IN THE COURT OF APPEALOF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI J.A., MWAMBEGELE J.A., And LEVIRA J.A.)

CIVIL APPLICATION NO. 115/01 OF 2017

JACKSON MWAIPYANA ..... APPLICANT

VERSUS

PARCON LIMITED ..... RESPONDENT

(Application for striking out Notice of Appeal pursuant to the order of the High Court of Tanzania at Dar es Salaam)

[Mwarija, J. (as he then was)]

dated the 23rd day of May, 2013
in
Civil Case No. 159 of 2002

.....

RULING OF THE COURT

21st July & 10th August , 2020

MWANGESI J.A.:

By Notice of Motion preferred under the provisions of rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 G.N. No. 368 of 2009 **(the Rules**), the applicant is moving the Court to issue an order for striking out the Notice of Appeal which was lodged by the respondent on the 25th May, 2013 to challenge the decision of Kimaro, J. (as she then was), which was delivered on the 15th January, 2003 on the grounds that: -

(a) No appeal lies;

(b) The respondent has failed to institute the intended appeal for an exceedingly inordinate and unexplained delay of more than three years.

The Notice of Motion is supported by an affidavit which was sworn by the applicant. Moreover, on the 6th day of April, 2017 the applicant lodged written submission to amplify the Notice of Motion pursuant to rule 106 (1) **the Rules.**

On her part, the respondent filed an affidavit in reply which was sworn by Mr. Denis Michael Msafiri, who happened to be the advocate of the respondent. Also, in terms of rule 106 (7) of **the Rules,** the counsel lodged a written submission in opposition of the written submission which was lodged by the applicant.

At the hearing of the application before us, the applicant entered appearance in person legally unrepresented, whereas, the respondent had the services of Mr. Denis Michael Msafiri, learned counsel.

Upon being invited by the Court to expound his Notice of Motion, the applicant being a lay person just sought leave of the Court, which was

granted to adopt the written submission which had been prepared for him by his lawyer and lodged in Court on the 6th day of April, 2017 with nothing more. In the same vein, when the ball was rolled on the other side, Mr. Msafiri, did not wish to add anything to the written submission which was lodged on behalf of the respondent on the 8th day of May, 2017.

In view of the contents of the notice of motion and the affidavit in its support, which were lodged in Court by the applicant, the basis of the application is founded on the averments deponed by the applicant in paragraphs 5, 6 and 7 of the affidavit which read *in ipsissima* that: -

> *"5. That, on 23.5.2013 Hon. Justice Mwarija (as he then was) granted the respondent leave to file a fresh Notice of Appeal against the said ruling of 2.1.2003 by Hon. Madam Kimaro (attached to the application).*
>
> *6. That, in compliance with the said ruling by Hon. Justice Mwarija, the respondent on 27.5.2013 filed a fresh Notice of Appeal and the respondent also wrote a letter applying for copies of proceedings, decree and ruling (also appended to the application).*
>
> *7. That, ever since the respondent filed the said Notice of Appeal almost four years ago on 27.5.2013 the respondent has deliberately refrained from making any follow up or process on the intended appeal."*

It is the contention of the applicant in his written submission, that the respondent has failed to take the essential steps in making his intended appeal be lodged and proceeded. Relying on the holding in **Halais Pro-Chemie Vs Wella A.G** [1996] TLR 269, he urged us to strike out the notice of appeal as no appeal lies.

On the other hand, according to the affidavit in reply and the written submission, the respondent is in agreement with what the applicant deponed in his affidavit in the paragraphs quoted above as well as the written submission. The respondent's departure to the stance submitted by the applicant is reflected in paragraphs 15, 16 and 17 of the affidavit in reply wherein the counsel for the respondent has deponed by the counsel that: -

> *"15. The respondent is yet to be furnished with all documents indicated in the letter dated 27th May, 2013 despite numerous visits to the court registry and the Registrar is yet to communicate to the respondent that the documents are ready for collection.*
>
> *16. That, the respondent is still interested in Instituting an appeal against the decision of the High Court in Civil Case No. 159 of 2002 as it was wrong for the High Court to dismiss the*

suit on the ground that it was functus officio in a suit arising from objection proceedings against attachment of property in execution of decree.

17. That, the application for striking out the notice of appeal has been made prematurely because the respondent is yet to be furnished by the High Court with documents which are essential in the institution of the intended appeal.

The written submission by the respondent in opposition of the one filed by the applicant, has expounded further by arguing that the application for striking out the notice of appeal, is misconceived because the respondent is yet to be furnished with the documents which he requested from the Court; which are necessary for the lodgment of his appeal. It is thus prayed that the application be dismissed with costs.

The issue which stands for our determination, is whether the application by the applicant is merited. What is apparent from the affidavit sworn by the applicant and that sworn in reply on behalf of the respondent, as expounded in the respective written submissions, is the fact that the respondent did take the requisite steps in that; he timely lodged the notice of appeal, which was served on the respondent in time. He wrote to the Court asking for the necessary documents within time and

copied to the applicant. The only dispute between them as raised in paragraph 7 of the applicant's sworn affidavit, is the failure by the respondent to make a follow up to the requested documents from the Court. The immediate question which crops here is whether the respondent was tasked such a duty.

Prior to the amendment which was made to the Tanzania Court of Appeal Rules by Government Notices No. 362 of 2017 and 344 of 2019, the answer to the question posed above was clearly in the negative that the applicant did not bear any such duty. Once an intending appellant had lodged a notice of appeal; written a letter to the Registrar asking for the necessary documents and served on the respondent timely; he was home and dry. See: **Transcontinental Forwarders Limited Vs Tanganyika Motors Limited** [1997] TLR 328.

The position obtaining after the amendment brought about by the two Government Notices mentioned above, is slightly different. The law has now put some obligation to both the Registrar and the intending appellant in an attempt to fast track the process as stipulated under rule 90 (5) of **the Rules,** which reads that: -

"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."

In the light of the foregoing provisions, the Registrar is required to ensure that within ninety (90) days from the date when the intending appellant asked for the documents, they are ready for collection and bears the duty to inform him so. After the expiry of the ninety (90) days, the intending appellant is tasked by the provision to make a follow up of the documents he requested from the court within fourteen (14) days.

There is no doubt in the application under scrutiny that, at the time when the applicant lodged the instant application for striking out the notice of appeal, the ninety (90) days stipulated under rule 90 (5) of **the Rules,** had expired for quite long, and so were the fourteen (14) days in which the respondent (intending appellant) was required to make a follow up.

Nonetheless, the law is silent as to what should follow after the period provided by rule 90 (5) of **the Rules,** has elapsed without an appeal being lodged. Since it stands uncontroverted that the respondent is

yet to be furnished with the documents which he requested from the Court, which are relevant for lodgment of his appeal; it would be doing injustice to him, a blame which we are unprepared to shoulder; if the Court would grant the prayer for striking out the notice of appeal. As categorically deponed by the respondent in paragraph 16 of the affidavit in support of the notice of motion, he still intends to pursue his intended appeal.

That said, we find the contention by the applicant that no appeal lies in the instant to be baseless and so is his argument that the respondent has failed to institute the intended appeal for an exceedingly and unexplained delay. As highlighted above, the delay is not from the respondent's own making but something else. In the circumstances, the decision of **Halais Pro-Chemi Vs Well AG.** (supra), which was relied upon by the applicant in his submission, is inapplicable because the circumstances in that case were distinguishable from the ones under discussion. We therefore dismiss the application with order that the respondent will have its costs.

Order accordingly.

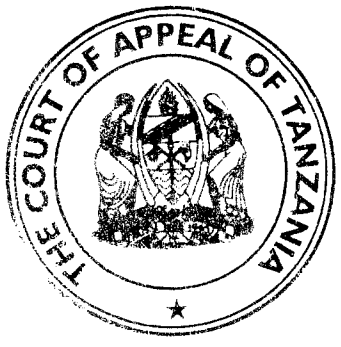
DATED at **DAR ES SALAAM** this 5th day of August, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

Ruling delivered this 10th day of August, 2020 in the presence of the Applicant in person and Ms Marietha Mollel holding brief of Mr. Dennis Msafiri learned counsel for the Respondent, is hereby certified as a true copy of original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL