

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

**(CORAM: LILA, J.A., MWANGESI, J.A., And SEHEL, J.A.)**

**CIVIL APPLICATION NO. 181 OF 2016**

**TANZANIA PRIVATE SECTOR FOUNDATION..... APPLICANT**

**VERSUS**

**1. ADOLPH QAMBAITA**

**2. UPENDO MWAKISISILE } ..... RESPONDENTS**

**[Application from the Ruling and Drawn Order of the High Court of  
Tanzania (Labour Division) at Dar es Salaam]**

**(Munis, J.)**

**dated the 25<sup>th</sup> day of June, 2013**

**in**

**Civil Revision No. 127 of 2011**

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**RULING OF THE COURT**

27<sup>th</sup> April & 27<sup>th</sup> May, 2020

**LILA, J.A.:**

In this application by way of notice of motion, Tanzania Private Sector Foundation, the applicant, is moving the Court under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to strike out the respondents' notice of appeal which was lodged in Court on 28<sup>th</sup> June, 2013 intending to challenge the decision of The High Court of Tanzania (Labour Division) (Munisi, J.) in Revision No. 127 of 2011, on the ground that no essential steps have been taken by the respondents in pursuing the intended appeal within the prescribed time.

The application is supported by the affidavit sworn by Henry Lazaro Chaula, learned advocate. The respondents resisted the application through an affidavit in reply deposed to by Sylvanus Sylvanus Mayenga, the respondents' advocate. Both parties lodged their respective written submissions.

The material facts that lead to this application are as follows; that the respondents successfully filed an Application for Revision No. 127 of 2011 in the High Court (Labour Division) at Dar es Salaam. In that application the respondents were seeking the High Court to revise and quash an award issued by the Commission for Mediation and Arbitration (CMA) on 27<sup>th</sup> June, 2011. The High Court (Munisi, J) delivered the ruling on 25<sup>th</sup> June, 2013 in which it vacated the CMA award. Dissatisfied, the respondents lodged the instant appeal.

The bane of the applicant in the present application is that the respondents' notice of appeal should be struck out because no essential steps have been diligently taken to pursue the intended appeal. The gist of the applicant's contention, as averred in paragraph 5 of the supporting affidavit, is that since the respondents lodged the said notice of appeal to the date the present application was lodged they have not lodged the intended appeal. In addition, the applicant asserted that the relevant and necessary documents for appeal purposes including copies

of the ruling and the drawn order in respect of Revision No. 127 of 2011 were available and or supplied to both parties soon after it was determined. On that basis the applicant is now seeking for an order of the Court striking out that notice of appeal for the reason that the respondents have failed to take essential steps to institute the intended appeal.

When the application was called on for hearing before us, the applicant did not enter appearance despite having been dully served with the notice of hearing through M & C Advocates on 16/9/2020. On the other hand, the respondent enjoyed the services of Mr. Sylivatus Sylvianus Mayenga, learned counsel.

At the inception of the hearing of the application, Mr. Mayenga, in terms of Rule 63(1) of the Tanzania Court of Appeal Rules, 2019 (the Rules), urged the Court to dismiss the application on account of the applicant's failure to appear at the hearing when he was duly notified of the date of hearing. However, after a brief exchange with the Court and particularly when his attention was drawn to Rule 106(12) of the Rules, he succumbed and was of the view that since the applicant had filed written submission in support of the application then the application can be determined based on the submission. That concession was inevitable for it is eminently clear that the view taken by Mr. Mayenga is the thrust

and impeccable construction of Rule 106(12)(a)(b) of the Rules. That paved the way for us to proceed with the hearing of the application.

In addressing the Court, Mr. Mayenga adopted the averments in the affidavit in reply and the reply submission without more.

In that very brief written submission, the applicant through its counsel, to a large extent, substantially repeated the same assertions contained in the affidavit in support of the application as summarised above. We therefore see no need to rehearse them again save for the insistence that in terms of Rule 90(1) of the Rules the respondents were required to lodge the appeal within sixty days of the lodgement of the notice of appeal. The applicant complains that failure to do so makes the matter endless at its detriment. The unreported cases of **Selemani Rajabu Mzino vs Shabir Ebrahim Bhaijee and Two Others**, Civil Application No. 80 of 2007, **Colgate Palmolive Company Ltd vs Zakaria Store and Three Others**, Civil Application No. 67 of 2003 and **The Registered Trustees of Agricultural Inputs Trust Fund vs Alhaj Ali Utoto**, Civil Application No. 62 of 2007 were cited to us to augment that the Court has consistently struck out notices of appeal in the event of failure to take essential steps to pursue an appeal.

The respondent, after adopting the submission resisting the application, contended that after the decision in Revision No. 127 of 2011 was delivered on 25/6/2013, a letter requesting to be supplied with copies of ruling, drawn order and proceedings was lodged on that very day and a notice of appeal was lodged on 28/6/2013 and the copies thereof were duly served to the applicant. He submitted that since then he is yet to be supplied with such documents despite reminding the Registrar of the High Court. To him that constituted good cause for the delay to take the necessary step of lodging an appeal and, to augment his assertion, he cited the cases of **The Board of Trustees of the National Social Security Fund and Another vs New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004, **Benedict Mumello vs Bank of Tanzania**, Civil Appeal No. 12 of 2002 (both unreported) and **DT Dobie and Company Tanzania Limited vs N. B. Mwatebele** [1992] TLR 152.

We have duly considered the parties' rival submissions. The applicant herein is moving the Court to strike out the notice of appeal which relief is available under Rule 89(2) of the Rules. That Rule reads as follows:-

*"(2) Subject to the provisions of subrule (1), any other person on whom a notice of appeal was*

*served or ought to have been 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."*

The Court had an occasion to pronounce the circumstances under which a party may be considered to have failed to take necessary steps to pursue an appeal in the case of **Transcontinental Forwarders Limited (1997) TLR 328** as being:-

*"... failure to take essential steps to institute the appeal could either be procedural or evidential. An example could include omission to apply for leave to appeal or a certificate on a point of law, when one was required; or failure to collect copies of proceedings, judgment or order necessary for the institution of an appeal or failure to lodge an appeal within the prescribed time, where the documents are ready."*

From the parties' submissions, it is evident that the point of contention by the parties is whether the respondent has failed to take necessary steps to pursue the intended appeal. We shall resolve the

matter while alive of the fact that this application was lodged on 20/6/2016 which was before the Rules were amended by the Tanzania Court of Appeal (Amendment) Rules, 2019 GN No. 344 of 2019. We defer the discussion on changes effected by the amendment to a later stage of this ruling.

It can be discerned from the submissions of both parties that it is a common ground that the ruling in the High Court was delivered on the 25/6/2013 and the respondent on the same day wrote a letter to the Registrar requesting to be supplied with copies of ruling, drawn order and proceedings. It is, further, not in dispute that on 28/6/2013 the respondent lodged the notice of appeal, although the applicant erroneously indicated in paragraph 5 that it was filed on 29/6/2013 which is not in line with the copy of the notice of appeal annexed to it. These uncontested facts are evidenced by the copies of such letters and the notice of appeal annexed to the affidavit in support of the application.

Basically, without indicating the date, the applicant's complaint is that, the necessary documents for lodging an appeal were ready for collection and or supplied to both parties but the respondent has not diligently pursued the appeal. On his part, the respondent strongly resisted that allegation and submitted that his efforts to lodge the

appeal were thwarted by the Registrar who did not avail him with the requisite documents for appeal purposes despite writing him a reminder letter.

Regarding the applicant's assertion that the proceedings were ready for collection but the respondent has not bothered to collect them, the answer is well put by the respondent. The record bears out that the respondent wrote a reminder letter to the Registrar dated 18/7/2016 and a copy was served to the applicant. In terms of Section 110(1) of the Evidence Act, he who asserts must prove. The applicant had to establish the existence of those facts. Unfortunately, he has been unable to establish that the respondents were ever served with any letter from the Registrar informing them that the requested documents were ready for collection or the date when the respondent became aware of the fact that the proceedings were ready for collection. This is when time starts to run for the institution of the appeal (See: Civil Reference No. 10 of 1993, **Tanzania Uniform & Clothing Corporation v. Charles Mosses** (unreported)).

In the circumstances we are inclined to agree with the respondent that he has not obtained as yet the requested copies of certified ruling, drawn order and proceedings from the Registrar of the High Court. He has thereby contributed materially to the delay to lodge the appeal. The



respondent cannot, therefore, be blamed for the delay in taking necessary steps to pursue the intended appeal. This is because under Rule 96(1)(d) and (h) of the Rules, in lodging the appeal, the respondents are imperatively required to attach, among other documents, the copies of the proceedings, ruling and drawn order which are yet to be supplied to them. In the case of **The Registered Trustees of Kagera Farmers Trust Fund vs CRDB Bank Limited, Civil Application No. 58 of 2015** (unreported) the Court restated its position in the case of **Transcontinental Forwarders Limited v Tanganyika Motor Limited** (supra) and stated that:-

*" once the respondent has shown that he had applied to the Registrar for a copy of proceedings sought to be appealed against, and he had not been furnished with any, he had complied with the Rules. It is evident from the correspondences between the respondent and the Registrar of the High Court that not all documents were furnished to the respondent and some of the documents supplied to him were problematic."*

Given the fact that there is ample evidence that the respondents wrote a reminder letter to the Registrar and there is no letter from the Registrar informing the respondents that the requested documents are ready for collection, the respondents cannot move a step further to

lodge the appeal without those documents. Contrary to the view taken by the applicant that the respondents did not exercise due diligence in pursuing the appeal, we, instead, find the step taken by the respondents to remind the Registrar to avail them with the requisite documents for appeal purposes depicts diligence on the part of the respondents. This is actually the position stipulated by the Court in the case of **Foreign Mission Board of the Southern Baptist Convention vs Alexander Panomaritis** [1984] TLR 146 where it was stated thus:-

*"Since the inordinate delay in furnishing a certified copy of the proceedings of the High Court cannot be blamed on the respondent no cause of action existed on his part to bar him from instituting and prosecuting his appeal."*

In the present case the inordinate delay in furnishing the requested documents to the respondents by the Registrar or informing them that such documents are ready for collection seriously thwarted the respondent's efforts to lodge the appeal. For this reason, the application stands to be dismissed.

A follow-up issue here may be for how long the applicant will keep on waiting for the respondent to lodge the intended appeal. This brings us to the need to discuss the amendments effected to the Rules by GN.

No 344 of 2019. Briefly, the amendment introduced into Rule 90 of the Rules a new sub rule (5) which states:-

*"(5) Subject to the provisions of sub rule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such copy and the appellant shall take steps to collect copy upon being informed by the Registrar to do so, or within fourteen (14) days after the expiry of the ninety (90) days."*

The above provision enjoins the Registrar to make sure that the requested documents are ready for delivery within ninety (90) days and inform the appellant to collect the same. It, similarly, imposes a duty to the appellant to ensure that he collects them after being informed or not later than fourteen days after the expiry of the ninety days. The Rule attempted to solve the problem of either the Registrar not acting on the appellant's request timeously or the appellant not taking steps to follow up the requested document thereby delaying the process of appeal at the detriment of the respondent. In terms of Rule 90(5) of the Rules, the appellant is guaranteed to have obtained the requested document not later than one hundred and four (104) days. This is, no doubt, a positive move towards expediting the appeal process given that the Registrar complies with the Rule to the letter. We still, however, think

that the Rules should have gone further to provide the time limit within which the appellant, upon being informed by the Registrar, should collect the documents in the event the same are ready for collection before the expiry of the ninety (90) days allocated to the Registrar to prepare them.

Since, as intimated above, the present application was lodged prior to the aforesaid amendment, the Registrar was not obligated to inform the appellant that the documents were ready for collection and similarly the appellant was not duty bound to make a follow up of the documents. In that accord, after writing a letter requesting for the documents the appellant had nothing to do but wait to be informed to collect the document hence taken to be "home and dry".

Now taking inspiration from sub rule (5) of Rule 90 of the Rules, we have found it proper, in the peculiar circumstances of this matter, to direct the Registrar of the High Court, as we hereby do, to immediately inform the respondents that the documents they requested are ready for collection and the respondents are to collect the same within fourteen (14) days of the notification. Thereafter, the appeal process shall proceed according to the Rules.

Save for the directions given, the application is dismissed. We, however, considering the circumstances of this case, make no order for costs.

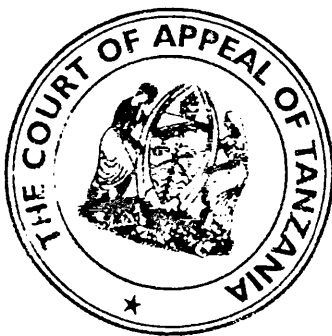
**DATED at DAR ES SALAAM.** this 20<sup>th</sup> day of May, 2020.

S. A. LILA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

The Ruling delivered this 27<sup>th</sup> day of May, 2020 in the presence of applicant in person and Mr. Musa Mbaga, learned counsel for the Respondents/Republic is hereby certified as a true copy of the original.



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