IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 114 OF 2020

HENRY ZEPHYRINE KITAMBWA ..... APPELLANT

VERSUS

THE PRESIDENT OF THE UNITED

REPUBLIC OF TANZANIA ..... 1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

NATIONAL AUDIT OFFICE..... 3RD RESPONDENT

[Appeal from the Ruling of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam]

(De Mello, J.)

dated the 19th day of December, 2019
in
Miscellaneous Civil Application No. 33 of 2018

.....

RULING OF THE COURT

28th March, & 25th April, 2022

GALEBA, J.A.:

Henry Zephyrine Kitambwa, the appellant, was dismissed from employment by the third respondent on 20th February, 2017 on a charge of embezzlement of public funds amounting to TZS. 123,330,000.00. He was aggrieved by his dismissal from employment and to assert his rights, he appealed to the Public Service Commission (the PSC) but his appeal was dismissed on 25th July, 2017. Once again, the appellant was dissatisfied with

the dismissal of his appeal before the PSC. He lodged the second appeal before the first respondent, but like with the PSC, he was still unfortunate, for his appeal was dismissed on 11th January 2018, and that decision aggrieved the appellant.

This time he resolved to approach the court system to seek judicial review in his quest to challenge the first respondent's decision. He first applied for leave to apply for prerogative orders and ultimately, he managed to file an application in the High Court praying for issuance of an order in the nature of *certiorari* to quash the decision of the first respondent. Nonetheless, the appellant was still unlucky. The High Court dismissed his application on 19th December, 2019 on grounds that the first respondent contravened no law in the course of dealing with the appellant's appeal. This decision like several others preceding it, deeply aggrieved the appellant hence the present appeal. However, as it will be noted shortly, we could not get to the grounds of appeal raised for purposes of determining them, because of a preliminary concern which we were unable to skip, without requiring parties to address us on. That point, to which we will, in a moment, focus our full attention to discuss, forms the bedrock upon which this ruling is founded.

At the hearing of this appeal on 22nd March, 2022, the appellant was represented by Mr. Richard K. Rweyongeza teaming up with Messrs. Mpaya

Kamara and Abraham Hamza Senguji, all learned advocates, whereas the respondents had the services of Messrs. Xavier Ndalahwa and Ayoub Sanga, both learned State Attorneys.

Prior to commencement of hearing, we found it appropriate to share with parties' advocates a point of both legal and factual importance in this appeal, that we had encountered when preparing for hearing of the appeal. That point, had a relation with a letter dated 23rd December, 2019, which the appellant, through RK Rweyongeza & Co. Advocates, had written to the Registrar of the High Court, requesting for a copy of the proceedings in compliance with Rule 90(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). What we noted in the record of appeal was a complete absence of a letter from the Registrar of the High Court replying to the above advocates' letter informing the appellant or his advocates that the requested documents were ready for collection. It is this aspect of the appeal, that we put to parties' counsel to address us upon, when the appeal came up for hearing on 22nd March, 2022.

In that respect, for the appellant, Mr. Kamara admitted to the absence of the letter and initially prayed under rule 96(7) of the Rules for leave to lodge a supplementary record containing the missing letter after procuring it from the Registrar of the High Court. However, on a reflection, he was of a different view, he contended that because the appellant was not certain on the existence

of the letter or its whereabouts, the better and a safer prayer for him to make was a short adjournment of the hearing, if possible, within the same session. Mr. Kamara submitted that the appellant was informed by way of a telephone call from the High Court registry that the requisite copy of the proceedings was ready for collection, and that his client does not recall to have received the missing letter. So, they needed a short adjournment in order to ascertain the status of the letter's whereabouts by confirming with the Registrar of the High Court in Dar es Salaam so that they could thereafter appear before us and make appropriate prayers necessary for a plausible way forward.

In reply, Mr. Sanga had no objection to the prayer for a brief adjournment of the hearing, he however added that even the Court documents in respect of an application for leave to seek judicial review in the High Court, were, like the letter from the Registrar, missing in the record of appeal.

In a brief rejoinder, Mr. Kamara submitted that if Mr. Sanga thought that the documents relating to an application for leave were of any relevance to the disposition of this appeal, he was at liberty to apply to the Court for leave to include the documents in the record.

Based on the uncontested prayer and submissions by counsel, particularly that of Mr. Kamara which had elements of uncertainties as to the letter's existence and availability, prudence and wisdom were both in favour of

granting the requested adjournment of the hearing. The adjournment was, in our view, necessary for it would avail, the appellant and his advocates, a reasonable time to enable them to double check with the Registrar of the High Court, so that they may come up with an informed status from an authentic source, and make appropriate prayers at the resumed hearing. In the circumstances, hearing of the appeal was adjourned for six (6) days within the session from 22nd March, 2022, to 28th March, 2022 for the above specific purpose.

When the appeal was called on for a resumed hearing on 28th March, 2022 Mr. Rweyongeza, learned advocate appeared for the appellant and the respondents were appearing by Messrs. Ndalahwa and Sanga, learned State Attorneys.

At the outset, Mr. Rweyongeza rose to inform the Court that during the time that the hearing stood adjourned, the appellant's side approached the Registrar of the High Court and the latter confirmed that indeed, the letter to inform the appellant that a copy of the proceedings was ready for collection, was never written.

Arguing for a way forward favourable to the appellant, from a remote and an indirect perspective, Mr. Rweyongeza carefully elaborated that although the

information they received from the Registrar of the High Court reflected the factual status, but all the same when the appellant felt aggrieved and wished to contest the decision of the High Court, he took necessary steps including requesting for a copy of the proceedings from the Registrar of the High Court, by writing a letter in which case he complied with Rule 90(1) of the Rules. However, he argued, although the letter was never replied, he was called by telephone and was availed with the copy of the proceedings necessary for lodging an appeal. In the circumstances, he contended, nonetheless, the appeal was incompetent because it was lodged prematurely before issuance of the requisite letter from the Registrar of the High Court. He indicated to us that the fate of the appeal was, in any event, to be struck out for being incompetent although he did not end there.

He prayed for two more competing orders from the Court. He prayed that either the hearing be adjourned and the appeal be stayed pending the appellant taking appropriate remedial measures to rectify the situation or, alternatively, because the omission that led to the incompetence of the appeal was a rare and a unique encounter, then this Court, when considering a way forward, should approach the matter in a way which is also peculiar and unique. Suggesting for the special manner in which he was beseeching us to handle the appeal, he was of a firm position that instead of striking out all the

documents when striking out the appeal, which is the usual remedy for incompetent appeals, he implored us to strike out the record of appeal, but spare the notice of appeal, which according to him was a valid document which could not be affected by the order striking out the rest of the appeal. That, to him, would meet the justice of the matter.

The suggestion to adjourn an incompetent appeal or to strike out part of it and leave behind the other, was the point which attracted a stiff resistance from Mr. Sanga, when invited to reply to the submissions by Mr. Rweyongeza. He strongly submitted that in the absence of the letter from the Registrar informing the appellant that the requested copy of the proceedings was ready for collection, there is no basis upon which a valid certificate of delay could have been prepared and issued. To bolster his argument, he referred us to the decision of this Court in **Judith Mbwile and Jackson Ernest Mbwile v. FBME Bank Limited (under liquidation) and Another,** Civil Appeal No. 154 of 2018 (unreported). Mr. Sanga contended further that, the case cannot be adjourned or stayed because rule 96(7) of the Rules would not be available to the appellant because the letter that the appeal would be adjourned to wait for incorporation in the record of appeal has been confirmed to be in no existence. He contended that because of the absence of the letter, even the certificate of delay cannot be cured from the ills it is presently suffering. He

finally prayed that the present appeal ought to be struck out only that the appellant be spared to pay costs because his grievances trace origin from a labour dispute.

In a brief rejoinder, Mr. Rweyongeza submitted that the case of **Judith Mbwile and Jackson Ernest Mbwile** (supra), is distinguishable because in that case, the letter was there which is not the case in this matter. As for the other submission of Mr. Sanga, he argued that on the appellant's part, they agree that the appeal is incompetent because it was filed prematurely and that was why he had prayed that it be struck out except the notice of appeal.

As this ruling is written essentially because of the absence, of that letter from the Registrar, before proceeding to determine counsel's contending positions at this stage, it is, we think, instructive to briefly make a point or two on the use value of the letter in question in the context of the provisions of Rule 90 (1) of the Rules, and consequences of its absence to the certificate of delay, specifically and the appeal, generally.

In the case of **Tanzania Telecommunications Co. Ltd v. Stanley S. Mwabulambo**, Civil Appeal No. 26 of 2017 (unreported), this Court observed that it is not correct to say that whatever the Registrar writes in the certificate is correct, because the dates appearing on the certificate should be borne out

of the record and in the absence of such record, such certificate of delay cannot be relied upon for containing unverifiable details. Briefly stated, the usefulness of the letter from the Registrar to the appellant, is to assist the Registrar to state with certainty in the certificate of delay, the end date of the period for exclusion which must be based on the letter from the Registrar to the appellant.

In the same vein in **Puma Energy Tanzania Limited v. Diamond Trust Bank Limited,** Civil Appeal No. 54 of 2016 (unreported) this Court observed that, the letter from the Registrar is meant to enable him to issue a certificate of delay that reflects a verifiable and definite latest cut-off date from which the sixty days within which to lodge an appeal under rule 90(1) of the Rules, starts to run. The relevant period for exclusion, is the duration between when the copy of the proceedings was requested to the date of the letter from the Registrar informing the appellant that the said copy is ready for collection.

That is to say, legally, the absence of a letter from the Registrar in the record of appeal, in this matter triggered a chain of detrimental effects to the appellant's appeal. The said dreadful consequences to the appeal include, **one,** the certificate of delay issued in the absence of the letter is defective and cannot be used to exclude any time used by the Registrar for preparation and

delivery of the copy of the proceedings. For this position, see the case of **Tanzania Occupational Health Services v. Agripina Bwana and Another,** Civil Appeal No. 127 of 2016 (unreported); **two,** consequently, the appeal was supposed to be lodged within sixty days from 23rd December, 2019 when the notice of appeal was lodged, see the case of **Tanzania Telecommunications Co. Ltd (supra)**; and **three,** the present appeal, having been lodged on 11th May, 2020, was lodged hopelessly out time. It is therefore time barred. With the above understanding in mind, we think, we can now proceed to determine the issues before us based on the arguments of counsel for the parties.

Having heard the submissions of counsel on the matter, the two issues before us for resolution are, **one,** whether by any chance, hearing of this appeal can be adjourned and the appeal itself stayed pending the appellant's pondering on appropriate steps to take in order to remedy the situation he found himself into; and **two**, whether this Court can strike out the appeal and leave the notice of appeal unaffected.

The first prayer we were called upon to consider, is the one relating to adjourning the hearing and staying the appeal. In respect of that one, Mr. Rweyongeza did not inform the Court on the specific legal steps that

necessitated him to seek for an adjournment. In any event, we had granted the appellant six (6) days adjournment for him to satisfy the Court whether he had the letter or he was in position to procure one. The certain update we got was that, there was no letter and to our recollection, there was no promise from the Registrar that the appellant would be in a position to get one sooner or later. We do not therefore, appreciate the reasoning behind the prayer for adjournment.

As for the other aspect of staying the appeal, Mr. Rweyongeza did not only withhold to cite to us any rule upon which we can rely to grant such an order but also, he did not specify what is it that the appellant or his counsel were going to be doing during the period of stay, should we grant the prayer. This is so because, certainly, he could not have relied on rule 96(7) of the Rules, because that rule vests jurisdiction in the Court to order filing of a supplementary record of appeal to include documents which are either in existence but were not included in the record, or are presently included in the record but they have defects to rectify. However, in the present case, the letter in respect of which we were moved to stall the appeal in abeyance does not fall in either of the two categories. The present status is that the letter is non-existent, so we do not think, in the circumstances, that it is lawful or even logical to make an order staying the appeal indefinitely waiting for unspecified

processes and activities that might lead to procurement of a document that is non-existent. In the circumstances, with respect to the counsel for the appellant, we are afraid, we cannot order stay of this appeal which, even for the appellant it was submitted to be, and correctly so in our view, incompetent.

The second prayer which was in alternative to the above two prayers for adjournment and for stay of proceedings, was that, because the appeal is incompetent, it has to be struck out except the notice of appeal, which according to the submission on behalf of the appellant, was a valid document.

A million-dollar question, before us, and indeed the major point for determination of this appeal, at this level is whether legally, we can strike out an appeal leaving behind the notice of appeal. The following part of this ruling is devoted to that very deliberation.

There are two scenarios of this appeal that we gathered from counsel for the appellant that need a reflection. We need to deliberate on them because it appeared to us that, they were the reason why the appellant's counsel, found themselves all of a sudden at a center of a quagmire, from which they could not get out easily or without difficulty. The points have a bearing and they revolve around the assertion that the appellant was called on his private

telephone to go to the High Court and collect the documents his advocates had requested in writing.

First, the assertion was made before us from the bar, thereby falling short of the necessary authenticity that was expected in the circumstances. In our view, the only reliable authority that could have confirmed that the appellant was called by officials at the High Court, in all fairness, would have been the Registrar of the High Court who, in the first place, had a statutory duty to inform the appellant by way of a letter that a copy of the proceedings was ready for collection. Indeed, the essence of adjourning hearing of the matter on 22nd March, 2022 for six (6) days was to facilitate procurement of authentic information from a reliable source, but to the contrary, what was presented to the Court on 28th March, 2022 were unsupported oral contentions from the bar. There was nothing credible in writing from the Registrar. There was not even a complaint that the Registrar refused to put anything in writing.

Second, there was no evidence that the appellant collected the documents from the High Court in the normal course of business. In our view, had that been the case, there would be presented to Court at least a receipt acknowledging payment of court fees in respect of the documents received. This did not happen even after we had granted the adjournment although we

recall, it was submitted on behalf of the appellant that he had signed some dispatch or ledgers at the High Court registry acknowledging that he received the documents from the court. If collection of the copy of the proceedings was an authentic process, evidence in that respect, would have been availed to Court.

A scenario similar, has ensued in the recent past. In the case of **The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited,** Civil Appeal No. 10 of 2014 (unreported), Professor Jwani Mwaikusa, then counsel for the appellant in that appeal had approached the High Court and took possession of a copy of the proceedings. It turned out however that, **first**, he did so without officially being informed that the documents were ready for collection; and **secondly**, he took the documents without any proof of payment of any court fees for the received copy of the proceedings. This Court made an observation on that informal collection of the proceedings from the High Court as follows:

> *"**It has now turned out that there was no payment of court fees. This means that there was no official delivery of the documents to the appellant on the 23.5.2003.** There should have been, in our view, an official communication from the Registrar to the learned advocates for the appellant that*

the documents requested in their letter dated 10.2.2003 were, now ready for collection, and after that the Registrar would issue a certificate in terms of Rule 83 (1) [now Rule 90(1) of the Rules]. ***We deprecate what appears to be the clandestine obtaining of court documents and we cannot give our blessing to such conduct. We must discourage it at any cost.***"

[Emphasis added]

Like it happened in the case referred to immediately above, in this case we were not availed with any evidence that there was any court fees paid for the documents allegedly collected from the High Court. What happened in this case was the conduct similar to that which the Court expressed deep disapproval above, a habit the Court refused to bless, a conduct to be discouraged at all costs, to use the exact phrase employed by the Court in the above case. On the same aspect of collecting document without formal invitation and without paying fees upon collecting them, see also the case of **Paulina Samson Ndawavya v. Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 (unreported). The point we want to drive home ultimately in this case, is that, no one is even sure that the alleged copy of the proceedings was lawfully obtained.

With that illustration outlining the status akin to that obtaining in this appeal, it is opportune now, we propose to get back in perspective and deliberate at some deserving detail, the major topic of the day. According to the submission on behalf of the appellant, is that we ought to strike out the appeal but then leave behind the notice of appeal, for it is valid. To agree or to disagree with the argument, we will tread along the path, in terms of trend and alignment, that this Court has always taken and steadily maintained, and see whether it leads us to a destination that the appellant's counsel desired.

We will start with this Court's decision in **Dhow Mercantile (EA) Ltd and Two Others v. The Registrar of Companies And Four Others,** Civil Appeal No. 56 of 2005 (unreported). Before the appeal was filed in that matter, the appellant had lodged Civil Appeal No. 86 of 2004 the previous year, that is 2004. The appeal however, had been struck out on account of having been attached with a defective decree. After procurement of necessary extension of time to lodge a fresh appeal, Civil Appeal No. 56 of 2005 was filed, but that happened without the appellant seeking extension of time to file a fresh notice of appeal upon which the fresh appeal would be based. The issue before the Court was whether the striking out of the first appeal, that is, Civil Appeal No. 86 of 2004, left the notice of appeal intact or it was struck out with the previous appeal. This Court answered that query in the following terms:

"Furthermore, it is also to be observed that it is now settled that after an appeal has been struck out upon the ground that it is incompetent, there is nothing, as it were, saved with regard to the appeal including the notice of appeal. That is, ***the order striking out the appeal also had the effect of striking out the notice of appeal as well****...To recapitulate, we agree with Mr. Kilindu, learned counsel, that after the initial record of appeal was struck out on 23.3.2005 in Civil Appeal No. 86 of 2004, no valid notice of appeal remained, as urged by Mr. Ukwong'a."*
[Emphasis added]

The next relevant case, in our considered view, is that of **Mohammed Suleiman Mohamed v. Amne Salum Mohamed and Ten Others,** Civil Appeal No. 87 of 2019 (unreported). In this appeal, like in the **Dhow Mercantile** case (supra), before the appeal was lodged, the appellant had filed Civil Appeal No. 142 of 2017 (the original appeal) previously in 2017. The original appeal, had however been struck out on account of failure to comply with rule 96(1)(h) and (2)(c) of the Rules. The subsequent appeal was then filed, after seeking and obtaining extension of time to file it. However, it was filed without seeking and obtaining extension of time to lodge a fresh notice of appeal. The basis of the appellant for not seeking extension of time to lodge a

fresh notice of appeal, was an assumption that when the original appeal was struck out, the notice of appeal survived the order striking out the appeal. When a preliminary objection was taken out arguing that the subsequent appeal was incompetent for want of a valid notice of appeal, this Court in no uncertain terms, stated that:

> *"From the rival arguments of the learned counsel for the parties, the only issue for determination is whether or not the appeal is incompetent for want of a notice of appeal and leave to appeal. With regard to the existence or otherwise of the notice of appeal, it is a correct position of the law as argued by Mr. Rajab that,* ***following the striking out of Civil Appeal No. 142 of 2017 for which the notice of appeal included in this appeal was lodged, the notice suffered the same consequence of being struck out.***"
>
> [Emphasis added]

Invariably, the position of the law where an incompetent appeal is struck out for whatever might be the reason, the Court has persistently maintained that the notice of appeal that initiated the appeal, suffers consequences of equal measure as the appeal. There is an unbroken chain of authorities of this Court on the subject, including **Robert John Mugo (the Administrator of the Estate of the late John Mugo Maina) v. Adam Molel,** Civil Appeal No. 2 of 1990; **William Loitiame v. Asheri Naftali**, Civil Appeal No. 73 of 2002;

and **Tanganyika Cheap Store v. National Insurance of Tanzania Limited,** Civil Appeal No. 51 of 2005 (all unreported). The other case discussing a similar matter is **William Shija v. Fortunatus Masha** [1997] T.L.R. 213 in which it was held that:

> *"**The applicant was correct in contending that when the appeal had been struck out the notice of appeal was also struck out**: in that situation, if a party still wished to appeal, a fresh application had to be filed in the High Court seeking extension of time in which to give a notice of appeal".* [Emphasis added]

On the prayer that, we strike out the appeal and leave behind the notice of appeal, we hope the above discussion elucidates the clear position of the law.

Before we come to the end of this ruling, we would wish to make one observation, in view of Mr. Rweyongeza's caution to the Court that this matter raises a unique question of critical importance such that it equally deserves special attention and a unique approach towards its determination. However, as observed above, it is not the first time, that an appeal is declared incompetent because the appellant lodged an appeal using a copy of proceedings which he obtained from the High Court without formal invitation from the High Court. Such was the incidence in the case of **The Board of Trustees of the**

National Social Security Fund (supra). Further, it is not the first time that this Court is called upon to consider whether striking out an appeal leaves the notice of appeal valid, such was the case in various decisions of this Court cited above. Although we agree that there are no any two cases that may easily be born out of identical facts in every aspect, nonetheless, with respect to the learned counsel for the appellant, the issues raised in this appeal for consideration in this ruling, have been raised before this Court and resolved, as observed above.

In the final analysis and in view of the above discussion, unless we want to repeat ourselves, but we have already observed that it was the position of both parties that the appeal is incompetent and it should be struck out. Counsel for the appellant however, put a caveat in respect of which we have abundantly explained above in terms of the authorities cited, that when an appeal is struck out for being incompetent, no document in the record of appeal survives the wrath suffered by the appeal, the notice of appeal alike. We are unable, in the circumstances, to strike out the appeal and leave the notice of appeal to survive the impact of the blow.

In the event, this appeal which is incompetent for being time barred is hereby struck out together with all documents composing the record of appeal, the notice of appeal inclusive. We make no order as to costs because the respondents' counsel did not press for the relief.

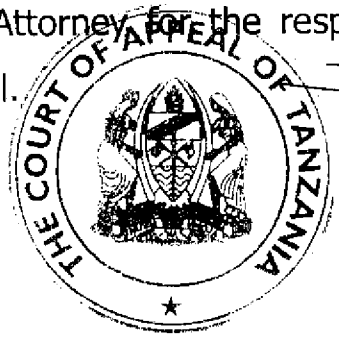
DATED at **DAR ES SALAAM** this 20th day of April, 2022

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 25th day of April, 2022 in the presence of Mr. Theodori Primus, counsel for the appellant and Mr. Lukelo Samwel. Principle State Attorney, for the respondents is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL