

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: LILA, J.A., WAMBALI, J.A., And KOROSSO, J.A.)

CIVIL APPEAL NO. 119 OF 2016

DAVID MALILI APPELLANT
VERSUS

MWAJUMA RAMADHANI RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Ndika, J.)

Dated the 26th day of September, 2014

in

Misc. Land Appeal No. 48 of 2013

JUDGMENT OF THE COURT

26th November, & 4th December, 2020

KOROSSO, J.A.:

The appeal arises from the decision of the High Court of Tanzania Land Division (Ndika, J.) in Misc. Land Application No. 48 of 2013, although the said Ruling of the High Court is inadvertently, titled Miscellaneous Land Appeal No. 48 of 2013 (found at page 106 of the record of appeal). In that application, the applicant sought for extension of time to appeal to the High Court challenging the decision of the District Land and Housing Tribunal Ilala District (DLHT) in Land Appeal No. 42 of 2010.

The background to this case albeit in brief is that, the respondent in Land Case No. AR 99 of 2008 successfully sued the applicant at the

Ward Tribunal of Segerea (WT) on a land dispute concerning a piece of land situated at Ugombolwa Street. The WT ordered that the respondent be compensated Tshs. 2,000,000/= in two installments. The respondent was dissatisfied by the granted compensation amount and hence appealed to the District Land and Housing Tribunal for Ilala (DLHT), arguing that the compensation amount granted and the order for the payment to be in installments was unreasonable. The appeal was allowed and the appellant was ordered to pay the respondent Tshs. 5,000,000/= in lumpsum and the costs of the appeal.

Aggrieved by this decision, the appellant filed an appeal to the High Court of Tanzania, Land Division, at Dar es Salaam, Miscellaneous Land Appeal No. 48 of 2013. The High Court (Ndika J.) in his judgment of 31st March, 2014 found the appeal hopelessly time barred, and struck it out with costs.

Not perturbed, the appellant proceeded to file an application (Misc. Land Application No. 48 of 2013) that sought extension of time within which to lodge an appeal to the High Court against the decision of the DLHT. The High Court (Ndika, J.) dismissed the application on the 26th September, 2014 finding that the appellant failed to establish good and sufficient cause to be granted extension of time to appeal. It is against

this decision whereby, the appellant dissatisfied, filed an appeal to this Court.

At this juncture it is also important to note that, prior to the filing of the current appeal, the appellant had sought leave to appeal to this Court and in the Ruling by the High Court (Ndika, J.), also unfortunately titled Miscellaneous Land Appeal No. 48 of 2013 (found at page 81 of the record of appeal), the appellant was granted the prayers sought.

The appeal is based on three (3) grounds as expounded in the Memorandum of Appeal filed on the 9th August, 2016 which reads:

1. That, the High Court (Land Division) erred in law when it denied to extend time for the Appellant to appeal out of time while the Appeal has overwhelming chance of success.
2. That, the orders of the High Court (Land Division) which declined extending time for the Applicant to appeal out of time is unlawful.
3. That, the High Court (Land Division) erred in law for dismissing the Appellant application to extend time to appeal out of time without taking into consideration reason for delay given by the Appellant.

In the appeal, the appellant seeks for the appeal to be allowed and the decision of High Court (Land Division) that declined to extend time for him to appeal out of time to be set aside.

David Malili, the appellant fended for himself and was unrepresented at the hearing of the appeal while Mwajuma Ramadhani, the respondent also appeared in person, unrepresented.

On the day the appeal was called on for hearing, the Court sought from the respondent information on whether or not he had filed the notice of appeal. This query was prompted because our perusal of the record of appeal failed to find it anywhere. The respondent informed the Court that he does not remember to have filed the notice of appeal or to have seen it and only remembered to have been granted leave to appeal to this Court by the High Court. He however intreated the Court, that notwithstanding the absence of the notice of appeal in the record of appeal, to protect his rights and determine the appeal in his favour.

On the part of the respondent, she adamantly denied having been served with the notice of appeal and that she has never seen it before. She prayed the Court to do the needful under the circumstances.

We have prudently perused through the record of appeal, and have not found the notice of appeal related to this appeal. The only

record available related to this appeal, is the leave to appeal granted as stated hereinabove.

As stated earlier, on the side of the appellant, he only remembers to have been granted leave to appeal to this Court. This prompted us to peruse further the record related to the application for leave to appeal to this Court, to gather whether there was a mention or reference of any filed notice of appeal. Understanding that, leave to appeal is granted upon there being a notice of appeal filed. We draw the inference that the notice of appeal must be filed first for other processes to institute the appeal to be undertaken from our reading of Rule 83 and 90 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

We thus took the liberty of perusing through the documents related to the application for leave to appeal. Our scrutiny of the relevant chamber summons (found at pages 112-113) and the supporting affidavit sworn by the appellant (at pages 114-115) shows no averment by the appellant related to a notice of appeal having been filed before the application was lodged. This can be drawn out from the contents of paragraphs 7 of the said affidavit which state:

"6. that, after the said judgment I lodged Application for the extension of time on 2nd of May 2014 the same was also dismissed by

Honourable G. A. M. Ndika on 26th of September 2014 in favour of the Respondent hence this Application. Attached herewith is a copy of Judgment and is hereby marked as ANNEXURE-E. for which leave of this Court is craved for it to form part of this Affidavit".

There is no averment in the other paragraphs of respective affidavit which in any way makes reference to there being a notice of appeal in place.

Having regard to what has been emphasized above, undoubtedly, the issue before us for determination is whether or not the appellant complied with the requisite requirements provided by the law when one is desirous to appeal to this Court. This being a civil appeal, Rule 83 of the Rules provides as follows:

"83(1) any person, who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court.

(2) Every notice shall, subject to the provisions of rules 91 and 93, be so lodged within thirty days of the date of the decision against which it is desired to appeal.

(3) N/A

(4) When an appeal lies only with leave or on a certificate that a point of law is involved, it shall not be necessary to obtain the leave or the certificate before lodging the notice of appeal.

(5) N/A

(6) Notice of appeal shall be substantially in the Form D in the First Schedule to these Rules and shall be signed by or on behalf of the appellant”.

The relevance of the cited provisions is that any person who desires to appeal to this Court against a decision by the High Court in civil cases has to lodge a written notice within thirty (30) days of the date of the impugned decision. Despite the fact that Rule 83 of the Rules does not clearly specify that once a notice of appeal is filed, it institutes an appeal as found in rule 68(1) of the Rules on criminal appeals but that the notice of appeal in civil appeals commences the appeal process to this Court.

The above provision is read together with Rule 90(1) which states:

*“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 the costs of the appeal..."*

[Emphasis added]

The import of Rule 90 was discussed by this Court in **Geoffrey Kabaka vs Farida Hamza (Administratrix of the Estate of the late Hamza Adam)**, Civil Appeal No. 28 of 2019 (unreported), by adopting the findings in two cases. In **East African Mines Limited vs Christopher Kadeo**, Civil Appeal No. 53 of 2005 (unreported) which was dealing with the old position when the current Rule 90 was Rule 83 and held:

"We shall first deal with the issue whether the appeal was time barred. On this, the relevant provision is rule 83 which under sub-rule (1) provides in clear terms that an appeal shall be instituted within sixty (60) days of the date of the notice of appeal..."

Another case referred to is **Mwanaasha Seheye vs Tanzania Ports Corporation**, Civil Appeal No. 37 of 2003 (unreported);

"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. Secondly he must have sent a copy of such application to the respondent"

The above cited cases clearly point out that it is the notice of appeal which initiates the appeal process to the Court of Appeal. At the same time, according to Rule 96(1) (f) of the Rules, a notice of appeal is part of the document required to form the record of appeal apart from all the other documents specified under Rule 96 of the Rules.

In the present case, as observed hereinabove, the notice of appeal was nowhere to be found in the record of appeal and the response from the appellant that he does not remember whether or not he did lodge a notice of appeal but remembers he applied and was granted leave to appeal, and this statement left us with doubts on there being a notice of appeal filed by the appellant. The doubts were enhanced by the fact even going through the chambers summons and supporting affidavit which sought leave to appeal to this Court, as also reproduced herein before, there is nothing that refers to the filing of a notice of appeal. To further augment our doubts, the respondent asserted that she has never been served with a notice of appeal.

The duty to serve a notice of appeal to the respondent lies upon the one who files the appeal. Rule 84(1) of the Rules states:

“An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal: but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court”.

This Court has previously discussed the import of this provision. In **National Bank of Commerce and Another vs Ballast Construction Company Ltd**, Civil Appeal No. 72 of 2017 (unreported), the Court observed as follows:

“That Rule is couched in mandatory terms... The purpose of serving the respondent with the notice of appeal is not far to seek. The notice is intended to make the respondent aware that an appeal is being preferred hence be able to marshal his arsenals properly”.

Our analysis of the oral submissions by the parties and upon perusal of the record of appeal, we are satisfied that the notice of appeal was never lodged nor served on the respondent. Thus, the appellant in effect never commenced his appeal process by lodging the notice of appeal. Being aggrieved by the impugned decision to dismiss his application for extension of time to appeal, the appellant proceeded

to seek for leave to appeal and thereafter filed a memorandum of appeal. The absence of the notice of appeal contravened the law, and in fact makes the appeal before us, incompetent.

For reasons stated above, in the end, we hereby strike out the appeal. This issue having been raised by the Court, under the circumstances, each party to bear own costs.

DATED at DAR ES SALAAM this 2nd day of December, 2020.

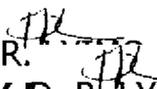
S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The judgment delivered this 4th day of December, 2020 in the presence of the appellant in person and in the absence of the respondent is hereby certified as a true copy of the original.



D. R. 
DEPUTY D. R. LYIMO
COURT OF APPEAL