

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: KOROSSO, J.A., GALEBA, J.A. And MAKUNGU, J.A.)
CIVIL APPLICATION NO. 95/01 OF 2020

JAPHET MACHUMU APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK RESPONDENT

**(An Application Against the Notice of Appeal filed on the 30th September
2019 by the Respondent Arising from the judgment and decree of the
High Court of Tanzania, Labour Division, at Dar es Salaam)**

(Muruke, J.)

**dated the 6th day of September, 2019
in**

Revision No. 710 of 2018

RULING OF THE COURT

16th March, & 11th April, 2022

KOROSSO, J.A.:

In the application before the Court, Japhet Machumu, the applicant, is by way of notice of motion, pursuant to Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), moving the Court to strike out a notice of appeal filed on 30/9/2019 by the National Microfinance Bank (NMB) (the respondent) on the ground that no essential steps have been taken by the respondent to pursue the intended appeal within the prescribed time. The challenged notice of appeal was filed by the respondent on 30/9/2019 against the decision of the High Court, Labour Division, sitting at Dar es Salaam in Labour

Revision No. 710 of 2018. The application is supported by the applicant's own affidavit. The respondent, through the affidavit in reply deposed by Mr. Paschal Kamala learned Advocate filed on 9/6/2020 resists the application.

The background to the matter in brief, is that the applicant was an employee of the respondent as of 12/09/1991 up to his termination from employment on 16/07/2014, allegedly for misconduct. Dissatisfied by the termination, the applicant referred his complaints to the Commission for Mediation and Arbitration (CMA) vide Dispute Reference No. CMA/DSM/ILA/R.789/14/234. The CMA decided in favour of the applicant and ordered his reinstatement without loss of remuneration and payment of Tshs. 100,000.00 as compensation.

Unsatisfied with the CMA's decision and award, the respondent appealed to the High Court, in Labour Revision No. 471 of 2017, which was found to be incompetent and thus struck out with leave to refile within 14 days. Subsequently, the respondent instituted Labour Revision No. 710 of 2018 in the High Court, Labour Division, and the High Court (Muruke, J.) revised the CMA award and substituted an order for the applicant to be paid an amount equal to twelve (12) months' salary at the time of his termination, instead of payment of Tshs. 100,000/- as

compensation. Aggrieved, the respondent on 30/8/2019, filed the notice of appeal that is the subject of the instant application.

According to paragraphs 4 to 8 of the affidavit supporting the notice of motion, the essence of the applicant's contention is that from the time the respondent filed the notice of appeal to the time of filing the instant application no appeal has been lodged even though the prescribed time for filing the appeal has expired. The applicant averred that he had followed up on the availability of essential documents for appeal at the office of the Registrar and upon being provided with the impugned judgment and decree, he had personally given the same to the respondent on 10/9/2019 and he was thus surprised that up to the time of filing the instant application, the appeal was yet to be lodged. In paragraphs 9-11 of the supporting affidavit, the applicant contends that the respondent's failure to file grounds of appeal within time was for the purpose of delaying and frustrating the process of execution of the decree of the impugned judgment, and essentially, an abuse of the court process and has caused unwarranted hardships to the applicant.

The respondent, through the affidavit in reply sworn by its counsel, vehemently disputes the applicant's assertions and in paragraph 6 avers that the respondent has diligently pursued the

intended appeal against the impugned judgment as discerned from the fact that upon filing a notice of appeal, a letter to the Deputy Registrar requesting to be supplied with copies of judgment, decree, and proceedings within the statutorily prescribed period was duly filed and served on the applicant.

Further to this, in paragraphs, 5-8 the respondent's counsel avows that despite constant follow-ups and reminders, there was no notification from the Deputy Registrar for him to collect the requested essential documents for the intended appeal in compliance with the law. He stated that being provided with the proceedings on 19/2/2020 was upon his follow-up at the office of the Deputy Registrar on the said day and it was then that he was informed that the documents were ready for collection. The respondent's counsel also averred that the certificate of delay has yet to be issued despite constant follow-ups and that the delay to get it has hindered efforts to process the appeal. Therefore, he urged us to find that he has taken all the relevant steps to obtain the documents for purpose of preparing the record of appeal as prescribed by the law and provided various letters as annexures to the affidavit in reply to support his assertions.

When the application was before us for hearing, the applicant appeared in person and fended for himself whereas Mr. Paschal Kamala, learned Advocate represented the respondent.

In his brief address to the Court, the applicant commenced by adopting the notice of motion and the supporting affidavit and prayed that the Court grant his prayers as averred in the said affidavit. He contended that the respondent, upon filing the notice of appeal against the impugned judgment on 30/9/2019 up to the date of hearing of the application has failed to take some essential steps to process the intended appeal and prayed that the Court should find so.

In response to the respondent's contention that there was no notification from the Registrar on when to collect the necessary documents, the applicant argued that the respondent's address was unknown and thus could not be traced after his counsel changed his address without notification as required by the law. In addition, he denied having been served with copies of any follow-up letters on the matter from the respondent to the Registrar. The applicant thus implored the Court to grant his prayers and find that the respondent has not shown any diligence or urge to process his appeal and not

processing the appeal in time was nothing but a delaying tactic to frustrate the execution of the impugned decree.

The respondent's counsel commenced his submission by adopting the affidavit in reply filed on 8/4/2020. He contended that the respondent exercised diligence as shown by timely filing the notice of appeal and writing the letter to the Registrar requesting essential documents as averred in the affidavit in reply. He further submitted that the respondent had clearly shown how he diligently followed up to get the essential documents. However, having received the proceedings on 19/2/2020, a time when the period to file the appeal had already expired to date, he was yet to receive a response from the Registrar on the certificate of delay to allow him to file the appeal together with the record of appeal.

The respondent's counsel challenged the allegation by the applicant that on 10/9/2019 he provided the respondent with the necessary documents to process the appeal and argued that there was no proof provided to prove the claim. He contended further that the assertion remained unproven as there was no affidavit of the court process server availed to verify it. In the alternative, he argued that if the claims were taken to be true, there remains the fact that what was

provided by the applicant to the respondent were the impugned judgment and decree only, and in the absence of the proceedings, the requisite record of appeal would not have been complete and thus the appeal could not be filed. He thus entreated us to find that the respondent took all the necessary steps to process the appeal, find the application to be devoid of merit and dismiss it.

The applicant's rejoinder was essentially a reiteration of his submission in chief. He however, conceded to have failed to provide the essential affidavit from the court process officer to substantiate his claims of serving the respondent with the impugned judgment and decree since the respective officers had refused to swear the related affidavit but stated that his averments on the issue should be taken as proof of having served the respondent with the relevant documents.

We have prudently considered the oral submissions and the contesting affidavits supporting the cases of the parties and annexures thereto and the filed authorities. Undoubtedly, the borne of contention between the parties is whether upon filing the notice of appeal against the impugned judgment and decree, the respondent did take the necessary steps to pursue the intended appeal as prescribed by the law. Whilst the applicant contends that upon filing the notice of appeal and

the letter requesting essential documents the respondent has not exercised the requisite diligence to pursue his appeal, and the respondent argues that essential steps to process the appeal have been duly taken within the confines of the law, however, his efforts were hindered by Registrar's failure to provide him with essential documents.

Rule 90(1) of the Rules prescribes for the institution of appeals in the Court and it states:

"Subject to the provisions of rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with-

- (a) A memorandum of appeal in quintuplicate;*
- (b) The record of appeal in quintuplicate;*
- (c) Security for the costs of appeal,*

Save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant."

In the instant application, the judgment in Labour Revision No. 710 of 2018 was delivered on 6/9/2019. The parties do not dispute that the respondent lodged the notice of appeal against the impugned judgment on 30/9/2019 and wrote a letter requesting copies of proceedings, judgment, and decree on 28/9/2019, and both in time. In our perusal of the record before us, we find nothing to support the applicant's averment that he had served the respondent with a copy of the judgment and decree on 10/9/2019. We are thus of the view that it will be a dangerous exercise to consider such contested claims, in the absence of any other evidence in support. Recognizing, that an affidavit of the process server would have verified the assertion.

In addition, we are of the firm view that, the applicant's assertion should not take much of our time since, even if the applicant's claim were to be true, as submitted by the counsel for the respondent, the applicant's contention was that what he served the respondent was the impugned judgment and decree only and not the proceedings. In the circumstances, and understanding that in processing the record of appeal, copies of proceedings are essential, and in their absence, the respondent would not have been able to process the appeal and thus the respondent cannot be condemned, merely on this issue.

We are alive to the fact that Rule 89(2) of the Rules for which the instant application is predicated, allows a person who has been served with a notice of appeal to seek for striking out a notice of appeal where no appeal lies after the prerequisite period to file an appeal has elapsed or where an essential step to process an appeal has not been taken, a position which has been restated in various decisions. (See, **Barclays Bank (Tz) Limited Vs Hood Transport Limited and Another**, Civil Application No. 134 of 2014, **Elias Marwa Vs IGP and Another**, Civil Application No. 11 of 2012, and **Habi Said Vs Joha Salum**, Civil Application No. 525/11 of 2017 (all unreported)). In **Amina Aden Ally Vs Gavita Mohamed**, Civil Application No. 4 of 2009 (unreported), the Court stated:

"It is settled that Rules of the Court must be respected and adhered to lest it leads to miscarriage of justice. He who comes to Court to prosecute a case or an appeal must see to it that essential steps are taken within time as prescribed by the relevant law. Applying delaying tactics leads to nothing less than causing unnecessary harm to the adverse party."

The record before us clearly shows that the impugned judgment of the High Court, Labour Division in Labour Revision No. 710 of 2018 was

delivered on 6/9/2019. On 30/9/2019 the respondent lodged a notice of appeal and on 28/9/2019 he wrote a letter to the Deputy Registrar requesting to be supplied with requisite copies of judgment, decree, and proceedings. Suffice to say, filing of the notice of appeal and the letter requesting necessary documents were filed within the prescribed time. We have also considered the argument by the respondent's counsel on the failure of the Deputy Registrar to give notice on whether the requested proceedings were ready for collection.

Suffice to say, in the instant application we tasked our minds on whether considering the reasons advanced by the respondent's counsel for failure to file the appeal to date in the affidavit in reply and oral submissions show the exercise of diligence in pursuance of the appeal in line with the provisions of Rule 90(1) and (5) of the Rules. Having hereinabove already reproduced Rule 90(1) and its proviso above, at this juncture we educe Rule 90(5) of the Rules, and it reads:

"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 a copy upon being informed by the Registrar to do

so, or within fourteen (14) days after the expiry of the ninety (90) days."

The Court in the case of **Daudi Robert Mapuga and 417 Others Vs Tanzania Hotels Investment Limited and Others**, Civil Appeal No. 462/18 of 2018 (unreported) restated the position held in **Arthur Kirimi Rimberia & Another Vs Kagera Tea Company Ltd. & 3 Others**, Civil Application No. 364/01/2018 (unreported) and underscored the context of Rule 90(5) of the Rules, reproduced above, following the amendments ushered in by the Tanzania Court of Appeal (Amendment) Rules, 2019, GN 344 of 2019 that: -

"...the above provision imposes two obligations: first, it enjoins the Registrar to ensure that a copy of the proceedings is ready for delivery within ninety days after the request is made. Secondly, it requires the intending appellant to collect a copy of the proceedings upon being informed by the Registrar to do so and that if he is not so informed, then he must take such steps within fourteen days following the expiry of the ninety days after the request was made."

We subscribe to the above observations. Therefore, applying them to the instant application, implies that having duly lodged the notice of appeal within time, fourteen (14) days after the expiry of the 90 days to

file an appeal, the respondent was duty-bound to follow up with the Registrar on the availability of the requested essential documents to pursue the intended appeal and not sit and wait to be notified (See **Daudi Robert Mapuga and 417 Others** (supra) and **Monica Makungu Vs Director of Education Department, Archdiocese of Mwanza**, Civil Application No. 31/08 of 2021 (unreported)).

Having scrutinized the affidavit in reply and its annexures, even though we have failed to gather any evidence that showed notification of readiness of documents for collection from the Registrar to the respondent nor evidence to support the applicants' assertion of having served the respondent with the requisite documents, we are inclined to agree with the applicant that this fact does not absolve the respondent from the duty imposed on him under Rule 90(5) of the Rules to follow-up on availability of the documents.

The notice of appeal having been filed on 30/9/2019 meant that the 90 days for filing of the appeal expired on or about 30/12/2019 and that 14 days thereafter was on about 14/1/2020. According to the averment in paragraph 6 of the affidavit in reply, the proceedings were collected on 19/2/2020. There are three letters to the Registrar referred to in paragraph 7 of the affidavit in reply as annexures NMB-2. Two of

the letters sought the certificate of delay, the first letter is dated 19/2/2020 with no evidence of having been received in court and thus will not be considered. The second letter which is dated 27/3/2020 was received on 31/3/2020. The third letter which is dated 28/9/2019 and was received on 30/9/2019 is one that requested typed copies of judgment, decree, proceedings, and any other material documents to enable the respondent to file the Appeal to the Court. There is also Annexure NMB-1 referred to in paragraph 6 of the affidavit in reply, which is a page from a dispatch signed by the advocate of the respondent then, showing the collection of the proceedings on 19/2/2020.

Our perusal of all the above annexures has discerned that they do not support the respondent's assertions that there was constant follow-up for the requested documents. It is evident that after filing the letter that requested for necessary documents for the intended appeal on 30/9/2019, the next communication was on 19/2/2020 when he collected the proceedings and later requested the certificate of delay. There is no evidence to support his claims of having been making any follow-ups between 30/9/2019 and 19/2/2020.

Moreover, while we cannot say that the Registrar is free from blame for his inaction and failing to supply the respondent with the requested documents and to notify his counsel on readiness for collection, at the same time we cannot absolve the respondent for failing to exercise diligence in pursuant of his intended appeal. First, there is no evidence that he made follow-ups on essential documents as claimed, as there were no letters annexed to the affidavit in reply that supported the assertion. Second, even after receiving the documents on 19/2/2020 as claimed, which was after the 90 days to file an appeal had expired, it took the respondent 41 days (from 19/2/2020 to 31/3/2020) to file a letter requesting for certificate of delay for purpose of processing an appeal. Essentially, 6 days after the applicant had filed the current application.

As alluded to above, we find the fact that the respondent just waited to be informed on when the copy of proceedings was ready for collection even after the requisite 90 days to file an appeal had elapsed without making the requisite follow-up, clearly shows inaction on his part and contravenes Rule 90(5) of the Rules. We thus refrain from accepting the respondent's inaction and complacency and finding that there was a lack of diligence on his part in pursuing the intended appeal.

In the end, we are inclined to agree with the applicant that the respondent, as the prospective appellant failed to take the essential steps required for the institution of the intended appeal. Consequently, we grant the application and order, in terms of Rule 89(2) of the Rules, that the Notice of appeal lodged on 30/9/2019 be hereby struck out. In the circumstances, each party to bear own costs.

DATED at DAR ES SALAAM this 5th day of April, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 11th day of April, 2022 in the presence of applicant in person and Mr. Pascal Kamala, learned advocate for the respondent is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL