IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., GALEBA, J.A., And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 217/08 OF 2019

GENERAL MANAGER AFRICAN BARRICK GOLD MINE LTD.....APPLICANT

VERSUS

CHACHA KIGUHA .....1ST RESPONDENT

NEEMA CHACHA .....2ND RESPONDENT

BHOKE CHACHA KIGUHA (A minor by his next friend CHACHA KIGUHA).....3RD RESPONDENT

KIGUHA CHACHA (A minor by his next friend CHACHA KIGUHA).....4TH RESPONDENT

MOTONGORI CHACHA (A minor by his next friend NEEMA CHACHA).....5TH RESPONDENT

SURATI CHACHA (A minor by his next friend NEEMA CHACHA).....6TH RESPONDENT

[Application for Orders that the Memorandum and the Record of Appeal be Served on the Respondents in Respect of the Decision of the High Court of Tanzania at Mwanza]

(Miacha, J.)

dated the 3rd day of August, 2016
in
Civil Case No. 09 of 2013

.....

RULING OF THE COURT

2nd & 13th May 2022

GALEBA, J.A.:

This application is made under rules 4(2) (a), 48(1) and (2) and 97(2) of the Tanzania Court of Appeal Rules 2009, (the Rules), moving this Court to

make an order that the memorandum of appeal and the record of appeal challenging a decision of the High Court in Civil Case No. 09 of 2013 in which the applicant lost, be served on the respondents within such time that this Court may determine. The said memorandum and record of appeal were lodged in this Court on 25th February 2019 and this application was filed on 30th April 2019. According to the notice of motion, the application is predicated on two grounds, namely:

> *"1. The respondents have not yet complied with the requirements of rule 86 for lodging in the Court of Appeal a notice of address for service and serving the said notice of address for service on the appellant.*
>
> *2. The appellant's own effort to serve the memorandum and record of appeal on the respondents at their last known address for service, Ntarachagini Hamlet, Komarera Village Tarime, failed as the first and second respondents were not found at the said address."*

The notice of motion is supported by an affidavit of Mr. Faustin Anton Malongo and to resist the application are two affidavits in reply by the first and second respondents.

At the hearing of this application the applicant was appearing by Mr. Faustin Anton Malongo, learned advocate, whereas the first respondent

appeared in person without legal representation but also was acting as the next friend for the third and fourth respondents. The second respondent appeared in person also as the next friend for the fifth and the sixth respondents.

To argue the application, Mr. Malongo had earlier on lodged in Court written submissions under rule 106(1) of the Rules, although it is not clear to us if the said submissions were also served on the respondents as required by rule 106(6) of the Rules. As indicated above, he had also lodged an affidavit in support of the notice of motion.

In essence, the two points made in the written submissions and the affidavit supporting the notice of motion are two. **One,** that up until the applicant was lodging this application on 30th April 2019, she had not been able to effect service of the notice of appeal on the respondents as required under rule 84(1) of the Rules. Had service of the notice of appeal been effected, Mr. Malongo observed, it is expected that the respondents would have lodged a notice of address for service in compliance with rule 86 (1) (a) and (b) of the Rules. Nonetheless, that had not happened, obviously because the notice of appeal was not served upon them, in the first place. As such, it was Mr. Malongo's point that service of the memorandum and the record of appeal onto the respondents under rule 97(1) of the Rules was impossible, although he

argued that, in the circumstances, the rule ceased to apply to the applicant. He added that finally, the applicant procured an order from this Court to effect service of the notice of appeal on the respondents by publication on 7th November 2019, at the time when this application was pending. The critical point that Mr, Malongo was making is that, effecting service of the memorandum and the record of appeal normally, under rule 97(1) of the Rules was in the circumstances, frustrated.

Two, that not only that it was impossible to effect service of the notice of appeal normally to the respondents, but also, service of the memorandum and the record of appeal on the last known address of the respondents proved futile.

At the hearing, Mr. Malongo elaborated further on the tireless efforts marshalled by the applicant in an endevour to serve the respondents with the notice of appeal on one hand and the memorandum and the record of appeal, on the other, but to no avail. He relied on this Court's decision in **Karori Chogoro v. Waitihache Merengo,** Civil Appeal No. 164 of 2018 (unreported).

Finally, he prayed that as this Court has powers to grant the order sought, of serving the respondents with the memorandum and the record of

appeal under the rules cited in the notice of motion, he implored us to grant the order.

In reply, the first and second respondents prayed that their affidavits in reply be adopted as part of their submissions. The respondents' affidavits in reply raise two points to challenge the application; **one,** that there is no sufficient evidence that any attempts were made to effect service of the memorandum and record of appeal to them at their last known address and; **two,** on the alleged dates that the attempts to serve them failed, the duo were at their home. Even at the hearing, the respondents maintained the position that any allegations that there were any efforts to trace them at their home and failed, are misleading and untrue. Based on the above submissions, the two respondents moved the Court to dismiss the application with costs.

Considering the contending arguments of parties, the issue for our determination, as framed by counsel for the applicant at page 2 of the written submissions, is whether there are sufficient grounds to justify grant of the order sought. We will do that in the context of the grounds upon which the application is based and the justifying facts in the affidavit supporting the notice of motion, with in mind the points raised by the respondents.

We will start with ground one. That ground is an assertion that the applicant failed to serve the respondents because the latter did not comply with the provisions of rule 86 of the Rules. The best premise to start from is the provisions of rule 97(1) of the Rules because that is the rule that makes reference to rule 86, which Mr. Malongo was complaining that the respondents did not comply with. Rule 97(1) provides as follows:

> *"97. (1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of rule 86".*

With that rule in mind, we can now comfortably go to rule 86 (1) (a) of the Rules, which provides that:

> ***"86.-(1) Every person on whom a notice of appeal is served shall-***
>
> ***(a) within fourteen days after service on him of the notice of appeal, lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address for service."***
>
> [Emphasis added]

In other words, according to the submissions of Mr. Malongo, the respondents were not served, with the memorandum and the record of appeal

because they had not lodged in Court and served to the applicant with a notice of address for service to the applicant. However, compliance by the respondents under rule 86, could happen only if they had been served with the notice of appeal in a manner provided for under rules 84(1) of the Rules, otherwise they would not have served any notice of address for service to the applicant. The obligation under rule 84 is placed on the appellant, in this application, the applicant. That rule provides as follows:

> *"84. (1) An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court."*

During the hearing of this application, Mr. Malongo made it clear to us that by the time they were lodging this application, they had not served the notice of appeal on the respondents. In our view, the submissions insinuating that the respondents did not perform their obligation of lodging the notice of address for service is misconceived because, the respondents could lodge the notice of address for service, only if had the applicant, in the first place served the notice of appeal on them, which Mr. Malongo conceded that the applicant

had not done it. The respondents therefore cannot be blamed for not complying with rule 86(1) of the Rules.

In respect of the first ground therefore, what we can gather is that the applicant's complaint is that it was difficult for her to serve the respondents with the notice of appeal, which translated into an impossibility to serve on them the memorandum of appeal and the record of appeal.

We think however, that failure to serve the notice of appeal on the respondents did not make any better the status of the matter. Seven days within which the appellant should have effected service of the memorandum of appeal and the record of appeal on the respondents under rule 97(1) of the Rules lapsed on 4th January 2019 as the documents were lodged in Court on 25th February 2019. That expiry however, has a remedy under rule 10 of the Rules, which provides as follows:

> *"10. The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."*

In this application, we did not hear Mr. Malongo telling us that he applied to extend time limited by rule 97(1) of the Rules, which is a relief to a party who has been constrained and failed to take a step necessary within a particular time as per the Rules. In such an application he would still cite the hiccups he narrates in his affidavit and in his written and oral submissions at the hearing. Briefly, we do not agree with Mr. Malongo that the first ground in the notice of motion is a justification for the applicant to file this application or even a justification to the Court to make any order extending time to lodge the said documents, so to speak, under the rules of the Court which are not meant for that purpose.

That leads us to the next ground in support of the application. The second ground, was that a lot of efforts were made to serve the respondents with the memorandum and the record of appeal, but it was impossible. Reacting to this point, the respondents submitted that there was no evidence that there were any efforts made to serve them, and that had such efforts been made, both would have accepted service because they were at home all the time and they did not travel to Dodoma as alleged by Mr. Malongo. We will start with the issue whether there is indeed sufficient evidence to show that the applicant made efforts to serve the respondents and that the attempts utterly failed.

Our starting point will be to revisit the law on service and proof of service of any Court process. The relevant provision is rule 22 (1) and (6) of the Rules which provides as follows:

> *"(1) Subject to the provisions of these Rules, where any document is required to be served on any person, service may be effected in accordance with the procedure and practice of the High Court under the provisions of the Civil Procedure Code read together with the provisions of these Rules or such other way as the Court may in any case direct.*
>
> *(6) Proof of service may be given where necessary by affidavit, unless in any case the Court requires proof by oral evidence."*

These provisions are relevant to the instant case, because at clauses 22 and 23 of the affidavit of Mr. Malongo, it is sworn that attempts were made to effect service of the memorandum and the record of appeal on the respondents at their last known address which was Ntarachagini Hamlet, Komamera Village in Tarime District, but they were not there.

As proof of service of the memorandum and the record of appeal, Mr. Malongo took us to pages 45 and 54 of the record of this application. At the foot of page 45, there is the following remark in free hand:

"Chacha Kiguha hayupo nyumbani kwake atafutwe kwa njia nyingine ili apokee yuko Dodoma.

Sgd

(Illegible stamp)

04.3.2019"

Similarly at the bottom of page 54 there is the same message but relating to the second respondent. This is the indorsement at that page:

"Neema Chacha hayupo nyumbani atafutwe kwa njia nyingine ili apokee naye yuko mkoani Dodoma.

Sgd

(Illegible stamp)

04.3.2019"

Mr. Malongo stressed that the above endorsements were sufficient evidence of service for purposes of the law, which fact the respondents disputed both in affidavit and before us at the hearing. These contending positions of parties take us to rule 22(6) of the Rules quoted above, and the question is, are the two endorsements proof of service as per the rule? Clearly, those endorsements, in our view, are not proof of service under the law because, rule 22(6) states that proof of service needs to be by affidavit, or in case the Court requires, orally. In other words, the above endorsements, presumably of a local leader are, with respect to Mr. Malongo, not proof of

service as required by rule 22(6) of the Rules, which means, the respondents were not served at their last known address.

The issue we had earlier on targeted to determine, was whether there are sufficient grounds to justify grant of the order sought. As indicated in the notice of motion, the grounds were two which we have hereinabove exhaustively discussed. In discussing the grounds, we did not find either of them to have merit, in which case, unfortunately, we have to answer the issue in the negative, as we hereby do, namely that there are no justifiable grounds upon which this Court can grant the order sought.

Before we pen off however, we wish to make one or two remarks. **One**, Mr. Malongo cited to us the case of **Karori Chogoro** (supra) and referred us specifically to page 5 of the said typed decision. At that page, this Court stated that it is under rule 97(1) of the Rules that the memorandum and the record of appeal should be served to the respondent, and that is the point we have maintained in this ruling. So, the learned advocate was right to cite the decision, but beyond citing it, the point is whether the provision discussed in the decision was compiled with by the applicant or if it was not complied with in time, what did the applicant do. In this case, the applicant did not serve the

respondents as required by that rule and lodged this application instead. It is even not clear if this is not an application for extension of time in disguise.

Two, this application has been brought under rules 4(2) (a), 48(1) and (2) and 97(2) of the Rules. We will very briefly indicate the relevance or otherwise of each of the above rules. First, rule 4(2) (a). That rule provides as follows:

> *"(1) N/A.*
>
> *(2) Where it is necessary to make an order for the purposes of-*
>
> *(a)* ***dealing with any matter for which no provision is made by these Rules or any other written law****;*
>
> *(b) N/A*
>
> *(c) N/A*
>
> *the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."*
>
> [Emphasis added]

It is beyond doubt that this rule is irrelevant to the application before us because, it applies where the Court is called upon to deal with a matter for which no provision is made in the Rules or in any other written law. Rule 4(2) (a) of the Rules was cited out of context in this matter because, Mr. Malongo

submitted before us, and correctly so in our view, that the appropriate provision for effecting service of the memorandum and the record of appeal to the respondent or respondents is rule 97(1) of the Rules.

There was also cited rule 48(1) which provides that:

> *"48. (1) Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit and shall cite the specific rule under which it is brought and state the ground for the relief sought:*
>
> *Provided that where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the order sought exists, the irregularity or omission can be ignored and the Court may order that the correct law be inserted."*

With respect to learned counsel, this provision provides for the manner that applications can be made to the Court. In this application, this rule was duly complied with, because being a formal application, it was instituted by way of a notice of motion and an affidavit.

The last provision cited in the notice of motion is rule 97(2) of the Rules. Rule 97 provides as follows:

> *"97. (1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on* ***each respondent who has complied with the requirements of rule 86.***
>
> *(2) The appellant* ***shall also serve copies*** *of the memorandum of appeal and the record of appeal* ***on such other parties to the original proceedings*** *as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint."*

We have quoted rule 97(1) for the second time on purpose. We have done so because sub rule (2) of rule 97 cannot be read in isolation from sub rule (1) of that Rule. That is so because, for service to be effected to another respondent or other respondents under sub rule (2), service under sub rule (1) of rule 97 must have been effected. In this case therefore, as no service had been effected under sub rule (1) whether within the time fixed or after extension of time, sub rule (2) would not have come into play. In our view, therefore, as long the applicant had not complied with rule 97(1), it was irregular to invoke sub rule (2) of that rule in alternative to sub rule (1) of rule 97. In short, rule 97(2) does not provide that where it becomes difficult or impossible to effect service of the memorandum and the record of appeal

under rule 97(1) then such a party facing the difficulty may apply from the Court for orders to effect the service under sub rule (2) of rule 97. In the circumstances, rule 97(2) of the rules has been quoted and sought to be relied upon out of context, and with respect, we are unable to grant the order sought under that rule.

For the above reasons, we find no merit in this application and we hereby dismiss it in its entirety with costs.

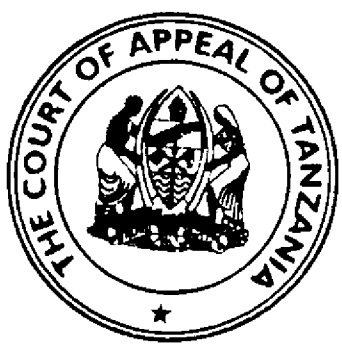
DATED at **MWANZA** this 12th day of May, 2022

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 13th day of May, 2022 in the presence of the Mr. Mussa Nyamwelo, learned counsel who took brief for Mr. Faustin Anton Malongo for the applicant and in absence of the respondents who were duly notified, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL