

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MZIRAY, J.A., MWANDAMBO, J.A., And KEREFU, J.A.,)**

**CIVIL APPLICATION NO. 61/16 OF 2017**

**MWANANCHI COMMUNICATION LTD .....APPLICANT**

**VERSUS**

**NEW HABARI (2006) LIMITED .....RESPONDENT**

**(Application for striking out a notice of appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam**

**(Nyangarika, J)**

**dated the 7<sup>th</sup> day of November, 2014**

**in**

**Commercial Case No. 1 of 2014**

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**RULING OF THE COURT**

26<sup>th</sup> March & 20<sup>th</sup> April, 2020

**MWANDAMBO, J.A.:**

Mwananchi Communications Limited, the applicant, has moved the Court by way of notice of motion under rule 89(2) and 48(1), (2) of the Tanzania Court of Appeal Rules, 2009 (G.N. 368 of 2009) (hereinafter to be referred to as the Rules) for an order striking out a notice of appeal lodged by the respondent on 21<sup>st</sup> November, 2014 challenging the judgment and decree of the High Court (Commercial Division) handed down on 7<sup>th</sup>

November, 2014. The affidavit of Josephat Kesagero has been annexed to the notice of motion in support of the application contested by the respondent through an affidavit in reply deposed to by Denis Mwesiga.

The material facts to the application run as follows: The applicant successfully sued the respondent in the High Court for an assortment of reliefs. The High Court delivered its judgment on 7<sup>th</sup> November, 2014. Aggrieved, the respondent, acting through IMMMA Advocates, lodged a notice of appeal in terms of rule 83(1) of the Rules and; in compliance with rule 90(1) of the Rules, applied for copies of proceedings, judgment and decree for the purpose of the intended appeal.

The letter applying for the requisite documents for appeal purposes was delivered to the Registrar on 21<sup>st</sup> November, 2014 and a copy of it delivered to the applicant's attorneys on the same day. For reasons which are not apparent from the documents availed to the Court, the Registrar at the time of this application has not yet notified the respondent's advocates of the readiness of the documents they requested for the purposes of the intended appeal. That notwithstanding, the applicant found it too much waiting indefinitely for the respondent's inaction in instituting the appeal. Her advocate conducted a perusal from the trial court's file which revealed

that the necessary documents for the purposes of the appeal were ready for collection but for the respondent's inaction in not collecting them. Having discovered that the requisite documents were ready but not collected by the respondent, on 16<sup>th</sup> February, 2017, the applicant lodged the instant application. The applicant has raised two grounds in the notice of motion contending that the respondent has, (i) failed to take the necessary steps to lodge the appeal; and that (ii) she has acted negligently by not collecting copies of the proceedings from the High Court (Commercial Division) whereas the same were ready since December 2015.

The deponent of the founding affidavit avers that the proceedings were ready for collection since November, 2015 but the respondent did not make any follow-ups thereby failing to institute the intended appeal to the applicant's prejudice in that she cannot enjoy the fruits of the decree in her favour. The respondent contests the application mainly on the ground that the Registrar of the High Court to whom an application was made for the supply of the requisite copies of proceedings, judgment and decree, has not notified her of the readiness of the requested documents neither has

he issued any certificate of delay as one of the necessary documents to be incorporated in the record of appeal.

On the date the application was called on for hearing, Mr. Frank Mwalongo, learned advocate, appeared for the applicant whilst Ms. Samah Salah, also learned advocate, did alike for the respondent. Both learned advocates had filed their respective submissions for and against the application contents of which each invited the Court to consider. We heard both of them orally highlighting on some aspects to reinforce their respective stand points.

Mr. Mwalongo's submissions are premised on two issues which he formulated namely; whether the respondent has taken the necessary steps in pursuing the appeal and; whether the Commercial Court is required to inform the respondent on the readiness of the proceedings. In addition, the leaned advocate brought to the fore the second ground in the notice of motion as an issue for the Court's determination that is to say; whether the respondent acted negligently by not following up on the proceedings from the date of lodging the notice of appeal to 17<sup>th</sup> February, 2017 on which it was served with a copy of the notice of motion. He invited the Court to consider and make a finding that the respondent acted negligently for

failure to make follow-ups by reminding the Registrar regarding the readiness of the copies of the documents requested for the purposes of the intended appeal. According to the learned advocate, the respondent had a duty to make such follow-ups with the Registrar and the fact that she has not produced any copy of a letter of reminder is proof of neglect of that duty. To bolster his argument, counsel referred the Court to **Ahmed Mbaraka v. Mwananchi Engineering And Contracting Co. Ltd**, Civil Application No. 229 of 2014 (unreported) in which the Court is said to have held that litigants have a duty to make follow-ups with the High Court regarding the documents they request for appeal purposes. On the strength of that decision, Mr. Mwalongo urged us to find that the respondent was negligent for failure to make follow ups of the requisite documents and so her notice of appeal ought to be struck out for failure to take an essential step in line with rule 89(2) of Rules.

Responding to the questions from the bench, Mr. Mwalongo conceded that the statement of the Court on the duty to make follow-ups in **Ahmed Mbaraka v. Mwananchi Engineering And Contracting Co. Ltd** (supra), was but an *obiter dictum*. He conceded too that apart from the said statement, there is no legal requirement for a party to remind the

Registrar on the availability of the documents requested. All the same, Mr. Mwalongo reasoned that prudence demands that there ought to be diligence in taking necessary steps for the purpose of an appeal.

Ms. Salah for her part had no difficulty in asking the Court to dismiss the application on the ground that the application has been made prematurely in so far as the Registrar has not yet notified the respondent's advocate that the documents requested through a letter dated 13<sup>th</sup> November, 2014 are ready for collection. Counsel argued that there is no legal requirement for a litigant who has made a request to the Registrar in compliance with rule 90(1) of the Rules to remind him to perform his duty.

To reinforce her arguments, the learned advocate referred the Court to its previous decisions for the proposition that once the appellant makes an application for the supply of copies of requisite documents for appeal purposes, he is home and dry. Such decisions include; **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [1997] TLR 328 to which reference was made in **Francisca Mbakileki v. Tanzania Harbours Authority**, Civil Reference No. 14 of 2004, **Juma Omary & Others v. The Director, Mwanza Fishing Industry**, Civil Application No. 14 of 2014 and **Olam Uganda Limited (suing through its Attorney Youth**

**Shipping Co. Ltd) v. Tanzania Ports Authority**, Civil Application No. 138 of 2009 (all unreported).

Placing reliance on the decided cases, Ms. Salah argued that the applicant has not made out a case for invoking rule 89(2) of the Rules. As to **Ahmed Mbaraka's** case (supra), the learned Advocate contended that apart from being an obiter, the statement relied upon by the applicant did not relate to the application for striking out a notice of appeal rather in connection with execution of decrees after the Court had been prompted by the applicant's advocate to make directions.

At any rate, counsel argued, despite the contention that a complete set of the proceedings was ready, the copies annexed to the founding affidavit show that not all proceedings were ready on the date the application was filed. On those submissions, the learned advocate invited the Court to dismiss the application.

Not amused, Mr. Mwalongo submitted in rejoinder that despite the fact that there is no legal requirement for a party to make follow-ups with the Registrar, prudence demands that there should have been follow-ups considering the time taken from the date the applicant lodged her notice of

appeal. As to availability of proceedings, the learned advocate reiterated that all proceeding were indeed ready except for a few of them.

After hearing the learned advocates' oral submissions and having examined the written submissions for and against the application, the crucial issue for our determination is whether the applicant has established a cause of action to sustain the application. Rule 89(2) on the basis of which the applicant has predicated her application vests right in the respondent served with a copy of a notice of appeal to ask the Court to strike out such notice on the ground that the intended appellant has failed to take essential steps in the appeal. One of such essential steps is where the appellant fails to institute his appeal within the prescribed time. The complaint in the instant application is that despite the fact that the proceedings were ready for collection as far back as December 2015 when the applicant's advocate perused the trial court's file, the respondent has not instituted her appeal.

The grounds in the notice of motion are interrelated and so the issues arising from them but we think we can conveniently begin our discussion with ground two. This ground raises the issue whether the respondent acted negligently in not following up for the requisite copies



from the Registrar. An affirmative answer to the issue presupposes the existence of two conditions. First, the Registrar having notified the respondent of the availability of the copies requested in response to her advocate's letter dated 13<sup>th</sup> November, 2014 (annexure **NH1** to the affidavit in reply). Second, the respondent had an obligation to make a follow-up of the requisite copies regardless of any notification by the Registrar to whom a request was made through annex **NH1**.

Both Mr. Mwalongo and Ms. Salah are in agreement that until the date on which the applicant lodged the instant application, the Registrar had not yet notified the respondent of the readiness of the requested copies for collection. It is logical that the respondent could not be blamed for not collecting the copies in the absence of proof of any notification by the Registrar that copies of the documents are ready for collection. That means that the applicant has not succeeded in the first aspect. In relation to the second aspect, whilst conceding that there is no legal requirement for a litigant who has complied with rule 90 (1) of the Rules by applying for the requisite copies within the prescribed time to remind the Registrar, Mr. Mwalongo contended that prudence required that the respondent should have acted diligently having regard to the date on which a notice of appeal

was lodged. With respect, considering that Mr. Mwalongo conceded that the statement extracted from **Ahmed Mbaraka v. Mwananchi Engineering And Contracting Co. Ltd** (supra) is not part of the Court's decision but an obiter, we cannot hold the respondent negligent in the manner contended. On the contrary, we endorse Ms. Salah's submissions premised on the Court's decisions placed before us that the respondent was under no legal obligation to make any follow-up with the Registrar in the absence of any proof that there was any notification for collection of such documents. In particular, we fully subscribe to a decision of the single Justice of Appeal in **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** (supra) that reminding the Registrar is a practical and realistic thing to do but that is not a legal requirement. Whilst one can agree with Mwalongo about the delay in instituting the appeal gauged from the date on which the respondent lodged her notice of appeal, we cannot go further than that because the blame does not lie in her. We are fortified in this view by the Court's decision in **Foreign Board of the Southern Baptist Convention v. Alexander Panomaris** [1984] TLR 146 in which it was aptly stated at page 147:

*"We are satisfied, that for reasons beyond the control of the respondent, the copy of proceedings was not ready for collection until 11.2.84. The court must bear the blame for this long and unexplained delay in furnishing a certified copy of the proceedings. There was a letter on the court record from the Registrar to the respondent dated 10.2.84 which excluded the days (over 900 odd days) taken for the preparation of the copy of proceedings..."*

*When the application to strike out was filed on 1.2.84, the respondent could not be blamed for the delay, as the court up to that date was unable to furnish him with a certified copy of the proceedings. **In our view, the application was filed prematurely, as on the 1st February, 1984, no cause of action existed for any delay on the part of the respondent to institute and prosecute his appeal.**"*[emphasis added]

Consistent with the above decision, we hold that the cause of action for invoking rule 89(2) of the Rules has not been established. Put it differently, the applicant has not made out a case to sustain the application on the ground that the respondent has failed to take essential steps in the intended appeal. Having so held, we do not think it is opportune to discuss

whether or not a complete record of proceedings was ready in so far as there is no evidence that the Registrar notified the respondent of the readiness of the requested copies.

In the event, we are satisfied that the application lacks merit and is hereby dismissed. Costs shall be in the cause.

It is so ordered.

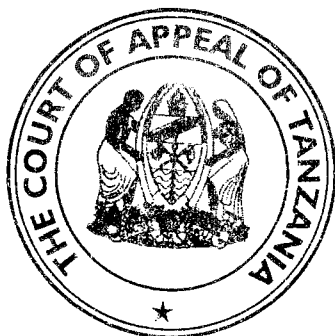
**DATED** at **DAR ES SALAAM** this 8<sup>th</sup> day of April, 2020

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

The Ruling delivered this 20<sup>th</sup> day of April, 2020 in the presence of the applicant in person and Mr. Imam Daffa, learned Advocate and Mr. Silas Shija, learned Advocate for the respondent is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**