

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: NDIKA, J.A., KENTE, J.A. and MAKUNGU, J.A.)

CIVIL APPLICATION NO. 489/16 OF 2021

HIRJI ABDALLAH KAPIKULILAAPPLICANT

VERSUS

NCBA BANK TANZANIA LIMITEDRESPONDENT

**[Application from the Ruling and Decree of the High Court of Tanzania
(Commercial Division) at Dar es Salaam]**

(Sehel, J.)

Dated the 11th day of October, 2018

in

Commercial Case No.116 of 2016

RULING OF THE COURT

10th &18th May, 2022

KENTE, J.A.:

The background facts giving rise to the present application in which the applicant one Hirji Abdallah Kapikulila has moved the Court to issue an order striking out the notice of appeal lodged on 11th June, 2020 by the respondent Ms. NCBA Bank Tanzania Limited (successor in Title of the defunct NIC Bank Tanzania Limited) on the grounds that the respondent has failed to take the necessary steps to lodge the intended appeal in time, are simple and straight forward. They can be conveniently summarised as hereunder.

In the High Court (Commercial Division) sitting at Dar es Salaam, the present respondent sued the present applicant for a claim of TZS. 160,562,539.53 being an outstanding amount of the credit facilities extended to the applicant on several occasions the total of which was said to be TZS 392,500,000.00. It was the respondent's claim that until 6th September, 2016 when she instituted the suit in the Commercial Division of the High Court, the applicant had not fully serviced the facilities hence the above-mentioned claim. In addition to the outstanding loan amount, the respondent sought to recover from the applicant an unspecified amount of general damages, interest at the rate of 20% per annum on the principal amount from the date of institution of the suit until payment in full, interest on the decretal amount at the court's rate of 12% from the date of judgment until payment in full, costs and any other reliefs which the court could deem fit and just to grant. Alternatively, the respondent sought an order for the sale of the applicant's three motor vehicles with registration Nos. T 988 CRP and T662 DBV and T 278 DFA makes Yutong buses.

The plaint was strongly resisted by the applicant who also raised a counter claim. When the pleadings were complete, the suit went through mediation but all to no effect. Subsequently thereafter, in terms of the

applicable Commercial Court Rules, each party filed a single witness statement which was to be relied upon in proof of their respective cases. However, it is on the record that one Michael Clement Benedict Kimwaga whose statement was lodged by the respondent went missing from work and all efforts to trace him proved futile. In a desperate attempt to salvage the situation, Mr. Makarious Tairo learned Advocate representing the respondent (the plaintiff then) filed a formal application seeking to substitute the missing witness.

Having considered the said application, the learned trial judge (Sehel, J. as she then was) was not convinced. She found it totally bereft of merit and went on dismissing it with costs.

Even though, standing up undeterred, the respondent applied to this Court to have the said dismissal order revised but all in vain. Having made up its mind and decided on the next legal course of action, the respondent went back to the High Court where, as opposed to the first time, whatever she did resulted to the desired aim. She begun by launching an application (Commercial Application No. 6 of 2020) seeking an extension of time within which she could lodge the notice of appeal. For purposes of clarity, it is particularly pertinent to state here that the respondent's intention was to

challenge the decision of the High Court dismissing the application to substitute the missing witness. The application for extension of time was granted on 27th May, 2020 whereupon the respondent went on to file the notice of appeal on 11th June, 2020. On 26th June, 2020, the respondent lodged another application seeking leave to appeal to this Court out of time which was granted on 27th April, 2021.

As stated earlier, in the present application which is by way of a Notice of Motion taken out under the provisions of Rules 89 (2), 90(1), (3) and (5) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules") the applicant seeks to move the Court to strike out the notice of appeal filed by the respondent on 11th June, 2020 on the grounds that soon after lodging it and having obtained leave to appeal out of the prescribed period, the respondent fell into a deep slumber and stayed for about 168 days without taking any further steps in pursuit of the appeal.

Messrs Octavianus Mushukuma and Makarious Tairo learned advocates respectively appeared to represent the applicant and respondent when the application was called on for hearing. As there is no dispute that until the filing of this application the respondent had not taken any further action in the prosecution of the appeal, it was relatively down-hill all the

way for Mr. Mushukuma to make a brief submission in support of the application. After taking us through the factual background of this dispute including the respondent's fruitless efforts to have the dismissal order revised, the learned counsel impressed upon us that, for about six months, the respondent had done nothing to prosecute the appeal. He therefore urged us to allow the application and strike out the notice of appeal on account of the respondent's inaction.

For his part, Mr. Tairo had an uphill task in an attempt to give a convincing rebuttal to the points raised by Mr. Mushukuma. His argument was twofold. He submitted in the first place that, having lodged the notice of appeal and obtained leave to appeal out of time, the respondent wrote a letter to the Registrar of the High Court requesting for the copies of proceedings, ruling and drawn order which were necessary to pursue the appeal and that, in the circumstances, the respondent could not do anything other than waiting to be called by the Registrar to collect the said documents. Assuming that the first explanation was found wanting and implausible, Mr. Tairo still had another card up his sleeves. In what seems to be an attempt to embellish the respondent, the learned counsel submitted that, it was the applicant himself who had impeded the appeal

process by lodging a notice of appeal to challenge the decision of the High Court granting leave to the respondent to appeal out of time. When we wanted to know why had the respondent not made a follow up of whatever she had requested for from the Registrar in terms of rule 90 (5) of the Rules, Mr. Tairo had a quick but definitely not well researched answer. Relying on our decision in **Juma Omari and six others v. The Director Mwanza Fishing Industry**, Civil Application No. 14 of 2014 (unreported), the learned counsel submitted that after complying with rule 90 (1) of the Rules, the respondent was home and dry. In a way therefore Mr. Tairo impressed that if anything we should place the blame on the Registrar of the High Court and the applicant for the delay by the respondent to lodge the intended appeal within the time prescribed by the law.

We wish to start by reproducing rule 89 (2) of the Rules which is the governing provision in the context of the present application. It provides that:

"subject to the provisions of sub rule (1), a respondent or other person on whom a notice of appeal has been served may at anytime, either before or after the institution of the appeal, apply to the Court to strike out the notice 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 within a time.***"

(Emphasis added).

There is no denying in the instant case that the respondent has not taken some essential steps in the pursuit of the appeal within the prescribed timeframe and here we come face to face with rule 90 (1) of the Rules which requires an intending appellant to lodge in the appropriate registry, a memorandum of appeal in quintuplicate, the record of appeal also in quintuplicate and to furnish security for the costs of the appeal within sixty days of the date when the notice of appeal was lodged. In that view, by any standards, unless otherwise objectively explained, the delay by the respondent for about 168 days to lodge the memorandum and record of appeal would be beyond ordinary comprehension.

As stated earlier, in an attempt to explain away the respondent's inordinate delay to take action, Mr. Tairo has advanced two grounds. **One**, that after lodging the notice of appeal and obtaining leave to appeal out of time, the respondent wrote a letter to the Registrar pursuant to the proviso to rule 90 (1) requesting to be issued with a copy of the proceedings, ruling and drawn order which were necessary in pursuing the

appeal. **Two**, that the applicant had lodged the notice of appeal to challenge the decision of the High Court granting an extension of time to the respondent to lodge appeal out of time.

We take note from the ruling of the trial court (Fikirini J, as she then was) dated 27th May, 2020 that, among other reliefs, the respondent was purportedly granted an extension of time within which to submit a letter requesting to be issued with a copy of the proceedings, ruling and decree (sic) for purposes of appealing the ruling and dismissal order in Commercial Case No. 116 of 2016. When we probed Mr. Tairo as to whether the High Court Judge was clothed with the requisite jurisdiction to enlarge the time within which the respondent could request to be availed with the said copies, his answer was that the High Court Judge did so pursuant to the powers conferred on her by section 95 of the Civil Procedure Code (Cap 33 R.E. 2019) (hereinafter "the CPC") which provides for inherent powers of the High Court and subordinate courts in civil matters.

With due respect to Mr. Tairo, it appears to us that his interpretation of the law is not in accord with the applicable law. Section 11(1) of the Appellate Jurisdiction Act (henceforth the "the AJA") provides categorically that:

" subject to subsection (2), the High Court or where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired".

The foregoing provision is reproduced advisedly to show two important things. **One**, that the powers of the High Court under s.11 (1) of the AJA are confined only to the grant of extension of time to the intending appellant to file the notice of appeal out of time, to apply for leave to appeal out of time or to apply for certification that the case is a fit case for appeal and **two**, that section 95 of the CPC has no place in the procedure culminating into appeals from the High Court to this Court. Put in other words, the AJA was not designed to work in tandem with the CPC.

It follows in our judgment that it was not open and indeed irregular for the learned Judge of the High Court to grant an extension of time to

the respondent to submit a letter requesting to be availed with a copy of the proceedings, ruling and drawn order for purposes of appeal.

And this brings us to the observation which we wish to make in passing, that having spent a considerable amount of time vainly pursuing the application for revision, the respondent cannot be heard today to seek shelter under the proviso to Rule 90 (1) of the Rules. What is crystal clear from the above-cited provision of the law is that, an appellant who intends to benefit from it, must have applied for the necessary copies from the High Court within thirty days of the date of the decision against which it is intended to appeal.

In the light of the above observation, we hold that after lodging the notice of appeal it appears that the respondent showed itself irresolute and procrastinating for six months without sticking to the sixty days timeline until it was awoken by the present application. As the matters stand today, the respondent cannot be allowed to benefit from its own dilatory tactics stalling further the progress of the case in the High Court and in the broader sense, denying the applicant the right to prove his counter-claim.

As stated before, the respondent still has got something up it sleeves. This is the explanation by Mr. Tairo that the respondent was

blocked from further pursuing the appeal by the applicant after he lodged the notice of appeal to challenge the decision of the High Court granting leave to the respondent to lodge the notice of appeal out of time.

One main question comes to mind in relation to Mr. Tairo's explanation. We are left speculating about the relationship between the notice of appeal filed by the applicant and the process of appeal launched by the respondent. Can't the two appeals be processed and prosecuted separately but contemporaneously? Did the notice of appeal lodged by the applicant operate as a bar either in law or in fact against the process of appeal initially launched by the respondent?

With due respect to Mr. Tairo, the above-posed questions whose answers are quite difficult to come by, suggest that the learned counsel might have rushed into justifying the respondent's inaction half-cocked which is what happens when matters turn out to be either too complex or too contentious for relaxed handling.

For our part, the best we can say is that, we are not in the least persuaded by the respondent's flimsy explanation. We see no reason why, after lodging the notice of appeal and obtaining leave to appeal out of time, the respondent adopted the snail-like pace in the pursuit of the

appeal. It was her duty to process and prosecute its appeal within the prescribed timeline, unless she harboured some hidden agenda.

It is for the above stated reasons that we are of the opinion that indeed the respondent has failed to justify its inaction. We allow the application with costs and, in terms of rule 89 (2) of the Rules, we proceed to strike out the notice of appeal lodged by the respondent on 11th June, 2020.

DATED at DAR ES SALAAM this 17th day of May, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 18th day of May, 2022 in the presence of Mr. Octavianius Mushukuma, learned counsel for the applicant and Ms. Prisca Nchimbi, learned counsel for respondent is hereby certified as a true copy of the original.



F. A. Mtaranja
F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL