

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MKUYE, J.A., LEVIRA, J.A., And RUMANYIKA, J.A.)**

**CIVIL APPLICATION NO. 524/16 OF 2021**

**DR. CRISPIN SEMAKULA .....1<sup>ST</sup> APPLICANT**  
**ACCESS MEDICAL & DIALYSIS CENTER LIMITED ..... 2<sup>ND</sup> APPLICANT**  
**VERSUS**

**HASHIM HASSAN MUSSA ..... RESPONDENT**

**(Application for striking out the Notice of Appeal against the decision of  
the High Court of Tanzania (Commercial Division) at Dar es Salaam)**

**(Fikirini, J.)**

**dated the 15<sup>th</sup> day of December, 2020  
in**

**Misc. Commercial Cause No. 31 of 2019**

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**RULING OF THE COURT**

*22<sup>nd</sup> March & 21<sup>st</sup> April, 2022*

**LEVIRA, J.A.:**

By a notice of motion made under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants seek an order of the Court striking out the respondent's notice of appeal lodged on 21<sup>st</sup> December, 2020. The said notice of appeal indicates the respondent's intention to appeal against the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam (the High Court) in Miscellaneous Commercial Cause No. 32 of 2019 (the Petition). The relief sought in this application is predicated under the ground that, the respondent has failed to take essential steps to pursue the intended appeal within time as required by law. The notice of motion is supported

by the affidavit of the first applicant, the Director and shareholder of the second applicant. The application is resisted by the respondent through his affidavit in reply lodged in Court on 28<sup>th</sup> February, 2022.

The background of this matter is that, the respondent lodged in the High Court Petition No. 31 of 2019 praying for winding up of the second applicant company and appointment of the liquidator for that purpose. Having heard the parties, the learned High Court Judge (Fikirini J. as she then was) dismissed the petition with costs on 15<sup>th</sup> December, 2020. The respondent was not satisfied with that decision and thus he lodged the notice of appeal on 21<sup>st</sup> December, 2020 and on the same date applied for copies of proceedings, ruling and drawn order for appeal purposes. He further sought and obtained leave to appeal to the Court, that was on 9<sup>th</sup> July, 2021.

The applicants challenge the respondent for not taking essential step to lodge the intended appeal claiming that ninety (90) days from 21<sup>st</sup> December, 2020 the date when the respondent requested for copy of proceedings of the High Court expired on 21<sup>st</sup> March, 2021. According to the applicants, fourteen (14) days after expiry of ninety (90) days within which the respondent could collect copies of proceedings to enable him institute his appeal expired on 4<sup>th</sup> April, 2021, but there was

no step taken. Thus, up to the time of filing this application which it was ten (10) months from the date the respondent lodged the notice of appeal, yet has taken no measures to institute his appeal. Therefore, the applicants have filed the present application together with written submissions that the respondent's notice of appeal be struck out.

At the hearing of the application, the applicants were represented by Mr. Joseph Kipeche, learned advocate whereas, the respondent had the services of Messrs. Gabriel Simon Mnyele and Deogratias Lyimo Kiritta, both learned advocates.

Mr. Kipeche submitted in support of the application after having adopted the applicants' written submissions to the effect that, the respondent has not taken any essential step to lodge his intended appeal since the filing of the notice of appeal on 21<sup>st</sup> December, 2020. He added that the respondent applied for copies of proceedings, ruling and drawn order and he was informed by the Registrar that the documents were ready for collection on 3<sup>rd</sup> February, 2021, well within 90 days from when the request was made. However, having received the said documents the respondent did not lodge his appeal because he was yet to obtain leave to appeal as his application for leave was still pending in the High Court. The learned counsel went on to state that

the application for leave was granted on 9<sup>th</sup> July, 2021 and the respondent requested to the Registrar for the copy of the same on 12<sup>th</sup> July, 2021. On 29<sup>th</sup> October, 2021 the Registrar informed the respondent that the Ruling and the drawn order were ready for collection while the current application was lodged on 26<sup>th</sup> October, 2021.

Mr. Kipeche submitted further that on 16<sup>th</sup> November, 2021 the respondent wrote a letter to the Registrar requesting for ruling and proceedings in Misc. Commercial Cause No. 31 of 2019 and requested also for a certificate of delay. In this particular letter the respondent indicated that on 3<sup>rd</sup> February, 2021 the Registrar issued them certificate of delay while the application for leave was pending in the High Court. The said certificate was accompanied with the letter informing the respondent that the requested documents were ready for collection. The letter stated further that the certificate of delay was erroneously issued while the records were not complete as leave to appeal was missing. Following the respondents' letter, the Registrar issued another certificate of delay on 8<sup>th</sup> December, 2021.

The learned counsel argued that the letter of the respondent of 16<sup>th</sup> November, 2021 of follow up was made while this application had already been made. According to him, the letter and the second

certificate of delay were meant at preempting this application. It was Mr. Kipeche's further argument that the respondent ought to have applied for extension of time to file the intended appeal but he did not. Relying on the decision of the Court in **Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020 (unreported), the learned counsel submitted that essential steps are required to be taken before the application for striking out the notice of appeal is made under Rule 89 (2) of the Rules.

Finally, Mr. Kipeche prayed for the respondent's notice of appeal to be struck out with costs for failure to take essential steps.

Replying to the submission by the applicant's counsel, Mr. Mnyele made a remark at the outset that the legality or otherwise of the two certificates of delay issued by the Registrar to the respondent cannot be challenged in this application. He argued that, if the certificate of delay is irregular, it can be challenged in appeal and not herein.

As regards the allegation that the respondent has not taken essential steps since filing of the notice of appeal in Court, Mr. Mnyele submitted that the averment by the counsel for the applicant that the respondent did not collect the necessary documents for appeal after having been informed by the Registrar is incorrect. The respondent

never collected the record of appeal after expiry of 90 and 14 days as alleged by the counsel for the applicant. The said documents were collected on 5<sup>th</sup> November, 2019 after the respondent had received a letter of the Registrar of 3<sup>rd</sup> November, 2019 informing him that the documents were ready for collection. He added that, an appeal could not be filed without leave to appeal otherwise, the record of appeal would have been incomplete. Leave to appeal was granted on 9<sup>th</sup> July, 2021 and the respondent requested for certified copy of the ruling and drawn order on 12<sup>th</sup> July, 2021 and on 29<sup>th</sup> October, 2021 the Registrar wrote to the respondent informing him that the documents were ready for collection. On 16<sup>th</sup> November, 2021 the respondent wrote to the Registrar requesting for certificate of delay and the same was issued on 1<sup>st</sup> December, 2021.

The learned counsel submitted further that the case of **Beatrice Mbilinyi** cited by the Counsel for the applicants is distinguishable from the current due to two reasons; first, in the said case the respondent did not take essential steps contrary to the circumstances of the present case. Secondly, unlike the cited case, in the current case the respondent applied for and was supplied with certificate of delay. Therefore, he said, the case of **Beatrice Mbilinyi** is not a good authority in the circumstances.

In addition, Mr. Kiritta submitted that the submission by the counsel for the applicants that the acts by the respondent are an afterthought and intended to defeat this application is misleading. He forcefully argued that the letter of 3<sup>rd</sup> February 2021 of the Registrar was written while the application for leave was pending in Court. The said letter showed that the certificate of delay was erroneously issued, he insisted. According to him, the respondent was granted leave to appeal as an essential step towards filling of the intended appeal and not as a way of defeating this application. Cementing on the submission by his fellow counsel, Mr. Kiritta, distinguished the case of **Beatrice Mbilinyi** from the current one as he said, in that case the intended appellant did not do anything to collect the documents applied for until when he was supplied with the application to strike out the notice of appeal. In this appeal, he said, all the essential steps by the respondent are necessary towards lodging of the intended appeal. He thus prayed for the application to be dismissed with costs.

Mr. Kipeche made a very brief rejoinder stating that the Registrar is required to supply the applicant with requested documents within 90 days or after lapse of 14 days after expiry of 90 days; then, after that, the applicant has to apply for extension of time under Rule 90(5) of the Rules, but the respondent herein did not do so. He was firm that the

case of **Beatrice Mbilinyi** is relevant to the current case because, just as the one at hand, there was no follow up made until this application was made and thus an afterthought. He insisted that since the respondent was granted leave to appeal after the Registrar had complied with Rule 90 (5) of the Rules, the proper step was for the respondent to file an application for extension of time. He reiterated his prayer that his application be granted and each party should bear its own costs.

Having considered rival submissions by the counsel for the parties, the issue for our determination is whether the respondent has not taken essential steps from the time when he lodged the notice of appeal to file the intended appeal. The law is very clear that an intended appellant is required to serve copies of notice of appeal on all persons who seem to him to be directly affected by the appeal. However, lodgment and service of the notice of appeal are not enough, the intended appellant is required to take further steps thereafter failure of which attracts consequences which are as well provided under Rule 89 (2) of the Rules under which this application is made. This Rule shall guide us in determining the issue we have raised with regard to the consequences, it reads: -

*"89 (2) Subject to the provision of sub rule (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."*  
*[Emphasis added].*

It can be deduced from the above provision that, any person upon whom a notice of appeal is served has a right to apply for striking out of the notice of appeal 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 the current application the applicants contend that the respondent has not taken essential step to institute the intended appeal since the time he lodged the notice of appeal.

As intimated above, the respondent's notice of appeal was lodged on 21<sup>st</sup> December, 2020 together with a letter to the Registrar requesting to be supplied with copies of ruling, drawn order and proceedings for appeal purposes. The copies of the notice of appeal and

the said letter were served on the applicant on 30<sup>th</sup> December, 2020. Since the intended appeal required leave, the respondent applied for leave to appeal vide Miscellaneous Commercial Application No. 193 of 2020 which was granted on 9<sup>th</sup> July, 2021 as indicated in both supporting affidavit and affidavit in reply, paragraphs 5 and 4 respectively. We take note that the leave applied for was a necessary step towards filing of the intended appeal. Immediately after being granted leave to appeal, the respondent applied for copies of Ruling, order and certificate of delay, that was on 12<sup>th</sup> July, 2021 as per annexure HH5 to paragraph 4.5 of the affidavit in reply. The respondent was notified by the Registrar that those documents were ready for collection on 29<sup>th</sup> October, 2021 after the applicants had already filed this application on 26<sup>th</sup> October, 2021.

Nevertheless, the certificate of delay issued by the Registrar on 1<sup>st</sup> December, 2021 excluded the period from 22<sup>nd</sup> December, 2020 to 29<sup>th</sup> October, 2021 as per annexure HH8 paragraph 4.7 of the affidavit in reply. The appeal was lodged on 28<sup>th</sup> December, 2021 and the copy of memorandum of appeal was served on the applicants on 3<sup>rd</sup> January, 2022.

It can be observed from the sequence of events narrated above that when this application was lodged on 26<sup>th</sup> October, 2021, the respondent had already taken various essential steps toward lodging the intended appeal which was eventually lodged in December 2021 as indicated above. We observe further that the certificate of delay issued to the respondent excluded days from 22<sup>nd</sup> December, 2020 to 29<sup>th</sup> October, 2021 and therefore, this application was filed within the period of time covered by the certificate of delay.

Regarding our decision in **Beatrice Mbilinyi** cited by the counsel for the applicants, we agree with the counsel for the respondent that the same is distinguishable from the circumstances of the current case. While in the **Beatrice Mbilinyi's** case, the respondent took step to make follow up of the necessary documents for appeal purposes to the Registrar after the application like the one at hand had already been filed, in the current case, it is the vice versa; the application for striking out the notice of appeal was lodged after essential steps had already been taken by the respondent as he had already applied for necessary copies for appeal purposes.

Before we conclude, we find it apposite to comment on the applicant's counsel submission in support of the application. With

respect, we think, he did not direct his mind properly on the requirement of leave to appeal and the necessity of including proceedings of the application for leave in the record of appeal. As a result, his submission challenged the powers of the Registrar conferred under Rule 90 (5) of the Rules. We are of the considered opinion that, the said issue regarding powers of the Registrar in supplying the requested documents and the requirement of applying for extension of time were raised out of context and thus beyond this Ruling.

In the upshot, we find this application with no merits. Consequently, we strike it out with costs.

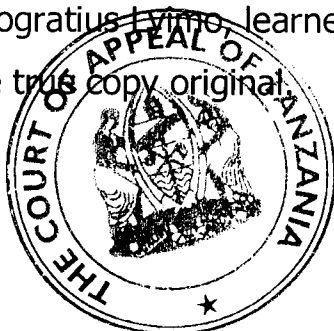
**DATED at DAR ES SALAAM this 19<sup>th</sup> day of April, 2022.**


R. K. MKUYE  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The ruling delivered this 21<sup>st</sup> day of April, 2022 in the presence of Mr. Joseph Kipeche, learned counsel for the applicants and Mr. Deogratius Lyimo, learned counsel for the respondent, is hereby certified the true copy original.



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