

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., NDIKA, J.A., And KITUSI, J.A.)

CIVIL APPLICATION NO. 446/01/2016

NEW NORTHERN CREAMERIES LTD APPLICANT

VERSUS

TISCO CONSULTANTS & ASSOCIATES LTD RESPONDENT

**(Application for striking out notice of appeal from the Judgment and Decree
of the High Court of Tanzania at Dar es Salaam)**

(Massengi, J.)

dated the 15th day of June, 2010

in

Civil Appeal No. 16 of 2010

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RULING OF THE COURT

20th July & 7th August, 2020

NDIKA, J.A.:

By the notice of motion lodged on 27th October, 2016, New Northern Creameries Limited ("the applicant") seeks an order of the Court striking out the notice of appeal filed by Tisco Consultants & Associates Limited ("the respondent") on 2nd July, 2010. The aforesaid notice of appeal was lodged to manifest the respondent's intention to appeal to this Court against the judgment and decree of the High Court of Tanzania at Dar es Salaam (Massengi, J.) dated 15th June, 2010 in Civil Appeal No. 16 of 2010.

The application is brought under Rule 89 (2) of the Tanzania Court of Appeal Rules (“the Rules”) on two grounds: **one**, that no appeal lies on an order of the High Court dismissing objection proceedings; and **two**, that the respondent has failed to take essential steps to institute the intended appeal within the prescribed time.

In support of the application, Mr. Kweyambah Quaker, a Principal Officer of the applicant, swore an affidavit. In essence, it is averred, by way of background, that the applicant, being the decree-holder in respect of Civil Case No. 21 of 2005 determined by the Resident Magistrate’s Court at Arusha, moved the Resident Magistrate’s Court of Dar es Salaam at Kisutu, as the executing court, to attach and sell the respondent’s landed property located in Dar es Salaam. In response, the respondent filed objection proceedings in the executing court vide RM Miscellaneous Civil Application No. 20 of 2008. By its decision dated 29th January, 2010, the said executing court dismissed the objection. Subsequently, the respondent unsuccessfully appealed to the High Court against the dismissal. The respondent, then, lodged the now impugned notice of appeal in signification of its intention to pursue a further appeal to this Court as hinted earlier.

Moreover, the supporting affidavit repeats the aforesaid grounds for the relief prayed for and acknowledges that the respondent duly lodged and

served a request for a copy of proceedings from the High Court. Nonetheless, the deponent bemoans that the respondent has failed for over six years to lodge the intended appeal and that the notice of appeal is only intended to perpetuate the respondent's determination to abuse the court process and prevent the applicant from enjoying the fruits of its decree.

For the respondent was filed an affidavit in reply sworn by Mr. Boniface S. Mg'anya, a Principal Officer of the respondent. The deponent does not dispute most of the depositions made in the supporting affidavit. Nonetheless, the averment in Paragraph 7 asserts, in part, thus:

*"The respondent engaged Advocate Bashaka of Bashaka & Co. Advocates who **instituted the said appeal but** unfortunately he is now dead and all the documents were in his custody thus the respondent could not be able to engage another advocate to proceed with **the process of appeal as the respondent did not have any document to brief him**. Further on 31st August, 2016 the respondent wrote a letter with reference no. TISCO/31082016 to the **Registrar of the Court of Appeal requesting to be supplied with the copy of all documents filed in Court regarding this matter** so that he can be able to brief Chuwa and Company Advocates to proceed pursuing this matter. (A photocopy of the*

*letter from TISCO Consultants and Associates Ltd.
Dated 31st August, 2016 is annexed herewith and
marked Annexure 'B')*”[Emphasis added]

At the hearing of the application, the applicant appeared through Mr. Kweyambah Quaker, its Principal Officer as said earlier. There was no appearance on the part of the respondent who had been duly served with the notice of the hearing through its advocates, Chuwa & Company Advocates. Nor did the respondent file any written submissions in opposition to the application. Given the circumstances, we granted the applicant’s request to proceed *ex parte* in terms of Rule 63 (2) of the Rules as there was obviously no good cause for adjournment.

Before us, the applicant adopted the contents of the notice of motion, the accompanying affidavit and the written submissions in support of the application. On reflection, however, the applicant abandoned the first ground upon which the application was based, meaning that the application remained solely grounded on the contention that the respondent had failed to institute the appeal in time.

We have given due consideration to the notice of motion, the affidavits and the applicant’s submissions. The sticking issue is whether the respondent failed to institute the intended appeal within the prescribed time.

Before our determination of this matter, we wish to state the obvious that an application of this nature is governed by Rule 89 (2), which stipulated as follows at the time this matter was lodged:

"Subject to the provisions of sub rule (1), a respondent or other person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice 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."

[Emphasis added]

The above provision is self-explanatory. It gives recourse to the relief of striking out a 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 the prescribed time – see, for instance, **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 (unreported); and **Grace Frank Ngowi v. Dr. Fank Israel Ngowi** [1984] TLR 120.

In the instant matter, it is common cause that the notice of appeal was duly lodged on 2nd July, 2010. By dint of Rule 90 (1) of the Rules, the intended appeal should have been filed within sixty days thereafter but none was filed. Admittedly, since the applicant acknowledges that the respondent duly lodged and served a letter requesting a copy of the record of proceedings from the High Court the latter was certainly entitled under the proviso to Rule 90 (1) of the Rules to exclusion of the time necessary for preparation and delivery of that copy. It is also undisputed that at the time this matter was filed, six years and three months had passed since the notice of appeal was lodged.

As intimated earlier, it was averred in the affidavit in reply that the respondent's previous counsel, the late Advocate Bashaka, instituted the intended appeal. We find this averment rather baffling as it is evidently unsubstantiated and unacceptable. If the alleged appeal was indeed instituted, the respondent should have liaised with the Registrar of the Court and obtained proof of that fact.

It is noteworthy that in Paragraph 7 of the affidavit in reply that we reproduced earlier, it is stated also that upon being served with this application, the respondent requested from the Registrar of the Court to be "supplied with the copy of all documents filed in Court regarding this matter

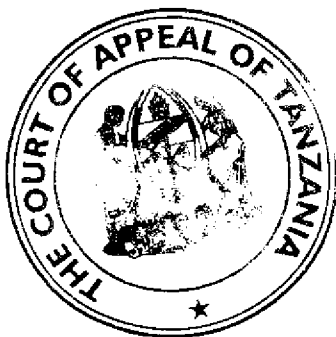
so that he could be able to brief Chuwa and Company Advocates to proceed pursuing this matter.” It should be stressed here that the affidavit in reply is inaptly silent on whether an effort was made to establish the existence of the alleged appeal. Even though in these circumstances it was safe to hold that the alleged appeal is non-existent, we confirmed that position upon our own perusal of the Court’s register. Accordingly, we take judicial notice of that fact and find that the respondent has not filed any appeal to date.

Given that the respondent failed to file its intended appeal for more than six years at the time this matter was lodged and that no good cause has been furnished for that failure, we find justification in the applicant’s criticism that the respondent has failed to institute his intended appeal in time. There has been no evidence placed before us by the respondent as to whether, and if so when, the respondent collected the requested record of proceedings from the High Court for us to determine compliance with the dictates of Rule 90 (1) of the Rules. We think that the despondency of the respondent’s position is laid bare not just by absence of a plausible account on the steps taken to pursue the intended appeal but also by the palpable lie in the affidavit in reply that the intended appeal had been duly filed. It thus remains a mystery why the intended appeal is yet to be filed.

The applicant lamented that the notice of appeal was aimed at perpetuating the respondent's determination to abuse the court process and prevent the applicant from enjoying the fruits of its decree. While that suggestion seems speculative, we find the respondent's conduct after lodging the notice of appeal both cavalier and indolent.

In conclusion, we hold that the respondent as the intending appellant failed to institute the intended appeal within the prescribed time. For its default, we order, in terms of Rule 89 (2) of the Rules, that its notice of appeal lodged on 2nd July, 2010 be and is hereby struck out. Accordingly, the application is granted with costs.

DATED at DAR ES SALAAM this 5th day of August, 2020.



B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 7th day of July 2020, in the Presence of the Applicant in person and the absence of the Respondent is hereby certified as a true copy of the original.


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL