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. 527/17 OF 2019

REHEMA IDD MSABAHA ..... APPLICANT

VERSUS

1. SALEHBHAI JAFFERJEE SHEIKH
2. RAJENDRA SHIVCHANO CHOHAN ..... RESPONDENTS

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

(Mkuye, J.)

dated the 14th day of August, 2015
in
Land Case No. 213 of 2005

RULING OF THE COURT

22nd February, & 8th March, 2022

MWAMPASHI, J.A.:

By a notice of motion taken under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant Rehema Iddi Msabaha, has moved the Court for an order that the notice of appeal lodged on 25.08.2015 by the second respondent Rajendra Shivchano Chohan, be struck out. According to the notice of motion, the application hinges on the following two grounds:

1. *That there has been an inordinate delay in filing the appeal.*
2. *That the Notice of Appeal should be deemed to have been withdrawn.*

The application is supported by an affidavit deponed by the applicant wherein it is averred among other things that on 14.08.2015 a judgment and decree in her favour and against the second respondent was passed by the High Court of Tanzania (Land Division) at Dar es salaam (Mkuye, J. as she then was) in Land Case No. 213 of 2005. Dissatisfied with the decision, the second respondent filed a notice of appeal on 25.08. 2015. On the same day, he applied for certified copy of the proceedings, judgment and decree. It is further deponed in the supporting affidavit that since then the second respondent has taken no necessary effort towards obtaining the requested documents for appeal puropses.

In opposing the application, an affidavit in reply by the second respondent was filed. It is deponed in the said affidavit that after lodging the notice of appeal, the second respondent requested to be supplied with relevant documents for appeal purposes and did also apply for leave to appeal vide Misc. Application No. 494 of 2015 of the High Court which was granted on 27.05.2016. Since then, it is further averred, the second respondent has been making follow-ups with the Registrar for the said requested relevant documents but all in vain. It is insisted in the affidavit in reply that the second respondent has taken

all necessary steps and efforts to prosecute his intended appeal but he cannot file it because the relevant copy are yet to be supplied to him.

When the application was called on for hearing before us, the applicant was represented by Ms. Mary Lamwai, learned advocate and the second respondent had the services of Mr. Ngassa Ganja Mboje, also learned advocate.

In their respective oral arguments for and against the application, both learned advocates adopted their respective written submissions which had been filed earlier in terms of rule 106 (1) and (7) of the Rules, to form part of their oral arguments.

In his oral submissions, while clarifying his written submissions, Mr. Mboje raised an issue which we think should be determined first at this very stage. It was Mr. Mboje's complaint that while according to the notice of motion the grounds on which the application is based are that there has been an inordinate delay in filing the intended appeal and that the notice has to be deemed withdrawn, in the written submissions the applicant has raised another new ground that there is a failure on part of the second respondent to take essential steps. Mr. Mboje lamented that raising a new ground in that manner is not proper and not allowed. To buttress his point, he refereed us to the case of

Georgio Anagnostou and Another v. Emmanuel Marangakis and Another, Civil Application No. 464/01 of 2018 (unreported) where the Court stated, among other things, that additional ground raised in the submissions without the Court's leave was, but irregular and at best a surprise on the respondents. Mr. Mboje did therefore urge the Court not to consider the said new ground.

Responding to the above complaint, Ms. Lamwai vehemently disagreed that a new ground has been raised in her written submissions. She contended that as the application is premised under rule 89 (2) of the Rules, the ground on which the application is based is essentially the second respondent's failure to take essential steps. It was further argued by her that the fact that in the notice of motion it is stated that there has been an inordinate delay instead of that some essential steps have not been taken, is immaterial and just a matter of semantics. She insisted that there is no new issue which has been raised and that the case of **Georgio Anagnostou** (supra) is distinguishable from the case at hand because in the former case, the applicants' advocate raised a totally new ground in his submissions which is not the case in the instant case.

Our considered observation on the above issue is that, as rightly argued by Ms. Lamwai, in essence no new ground has been raised in

the applicant's written submissions. We agree with Ms. Lamwai that since the application is premised under rule 89 (2) in which grounds for striking a notice of appeal or appeal is limited to the grounds that no appeal lies or that some essential steps in the proceedings have not been taken or have not been taken within the prescribed time, then the ground phrased in the form that " *there has been an inordinate delay in filing appeal'* is, under the circumstances of this matter, as good as stating that some essential steps have not been taken. As rightly argued by Ms. Lamwai, what we have here is just a matter of semantics. Upon our objective consideration we find that complaining that there is an inordinate delay in filing the intended appeal means and connote that some essential steps have not been taken.

The above stand that in stating in the notice of motion that the notice of appeal has to be struck out on the ground that there has been an inordinate delay in filing the intended appeal, the applicant did not mean anything different from complaining that some essential step has not been taken. This is fortified by the fact that in the supporting affidavit under paragraph 4, it is clearly averred that the second respondent has not filed his appeal and has not made the necessary efforts towards obtaining the documents he requested from the High Court. Since the supporting affidavit is part and parcel of the notice of

motion in which grounds raised in the notice of motion are substantiated and factually clarified and as under paragraph 4 of the supporting affidavit it is averred that some essential steps have not been taken then, the argument by Mr. Mboje that a new ground has been raised is unfounded and with no merit.

We have carefully passed through the case of **Georgio Anagnostou** (supra) and found that it is distinguishable from the instance case for two reasons; **One**, in that case two grounds for striking out a notice of appeal were raised in the notice of motion namely; failure to take essential steps and the intended appeal being overtaken by the events. However, in their written submissions, the applicants raised another ground that the respondents had not applied for leave to appeal which was a completely new ground. **Two**, while in the former case the new raised ground did not in any way feature in the supporting affidavit, in the case at hand the alleged new ground features in the supporting affidavit. For these reasons, we find the issue raised by Mr. Mboje unfounded and we accordingly overrule it.

Before we proceed any further, we have asked ourselves and keenly considered whether the second ground raised in the notice of motion that the notice of appeal should be deemed withdrawn is really a ground that can be raised under rule 89 (2) of the Rules. It is our

considered view the said ground is misconceived and cannot be one of the grounds for striking out a notice of appeal in terms of rule 89 (2) of the Rules. A notice of appeal can be deemed to have been withdrawn in terms of rule 91 (a) of the Rules where a party who had lodged it fails to institute an appeal within the prescribed time. Rule 89 (2) of the Rules under which the instant application is premised has nothing to do with deemed withdrawal of a notice of appeal. For the above given reasons, we discard the said second ground and we will therefore proceed to determine this application on the first ground.

In her submissions on the ground that the second respondent has failed to take essential steps towards filing his intended appeal, Ms. Lamwai argued that since 2015 when the decision was passed against him or even since 2016 when leave to appeal was granted by the High Court, which is more than five (5) years, the second respondent has taken no essential step in filing his intended appeal. She further pointed out that apart from a copy of the second applicant's letter to the Registrar of the High Court requesting to be supplied with relevant certified copy of documents for appeal purpose dated 17.08.2015, no any other copy of letters by the second respondent, in regard to the alleged follow-ups with the Registrar, has ever been copied to the applicant. It was also complained by Ms. Lamwai that the second

respondent has not even applied for the ruling and drawn order in respect of his application for leave to appeal which was granted on 27.05.2015. She maintained that due to the second respondent's inaction and idleness the notice of appeal should be struck out with costs.

It was further submitted by Ms. Lamwai that the second respondent cannot rely on the case of **Birr Company Ltd v. C-Weed Corporation (ZNZ)**, Civil Application No. 07 of 2003 (unreported) where it was stated that there is no requirement under the Rules for the respondent to remind the Registrar on the obtainability of the requested documents because that case is different from the instant case. She however, did not give the distinction.

Resisting the application, Mr. Mboje submitted that after requesting the relevant documents as exhibited by a letter dated 17.08.2015 which is annexed to the affidavit in reply and marked R.C2, no relevant document has been supplied to him and that his efforts of making physical follow-ups with the Registrar have proved futile. It was further contended by him that this is not a fit case for the Court to invoke its powers under rule 89 (2) of the Rules whereby the Court can strike out a notice of appeal. In the instant case, it was argued by him, all essential legal steps have been taken by the second respondent within

the prescribed period of time. He insisted that the intended appeal could not be filed because the requested documents are yet to be supplied to the second respondent by the Registrar and that since there is no notification on the readiness of the said documents the second respondent, cannot be condemned.

Mr. Mboje further submitted that the second respondent having duly applied for certified copy for appeal purposes and no letter from the Registrar informing him that the requested copy is ready for collection, having sent to him, the notice of appeal cannot be struck out on the ground that no essential steps have been taken by him. The learned counsel contended that on the authority of **Georgio Anagnostou** (supra), the second respondent cannot be blamed because on his part he has performed his obligation. He stressed further that the second respondent having undertook all the essential legal steps as above explained, is home and dry as per **Birr Company Ltd** (supra).

It was finally argued by Mr. Mboje that under the circumstances of this case, the notice of appeal should not be struck out and that the Court should hold that this is a fit case to invoke section 3A (1) and (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) as it was done in **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil

Appeal No. 55 of 2017 (unreported). He thus urged us to dismiss the application with costs.

The basic issue for our determination in this application is whether the notice of appeal lodged by the second respondent on 25.08.2015 should be struck out.

The Court derives powers to strike out a notice of appeal or appeal from rule 89 (2) of the Rules under which it is provided as follows:

> *"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".*

As rightly argued by Mr. Mboje, a notice of appeal or appeal can be struck out under rule 89 (2) of the Rules, on either of the following three grounds:

1. *That no appeal lies;*
3. *That some essential step in the proceedings has not been taken; and*
4. *That an essential step has been taken but not within*

the prescribed time.

In the instant case it is not disputed that being dissatisfied with the High Court judgment and decree, the second respondent filed the notice of appeal and applied for relevant certified copy for appeal purposes from the Registrar of the High Court. Further, since by then, leave to appeal was mandatory in such cases, the second respondent applied for leave which was granted on 27.05.2016. Since then, the second respondent has not filed the intended appeal mainly on the ground that he is still waiting to be supplied with the relevant documents for appeal purposes of which he had applied since 17.08.2015. The second respondent relied on the case of **Birr Company Ltd** (supra) and **Georgio Anagnostou** (supra) arguing that having requested for the relevant documents and having not been informed that the documents are ready for collection, he is home and dry. With due respect, we do not agree with Mr. Mboje that the two cited cases are, under the circumstances of this case, of any assistance to the second respondent. We will explain.

The decisions in **Birr Company Ltd** (supra) and **Georgio Anagnostou** (supra) were made before the amendments to rule 90 of the Rules by the Tanzania Court of Appeal (Amendments) Rules, 2019, GN No. 344 of 2019 published on 26.04.2019. Through the said

amendments, a new subrule (2) was added and hence subrule (4) became subrule (5). Thereafter, rule 90 (5) was amended and it reads as hereunder:

> *"Subject to the provisions of subrule (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****".*
>
> [Emphasis added]

It should also be noted that before the said amendments, the then relevant provision was subrule (4) of rule 90 which came into force through the Tanzania Court of Appeal Rules (Amendments) Rules, GN No. 362 of 2017. Under those provisions, the time limit within which the appellant could take steps to collect the copy after the expiry of ninety (90) days, was not set. The fourteen days-time limit was introduced by the 2019 amendments vide GN No. 344 0f 2019. It was for the reason and basing on the said provisions of 2017 that the Court in **Georgio Anagnostou** (supra) stated that the subrule did not prescribe any consequence flowing from the failure to approach the

Registrar for the copy after the expiry of ninety (90) days and further that there was no express placement of obligation on the appellant. In that case and for that reason, the relevant notice of appeal was saved.

It is our settled view that, the current rule 90 (5) of the Rules, expressly places an obligation to the appellant who has requested for the relevant documents for appeal purpose and who on expiry of ninety (90) days, has not been informed by the Registrar that the requested documents are ready for collection, to approach the Registrar asking to be supplied with the documents. It is imperative that he should do so within fourteen days after the expiry of the ninety days. It should also be emphasized that when the appellant takes such a step, there must be a proof to that effect.

The position obtaining from rule 90 (5) of the Rules, was well articulated by the Court in **Jackson Mwaipyana v. Parcon Limited**, Civil Application No.115/01 of 2017 where it was observed that:

> *"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 follow up of the documents he requested from the court within fourteen (14) days".

[Emphasis added]

In light of the provisions of rule 90 (5) of the Rules, the consequences of the failure to approach the Registrar within the prescribed period of 14 days is now clear. The failure amounts to failure to take an essential step within the meaning of rule 89 (2) of the Rules. See also- **Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020 (unreported).

In the instant case it is not disputed that since 27.05.2016 when leave to appeal was granted, the second respondent has remained idle and inactive. There is no evidence to show that since then he has done anything in furtherance of his intended appeal in respect of which the notice of appeal was lodged by him on 25.08.2015. The argument that there have been physical follow-ups with the Registrar on the obtainability of the said relevant documents by the second respondent himself and by his advocate, without any proof of the same, cannot be accepted. If it is true that such efforts were made, the second respondent ought to have obtained an affidavit of the Registrar or even a letter to that effect. We have no grain of doubt that no such efforts have been done and that the second respondent has therefore failed to

take essential steps in filing his intended appeal. His notice of appeal cannot avoid the wrath of the law.

In addition to the above, it is also our observation that after obtaining leave on 27.05.2016, for more than five years, the second respondent has not applied for the copy of the relevant ruling and drawn order. Since under rule 96 (1) (i) of the Rules, a copy of the order granting leave to appeal is one of the essential documents that must be contained in the record of appeal, the second appellant's failure to request for the same, amounts to failure to take essential step in the proceedings as it is envisaged under rule 89 (2) of the Rules. This failure, by itself, is sufficient for the notice of appeal to be struck out as prayed in the notice of motion.

Before we pen off, we should briefly point out that we have also considered the argument by Mr. Mboje that section 3A (1) and (2) of the AJA be invoked. With due respect, we do not think that this is a fit case for the application of the overriding objective principle. The principle enjoins the Court to do away with legal technicalities and decide cases justly, however, the principle cannot be applied blindly on mandatory provisions of procedural laws. See- **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (unreported). The argument is therefore rejected.

For the reasons we have amply given above, we find the application meritorious. The second respondent has failed to take essential steps in filing his intended appeal. Consequently, in terms of Rule 89 (2) of the Rules, the notice of appeal lodged by the second respondent on 25.08.2015 in respect of the High Court of Tanzania, Land Division at Dar es salaam in Civil Case No. 213 of 2005 is hereby struck out with costs.

It is so ordered.

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 this 8th day of March, 2022 in the presence of Ms. Mary Lamwai, advocate counsel for the Applicant holding brief for Mr. Ngassa Ganja Mboje, counsel for the Respondent is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL