her delay to take essential steps to lodge the appeal has not been caused by her negligence on her part, but it is due to her financial constraints and illness. She thus urged us to dismiss the application.

Having heard the learned advocate for the applicant and the respondent submission and upon considering the affidavit in support of the application, the major issue for our determination is whether the application has merits.

We deem it appropriate to preface our deliberation by reproducing the provisions of Rule 90 (1) and (3) which provides as follows:-

*"90 (1) 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 the 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.*

*(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".*

It is apparent from the reproduced provisions of Rule 90 (1) of the Rules that an intending appellant should lodge an appeal within sixty days of

the date of filing the notice of appeal. In the present matter, therefore, as the respondent lodged the notice of appeal on 6<sup>th</sup> November, 2018, she was mandatorily required to institute the appeal on or before 5<sup>th</sup> January, 2019. On the contrary, until 8<sup>th</sup> October, 2019 when the applicant lodged the present application, it is not disputed that the respondent has not taken essential steps prescribed by the law to lodge the appeal.

At this juncture it is instructive to emphasize that Rule 90 (1) and (3) of the Rules that require the intending appellant to apply for copies of proceedings of the subordinate court to the Registrar of the High Court and serve the same to the intending respondent is the first step to show that the respective party has initiated the appeal processes after lodging the notice of appeal. Besides, serving the said letter to the respondent, entitles the intending appellant to rely on the proviso to Rule 90 (1) of the Rules to apply for a certificate of delay to be issued by the Registrar of the High Court excluding the days in which there was a delay of lodging the appeal after the expiry of the period of sixty days. In the present matter, the respondent readily conceded that she did not write a letter to the Registrar of the High Court to apply for copies of proceedings and therefore, she could not have served it on the applicant.

On the other hand, the respondent conceded that she did not lodge before the High Court any application to apply for leave and certificate on points of law as required in terms of the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 despite the fact that the dispute between the parties originated from the Primary Court as rightly submitted by Mr. Kalonga for the applicant.

From what we have stated above in our deliberation, it is undisputed that since the respondent lodged the notice of appeal on 6<sup>th</sup> November, 2018 until when the applicant lodged the present appeal on 19<sup>th</sup> September, 2019, more than ten months had lapsed without taking any essential steps to lodge the appeal. Indeed, as she readily admitted before us during her oral submission, to date she has not taken any step to lodge the appeal or seek extension of time to take those essential steps whose periods provided by the law have also lapsed.

In an akin situation the Court in the **Registered Trustees of Chama cha Mapinduzi v. Christina Ngilisho**, Civil Application No. 153/05 of 2017, made reference to the previous decision in **Olivia Kisinja Ndete v.**



**Hilda Mtunga**, Civil Application No. 4 of 2011 (both unreported) where it was stated that:-

*"The law is now settled, upon lodging a Notice of Appeal, the intending appellant must not sit back but is required to move the processes 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."*

In the present application, we share the observation of the Court in the reproduced quotation much as since the respondent lodged the notice of appeal, she seems to have sat back without taking any essential steps to move the processes to lodge the intended appeal as we have amply demonstrated above. In the circumstances, we are satisfied that failure of the respondent to take essential steps to lodge the appeal within the prescribed period entitles the applicant to approach the Court under Rule 89(2) of the Rules to have the notice of appeal struck out.

We are mindful of the reasons for the delay advanced by the respondent. However, with respect, we think they are not backed by any

cogent evidence in the record of the application. It is not disputed that the said reasons were stated by the respondent in her oral submission before us. She did not for instance; explain sufficiently the exact period she has been sick to the extent of failing to take essential steps to lodge the appeal. Unfortunately, as we intimated at the beginning of this ruling, she did not lodge an affidavit in reply where she would have included medical evidence concerning her illness. This allegation, therefore, has not been sufficiently substantiated by the respondent to enable us to find her explanation plausible. Moreover, she has also not convinced us that her alleged lack of finance obstructed her to take essential steps. We think that some of the steps, like writing a letter to the Registrar of the High Court requesting for copies of proceedings immediately after she lodged a notice of appeal could not have involved a lot of finance on her part as she is within Dodoma Region where the High Court Registry is situated. This step was very crucial as it would have entitled her to rely on the proviso to Rule 90 (1) of the Rules, if she would have also copied the respective letter to applicant.

It follows that as the respondent has unreservedly demonstrated that she has not taken essential steps to lodge an appeal after she lodged the

notice of appeal, the applicant is entitled to move the Court in terms of Rule 89 (2) of the Rules to have her notice of appeal struck out.

We must emphasise that while it the duty of the courts of law to facilitate expeditious and timely disposal of proceedings before them, equally important, parties in the dispute should ensure that they take essential steps prescribed by the law to move the processes of the desired proceedings for the purpose of enabling timely determination of those disputes by the courts. Litigation must have an end to enable parties to engage in other businesses. It is in this regard that in **Mwanaasha Seheya v. Tanzania Posts Corporation**, Civil Appeal No. 37 of 2003 (unreported) the Court emphasised the importance of parties lodging the appeals within the prescribed period when it stated that:-

*"...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..."*

In the result, in the present application, we are satisfied that the respondent has failed to take essential steps to lodge the intended appeal

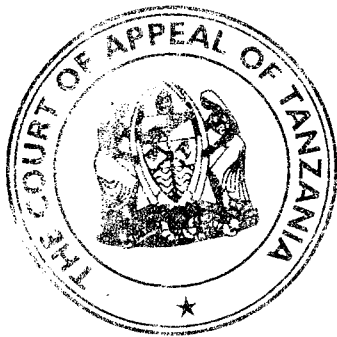
within the prescribed period of sixty days without sufficient cause. The application, therefore, has merit. Consequently, in terms of Rule 89 (2) of the Rules, we strike out the notice of appeal. However, in view of the circumstances of this application, we order that parties shall bear their respective costs.

**DATED** at **DODOMA** this 19<sup>th</sup> day of September, 2020.


I. H. JUMA  
**CHIEF JUSTICE**

R. K. MKUYE  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**



The Ruling delivered this 21<sup>st</sup> day of September, 2020 in the presence of Mr. Fred Peter Kalonga, for the Appellant and the Respondent appeared in person is hereby certified as a true copy of the original.

  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**