

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. 498/16 OF 2018

**EDUCATIONAL BOOKS PUBLISHERS LIMITED APPLICANT
VERSUS**

1. HASHAM KASSAM & SONS LTD

2. ISA LIMITEDRESPONDENTS

**(Application to strike out Notice of Appeal from the decision of the High
Court of Tanzania, at Dar Es Salaam)**

(Mruma, J.)

dated 17th day of October, 2017

in

Commercial Case No. 5 of 2011

RULING OF THE COURT

29th March & 25th day of April, 2022

RUMANYIKA, J.A.:

By way of a notice of motion filed under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the application comes at the instance of Educational Books Publishers Ltd, the applicant, seeking to strike out a notice of appeal (the notice) lodged on 18/10/2017 against the judgment and decree of the High Court Commercial Division, Mruma, J. dated 17/10/2017. The notice was lodged by Hasham Kassam & Sons Ltd and Isa Limited, the 1st and 2nd respondents respectively. The notice of

motion is supported by the affidavit of Wilson Edward whose contents essentially, the applicant's counsel adopted at the hearing.

It all began with the High Court Commercial Case No. 05 of 2011. At the end, the applicant won the war and battle on 17/10/2017. As they were unhappy with the judgment and decree, the respondents lodged a notice of appeal on 18/10/2017 as indicated above, and duly served its copy on the applicant on 20/10/2017. The respondents, having requested in writing for the requisite copy of the proceedings in the High Court on 18/10/2018, vide a letter dated 26/2/2018 the Deputy Registrar accordingly notified them that the copy was at the latter's disposal and ready for collection. It is alleged that since then, the respondents took no other essential steps in furtherance of the intended appeal. The omission has culminated into the instant application.

When the application was called for hearing on 29/03/2022, Messrs Wilson Edward Ogunde and Abdon Rwegasira, learned counsel appeared for the applicant and the respondents respectively.

Essentially the notice of motion hinges on one ground. That, no appeal lies against the impugned decision or, alternatively, that the respondent has failed to take essential steps in prosecuting the appeal.

Having narrated, in a nutshell as per the above stated historical background, Mr. Ogunde submitted that upon delivery of the impugned judgment and decree, accordingly the respondents requested for the copies requisite for lodging an appeal. However, despite the Registrar of the High Court (the Registrar) notifying them on 26/02/2020 to collect the readily available documents, as admitted by the respondents in paragraph 4 (a) of the supporting affidavit, the respondents just muted until nine good months later, that is on 29/09/2020 when they wrote to the Registrar requesting for some missing documents. On account of the said omission, Mr. Ogunde now asks the Court to strike out the said notice under Rule 89(2) of the Rules, with costs.

In reply, Mr. Rwegasira adopted the contents of the affidavit in reply and submitted that the steps taken by the respondents namely filing the notice of appeal and their request for the copy of the proceedings from the Registrar are essential and sufficient. In support of his argument, he cited our decisions in the cases of **Morco Mbuku v. Mohamed Ngaunje**, Civil Application No. 142 of 2013 and **Hassan Abdallah v. Tanzania Telecommunications Company Limited**, Civil Application No. 176 of 2014 (both unreported). Additionally, Mr. Rwegasira submitted that with all

the days required for preparation of the copies excluded as shown in the certificate of delay, the respondents have an application for extension of time pending in this Court as a safe guard. Therefore, the issue of the respondents' failure to take essential steps should have not been raised. Supporting his argument, he cited decisions of this Court in the cases of **Hassan Abdallah** (supra) and **Tanzania Harbours Authority v. Gerald Patrick and Another**, Civil Application No. 5 of 2002 (both unreported), also the case of **Mrs. Kamiz Abdullah M. D. Kermal v. The Registrar of Buildings and Another** [1988] T.L.R. 199.

Rejoining, Mr. Ogunde submitted that actually the respondents had service of Dr. M. M. Lamwai advocate whom the Registrar notified on 12/11/2018 to collect the copy of the proceedings which fact the respondents did not deny in their affidavit in reply. In the circumstances, the claim of the respondents not being aware of the Registrars' notification is an afterthought. Concluding, Mr. Ogunde submitted that the cases of **Marco Mbuku** (supra), **Hassan Abdallah** (supra), **Tanzania Harbours Authority** (supra) and **Mrs. Kamiz Abdullah M. D. Kermal** (supra) cited by Mr. Rwegasira are distinguishable. He added that all the steps taken by

the respondents are preemptive because they preceded the filing of the present notice of motion.

We are settled in our mind that the issue in this application is not that the respondents have not taken essential steps but the timing of doing so. Much as we agree with Mr. Rwegasira that filing of a notice of appeal, a written request for the copy of proceedings under Rule 90(1) of the Rules, and, although fruitless, the certificate of delay issued by the Registrar, resulting into the application for extension of time, all these demonstrate the respondents' furtherance of the intended appeal as we held in various cases for instance **Asmin Rashid v. Boko Omari** (1997) TLR 146, cited in the case of **Hassan Abdallah**, (supra) as hereunder: -

"...the essential steps in the prosecution of an appeal as envisaged by Rule 82 (now Rule 84) were those steps which advanced the hearing of the appeal..."

There is no gainsaying that relating to this case, essential steps include, but not limited to, where applicable, an application for leave to appeal or a certificate on point of law as the case may be. Here, the respondents lodged a notice of appeal and they requested promptly for the

copy of the proceedings on 18/10/2017, just a day after delivery of the impugned decision but very unreasonably late they wrote a first reminder letter requesting for the missing requisite endorsed exhibits, pleadings, applications, rulings and orders on 29/09/2020. That is to say two years and nine months far beyond the 30 days limit set under Rule 90(1) of the Rules. Like well said by Mr. Ogunde, the steps lately taken by the respondents is strategically preemptive of the instant application lodged long ago on 05/11/2018. In our considered view, the steps taken by the respondents such as the first reminder to the Registrar for the copy of the proceedings, their request for a certificate of delay in their letter dated 15/02/2021 and the application for extension of time filed on 23/02/2021 seem to be acts aiming at circumventing the present application.

With regard to Mr. Rwegasira's complaint that his clients were not aware of the Registrar's notification for collection of the requisite copies, Mr. Ogunde cut the long story short. He argued that Dr. M. M. Lwamwai advocate who was representing the respondents was notified on 26/02/2018. We are, therefore, settled in our mind that upon Dr. Lamwai being notified by the Registrar that the documents requested were ready for collection, any failure to collect them documents was at the

respondents' risk. In any event, the respondents' conduct was inconsistent with a degree of militancy expected of any reasonable litigant. They simply chose to sleep over their right of appeal. They cannot have the right any more.

In the upshot, on account of the respondent's failure to take essential steps, the application is granted. The notice of appeal filed on 18/10/2018 against the High Court's decision dated 17/10/2017 is struck out with costs to the applicant.

Order accordingly.

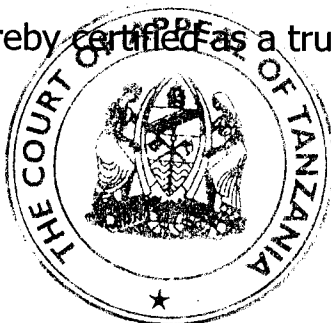
DATED at DAR ES SALAAM this 20th day of April, 2022.


R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 25th day of April, 2022 in the presence of Mr. Abdon Rwegasira, learned counsel for the respondents, who is also holding brief for Mr. Wilson Ogunde, learned counsel for the Applicant, is hereby certified as a true copy of original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL