

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MKUYE, J.A, MWANDAMBO J.A And KITUSI, J.A)

CIVIL APPLICATION NO. 106/01 OF 2018

YUNUS KASHAKALA.....APPLICANT

VERSUS

ANTHONY HAJI.....RESPONDENT

**(Application for striking out the notice of appeal from the decision
of the High Court of Tanzania District Registry
at Dar es salaam)**

(Sameji, J.)

Dated the 18th day of August, 2017

in

Civil Appeal No 223 of 2016

RULING OF THE COURT

16th & 30th October, 2020

MKUYE, J.A.

Before the Resident Magistrate's Court of Dar es Salaam at Kisutu, the applicant, vide Civil Case No. 239 of 2011, sued the respondent for malicious prosecution claiming damages to the tune of Tshs. 70,000,000/= for humiliation, mental anguish and economic loss. The basis of the said suit was that the respondent had, initially, accused the applicant for stealing his fishing rods/gears which led to his arrest and

prosecution in the District Court for Kinondoni District through Criminal Case No. 1621 of 2009 but the said case was dismissed. The Resident Magistrate's Court of Dar es Salaam at Kisutu found in favour of the applicant and awarded him general damages to the tune of Tshs. 50,000,000/= . Upon being dissatisfied with that decision, the respondent lodged Civil Appeal No. 223 of 2016 at the High Court of Tanzania (Sameji, J.), but the same was, on 18/8/2017 dismissed for being time barred. Aggrieved by the High Court's decision, the respondent lodged a notice of appeal on 4/9/2017 and served a copy of it on the applicant on 6/9/2017. He also made an application for copies of proceedings, ruling and order on 21/8/2017 which was served on the applicant on 8/9/2017. Until on 6/4/2018 when this application was filed, he was yet to file an appeal to this Court.

The applicant has now filed this application by way of a notice of motion made under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for an order that the notice of appeal filed by the respondent on 4/9/2017 be struck out on the grounds that some essential steps in the proceedings have not been taken, to wit; no

application for leave to appeal to this Court has been made and the time within which to apply for the same and/ or file the appeal has lapsed.

The notice of motion is supported by the affidavit deposed by Yunus Kashakala, the applicant, contenting that from 18/8/2017 the date of the ruling sought to be impugned to 5/4/2018 when this application was lodged, almost 220 days have lapsed while the respondent has not taken any steps to apply to the High Court to be granted leave to appeal to this Court against the said decision.

On his part, the respondent resisted the application. Through his affidavit in reply he averred that he took all the necessary steps in instituting the intended appeal including lodging the notice of appeal, applying for certified copies of proceedings, Ruling and Order. Further to that, he lodged a reminder letter through his advocate requesting to be availed with the certified copies of those documents and that the delay has been caused by reasons which are beyond the applicant's control.

When the application was called on for hearing, the applicant was represented by Mr. Elisaria Masha, learned advocate while the respondent had the services of Mr. George Nyangusu, also learned advocate.

It should be noted that after the application was served on the respondent's advocate, he lodged a notice of preliminary objection on the ground that the jurat of attestation is defective for lack of the deponent's signature. However, upon informing the advocate that such anomaly did not exist in copies of the record of application for the use of the Court, he applied for leave, which we granted, to withdraw it.

Submitting in support of the application, Mr. Mosha in the first place adopted the affidavit and the written submission filed earlier on. After having done so, he contended that the respondent has not taken essential step in instituting the appeal and, in particular, he did not apply for leave to appeal to the Court of Appeal in compliance with Rule 45 of the Rules 2009 as amended by Tanzania Court of Appeal (Amendments) Rules, 2017 (GN No. 362 of 2017) and section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141, R.E. 2002 (the AJA). He said, since the appeal originated from the Resident Magistrate's Court of Dar es Salaam at Kisutu, leave to appeal was a mandatory requirement. In support of his argument he referred us to the case of **Asmin Rashid v. Boko Omari**, [1997] TLR 146. In that premise, he implored the Court to strike out the notice of appeal with an order that cost should follow the event.

In response, Mr. Nyangusu initially, resisted the application but upon a short dialogue with the Court, conceded that the respondent did not apply and obtain leave to appeal to this Court prior to lodging such appeal as required by terms Rule 45 of the Rules as amended by (GN No. 362 of 2017) and section 5 (1) (c) the AJA. In this regard, he implored the Court to strike out the notice of appeal as the respondent has failed to take essential steps for more than seven months now. He also agreed with Mr. Mosha that costs should follow the event.

We have examined and considered the averments in the affidavit and written submissions from either side as well as the concession by Mr. Nyangusu. The issue for this Court's consideration is whether the respondent has taken essential steps in instituting the appeal after having filed a notice of appeal on 4/9/2017.

Our starting point would be to reproduce Rule 89 (2) of the Rules to which this application is premised. It states as follows:

" Subject to provisions of sub rule (1), any other person on whom a notice of appeal was 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”.

Our reading of the above cited provision is that the person on whom a notice of appeal has been served is permitted/ entitled to apply for the striking out the notice of appeal on two situations. **One**, if no appeal lies; **two**, if some essential steps in the proceedings have not been taken or have not been taken within the prescribed time. - See also **Atlantic Electric Ltd v. Morogoro Region Cooperative Union**, [1993] TLR 12; and **Martin D. Kumaliya & 117 Others v. Iron and Steel Ltd**, Civil Application No. 70/18/2018 (unreported). For instance, in the latter case it was categorically stated as follows:

“The above provision is self-explanatory. It gives recourse to the relief of striking out the notice of appeal to a respondent or any other person on whom a notice of appeal has been served 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 time."

In the matter at hand, the judgment sought to be appealed against was delivered on 18/8/2017. The respondent lodged the notice of appeal on 4/9/2017. He wrote a letter to be supplied with typed and certified copies of proceedings for his necessary action on 21/8/2017 and served it on the applicant on 8/9/2017. Having regard to the fact that the intended appeal originated from the Resident Magistrate's Court, then the respondent ought to apply and obtain leave to appeal to this Court prior to lodging such appeal. (See **Margreth Mkima v. Saada Bakari**, Civil Application No 113 of 2012 (unreported). This requirement was also emphasized in the case of **Asmin Rashid** (supra) where it was stated as follows:

"The essential steps in the prosecution of an appeal as envisaged by Rule 82 [Now 89 (2)] were steps which advanced the hearing of the appeal and not explanation for delays. One of the essential steps... was to apply for leave to

appeal...for there was no automatic right of appeal against that ruling."

However, the respondent did not apply for leave to appeal to this Court as required by section 5(1)(c) of the AJA which provides as follows:

"In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(a).....N A.....

(b).....N A.....

(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order judgment, decision or finding of the High Court".

Much as the respondent applied for copies of proceedings and served the copy of the letter applying for such documents within time so that it could entitle him to appeal at a period beyond 60 days from the lodgment of the notice of appeal, he cannot dispense with leave to

appeal to this Court. (See **Margreth Mkima** (supra) and **Asmin Rashid** (supra)). On the effect of such failure, we are guided by the case of **National Housing Corporation v. Miss Lazim Ghodu Shekhe**, Civil Application No. 134 of 2005 (unreported) where the Court, when was faced with an akin situation stated as follows:

"Since the respondent failed to apply for leave to lodge her appeal in this Court for the past nine years, and since there is no application for extension of time in which to file the same, I agree with the applicant's Legal Officer that the respondent has failed to take essential steps in prosecuting the intended appeal."

Thus, in the matter at hand, it is our considered view, much as we acknowledge that the respondent took some steps such as applying for copies of proceedings and serving the application thereof on the applicant which if all things were equal would have entitled the respondent the exclusion of time under Rule 90 (1) of the Rules, we agree with Mr. Mosha's argument to which Mr. Nyangusu conceded that, failure by the respondent to seek and obtain leave to appeal to this Court

amounted to failure to take one of the essential steps in prosecuting the appeal as we have alluded to earlier on.

In the final analysis, we are settled in our mind that the respondent failed to take essential steps in instituting his appeal within time. Hence, in terms of Rule 89 (2) of the Rules, we order that the notice of appeal lodged by the respondent on 4/9/2017 be struck out with costs.

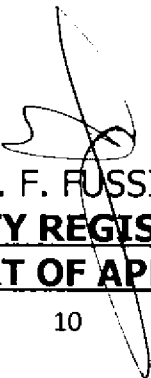
DATED at **DAR ES SALAAM** this 27th day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 30th day of October, 2020 in the presence of Mr. Elisaria Masha, learned advocate for the Applicant and Mr. Othman Omary, learned advocate for the respondent, is hereby certified as a true copy of the original.


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL