

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

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 52/17 OF 2020

**DR. WAHIDA SHANGALIAPPLICANT
VERSUS**

PENDO FULGENCE NKWENGERESPONDENT

**(Application to strike out a Notice of Appeal from the decision of the
High Court of Tanzania, Land Division at Dar es Salaam)**

(Mutungi, J.)

**dated the 31st day of May, 2016
in**

Land Case No. 224 of 2014

RULING OF THE COURT

23th February, & 8th March, 2022

MAIGE, J.A.:

The application at hand, traces its genesis from the decision of the High Court, Land Division (“the trial court”) in Land Case No. 224 of 2014 wherein the trial court dismissed the suit by the respondent herein for ownership of a landed property at Plot 1366 Block A, Kinyerezi, Ilala Dar es salaam, (“the suit property”) and declared the applicant herein the lawful owner of the suit property. The respondent was not happy with the said decision. As a necessary step for pursuing an appeal to the Court, the respondent lodged, on 3rd June 2016, a

notice of appeal and a letter requesting for a copy of the proceedings, judgment and decree was duly sent to the Registrar of the High Court.

Since the amendment excluding leave in appeals against decisions of the High Court, Land Division on trial was by then not in force, the respondent successfully applied for extension of time to apply for and for leave to appeal to the Court. She equally applied which was granted, for an order staying execution of the decree.

Realizing that the time within which to institute the intended appeal had expired and no appeal had been filed, the applicant lodged, on 19th February 2020, a notice of motion supported by his own affidavit moving the Court under rule 89(2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) to strike out the notice of appeal on account that no appeal lies and that, some essential steps in the proceedings have not been timely taken.

The complaints of the applicant in the affidavit is not that the respondent did not timely request for a copy of the trial proceedings, judgment and decree but that the proceedings, rulings and orders in application for extension of time to apply for leave to appeal which was filed subsequent thereafter were either not requested or if requested,

a copy of the request letter was not served on the applicant. The applicant complained further that, the documents just referred being vital for preparation of the record of appeal, the omission to timely serve the same on the applicant was violative of the law. In paragraph 10 of the affidavit, the applicant deposed as follows:

"9. That from 20.9.2018 when leave to appeal was granted to date (after elapse of almost 17 months), the respondent despite the elapse of the sixty (60) days period within which she was required to appeal to this court, she has failed to timely lodge her appeal. And if there is any appeal lodged, which is denied, the same was not timely lodged nor was it served on me within the prescribed time".

At the hearing of the application, Mr. Francis Mgare, learned advocate, appeared for the applicant whereas his learned friend advocate Alex Balomi appeared for the respondent. When given the floor to address the Court on the substance of the application, Mr. Mgare adopted the facts in the affidavit and written submissions and urged the Court to strike out the notice of appeal with costs.

Mr. Balomi who neither filed an affidavit in reply nor written submissions, urged the Court to strike out the application with costs

for being overtaken by events as an appeal has already been filed. The counsel called upon us to take judicial notice of the existence of Civil Appeal No. 368 of 2020 pending in this Court.

In his brief rejoinder submissions, Mr. Mgare was of the contention that, the application should not be struck out as the alleged appeal, if any, was filed subsequent upon the filing of the instant application.

We have considered the rival submissions and judicially noted the existence of the Civil Appeal No. 368 of 2020 instituted by the respondent against the applicant on 12th October, 2020. We have noted as well that, written submissions for and against the appeal have been filed and further that, a certificate of delay excluding the period of time which is the subject of the complaints in this application has been incorporated at page 381 of the record of appeal. In the circumstance, the complaints cannot be resolved unless the validity and relevancy of the certificate of delay is tested which is not the subject of this application. We have also considered the deposition in paragraph 9 of the affidavit that, "if there is any appeal lodged, which is denied, the same was not timely lodged nor was it served on me

within the prescribed time". It sounds to us that, in as much as the appeal has already been lodged, the pending appeal is an appropriate forum to address these complaints

It is for the foregoing reasons that, we agree with Mr. Balomi that, the instant application has been overtaken by events. It is accordingly struck out. In the circumstances of this matter, we make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 3rd day of March, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The ruling delivered on 8th day of March, 2021 in presence of Mr. Frances Mgare, learned counsel for the applicant who is also holding brief for Mr. Alex M. Balomi, learned counsel for the respondent though dully served is hereby certified as a true copy of the original.




A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL