

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 265/16 OF 2017

URBAN J. MTUI APPLICANT

VERSUS

1. COMMISSIONER GENERAL,

TANZANIA REVENUE AUTHORITY

2. ATTORNEY GENERAL



..... RESPONDENTS

**(Application to a strike out Notice of Appeal from the Judgment and Decree
of the High Court of Tanzania, at Dar es Salaam)**

(Mwaikugile, J.)

dated the 16th day of August, 2013

in

Civil Case No. 365 of 2001

.....

RULING OF THE COURT

12th & 23rd October, 2020

MWAMBEGELE, J.A.:

The applicant, Urban J. Mtui, together with one Ngidos Mkamba who is not a party to this appeal as he passed on during the pendency of the matter in the High Court the subject of this appeal, were employees of the first respondent. Upon termination of their employment, they challenged it in the High Court vide Civil Case No. 365 of 2001. The High Court (Mwaikugile, J.), on 16.08.2013, decided in favour of the applicant and

awarded him "Shs. 383,364,476/30 with interest at the rate of 13% on the principal sum from the date of the suit to the date of judgment and at the court rate of 7% from the date of delivery of judgment till satisfied in full plus costs."

The respondents did not file any notice of appeal to challenge the decision of the High Court. However, about three years later; in 2016, when the applicant commenced the process of executing the decree, the respondents filed an application in the High Court for extension of time within which to lodge a notice of appeal. The High Court (Munisi, J.) granted the application on 15.09.2016 basically on the ground of illegality of the decision of the High Court. The respondents were given a fortnight reckoned from 15.09.2016; the date of the ruling, within which to file the notice of appeal craved for.

The notice of appeal was prepared on 22.09.2016 and lodged in the High Court on 27.09.2016. However, it had two ailments; first, it made reference to Civil Case No. 365 of 2013 instead of Civil Case No. 365 of 2001 and, secondly, it was lodged in the registry of the Land Division of the High Court. We shall revert to these ailments at a later stage in this ruling.

On 21.09.2016, the respondents wrote the Registrar of the High Court (Main Registry) requesting for copies of documents in respect of Civil Case No. 365 of 2013 for appeal purposes. Ever since, the respondents stayed put. This prompted the applicant to file the present application taken out under the provisions of rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same was lodged in the Court on 20.06.2017. It is supported by an affidavit deposed by Urban Jeremiah Mtui; the applicant, and resisted by an affidavit in reply deposed by Narindwa Sekimanga; a State Attorney in the office of the second respondent.

On the one hand, the gist of the applicant's affidavit is that the respondents have not taken essential steps towards the furtherance of the intended appeal in that the notice of appeal and the letter requesting for the documents for appeal purposes are in respect of a non-existent matter; they are not in respect of Civil Case No. 365 of 2001, the matter which the respondents intend to assail. To him, the applicant deposes, no essential steps have been taken by the applicant in furtherance of the intended appeal. On the other hand, the gist of the respondents' affidavit in reply is that the reference to the year 2013 in the notice of appeal and in the

letter requesting for documents for appeal purposes was but a slip of the pen. It is deposed that the respondents still have intention to institute the appeal but that they have not been supplied with the relevant documents to date.

When the application was placed for hearing before us on 12.10.2020, both parties were represented. While the applicant was represented by Mr. Cornelius Kariwa, learned advocate, the respondents had the services of Ms. Mercy Kyamba, learned Principal State Attorney and Ms. Narindwa Sekimanga, learned State Attorney.

In their arguments, the trained minds for the parties, having adopted the respective affidavit and affidavit in reply, they did not have much to add. Mr. Kariwa only added that taking into consideration the chronological set of events deposed in the affidavit and affidavit in reply, it would appear the respondents are not interested in instituting their appeal and hence the notice of appeal which impedes the execution of the decree should be struck out with costs. On the part of the respondents, Ms. Kyamba reiterated that the respondents are still interested in instituting the appeal and that is the reason why they filed a notice of appeal and applied for the documents for appeal purposes which have not been supplied to

them yet. Ms. Kyamba relied on our decision in **Transcontinental Forwarders Ltd. v. Tanganyika Motors Ltd.** [1997] T.L.R. 328 at 330 cited in **Saleh Abdi Mohamed v. Katibu Baraza la Mapinduzi and Another**, Civil Application No. 384/15 of 2018 (unreported) – [2018] TZCA 334 at www.tanzlii.org, to drive home the point that when they applied for the documents, they had no legal duty to make a follow up; they were home and dry. Ms. Kyamba thus prayed that the application should be dismissed with costs.

The issue for determination by the Court, we think, is whether the respondents have not taken essential steps towards the institution of the intended appeal so as to warrant us strike out the underlying notice of appeal. The issue on which the parties have locked horns is on a very narrow compass: whether reference to the year of the case sought to be assailed as 2013 instead of 2001 was a slip of the pen as claimed by Ms. Kyamba for the respondents. We have dispassionately considered the arguments for both parties and the entire record of the application. Having so done, we have serious doubts if reference to the decision sought to be challenged as Civil Case No. 365 of 2013 was not a deliberate act. We shall demonstrate. However, before such demonstration, in order to

appreciate the decision we are going to make, we find it apt to reproduce the notice of appeal and the letter requesting for documents for appeal purposes. The notice of appeal was annexed to the affidavit as Annexure UM-5. It reads:

"IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

IN THE MATTER OF THE INTENDED APPEAL NO. OF 2016

BETWEEN

TANZANIA REVENUE AUTHORITY1ST APPELLANT

ATTORNEY GENERAL2ND APPELLANT

AND

NGIDOS MKAMBA1ST RESPONDENT

URBAN J. MTUI2ND RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
at Dar es Salaam (Honourable Mwaikugile, J.) dated 16th August, 2013
in Civil Case No. 365 of 2013**

NOTICE OF APPEAL

(Made under Rule 83 (1) of the Tanzania Court of Appeal Rules, 2009)

TAKE NOTICE that the Appellants being aggrieved by the decision of **Honourable Justice Mwaikugile, J.** given at Dar es Salaam on the 16th August, 2013 intends to appeal to the Court of Appeal of Tanzania against the whole of the said decision.

The address for service of the intended Appellants is;

Attorney General's Chambers,
Kivukoni Front,
P.O. Box 9050,
DAR ES SALAAM.

It is intended to be served to;

C. K. Kariwa & Co. Advocates,
Mkunazini Building, 1st Floor,
Kiungani Street,
P. O. Box 13138,
DAR ES SALAAM.

Dated this 22nd day of September, 2016.

.....
STATE ATTORNEY

To: The Registrar of the High Court of Tanzania at Dar es Salaam.

Lodged in the High Court of Tanzania Land Registry at Dar es Salaam on the
27th day of September, 2016.

.....
REGISTRAR

COPY TO BE SERVED:

The Registrar,
Court of Appeal of Tanzania,
P. O. Box 9004,
DAR ES SALAAM.

DRAWN AND FILED BY:

State Attorney,
Attorney General's Chambers,
Kivukoni Front,
P. O. Box 9050,
DAR ES SALAAM. "

[bold in the court of lodgement supplied].

The letter requesting for documents for appeal purposes which was appended to the affidavit in support of the application as Annexure UM-6 reads:

"Ref. No. AGC/MISC/2016/4/13

21st September, 2016

The Registrar,
High Court of Tanzania,
(Main Registry) At Dar es Salaam,
DAR ES SALAAM.

RE: CIVIL CASE NO. 365 OF 2013

NGIDOS MKAMBA1ST PLAINTIFF

URBAN J. MTUI2ND PLAINTIFF

VERSUS

TANZANIA REVENUE AUTHORITY1ST DEFENDANT

ATTORNEY GENERAL2ND DEFENDANT

Reference is made to the above heading.

We hereby inform you that, we have been aggrieved by the decision of **Honourabel Mwaikugile, J. delivered on 16th August, 2013** in the above named Civil Case.

In view thereof, we hereby urgently request your good Office to avail us with the following documents for appeal purposes:-

1. Copy of Judgment
2. Copy of Proceedings
3. Copy of decree and drawn orders
4. Certificate of delay under Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009

Thanks in advance.

C. Mtae

FOR: ATTORNEY GENERAL"

Having reproduced the notice of appeal and the letter which was written by the respondents requesting for a copy of proceedings so as to challenge the decision of the High Court, we now proceed to demonstrate why we do not think reference to the decision as Civil Case No. 365 of 2013 was not a deliberate act.

First, when the matter the subject of this application was decided in favour of the applicant, the respondents did not immediately seek to challenge it by way of an appeal. They sat back and relaxed until some three years later when they filed an application for extension of time after the applicant wrote them a letter bearing Ref. No. CK/GC/2015 dated 18.11.2015 annexed to the affidavit in support of the application seeking to execute the decree of the High Court. The High Court (Munisi, J.) granted the extension relying on **VIP Engineering and Marketing Limited v. Citibank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7, and 8 of 2008 (unreported). In essence, it was on the basis of the illegality of the decision of the High Court the respondents were granted the extension applied for, not that they had good cause for the delay.

Secondly, the notice of appeal the respondents filed having been granted the extension sought made reference to Civil Case No. 365 of

2013, not Civil Case No. 365 of **2001**. Reference to the year **2013**, Ms. Kyamba deposed that it was a slip of the pen. We understand Mwaikugile, J. delivered the judgment in respect of the parties on 16.08.2013 and, everything being equal, we would have said the error was a slip of the pen. That is, ordinarily, we would have agreed with this contention if it were not for its recurring, as hereunder demonstrated, coupled with other seemingly deliberate ailments which takes it away from the realm of the slip of the pen.

Thirdly, the notice of appeal referred to in the foregoing paragraph was lodged in the registry of the **Land Division of the High Court**. This course of action by the respondents baffled us. The dispute between the parties was not at all related to a land dispute and the parties had never referred their dispute to that court. Why should the respondents have resorted to lodge it in the land division of the High Court? Given the lousy way the respondents handled this matter from the outset compels us to agree with Mr. Kariwa that the respondents had no intention to appeal so as to assail the decision.

Fourthly, the letter by the respondents bearing Ref. No. AGC/MISC/2016/4/13 dated 21.09.2016 purporting to apply for documents

for appeal purposes was addressed to the Registrar of the High Court (Main Registry). We wish to state at this juncture that even though the letter indicates "(Main Registry)", the same was cancelled and against it the words "at Dar es Salaam" were scribbled. No initials were inserted to suggest the scribble words were in were meant to replace the "Main Registry". This adds yet another puzzle as to which court was addressed.

The suit whose decision is sought to be challenged was filed in the High Court, Dar es Salaam Zone. Thus, addressing the letter to the Main Registry of the High Court served no useful purpose and this enhances our worries of the respondents not intending to institute the intended appeal.

Fifthly, the letter by the respondents referred to in the foregoing paragraph, made reference to Civil Case No. 365 of 2013 instead of Civil Case No. 365 of 2001. Again, the same arguments in respect of such reference in the notice of appeal above, are useful here. We shall not repeat them.

Lastly, the notice of motion and affidavit in this application were served on the respondents way back in 2017. Ms. Kyamba so admitted at the hearing of the application. The respondents never filed an affidavit in reply until 12.10.2020; the date of the hearing when we granted the prayer

by Ms. Kyamba to have it accepted as on the previous working day, the Registrar of the Court could not admit it for not being brought within three working days.

In view of the above discussion, we have serious doubts if the infraction by the respondents to refer the impugned judgment as Civil Case No. 365 of 2013 instead of Civil Case No. 365 of 2001, to lodge the notice of appeal in the Land Division of the High Court and to apply for documents for appeal purposes to the Registrar of the High Court (Main Registry) was not by design. If anything, we think the ailment is far from being a *lapsus calami* as Ms. Kyamba would have us believe. It seems to us diligence of the respondents in instituting the intended appeal, with profound respect to Ms. Kyamba, is questionable. From the look of things, we, respectfully, do not think the shortcoming is an excusable keyboard mistake as Ms. Kyamba argued with some considerable force. It is our considered view that the respondents' way of handling the matter at hand leaves a lot to be desired. What explanation is given of lodging in the Land Division of the High Court a notice of appeal which had nothing to do with a land matter? Or what made the respondents address the letter to the Registrar of the Main Registry of the High Court while the case was filed,

heard and determined by the High Court, Dar es Salaam Zone? When we put these questions to Ms. Kyamba at the hearing, she did not have any plausible explanation. She ultimately surrendered the matter to the wisdom of the Court. And to take the matter a little bit further, what prevented the respondents from filing an affidavit in reply in the year 2017 when they were served with the application? Surely, we do not think the respondents were not deliberately negligent in dealing with the matter at hand. In the circumstances, the authorities relied upon by the respondents; **Transcontinental Forwarders Ltd** (supra) and **Saleh Abdi Mohamed** (supra) are distinguishable from the instant case.

For the avoidance of doubt, with the current position of the Rules, **Transcontinental Forwarders Ltd** (supra) is no longer good law – see: rule 90 (5) of the Rules. As per rule 90 (5) of the Rules, the Registrar is mandatorily required to ensure a copy of the proceedings is ready for delivery within ninety days from the date the appellant requested for such a copy. Likewise, the appellant is mandatorily required to take steps to collect the copy upon being informed by the Registrar to do so, or within fourteen days after the expiry of the ninety days. See also: **Arthur Kiriimi**

Rimberia & Another v. Kagera Tea Company Ltd & 3 Others, Civil Application No. 364/01 of 2018 (unreported).

Flowing from the above, we are satisfied that the cumulative effect of the respondents' acts in dealing with this matter would suggest that they are not interested in instituting the intended appeal hence their deliberate acts of not taking essential steps towards the institution of the purportedly intended appeal. As we observed in **Olivia Kisinja Mdetete v. Hilda Mkinga**, Civil Application No. 4 of 2011 (unreported):

"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."

[Quoted in **AIRTEL Tanzania Ltd v. Tanzania Revenue Authority**, Civil Application No. 148 of 2014 (unreported)].

We wish to underline that the essential steps envisaged by rule 89 (2) must be in respect of the decision sought to be challenged and relevant

documents lodged in the court which pronounced it. It is also important that the letter requesting for documents for appeal purposes must be addressed to the registrar of the court which passed the impugned judgment. Lodging the notice of appeal in a registry of the court which did not pronounce the impugned judgment and addressing the letter to the registrar of the Court which did not decide the matter sought to be challenged as happened in the case at hand are of no consequences, for they will not amount to taking essential steps in advancing the institution of the intended appeal. Simply put, the totality of the above discussion shows that contrary to rule 90 (1) of the Rules, there was no request to the Registrar, High Court at Dar es Salaam for the supply of the requisite documents for appeal purposes as required by the rule. Accordingly, the respondents, as already alluded to above, cannot avail themselves of the shield in **Transcontinental Forwarders Ltd** (supra). In our considered view, that shield is only available to a diligent litigant as opposed to the indolent.

In the upshot, we find merit in the application and grant it. Consequently, we are constrained to strike out the notice of appeal lodged by the respondents on 27.09.2016 seeking to challenge Civil Case No. 365

of 2013 (sic) delivered by the High Court (Mwaikugile, J.) on 16.08.2013. Bearing in mind that the subject of the dispute stems from the employer-employee relationship, we make no order as to costs.


DATED at DAR ES SALAAM this 22nd day of October, 2020.

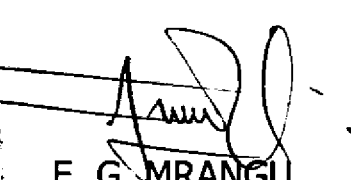
S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 23rd day of October, 2020 in the presence of Ms. Glory Venance, learned counsel for the Applicant and Mis Narindwa Sekimanga, learned State Attorney for the Respondents is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL