IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CIVIL APPLICATION NO. 213/16 OF 2020

MEHBOOB HASSANALI VERSI ..... APPLICANT

VERSUS

MURTAZA MOHAMED VIRAN..... 1ST RESPONDENT

MRS. RUBAB MOHAMED RAZA VIRAN..... 2ND RESPONDENT

[Application to Strike Out a Notice of Appeal Seeking to Challenge the Decision of the High Court of Tanzania at Dar es Salaam]

(Mruma, J.)

Dated the 13th day of December 2016
in
Commercial Case No. 281 of 2002

.....

RULING OF THE COURT

14th March, & 6th April, 2022

GALEBA, J.A.:

In this application which was lodged on 17th June, 2020 under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), Mehboob Hassanali Versi the applicant, is moving the Court to strike out a notice of appeal by Murtaza Mohamed Virani and Mrs. Rubab Mohamed Raza Virani, the first and second respondents respectively, who lost in his favor before the Commercial Division of the High Court at Dar es Salaam in Commercial Case No. 281 of 2002. According to the applicant, the respondents did not lodge a

memorandum and a record of appeal within sixty days of being notified under Rule 90 (1) of the Rules that a copy of the proceedings in the High Court is ready for collection. If, the applicant adds, the appeal had been filed at the time of lodging this application, then the same was not served on the applicant in seven (7) days as required by Rule 97 (1) of the Rules. Because of that, the applicant's position is that, legally, the notice of appeal which was lodged on 16th December, 2016 on behalf of the respondents, ought to be struck out with costs under Rule 89(2) of the Rules.

The application is, nonetheless, strongly resisted by the respondents, because according to them, they took all necessary steps prior to filing Civil Appeal No. 312 of 2020. The necessary steps taken they argued, included requesting for a copy of proceedings from the High Court which were not availed to them in time. Their argument being that it is only on 17th July, 2020 that they obtained the documents detailed under Rule 90(1) and (2) of the Rules, which are necessary for them to lodge a competent appeal which they eventually, lodged on 15th September, 2020.

To appreciate the background preceding the filing of this application, it is, in our view, desirable that we detail at least a few crucial milestones along this application's timeline from 13th December 2016 when the respondents lost

in the High Court until 17th July 2020 when they eventually received a copy of the genuine copy of the proceedings from the High Court.

According to the material presented before us by parties, the judgment that aggrieved the respondents was handed down on 13th December 2016, as indicated earlier on above. Two days later, on 15th December 2016 they wrote a letter to the Registrar of the High Court at the Commercial Division requesting for a copy of the proceedings in the High Court as required by Rule 90 (1) of the Rules. The next day, on 16th December 2016, they lodged a notice of appeal under Rule 83 (1) of the Rules and served both the letter and the notice of appeal to the applicant under Rules 90 (1) and 84 (1) of the Rules respectively.

Over four months later, on 10th April 2017, to be particular, the Registrar wrote a letter to the respondents advising them to go to court and collect the documents requested, for they were ready for collection. They paid Tshs. 80,000/= but they were accessed only with the judgment, decree and the proceedings. The respondents, were not given the exhibits, which necessitated them to write a letter dated 9th May 2017 informing the High Court that the exhibits were omitted in the documents availed to them. Exactly one year passed without the High Court supplying the requested

exhibits to the respondents, such that on 10th May 2018, the respondents' advocates wrote another letter to the High Court referring to their previous letter of 9th May 2017 reminding the Registrar to supply them with the same exhibits which had not been received.

Further, on 25th June 2018, vide a letter by the respondents through their advocates, Sylvester Shayo and Company Advocates, requested for an audio recording of the evidence of DW1 and DW2 for the advocates to satisfy themselves whether the audio recording was in tune with what those witnesses testified. They received the recording, but upon comparing it with the typed evidence on record, there were material errors and mismatches such that the said advocates vide a letter dated 10th August 2018, notified the Registrar of 5 material errors together with 67 more mistakes identified on 67 different pages of the typed transcript constituting the record of the evidence. On the basis of that finding, the advocates requested for correction of the errors, and requested to be supplied with a corrected version for them to lodge an appeal.

The High Court rectified the record but still there remained five errors at pages 78 and 80 of the transcripts. The said errors were pointed out by Sylvester Shayo and Company Advocates in their letter to Registrar of the

High Court, dated 11th September 2018. Following this letter, the Registrar wrote a letter dated 20th September 2018 advising the said advocates that, in case they found any more errors, they were at liberty to correct the record by themselves in terms of rule 60 of the High Court (Commercial Division) Procedure, Rules 2012 and send the corrected version to court. This letter from the Registrar was received by its addressee on 16th December 2019 which was about 84 days from when it was written by the Registrar. The advocates corrected the transcript as advised by the court, and by a letter dated 23rd December 2019, they sent the rectified version of record to the Registrar. On 17th February 2020, the Registrar informed the advocates that the corrected copy of the proceedings of the High Court was finally ready for collection from the court. This letter was received on 2nd March 2020.

Note that by this time, the exhibits which the court had been reminded to supply earlier on have not been accessed to the respondents and nothing so far has been communicated to the respondents.

Nonetheless, the acrobatics in the matter were yet to end. The advocates for the respondent still discovered another anomaly that would not, by any standards, be glossed over. This time the advocates noted that, the court sent to them, the same documents that the advocates had sent to the

court, but worse still, the documents were not endorsed as being the court's. The advocates advised the court of this latest setback vide its letter dated 18th June 2020.

The unbroken chain of communication between the court and the respondents or their advocates came closer to an end on 2nd July 2020 when the Registrar wrote a letter to the above referred advocates inviting them to go to court and collect the rectified copy of the proceedings, as it was finally ready for collection. The call was also repeated on 17th July 2020 vide a letter of reference no. Comm. Case. No. 281/2002 attached with a certificate of delay.

The certificate of delay excluded the time between 15th December 2016 and 17th July 2020 as the time that was necessary required for the preparation and delivery of the copy of the proceeding in the High Court under Rule 90 (1) of the Rules.

All the letters above, between the court and the respondents were all copied to the applicant or to Rwebangira & Co. Advocates, the latter's legal counsel, except the letter dated 20th September 2018. That is to say, the applicant was fully aware of all that was happening between the court and the respondents.

On the respondents' part, following receipt of the corrected documents and the certificate of delay on 17th July 2020, from the court, lodged Civil Appeal No. 312 of 2020 before this Court on 15th September 2020.

The notice of appeal forming the basis of the above stated civil appeal, is the target document that the applicant is moving this Court to strike out under Rule 89(2) of the Rules to be followed, obviously, by an automatic collapse of the said appeal under Rule 89(3) of the Rules.

As indicated earlier on however, the respondents' position was that the stream of communication through letters that they were sending to the High Court and receiving others from the court, were essential steps necessary before they could lodge the appeal. Therefore, they cannot be taken as having failed to lodge the appeal any time earlier than they did.

With that prelude, we are now able to tackle the parties' arguments for and against the application.

At the hearing, Mr. Thomas Eustace Rwebangira learned advocate appeared for the applicant and the first respondent appeared in person without legal counsel. Although the second respondent was not in attendance, we allowed hearing to proceed in her absence because, **first** she had been notified of the hearing date but she requested the first respondent to inform

the Court that the hearing may proceed in her absence as she was, on that day, in a bad state of health and **secondly** as written submissions had been lodged in Court on her behalf, under Rule 106(12)(b) of the Rules, we deemed the said respondent to have appeared and argued her appeal before us.

Consequent to adopting the applicant's written submissions earlier filed, in fortifying the applicant's stronghold at the hearing of the application, Mr. Rwebangira contended that although the respondents were in constant communication with the court from when they lost in 2016 to July, 2020, still, in between there are times where they were supposed to file their appeal but they did not. He singled out several instances; **firstly,** he submitted that when the Registrar advised the respondents to correct the documents with errors in his letter of 20th September 2018, for over two months, the respondents did nothing until 23rd December 2018 when they responded *vide* their letter (MMV10) of the same date sending the corrected transcript to the court.

Secondly, because according to the letter from the Registrar of the High Court dated 17th February 2020, which the respondents received on 2nd March 2020, the respondents were informed by the court, to go and collect

the corrected copy of proceedings so that they could appeal, then time to do so started to run on 2nd March, 2020 and lapsed on 2nd May 2020.

Thirdly, in the respondents' letter dated 25th June 2018, the respondents were requesting the Registrar to avail them with a certificate of delay, which, according to Mr. Rwebangira, if the respondents wanted the certificate, then they had all documents necessary for purposes of appeal.

Mr. Rwebangira referred us to this Court's decision in **Njowoka M. M. Deo and Another v. Mohamed Musa Osman**, Civil Application No. 78/17 of 2020 (Unreported) in supporting his point that time cannot be excluded by a certificate of delay to include a day on which the certificate is issued. He further cited to us the case of **Hamis Mgida and Another v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 59 of 2020 (unreported) urging us to hold that the Registrar of the High Court has no jurisdiction in matters of extension of time to lodge any document to the Court. Mr. Rwebangira contended that the certificate of delay sought to be relied upon by the respondent was defective and the appeal lodged by them, was equally incompetent for having been filed out of time. In that respect, he cited the case of **Puma Energy Tanzania Limited v. Diamond Trust Bank Tanzania Limited**, Civil Appeal No. 54 of 2016 (unreported). He finally

prayed that as the respondents did not take essential steps to appeal in time, the notice of appeal ought to be struck out with costs.

In reply, the first respondent, like Mr. Rwebangira moved the Court to adopt the written submissions lodged in contesting the application adding a long protracted oral account on the communications which was almost a *repllca* of the background we narrated earlier on. The first respondent, thereafter beseeched us to dismiss the application with costs.

It is now opportune, we think, to point out the issue for determination of this application. In our view, the issue for resolution of this matter, is whether the notice of appeal lodged on 16th December 2016 is liable to be struck out on the grounds that an essential step or steps in the proceedings have not been taken, or if they have, they have been taken out of the time prescribed by law. To determine the issue, we will first briefly navigate the law applicable, then we shall carefully examine the record before us in view of the submissions of parties in an endeavor to establish, whether indeed the respondents did not take necessary step or steps, to the extent of having violated Rule 89(2) of the Rules, which provides as follows:

> *"(2) 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."

In this case, the applicant's submission is that there are times between December, 2016 to June, 2020, where the respondents were supposed to lodge the appeal, but they did not. Essentially, that is what this application is all about.

The **first** point that was raised on behalf of the applicant is that when the Registrar advised the respondents to correct the documents with errors in his letter of 20th September 2019, for over two months the respondents did nothing until 23rd December 2019 when they responded vide their letter of the same date sending the corrected transcript to the court. We reviewed the said letter dated 20th September 2019, and noted that it has an endorsement that it was never couriered in good time to the respondents from the court to the respondents or their advocates because at the foot of the letter, it is written:

"Received from the Court, 16/12/2019

Sgd

Murtaza M. Virani."

It means therefore, that although the letter was written on 20th September, 2019 the same was not sent to the respondents until the first respondent went to court on 16th December 2019 and collected it physically. This letter was replied to on 23rd December 2019. We therefore do not agree with Mr. Rwebangira that the respondents did not act on the court's letter for the whole time from 20th September 2019 to 23rd December 2019, rather they received the letter and acted on it in just a week, which time, in our view, is quite reasonable.

The second point by Mr. Rwebangira was that because the letter dated 17th February 2020, from the Registrar which the respondents received on 2nd March 2020, was informing the respondents that the corrected proceedings were ready for collection, then counting from 2nd March 2020, sixty days lapsed on 2nd May 2020, on which day, Mr. Rwebangira submitted, was the latest on which an appeal was supposed to be lodged.

In this case, nothing was done by the respondents from the said 2nd March, 2020 to 18th June, 2020 when they wrote a letter to the Registrar informing him that in fact the court, had not given them proper documents, instead, it had sent them the documents that the respondents had themselves

corrected and sent to the court on 23rd December 2019 and further that the proceedings were not even endorsed by the court.

In this case, Mr. Rwebangira is not contesting the fact that the copy of the proceedings accessed to the respondents were marred with errors, but he is, nonetheless, insisting that the respondents had to lodge the appeal within sixty days from 2nd March 2020, be as it might have been.

We think it is opportune, at the moment to pause for a while and pose one point interrogatively; that is, could copies of the uncertified proceedings which were referred to in the letter that was received on 2nd March 2020, be used by the respondents to launch a competent appeal, assuming they lodged one? As for us, we do not think that an appeal composed of a copy of unauthentic proceedings could have been used to commence and sustain a competent appeal. We are of the settled position that the respondents were not expected to have acted upon invalid documents to lodge an appeal. Therefore, the argument on behalf of the appellant that the respondents having received the letter on 2nd March 2020, by hooks and crooks had to have the appeal lodged come 2nd May 2020, is in our view, with respect, incorrect and has no merit because the documents in their possession at the time, had errors, a problem which was not caused by the respondents.

The **third** argument by Mr. Rwebangira was that because in their letter dated 25th June 2018, the respondents were requesting the Registrar to access them with a certificate of delay, that implied that they had all documents necessary for purposes of appeal except the certificate requested. According to him, that letter is evidence that the respondents were ready to file the appeal but what was missing was only the certificate of delay.

