

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

(CORAM: KWARIKO, J.A., KEREFU, J.A., and KIHWELO, J.A.)

CIVIL APPLICATION NO. 287/01 OF 2021

HADRIAN BENEDICT CHIPETA.....APPLICANT

VERSUS

- | | | |
|---|---|-------------------------|
| 1. THE TREASURY REGISTRAR | } |RESPONDENTS |
| 2. THE PERMANENT SECRETARY MINISTRY OF FINANCE | | |
| 3. THE HONOURABLE ATTORNEY GENERAL | | |

**(Application for an order to strike out the notice of appeal from the Judgment
and Decree of the High Court of Tanzania, Land Division
at Dar es Salaam)**

(De-Mello, J.)

dated the 20th day of May, 2019

in

Land Case No. 386 of 2015

RULING OF THE COURT

3rd & 9th June, 2022

KEREFU, J.A.:

By notice of motion lodged on 22nd June, 2021 under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant seeks an order of the Court striking out the notice of appeal filed on 13th June, 2019 by the respondents on the ground that the respondents have failed to take essential steps to institute the intended appeal within the prescribed time. The notice of motion is supported by an affidavit duly sworn by Dora S. Mallaba, learned counsel for the applicant. The respondents, on the

other hand, resisted the application by filing an affidavit in reply sworn by Lilian Machagge, learned State Attorney.

In order to appreciate the context in which this application has arisen, we find it apposite to briefly provide the material facts of the matter as obtained from the record of the application. In 2015, the applicant instituted a suit (Land Case No. 386 of 2015) before the High Court of Tanzania, Land Division at Dar es Salaam against the respondents. Having heard the parties, the High Court (De-Mello, J.), on 20th May, 2019, decided the suit in the favour of the applicant.

Aggrieved by the High Court decision, the respondents manifested their intention to appeal against that decision by lodging a notice of appeal in this Court, on 13th June, 2019. The respondents also, vide their letter dated 7th June, 2019 addressed to the Registrar of the High Court, requested to be supplied with copy of the High Court's proceedings. The applicant avers that the said letter was served to him on 26th June, 2019. The applicant stated further that, in his letter dated 31st March, 2021, the Registrar of the High Court supplied the respondents with the said documents which were received by the office of the Solicitor General on 6th

April, 2021 through a dispatch. It was the applicant's claim that the respondents were supposed to lodge the appeal within sixty (60) days reckoned from 6th April, 2021 when they received the said documents and serve the applicant accordingly but nothing was forthcoming. Hence, he decided to lodge the current application as indicated above.

At the hearing of the application, the applicant was represented by Ms. Dora Mallaba assisted by Ms. Subira Omary, both learned counsel whereas the respondents were represented by Ms. Pauline Mdendemi assisted by Mr. Mussa Mpogole, both learned State Attorneys. It is noteworthy that pursuant to Rule 106 (1) and (7) of the Rules both parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition of the application.

Submitting in support of the application, Ms. Mallaba commenced her submission by fully adopting the contents of the notice of motion, the affidavit in support of the application and her written submission. She then narrated the historical background to this application as indicated above and then emphasized that having been supplied with the copy of the High Court's proceedings on 6th April, 2021, the respondents, in terms of Rule 90

(1) of the Rules were required to institute the appeal within sixty (60) days. It was her further argument that the computation of sixty days started to run from 6th April, 2021 when the respondents received the said documents from the High Court Registrar to 6th June, 2021. To support her proposition, she cited the cases of **Mrs. Cecilia Justine Temba v. The National Housing Corporation and 2 Others**, Civil Appeal No. 258 of 2018 and **Daudi Robert Mapuga & 417 Others v. Tanzania Hotels Investment Ltd & 4 Others**, Civil Application No. 462/18 of 2018 (both unreported). She then argued that, since the respondents have failed to take essential steps to institute the appeal within the prescribed time, the applicant is justified to press the Court to strike out the notice of appeal under Rule 89 (2) of the Rules. She thus urged us to grant the application with costs.

In response, Ms. Mdendemi also commenced her submission by adopting the contents of the affidavit in reply and her written submission. She then strenuously opposed the application for lack of merit. She however, left the matter on the hands of his colleague, Mr. Mpogole who clarified that the respondents have taken essential steps towards the institution of appeal by lodging the notice of appeal on 13th June, 2019 and

requested for copy of the High Court's proceedings on 7th June 2019. Although, he conceded that the respondents had received the High Court Registrar's letter dated 31st March, 2021 informing them that the documents were ready and have been attached to the said letter, but he contended that the said documents were not availed to the respondents. He thus challenged the claim by the applicant that the documents were supplied to the respondents on 6th April, 2021. He argued that after they observed that the requested documents were not attached to the Registrar's letter, they made follow-up by conducting physical visits to the High Court on 26th November, 2021 and 26th January, 2022 but without success. He contended further that, without the said documents, it was not possible for the respondents to institute the intended appeal.

When prompted by the Court as to whether the respondents upon noting that the said documents were not attached to the Registrar's letter, they notified him in writing and copied the applicant to enable him to appreciate the predicament they faced, Mr. Mpogole responded that the respondents did not write any letter to the Registrar but only made physical follow-ups which were not known by the applicant. He however insisted that since the respondents have taken essential steps and they are

still interested to pursue their intended appeal, the application should be dismissed for lack of merit. On the issue of costs, Mr. Mpogole argued that, if the Court will find the application to have merit, then the respondents should be spared from costs.

Having dispassionately examined the record of the application and considered the submissions advanced by the learned counsel for the parties, the main issue for our consideration is whether or not the respondents have failed to take essential steps to institute the appeal as alleged by the applicant.

We wish to begin our determination of the above issue by stating that an application of this nature is governed by Rule 89 (2) of the Rules which stipulates as follows:

"Subject to the provisions of sub rule (1), a respondent or other person on whom a notice of appeal has been served may at any time, 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 steps in the proceedings has not been taken

or has not been taken within the prescribed time. [Emphasis added].

The above provision is self-explanatory. It gives recourse to the relief of striking out a notice of appeal to a respondent or any other person on whom a notice of appeal has been served on account of failure by the appellant to take essential steps to institute the appeal within the prescribed time. The time to institute an appeal is stipulated under Rule 90 (1) of the Rules thus:

*"90 (1) Subject to the provisions of rule 128, **an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged** with –*

(a) a memorandum of appeal in quintuplicate;

(b) the record of appeal in quintuplicate;

(c) security for the costs of the appeal;

*save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, **in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been***

required for the preparation and delivery of that copy to the appellant.” [Emphasis added].

It follows then that an appeal is mandatorily required to be instituted within sixty (60) days from the date when the notice of appeal was lodged and in order for the appellant to benefit from the exclusion of time spent in preparation and delivery of documents, he must apply for copy of the proceedings in the High Court within thirty (30) days of the date of the decision against which it is desired to appeal. In the case of **Mwanaasha Seheya v. Tanzania Posts Corporation**, Civil Appeal No. 37 of 2003 (unreported) the Court emphasized that:

“...an appeal must be instituted within sixty (60) days from the date when the notice of appeal was lodged unless the exception under sub-rule (2) applies...”

In the instant application, it is evident that although the respondents initially lodged their notice of appeal on 13th June, 2019 and requested for copy of the High Court’s proceedings, which were availed to them by the Registrar on 6th April, 2021 through a dispatch attached to the Registrar’s letter dated 31st March, 2021, they took no further steps to keep live their pursuit of an intended appeal.

We are mindful of the fact that in his submission, Mr. Mpogole in justifying on why the intended appeal is yet to be filed, he argued that, although in his letter dated 31st March, 2021 the Registrar indicated that he had supplied the requested documents to the respondents, but the said documents were not attached to that letter. He also added that, upon discovering that the said documents were not availed to them, they made several visits to the Registrar's office to make follow-up of the same but without success. He thus insisted that the notice of appeal is still valid as the requested documents are yet to be supplied to the respondents. The argument of Mr. Mpogole on this aspect may sound attractive, but with profound respect, we are unable to agree with him because the same is only a mere statement which is not supported by evidence.

We hold this opinion because, there is no indication shown in the affidavit in reply of any serious efforts which have been taken by the respondents to make follow-ups with the Registrar on the said documents as claimed by Mr. Mpogole. It is also our considered view that, if indeed the said documents were not availed to them as indicated in the Registrar's letter, the respondents were expected to immediately respond to the Registrar's letter in writing to express that concern. The said letter was as

well required to be copied to the applicant, but that was not done. As such, Mr. Mpogole has not submitted any preponderant proof to establish that the said documents were not supplied to them and that they have indeed made several physical visits to the Registrar's office to make follow-up of the said documents.

In the circumstances, and on the strength of Ms. Mallaba's averment under paragraph 5 of the affidavit in support of the application and the attached Registrar's letter together with the signed dispatch dated 6th April, 2021 proving that the respondents have been availed with the said documents, we find the submission of Mr. Mpogole unfounded. We wish to emphasize that there being no evidence from the respondents on compliance with Rule 90 (1) of the Rules, we are inclined to agree with the submission of Ms. Mallaba that the respondents have failed to take essential steps towards instituting their appeal in this Court. It is our considered view that the respondents' appeal ought to have been instituted within sixty (60) days from 31st March, 2019 when they were notified by the Registrar that the requested documents were ready for collection and indeed availed to them on 6th April, 2019 but to date no appeal has been filed. In **Olivia Kisinja Ndete v. Hilda Mtunga**, Civil Application No. 4 of

2011 (unreported), when the Court was faced with an akin situation it stated that:

"The law is now settled, upon lodging a notice of appeal, the intending appellant must not sit back but is required to move the process forward by taking essential steps that have been clearly outlined by the Court of Appeal Rules. The applicant was entitled to move the Court under Rule 89 (2) to strike out a notice of appeal where no essential steps have been taken beyond that notice."

The above stance was emphasized in the decisions of the Court in **Daudi Robert Mapuga & 417 Others** (supra); **The Registered Trustees of Chama cha Mapinduzi v. Christina Ngilisho**, Civil Application No. 153/05 of 2017 and **Timothy Daniel Kilumile Co. Ltd v. Hillary Patrice Otaigo t/a Nyakanga Filling Station**, Civil Application No. 365/16 of 2017 (both unreported). In all these cases the notice of appeal was struck out on account of failure by the respondent to take essential steps to institute the appeal within the prescribed time.

Similarly, in the instant application, since the respondents have failed to take essential steps towards instituting their intended appeal within the

prescribed time, we agree with the submission of Ms. Mallaba that the notice of appeal lodged before this Court deserves to be struck out. Consequently, we are constrained to allow the application and hereby strike out the notice of appeal with costs.

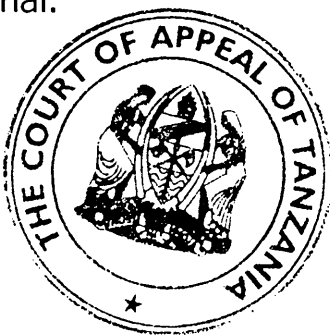
DATED at DAR ES SALAAM this 6th day of June, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO,
JUSTICE OF APPEAL

The ruling delivered this 9th day of June, 2022 in the presence of Ms. Dora Mallaba, counsel for the applicant and Ms. Doreen Mhina, learned State Attorney for the respondents, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL