

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWAMBEGELE, J.A., KITUSI, J.A. And KAIRO, J.A.)**

**CIVIL APPLICATION NO. 99/17 OF 2020**

**DOMINA KAGARUKI ..... APPLICANT**

**VERSUS**

**1. FARIDA F. MBARAK  
2. FARID AHMED MBARAK  
3. ELIUS A. MWAKALINGA** } ..... **RESPONDENTS**

**(Application to strike out notice of appeal from the decision of the High Court, at Dar es Salaam)**

**(Mkeha, J.)**

**dated the 23<sup>rd</sup> day of May, 2019**

**in**

**Miscellaneous Land Application No. 612 of 2017**

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**RULING OF THE COURT**

13<sup>th</sup> July & 18<sup>th</sup> October, 2021

**MWAMBEGELE, J.A.:**

In this application, the applicant Domina Kagaruki seeks an order of the Court striking out the notice of appeal lodged by the first and second respondents on 07.06.2019 in respect of the decision of the High Court in Miscellaneous Land Application No. 612 of 2017. The application is supported by an affidavit deposed by Thomas Eustace Rwebangira, learned advocate and resisted by an affidavit in reply

deposed by Rosan Mbwambo, also learned advocate, for the first and second respondents. No affidavit in reply was filed by the third respondent.

The decision which the first and second respondents intended to challenge was handed down on 23.05.2019. The notice of appeal thereof was timely lodged on 07.06.2019 as alluded to above but, the applicant's counsel deposes, was not served on the applicant. Neither was it served on the applicant's counsel as dictated by rule 84 (2) of the Tanzania Court of Appeal Rules (the Rules), hence this application.

The application was argued before us on 13.07.2021 during which the applicant was represented by Mr. Thomas Eustace Rwebangira, learned advocate. The first and second respondents, Farida F. Mbarak and Farid Ahmed Mbarak, were represented by Mr. Rosan Mbwambo, also learned advocate. The third respondent, Elius Mwakalinga, appeared through Mr. Gaspar Nyika, also learned advocate.

The applicant's advocate had filed written submissions in support of the application. So did the advocate for the first and second respondents. Both learned counsel sought to adopt their respective

affidavits and written submissions as part of their oral address before us.

Clarifying his written submissions, Mr. Rwebangira was very brief but focused. He submitted that he represented the applicant in Miscellaneous Land Application No. 612 of 2017 in the High Court. He was not aware of any notice of appeal in that application until later when a copy of that notice was attached with among the documents served on him in another application; Civil Application No. 49 of 2020 instituted in the High Court. He contended that the notice of appeal under discussion was not served on them through the address appearing in the pleadings of Miscellaneous Land Application No. 612 of 2017. Instead, he learnt later, it was served on Joseph I. Rutabingwa, advocate, of Rutabingwa & Co. Advocates. He argued that Joseph I. Rutabingwa, advocate, and Rutabingwa & Co. Advocates have never at any point in time appeared for and on their behalf in Miscellaneous Land Application No. 612 of 2017. In the premises, Mr. Rwebangira argued, the appeal which ought to have been lodged within sixty days of the lodgment of the notice of appeal in terms of rule 90 (1) of the Rules was not so filed. He added that the first and second respondents cannot rely on the proviso to rule 90

(1) of the Rules because the notice of appeal and the letter applying for documents for appeal purposes, if any, had never been served on them. He also submitted that the applicant did not utilize rule 90 (5) of the Rules which places the duty upon an intending appellant to follow up documents to the Registrar of the High Court within fourteen days if the same are not supplied upon expiry of ninety days of his making his application.

As the appeal was not lodged until 30.03.2020 when the application at hand was lodged, Mr. Rwebangira argued, the first and second respondents failed to take essential steps towards the prosecution of the appeal and thus the notice of appeal they lodged must be struck out. To support his arguments, the learned counsel cited **Mohamed Enterprises (T) Ltd v. Mussa Shabani Chekechea**, Civil Appeal No. 64 of 2015, **Samwel Kimaro v. Hidaya Didasi**, Civil Application No. 20 of 2012 and **National Bank of Commerce & Another v. Ballast Construction Company Ltd**, Civil Appeal No. 72 of 2017 (all unreported), among others.

Having argued as above, the learned counsel prayed that the notice of appeal filed by the first and second respondents be struck out with costs.

Responding, Mr. Mbwambo was also brief and focused in clarifying his reply written submissions. He submitted that the service of the notice of appeal was effected on Mr. Rutabingwa because Miscellaneous Land Application No. 612 of 2017 was a supplementary proceeding instituted after the decision of the Court in Civil Appeal No. 60 of 2016 in which the applicant was represented by advocates from M/S Rutabingwa & Co. Advocates and M/S Rwebangira Eustace & Co. Advocates. He added that the two firms continued to represent the applicant in an application for review of the decision of the Court in Civil Appeal No. 60 of 2016 and in an application for extension of time; Civil Application No. 68/17 of 2018. The learned counsel argued further that the two firms are still representing the applicant in a dispute over ownership of Plot No. 105 and 106 Burundi/Kinondoni Road, Dar es Salaam between the same parties.

Mr. Mbwambo also argued that service under rule 84 (2) of the Rules is optional and that the words "all persons" in the sub-rule is intended to capture any person. He added that the appeal has already been filed and prayed that the Court dismisses the application with costs.

Mr. Nyika for the third respondent had nothing to say because, he argued and to our mind rightly so, the matter involved, essentially, the applicant and the first and second respondents. However, he prayed that if the application is granted, the third respondent should not be condemned to pay costs. Rather interestingly, he prayed for costs in the event the application is refused.

In rejoinder, Mr. Rwebangira clarified that rule 84 (1) of the Rules refers to service on the parties as distinct from rule 84 (2) of the Rules which applies to service on advocates. He added that "may" used in rule 84 (2) of the Rules becomes optional if the service is effected on a party under rule 84 (1) of the Rules. It is not an option to serve any advocate, he argued. He insisted that Miscellaneous Land Application No. 612 of 2017 was a separate suit not a "supplementary proceeding" as claimed by the advocate for the first and second respondents.

Mr. Rwebangira argued further that rule 90 of the Rules has been amended twice; in 2017 and 2019. The first and second respondents were therefore under obligation to follow-up the documents after expiry of ninety days of their applying for the

documents from the High Court. After all, he argued, the same is a rule of procedure which applies retrospectively.

We have considered the contending learned arguments by counsel for the applicant on the one hand and by counsel for the first and second respondents on the other. The main issue of controversy on which the two trained minds have locked jaws, is whether service on the applicant through Mr. Rutabingwa, learned advocate, of Rutabingwa and Co. Advocates was legally appropriate. We say so because the learned advocates are at one that the service of the notice of appeal and letter to the Registrar of the High Court asking for supply of documents for appeal purposes, if any, were effected on Mr. Joseph Rutabingwa, learned advocate, of Rutabingwa and Co. Advocates. In deciding this matter, we think the best point of departure is to first come to grips with what is the tenor and import of rule 84 (1) and (2) of the Rules. For ease of reference, we take the liberty to reproduce it hereunder:

*"84.- (1) 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.*

*(2) Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the High Court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal."*

It is apparent on the above provisions of the Rules that, in terms of rule 84 (1) of the Rules, an intending appellant must serve a notice of appeal on "all persons who seem to him to be directly affected by the appeal" but the court may, on application, order that service should not be effected on a party who took no part in the proceedings.

The gist of the of sub-rule (2) is essentially that the respondent may be served through the address of an advocate who represented him in the High Court.



The question which pops up at this juncture is; was service on the applicant through Mr. Joseph Rutabingwa of Rutabingwa & Co. Advocates, appropriate?

The learned advocates for the parties are at one, as already said, that neither Mr. Joseph Rutabingwa nor any advocate from Rutabingwa & Co. Advocates represented the applicant in Miscellaneous Land Application No. 612 of 2017. Mr. Mbwambo's only lifeline is that the two advocates or firms represented and still represent the applicant in other court matters on the same subject and that Miscellaneous Land Application No. 612 of 2017 was a "supplementary proceedings" instituted after the decision of the Court in Civil Appeal No. 60 of 2016 in which the applicant was represented by advocates from both firms of advocates. With due respect, we are afraid we are not ready to accept Mr. Mbwambo's line of argument. With equal due respect, we are prepared to accept Mr. Rwebangira's line of argument that Miscellaneous Land Application No. 612 of 2017 was a separate suit. We shall demonstrate.

Miscellaneous Land Application No. 612 of 2017 was instituted against the following brief background, as gleaned from the impugned decision. The applicant lost in Land Case No. 51 of 2004; a suit she

instituted against the respondents for a declaration that she was a lawful owner of a semi-detached house No. 2 built partly on Plots No. 105 and 106 Burundi/Kinondoni Road in Kinondoni Municipality in the City of Dar es Salaam. The first and second respondents were declared lawful owners of that semi-detached building and the appellant was ordered to vacate the suit premises.

Immediately after procuring the decree the respondents evicted the applicant's tenants and demolished the suit premises without a formal court order.

The applicant successfully appealed to the Court. The Court ordered that Plots No. 105 and 106 be resurveyed and subdivided into three equal plots for the applicant, the first respondent and the second respondent. Following that decision by the Court, the applicant filed an application for restitution under section 89 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (the Civil Procedure Code) seeking the following orders:

- (a) That, the respondent be ordered to pay the sum of Tshs. 108,000,000/= to the applicant as compensation in order to restore the applicant's semi-detached house constructed partly on Plots No. 105 and 106 Kinondoni/Burundi Road,

Kinondoni Municipality, Dar es Salaam which was demolished by the respondents upon obtaining the decree of this court in Land Case No. 51 of 2004 which was reversed by the Court of Appeal in Civil Appeal No. 60 of 2016;

- (b) That, the respondents be ordered to pay the sum of Tshs. 7,000,000/= to the applicant being costs of demolition of a boundary wall constructed between Plots No. 105 and 106 Kinondoni/Burundi Road, Dar es Salaam in a place of demolished semi-detached house No. 2 and clearance of the debris to put the area as it was before demolition on 24<sup>th</sup> July, 2015 following reversal of the decree of this court;
- (c) That, the respondents be ordered to pay general damages following demolition, eviction and destruction of utilities such as water, telephone, electricity, garden and existing boundary wall to restore the applicant to the same position upon reversal of the decree of this court by the Court of Appeal of Tanzania as shall be assessed by the court;

- (d) The respondents be ordered to pay the sum of Tshs. 54,720,000/= being mesne profits as from 24<sup>th</sup> July, 2015;
- (e) The respondents be ordered to pay interest at a rate of 18% on (a), (b), (c) and (d) above to offset the rate of inflation and raising price of building materials; and
- (f) Any other relief as the court may deem just to grant.

We have reproduced the orders sought in Miscellaneous Land Application No. 612 of 2017 to underscore the point that the application was a separate suit in its own from which a drawn order (decree) was obtained in favour of the applicant. It should be remembered that the definition of a decree under section 3 of the Civil Procedure Code is deemed to include one obtained after determination of any question within section 89 of the Civil Procedure Code. We thus agree with Mr. Rwebangira that Miscellaneous Land Application No. 612 of 2017 was an independent suit. It was not "a supplementary proceedings" instituted after the decision of the Court in Civil Appeal No. 60 of 2016 as Mr. Mbwambo would have us believe.

It was Mr. Rwebangira who represented the applicant in Miscellaneous Land Application No. 612 of 2017. Mr. Rutabingwa did not feature at all in that application.

In view of the above, we are of the settled view that, in terms of the provisions of rule 84 (1), the first and second respondents ought to have effected service of the notice of appeal and a letter applying for proceedings on the applicant, failure of which, in terms of the provisions of rule 84 (2), the first and second respondents ought to have effected service on Mr. Rwebangira, advocate, who represented the applicant in the High Court in Miscellaneous Land Application No. 612 of 2017.

Because neither of the above was done, we are satisfied that the respondent cannot rely on the provisions of the proviso to rule 90 (1) of the Rules to exclude the days used in procuring the documents from the High Court for appeal purposes.

In fine, we agree with the applicant's counsel that the first and second respondents, until 30.03.2020 when the instant application was lodged, had failed to take essential steps towards the prosecution of their appeal. The consequence for such failure, upon numerous decisions of the Court including those cited by the applicant, is to have

the relevant notice of appeal struck out. Consequently, we strike out the notice of appeal lodged by the respondents on 07.06.2019 seeking to assail the decision of the High Court (Mkeha, J.) in Miscellaneous Land Application No. 612 of 2017.

This application is allowed. The first and second respondents are condemned to pay costs. The third respondent, for the avoidance of doubt, is exempted.

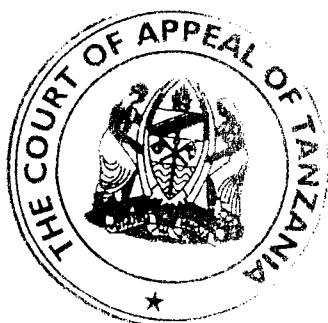
**DATED at DAR ES SALAAM** this 13<sup>th</sup> day of October, 2021.

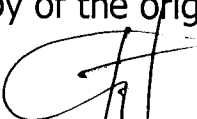
J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

L. G. KAIRO  
**JUSTICE OF APPEAL**

The Ruling delivered this 18<sup>th</sup> day of October 2021, in the Presence of Mr. George Ngemela, learned counsel for the Applicant, Ms. Nsangi Zilapulula, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Ms. Fatuma Mgunya, learned counsels for the 3<sup>rd</sup> respondent is hereby certified as a true copy of the original.



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