

**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. 384/01 OF 2020**

**MATHEW VICENT MWIRU.....APPLICANT**

**VERSUS**

**DPI SIMBA LTD ..... RESPONDENT**

**(from the Ruling and Order of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam)**

**(Mutungi, J.)**

**Dated 12<sup>th</sup> day of July, 2017**

**in**

**Misc. Civil Application No. 695 of 2017**

**.....**

**RULING OF THE COURT**

*25<sup>th</sup> March & 21<sup>st</sup> April, 2022*

**LEVIRA, J.A.:**

By notice of motion made under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant, Mathew Vincent Mwiru is seeking an order of the Court striking out the respondent's notice of appeal lodged in Court on 13<sup>th</sup> July, 2018 for failure of the respondent to take essential steps to file the intended appeal. The notice of motion is supported by the affidavit of the applicant. Opposing the application, the respondent filed an affidavit in reply.

It can be gathered from the affidavit of the applicant that vide Civil Case No. 61 of 2014, the applicant had successfully sued the respondent in the District Court of Temeke. The respondent was aggrieved by that decision, however her efforts to reverse it at the High Court could not bear fruits following the decision of the High Court in Miscellaneous Civil Application No. 695 of 2017, subject of the intended appeal. In that decision, the High Court dismissed the respondent's application for an order to set aside dismissal of Miscellaneous Civil Application No. 521 of 2016 due to non-appearance of the respondent and in lieu thereof, order for restoration of the said application. As intimated above, the respondent's application before the High Court in Application No. 521 of 2017 was dismissed for non- appearance on 12<sup>th</sup> July, 2018; on the same date, the respondent lodged the notice of appeal against that decision and, hence, the current application.

At the hearing of the application, the applicant appeared in person, unrepresented whereas, the respondent had the services of Mr. Omari Msemu, learned advocate.

Submitting in support of the application, the applicant contended that the respondent has failed to take essential steps to lodge the intended

appeal since when it lodged the notice of appeal to date. As a result, the said notice hindered the applicant from executing the judgment and decree of Temeke District Court. According to him, unless this application is granted, the applicant will suffer irreparable loss. Therefore, he prayed for the application to be granted as he believed that the respondent has already been supplied with the necessary documents for appeal purposes because he (the applicant) was as well supplied with the same on 1<sup>st</sup> September, 2018.

In reply Mr. Msemo confirmed that indeed, the impugned decision was delivered on 12<sup>th</sup> July, 2018 and on the same date the respondent lodged the notice of appeal. He added that on the very day the respondent applied to the Registrar of the High Court to be supplied with certified copies of ruling, order and proceedings for appeal purposes, in vain. He strongly contested the applicant's argument that the respondent has not taken further steps to lodge the intended appeal. In fact, he said, apart from physical follow ups, up to now, the respondent has written at least four letters to the High Court requesting and reminding the Registrar about his request to be supplied with necessary documents for appeal purposes. He went on to state that copies of the said letters are attached at paragraph 4 of the respondent's affidavit in reply. In the circumstances,

he argued, the respondent cannot in all fairness be faulted for failing to take essential steps to pursue the intended appeal, more so as in terms of Rule 90(1) of the Rules, among the documents to be enclosed in the record of appeal is the proceedings which the respondent is yet to be supplied with. Just like the applicant, he acknowledged to have been supplied with the copy of Ruling and order only.

Based on his submission, Mr. Msemo prayed for this application to be dismissed with costs.

We have carefully considered submissions by both sides and the record, the issue for our determination is whether the respondent took essential steps after lodging the notice of appeal. It is a requirement of the law that after lodging a notice of appeal, the intended appellant must within sixty days lodge his/her appeal, otherwise the adverse party upon whom the notice was served may apply to the Court to strike out the said notice of appeal. Rule 89(2) of the Rules under which this application is made provides as follows: -

*"Subject to the provisions of sub rule (1), any other person on whom a notice of appeal has been 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, as the case may be, on the ground that no appeal lies or that **some essential steps in the proceedings has not been taken** or has not been taken within prescribed time". [Emphasis added].*

Being guided by the above established position of the law and upon perusal of the record in the matter at hand, we have realized that the respondent lodged the notice of appeal on 13<sup>th</sup> July, 2018 and on the same date she wrote a letter to the Registrar of the High Court requesting to be supplied with certified copies of proceedings, ruling and drawn order for the appeal purposes. However, although the exact date is not mentioned, the counsel for the respondent acknowledged that the respondent was supplied with the copies of ruling and drawn order only, the same documents were supplied to the applicant as he also acknowledged in his supporting affidavit and oral submission. It was the argument of Mr. Msemu that the said documents supplied to the respondent were not complete to enable her file the intended appeal. His argument based on the requirements under Rule 90(1) of the Rules which requires among other documents, the proceedings leading to the impugned decision to be included in the record of appeal otherwise, the record of appeal would be

incomplete. The logic is simple, that there is no way the appellate court can determine an appeal without knowing what transpired at the lower court.

We have also taken note of the subsequent follow ups made by the respondent reminding the Registrar to supply the remaining documents. Paragraph four of the respondent's affidavit in reply mentions and attaches at least three letters written by the respondent to remind the Registrar. We had an opportunity of screening the said letters. Indeed, they are reminders to the Registrar to supply the respondent with certified copies of proceedings and certificate of delay. Just as deponed in the affidavit in reply, those letters are of various dates, to wit, 21<sup>st</sup> September, 2018, 12<sup>th</sup> April, 2019 and 14<sup>th</sup> June, 2019. The three reminder letters written by the respondent to the Registrar is a clear indication that steps are being taken despite lapse of long period of time since when the last reminder was written. The counsel for the respondent further submitted before the Court that the respondent has kept on making physical follow ups of the requested documents to the office of the Registrar, in vain.

We understand the concern of the applicant that it has been so long since when the notice of appeal was lodged but we cannot as well ignore

the efforts made by the respondent. We think, the applicant's concern is that the parties were supplied with the ruling and drawn order and thus he was wondering why the respondent has failed to lodge the intended appeal. Understandably, being unrepresented, he thought the two documents are enough for appeal purposes, but they are not. In our considered view, delay of the Registrar to supply the respondent with the remaining documents (proceedings) does not amount to the respondent's failure to take essential steps. We do not buy the applicant's proposition under paragraph 8 of the supporting affidavit that the respondent has lost interest in filing the appeal or taking essential steps.

With respect, we think, this is a mere assertion without any material backing to enable us find so. We appreciate that the applicant has commended the court for well-done job, to the extent that he does not believe that the respondent is yet to be supplied with the requested documents. However, the applicant has not been able to prove that the respondent was supplied with the same. The respondent has been able to prove its efforts through four letters attached in the affidavit in reply and through her counsel that physical follow ups are still made to procure the unsupplied documents which we have no reason to doubt. In the circumstances, having considered some efforts made by the respondent

and the fact that the proceedings applied for are necessary for appeal purposes, we find that necessary steps have been taken towards lodging the intended appeal.

Consequently, we hereby dismiss this application. We further direct the Registrar of the High Court to make sure that within 30 days of this Ruling the respondent is supplied with the requested documents for appeal purposes.

Having considered the circumstances of this matter, we make no order as to costs.

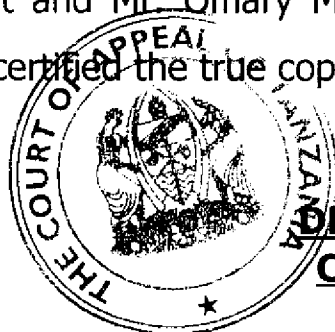
**DATED at DAR ES SALAAM this 19<sup>th</sup> day of April, 2022.**


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 absence of applicant and Mr. Omary Msemu, learned counsel for the respondent, is hereby certified the true copy original.



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