We have reviewed the above letter and we have noted that, in addition to requesting for the certificate of delay, the letter was requesting some evidence recorded on electronic gadgets. The relevant substance of that letter reads:

> *"We write to request for:*
>
> 1. *The audio recording of the testimony of DW1 and DW2 for purposes of certifying the trial judge's notes for use in the intended appeal.*
> 2. *A certificate of Delay.*
>
> *We undertake to pay the necessary fees."*

Our understanding of the above content of the respondents' letter is that, the letter was not requesting for only the certificate of delay. It was, as well, requesting for proceedings stored on an audio device which was in the court's custody and which had not been supplied to the respondents. The

argument on behalf of the applicant, that because in that letter the respondents were requesting for the certificate of delay then they had everything necessary for appealing, is with respect, inaccurate because the letter did not only request for the certificate of delay, but also oral evidence or proceedings recorded on a special electronic gadget. That is to say, the court had not supplied the entire requisite copy of proceedings under Rule 90 (1) of the Rules to enable the respondent to appeal.

At the time the judgment challenged was pronounced in 2016, the position of law was that once a party wrote a letter under Rule 90(1) of the Rules requesting for the copy of proceedings from the Registrar of the High Court, copied and delivered it to the respondent, the party was home and dry and did not have any other legal obligation to make any follow ups with the Registrar of the High Court who did not supply the requisite copy of proceedings to him. See **Raymond Costa v. Mantrac Tanzania Limited,** Civil Application No. 42/08 of 2018 and **Birr Company Ltd v. C-Weed Corporation,** Civil Application No. 7 of 2003 and **Thobias Andrew and Another v. Jacob Bushiri,** Civil Application No. 442/08 of 2017 (all unreported). Other decisions on the matter are also **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd,** [1997] TLR 328 and **Juma**

Ibrahim Mtale v. K. G. Karmali, [1983] TLR 5. For instance, in **Juma Ibrahim Mtale** (supra), the Court observed:

> *"Where a party, on reasonable grounds, writes to the Registrar asking for missing part(s) of the proceedings, the limitation period does not begin to run against such a party until he receives either the part of the proceedings asked for or an assurance that the proceedings sent to him were complete."*

That was the position with the respondents. Although they requested for the copy of the proceedings from the High Court, they were not accessed with the documents the necessary to lodge the appeal until when they received them on 17th July 2020.

At the hearing there sprang up from the floor two more points that were covered on behalf of the applicant by Mr. Rwebangira. The **first,** was that a certificate of delay attached to the affidavit in reply is defective and the **second,** was that the appeal lodged after receiving the proceeding on 17th July 2020, is incompetent because it was lodged out of time. We will deal with both complaints at the same time.

With respect to learned counsel for the applicant, the application before us, is seeking grant of three specific prayers, and none of them is moving the

Court to invalidate a certificate of delay or to determine whether Civil Appeal No. 312 of 2020 was lodged within or out of the statutory prescribed time. The applicant lodged this application on 17th June 2020, praying for only one order, that the notice of appeal lodged on 16th December 2016 be struck out with costs.

In any event, this application having been lodged on 17th June 2020 and the certificate of delay issued on 17th July 2020 it cannot legally be argued that the application also targeted to challenge the validity of the certificate of delay which was not in existence at the time the application was filed. The same is the position with respect to Civil Appeal No. 312 of 2020, which was lodged on 15th September 2020, when this application was more than two months old in this Court. In other words, even logically the application could not have been seeking to challenge directly an appeal that had not been lodged at the time the application itself was filed. In view of the above, the issue whether the appeal is time barred or not, in our considered opinion, may be, most appropriately, dealt with in other appropriate proceedings, certainly not this application.

In the final analysis, **first**, there is no basis upon which this Court can make an order striking out the notice of appeal as prayed by the applicant,

thus the relief is declined. **Second,** the oral prayers to declare the certificate of delay invalid and the appeal incompetent, are likewise misconceived and the corresponding orders are accordingly, refused.

In the event, this application has no merit and we dismiss it with costs.

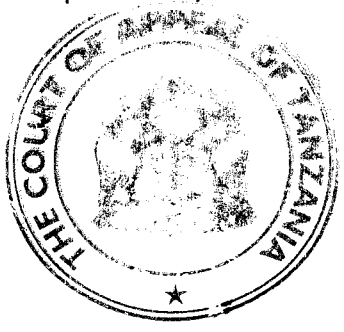
DATED at **DAR ES SALAAM**, this 4th day of April, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 6th day of April, 2022 in the presence of Mr. George Ngemela advocate for the Applicant and absence of the counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL