

**IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA**

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CIVIL APPLICATION NO. 290/11 OF 2021

**KAGOZI AMANI KAGOZI (Administrator
of estate of the late JUMA SELEMANI) APPLICANT**

VERSUS

**IBRAHIM SELEMAN 1ST RESPONDENT
ZAINA SELEMAN 2ND RESPONDENT
RUKIA SELEMAN 3RD RESPONDENT
REHEMA SELAMAN 4TH RESPONDENT
MWAJUMA SELEMANI 5TH RESPONDENT
ZAINA SELEMAN (Administratrix
of the estate of late KASSIM SELEMAN 6TH RESPONDENT
SAUDA SELEMAN 7TH RESPONDENT**

**(Application to strike out the Notice of Appeal from the judgement of
the High Court of Tanzania at Kigoma)**

(Matuma, J.)

Dated the 17th February, 2020

in

Land Appeal No. 2 of 2019

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RULING OF THE COURT

14th & 16th June, 2022

WAMBALI, J.A.:

The respondents named above were dissatisfied with the judgement of the High Court of Tanzania at Kigoma delivered on 17th February, 2020 in Land Appeal No. 2 of 2019 in favour of the applicant who was the appellant. Subsequently, on 25th February,

2020 the respondent through the service of Mr Ignatius Rweyemamu Kagashe, learned advocate they lodged the notice of appeal to this Court. On the same date a letter to the Deputy Registrar of the High Court was written requesting for certified copies of proceedings. In addition, the respondent lodged Miscellaneous Civil Application No. 3 of 2020 for leave to appeal which was accordingly granted by the High Court on 9th March, 2020 as it was not contested by the applicant.

As it is apparent from the record of the application that until now the respondents have not formally lodged the appeal, the applicant on 21st June, 2021 approached the Court in terms of Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking an order to strike out the notice of appeal. The application has been preferred through the notice of motion and an affidavit affirmed by Mr. Mussa Kassim, learned advocate for the applicant. The ground upon which the application is premised is as reproduced below:-

"That, while the High Court judgment in Land Appeal No. 2 of 2019 was delivered on 17th February, 2020 and the notice of appeal to the Court of Appeal lodged on 25th February, 2020 and leave to appeal to the Court of Appeal of Tanzania

being granted on 9th March 2020 through Misc. Land Application No. 3 of 2020, since then the respondent has failed to take essential steps to appeal to this Court by not lodging an appeal to this Court which is more than one year and two months since leave to appeal was granted."

It is noteworthy that the relevant paragraphs of the affidavit in support of the application are 5 and 6 in which it is stated thus:-

"5. That, on 16/3/2020 Hon. Deputy Registrar of the High Court at Kigoma informed the respondent on the readiness for collection of the documents they requested from his office for their purposes of record of appeal preparation. That was twenty-two (22) days from the judgement date of the High Court Land Appeal No. 2 of 2019 they are aggrieved with. Annexed hereto and collectively marked "KAK-2" with our letter dated 6/5/2021 with Ref. No.RMK/MISC/21/64 to the High Court Deputy Registrar and the reply letter thereof dated 10/5/2021 notifying us that the respondents stands informed way back on 16/3/2021 by annexing the said notification letter. Leave is craved to form part of the affidavit.

6. That despite obtaining leave to appeal to this court as stated under paragraph 5 above, the

respondent since 9/3/2020 when they obtained that leave to appeal up to date, which is more than one year and two months, have not taken any step to appeal to this court against the said High Court Land Appeal No. 2 of 2019 at Kigoma.”

The respondents have duly lodged the affidavit in reply deposed by Ignatus R. Kagashe, learned advocate to contest the application. It is noted that though the respondents do not dispute that they lodged the notice of appeal, wrote the letter to the Deputy Registrar requesting for a certified copy of proceedings and obtained leave to appeal to this Court as evident in paragraphs 3 and 4 of the affidavit in reply, they maintain that, the reason for failing to lodge the appeal within the prescribed time is because they have not been supplied with all necessary documents for preparation of the record of appeal to contest the judgement in Land Appeal No. 2 of 2019. Their averment explaining the reasons for the delay in lodging the appeal is also reflected in paragraphs 5, 6 and 7 of the affidavit in reply. In response to the applicant's averment in paragraphs 5 and 6 reproduced above, the respondents state as follows in paragraphs 8, 9 and 10 of the affidavit in reply which we deem it appropriate to reproduce hereunder: -

"8. That, the contents of paragraph 5 of the affidavit are disputed partly for being hearsay on the part of the deponent having allegedly received from Hon. Deputy Registrar of the High Court of Tanzania at Kigoma and consequently the verification clause in respect of the contents of paragraph 5 of the affidavit is defective for failure to differentiate between matters of the deponent's own knowledge and those received from the Deputy Registrar and believed to be true.

9. That notwithstanding the aforesaid, the letter by deputy Registrar dated 16th March, 2020 though addressed onto the respondents through me as their advocate and seemingly copied unto the applicant, in the light of the applicant's letter to the Hon. District Registrar dated 6th May, 2021 annexed to the affidavit marked KAK-2 appears to have not reached him and completely unaware of it.

10. That, moreover, I personally do not have a copy of it nor remember to have been served with the letter save that sometime in 2020, Mr Gerald Ngwádu of the High Court of Tanzania at Kigoma served me with some documents in respect of the aforesaid cases promising to work on the requested other remaining documents particularly those from the District Land and Housing Tribunal, exhibits and

proceedings of the High Court of Tanzania at Tabora aforesaid which unfortunately to date, have not been supplied, leaving the respondent without necessary tools for record of appeal preparation, and that is why the applicant has not deposed as to when such required documents were readily availed onto him."

At the hearing of the application, Mr Mussa Kassim learned advocate represented the applicant, whereas Mr. Igantus Rweyemamu Kaghashe learned advocate represented the respondents. Both adopted their respective, affidavit and affidavit in reply respectively to support their brief arguments.

Submitting in support of the application, Mr. Kassim argued that it is not known why the respondents in the preliminary paragraphs of the affidavit in reply, particularly, paragraphs 5, 6, and 7 have concentrated in advancing the reason for delay in lodging the appeal instead of the reasons toward lodging the appeal since they were granted leave to appeal and notified by the Deputy Registrar on 16th March, 2020 that the requested copy of proceedings was ready for collection. Relying on the decision of the Court in **Jackson B. Rumenyera and 16 Others v. Registered Trustees of the**

Roman Catholic Diocese of Kigoma, Civil Application No. 100/11 of 2020 (unreported) which reference was made to the earlier decision in **Asmini Rashid v. Boko Omary** [1997] T.L.R 146 where it was stated that:-

"The essential steps in the prosecution of an appeal as envisaged by Rule 83 were steps which advanced the hearing of the appeal and not explanation for delays. One of the essential steps in the instant case was to apply for leave to appeal against the ruling of the Court of 25th April 1996 for there was no automatic right of appeal against the ruling."

It is noted that, Rule 83 referred in the above excerpt is in parimaterial with the current Rule 89 of the Rules.

Mr. Kassim argued further that though the respondents claims that they did not receive letters from the Deputy Registrar notifying them that the proceedings were ready for collection, impliedly, as evidenced in paragraph 10 of the affidavit in reply, it is acknowledged that they received some documents which are however not mentioned. Be that as it may, he stated in terms of Rule 90 (5) of the Rules, the respondents have not indicated in the affidavit in reply why

they did to comply with the requirement under that provision to follow up with the Deputy Registrar to ask for the documents after 90 days expired as they have remained quiet for over one year and two months since leave was granted by the High Court.

In the circumstances, relying on the decisions of the Court in **Barclays Bank Tanzania Limited v. Hood Transport Limited and Another**, Civil Application No. 134 of 2014 for the holding on the failure of the party to collect the documents after being notified and **Beatrice Mbilinyi v. Ahmed Mabkhui Shabiby**, Civil Application No. 457/01 of 2020 (both unreported) on the consequence of the failure to comply with Rule 90 (5) of the Rules, Mr. Kassim implored us to find that the respondents have failed to take essential steps to lodge the appeal. Based on his submission in support of the application. Mr. Kassim prayed that the application be allowed resulting in the striking out of the notice of appeal with cost.

As intimated above, Mr. Kagashe fully adopted the affidavit in reply and strenuously contested the applicant's prayer to have the notice of appeal struck out with costs. He emphasized that to date the respondents have not received the letters from the Deputy Registrar dated 16th march, 2020 and thus it was not possible to lodge the

appeal without being supplied with the requisite documents. He argued further that the respondents did not receive the letter attached to the applicant's affidavit. He maintained that even the applicant's counsel obtained it almost after one year after they prompted the Deputy Registrar inquiring availability of the proceedings. However, despite Mr. Kagashe's admission that he obtained some documents on the date he cannot remember as stated in paragraph 10 of the affidavit in reply, he submitted that he could not have lodged the appeal on behalf of the respondents as not all documents were supplied as requested.

With regard to the failure of the respondents to comply with the provisions of Rule 90 (5) of the Rules, though the learned advocate admitted that he had a duty to follow up the matter, he still maintained that it was the duty of the Deputy Registrar to notify the respondents by ensuring that the respective letter was served on them as to date they have not received it save for seeing it included in the instant application attached a letter directed to the applicant's counsel. This is notwithstanding, that letter was copied to him. In support of his submission on the provisions of Rule 90 (5) of the Rules, he referred the Court to the decision in **Jackson Mwaipyana**

v. Parcon Limited, Civil Appeal No. 115/01 of 2017 (unreported) in which it was observed that it would be an injustice to condemn the party who has not received the requested copy of proceedings. He pressed us to be inspired by that decision and hold that the instant application is unmerited. He maintained that the availability of the relevant documents has been difficult since the proceedings were firstly conducted in Tabora sub-registry and later in Kigoma sub-registry of the High Court.

Mr. Kagashe argued that the decisions of the Court referred by Mr. Kassim are distinguishable in the circumstances of this application as in **Jackson Mwaipyana** (supra) the issue concerned the failure of the respondent to apply for leave and that **Beatrice Mbilinyi** (supra) is of little assistance on the facts of the instant application. In the circumstances, Mr. Kagashe urged us to find that the application is unfounded and dismiss it with cost.

Rejoining, Mr. Kassim reiterated his earlier submission and insisted that the decision of the Court in **Beatrice Mbilinyi** (supra) equally applies to the instant application as the respondents have not shown that they have taken steps to contact the Deputy Registrar

after the period of 90 days expired even though their contention is that they have not received the notification letter from his office.

From the record of the application and the submission of the parties' counsel, there is no dispute that until the instant application was lodged on 21st June, 2021 the respondents had not taken steps to lodge the appeal. According to the affidavit in reply, the reason advanced by the respondents is that they have not been notified by the Deputy Registrar that a copy of the proceedings requested are ready for collection. It is further stated that the averment by the applicant that they have been notified through the letter dated 16th march, 2020 attached to the affidavit is not substantiated as it has never been served to them to date.

Having carefully considered the submissions of the parties' counsel, we are of the settled view that based on the material on record placed before us, it cannot be concluded with certainty that the copy of the letter dated 16th March, 2020 from the Deputy Registrar was communicated to the respondents through their advocate. We hold this view because though that letter was copied to the applicant's counsel it was almost after one year when he received it after he wrote to that office inquiring on the status of the requested certified

copy of proceedings. That notwithstanding, the question we ask ourselves is whether the respondents were entitled to sit back and relax for over a year without reminding the Deputy Registrar concerning their request contained in a letter dated 25th February, 2020.

We are aware of the respondents' counsel averments in the affidavit in reply that he has made several follow ups in the office of the Deputy Registrar, but what was availed to him are only part of the requested documents which cannot enable the respondents to lodge the appeal. While the argument might seem attractive and presumably convincing, we think the respondents have not seriously demonstrated that they have made concerted efforts to communicate with the office of the Deputy Registrar to inquire on the availability of the proceedings they requested. We say so because apart from the respondents' counsel verbal averment in the affidavit in reply, there is no indication that he officially communicated with the respective office in writing for over a year to follow up the matter as there is no any letter attached to support his assertion. Besides, despite the learned advocate admission in paragraph 10 of the affidavit in reply that sometimes in 2020 on a date he cannot remember he received some

documents from Mr. Gerald Ng'wandu, who he did not describe his title, save for indicating that is an officer the High Court of Tanzania at Kigoma, and he was promised that the other documents would be forthcoming, he has not bothered to show through the same affidavit that he further followed up the matter and what was the status until he lodged the affidavit in reply.

More importantly, it is not clear why the respondents' learned counsel did not deem it appropriate to secure the affidavit from the said Mr. Gerald Ng'wandu to justify his assertion, as in terms of Rule 56 (1) of the Rules, he was entitled to lodge more than one affidavit to support his assertion. Indeed, it is surprising why he has not contacted the Deputy Registrar directly instead of communicating with officers from his office, much as being the in charge of the High Court sub-registry, the Deputy Registrar would have assisted him to solve the problem of the alleged unavailability of the record of proceedings of the High Court and subordinate tribunal or advise him on the way forward. In this regard, we find that the averment in the affidavit in reply remains bare assertions for not being supported by the requisite evidence that he really followed up and asked to be supplied with the requested copy of proceedings.

It is important to emphasize that considering the current set up of the Rules of the Court with regard to the duty of the Registrar of the High Court and a party requesting for documents, an intended appellant cannot simply sit back and relax after writing a letter requesting for a certified copy of proceedings even after the expire of 90 days. It is at this juncture that we find it pertinent to make reference to Rule 90(5) of the Rules which provides as follows:-

"5. Subject to the provisions of sub-rule 1, the Registrar shall ensure a copy of the proceeding is ready for delivery within ninety (90) days from the date the appellant requested for such copy and the appellant shall take steps to collect a copy upon being informed by the Registrar to do so, or within fourteen days after the expiry of the ninety (90) days".

It is apparent from the above reproduced provision that though the Registrar of the High Court is required to ensure that the requested copy of proceedings is ready for delivery within 90 days, equally important the appellant must take steps to collect the same within a reasonable time after being so informed. Besides, the appellant is also enjoined to follow up on the availability of the

requested proceedings after 90 days and there is no information from the Registrar of the High Court.

Therefore, in terms of Rule 90 (5) of the Rules, it is not expected that the intended appellant would remain silent without reminding the Registrar of the High Court on the status of the requested copy of proceeding after the expire of 90 days. It is in this regard, that faced with an akin situation, in **Daudi Robert Mapuga and 417 Other v. Tanzania Hotels Investment Ltd and Four Others**, Civil Application No. 426/18 of 2018 (unreported), the Court remarked that:-

"While we acknowledge that the Registrar is plainly blameworthy for his inaction in supplying the requested documents, we think the respondents' diligence is serious in question. We are unprepared to let the respondents claim they were home and dry. It would be most illogical and injudicious we think, to accept the respondent's wait for a copy of proceedings while they take no action on their part to follow up on their request to the Registrar. To say the least, this inaction in our respectful view, offends the end of justice."

Similarly, in the application at hand, considering the affidavit in reply and the deliberation above, we are satisfied that the respondents have not substantiated by impeccable evidence why they did not follow up their requested copy of proceedings to the office of the Deputy Registrar for almost over a year after expiry of 90 days since their request. If we go by the record of the application, the 90 days expired sometimes towards the end of May 2020. In the circumstances, we share the remarks expressed by the Court in **Beatrice Mbilinyi** (*supra*) when it was stated that:-

"Although the provision does not provide time frame for the follow up after the expire of 90 days, we would not expect a party who has intention to appeal to have kept quite for about nine months before following up the documents necessary for the institution of the appeal. We will not be out of context if we state that the appellant was not diligent enough to follow up the matter".

We therefore think that, the decision of the Court in **Jackson Mwaipyana** (*supra*) referred by Mr. Kagashe to support the inability of the respondents to lodge the appeal is distinguishable. In the end, considering the materials placed before us by the applicant, and the

respondents' response, we agree with Mr. Kassim that the applicant has substantiated that the respondents have failed to take essential steps to lodge the appeal.

Consequently, we allow the application and hereby, in terms of Rule 89 (2) of the Rules, strike out the notice of appeal lodged by the respondents on 25th February, 2020 with costs.

DATED at KIGOMA this 15th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 16th day of June, 2022 in the presence Ms. Edna Aloyce holding brief Mr. Musa Kassim, learned Counsel of the Applicant and Mr. Ignatius Kagashe, learned Counsel for the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL