

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

**(CORAM: LILA, J.A., KITUSI, J.A., And MASHAKA, J.A.)**

**CIVIL APPLICATION NO. 648/01 OF 2021**

**MOHAMED ASLAM ..... APPLICANT**

**VERSUS**

**ISON BPO (T) LIMITED ..... RESPONDENT**

**[Application for review of the Judgment of the High Court of Tanzania  
(Labour Division) at Dar es Salaam]**

**(Mwipopo, J.)**

**dated the 16<sup>th</sup> day of July, 2021**

**in**

**Revision No. 553 of 2020**

.....

**RULING OF THE COURT**

*4<sup>th</sup> & 29<sup>th</sup> July, 2022*

**LILA, J.A.:**

The respondent was dissatisfied by the judgment and decree of the High Court (Labour Division) in Revision Application No. 553 of 2020 rendered on 16/7/2021 which not only sustained the Commission for Mediation and Arbitration's (CMA) award in favour of the applicant but also enhanced it from TZS 45,123,570.00 to TZS 147,537,870.00. She exhibited her desire to challenge the award by lodging a notice of intention to appeal on 10/8/2021. It however turned out that until 15/12/2021 when the present application was lodged, the appeal was yet to be lodged. The applicant took this failure to lodge the appeal to be an inaction warranting

the Court to strike out the notice of appeal in terms of Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) on the ground that no appeal lies or that some essential steps in the proceedings have not been taken by the respondent in furtherance of the appeal process, the subject matter of this application. The application is founded on two grounds, namely; **one**, failure to serve the notice of appeal on the applicant and, **two**, failure to file the appeal within the prescribed period of time. The averments in the affidavit deposed by the applicant himself support the application.

ISON BPO (T) LIMITED, the respondent, resisted the application by lodging an affidavit in reply lodged on 9/2/2022 sworn by one Anna Mwakatundu, the Principal Officer of the respondent. Her major arguments are reflected in paragraphs 4 and 5 of the affidavit in reply which, given their significance in the determination of this application, we let them tell in parts:-

*"4. ...The respondent states that the effort to trace the whereabouts of the applicant proved futile as he did not leave his physical address, the respondent went further and tried to serve notice of appeal by DHL and memorandum and records of appeal to the office of Advocate Hidary Mwinyimvua of P. O. BOX*

*102688 whose office is located at Fundikira Street Kinondoni but again the said advocate refused to receive such documents. Copy of affidavit of proof of service is hereby marked collectively as **Annexure ISON-1(a)(b)**. Leave of this Court shall be craved for the same to form part of this affidavit. 5....Further, the respondent states that the notice of appeal which was filed by the respondent on 10<sup>th</sup> august 2021 its memorandum and Records of appeal in respect of appeal No. 485 of 2021 between Ison Bpo Tanzania Limited and Mohamed Aslam (the applicant) was filed at the Court of Appeal on 20<sup>th</sup> December 2021 and efforts to trace the whereabouts of the applicants for the purpose of service proved futile. (A copy of the exchequer receipt of payment of court fee for such memorandum and records is hereto marked as annexure ISON-2 attached and leave of this Court is craved to form part of this Counter affidavit)."*

Before us, Mr. Ali Jamal, learned advocate who represented the applicant rested his arguments on purely legal foundations. It was his arguments that since the notice of appeal was lodged on 10/8/2021, in terms of Rule 84((1) of the Rules, it ought to have been served to the applicant within fourteen days but was not so served and also that the

appeal ought to have been lodged, in terms of Rule 90(1) of the Rules, within sixty days which elapsed on 9/10/2021 but was not so filed. Otherwise, he submitted, the respondent would seek refuge under the exception to Rule 90(1) only if the respondent had, by writing, requested for copy of proceedings and a copy of the letter served to the applicant, but she cannot because she did not do so. Consequently, he concluded, the respondent would not benefit from Rule 90(3) of the Rules and was therefore supposed to have lodged the appeal within sixty days of the notice of appeal.

Reacting to the respondent's averments in paragraph 4 of the affidavit in reply, Mr. Jamal contended that it is contradictory. He pointed out that while the process server in the affidavit proving service of the notice of appeal to the respondent affirmed in paragraph 4 that he found the advocate's office closed; in paragraph 4 of the affidavit in reply Anna Mwakatundu deposed that the advocate refused service. On the same affidavit by process server, Mr. Jamal contended, copies of the notice of appeal, letter requesting for certified copies of the proceeding, judgment, decree and certificate of delay allegedly received by the process server are not annexed to the affidavit. Regarding ISON-1(b), he submitted that it

was posted on 3/11/2021 which was 74 days reckoned from 9/8/2021 without reasons as to why the delay.

On the strength of the above arguments, Mr. Jamal submitted that essential steps were not taken within time rendering the notice of appeal liable to be struck out. In supporting his arguments he cited to us the Court's decisions in **Martin D. Kumaliya & 117 Others vs Iron and Steel Limited**, Civil Application No. 70/18 of 2018 and **Rehema Idd Msabaha vs Salehbhai Jafferjee Sheikh and Another**, Civil Application No. 527/17 of 2019 (both unreported).

In response, Mr. Peter Paul Ngowi who appeared together with Ms Mercy Kisinza, both learned counsel in representing the respondent, adopted the averments in the affidavit in reply and then strongly resisted the application. He first addressed the second limb of the ground raised by the applicant and contended that the issue of the appeal being filed out of the prescribed period of time cannot be resolved in this application as the relevant material such as the certificate of delay and the letter by the Registrar of the High Court informing the respondent to collect the requisite documents for appeal purposes for the Court to rely on in its finding are in the record of appeal which is not before the Court. He

proposed such issues be raised in Civil Appeal No. 485 of 2021 which is still pending in this Court.

As for failure to timeously serve the applicant with the notice of appeal, Mr. Ngowi was not ready to agree that it was attributed by any inaction on the part of the respondent. He was insistent that after termination of employment the applicant could not be traced as his whereabouts was unknown and efforts to serve him even through the address of the previous advocate was unsuccessful as he refused service. If not this application, he submitted, the applicant's address for service would have not been known. The respondent, Mr. Ngowi further submitted, resorted to service through DHL in his further attempt to serve the applicant as exhibited by the attached DHL receipt [ISON-1(b)]. Notwithstanding the aforesaid predicaments, Mr. Ngowi argued, after lodging the notice of appeal on 10/8/2021, the respondent lodged the appeal on 20/12/2021.

In his rejoinder submission, Mr. Jamal pressed that the respondent could have served the applicant through the previous advocate but he did not and he implored the Court to strike out the notice of appeal.

We have given due consideration to the contending arguments by the parties' learned counsel. We must, however, quickly and respectfully point out here that on the submissions, it seems clear to us that, **one**; Mr. Ngowi conceded to the fact that he did not serve the applicant with the notice of appeal within fourteen days as prescribed under rule 84(1) of the Rules. All that he has argued is an attempt to convince us that he was prevented to do so by certain circumstances. We are being invited to determine whether they are valid. **Two**, the respondent has already lodged an appeal - Civil Appeal No. 485 of 2021, a subject of the notice of appeal sought to be struck out. That detail was not controverted at all. In effect, that means, if we are to agree with the applicant and strike out the notice of appeal, in terms of Rule 89(3) of the Rules, the pending appeal shall die a natural death as it shall be deemed to have been struck out too and the Registrar shall mark it accordingly. A single stone shall have killed two birds at the same time. Although Mr. Jamal was not forthcoming on this, we think, he was so determined and inclined.

It will be recalled that the applicant's contention is that the notice of appeal is liable to be struck out because the respondent has not taken essential steps in time so as to lodge an appeal, in particular, that she did

not serve him with notice of appeal in time. On the facts placed before us, the complaint is, in fact, that he was not served with it completely. The Court's power to strike out notice of appeal traces its legitimacy in Rule 89(2) of the Rules. That Rule prescribes as follows.

*"Subject to the provisions of sub rule (1), any other person on whom a notice of appeal was served or ought to have been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal 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 or has not been taken within the prescribed time."*

In the light of the above provision of the law, the applicant has to show that the appeal has not been instituted within the prescribed time or no essential steps have been taken to initiate the appeal. As to what the phrase "essential steps" entails, the Court has interpreted it to mean steps which advance the lodgment and prosecution of the appeal (See **Asmin Rashidi vs Boko Omari** [1997] TLR 146), taking further action to keep live the pursuit of an intended appeal (See **Martin Kumaliya vs Iron and Steel Ltd** (supra) and not to remain idle or inactive or do anything in furtherance of the intended appeal (see **Rehema Msabaha vs Salehbhai**



**Jafferjee Sheikh and Another** (supra). Said it differently, it is a rule against inaction and is intended to discourage the tendency by the losing parties in the High Court from turning the Court into a park lane.

Guided by the above exposition of the law we are invited, herein, to gauge whether the respondent, after lodging the notice of appeal on 10/8/2021 remained idle or took no further steps in pursuit of her intended appeal.

It is trite law that in terms of Rule 84(1) of the Rules the intending appellant who has lodged with the Court a notice of appeal under Rule 83(1) of the Rules is obligated to serve a copy of it on all persons who seem to him to be affected by the appeal within fourteen days of the lodgment of the notice of appeal. No doubt, the applicant, being a party to the case hence the respondent in Civil Appeal No. 485 of 2021, was entitled to be served with the notice of appeal. As allude to above, the respondent conceded failure to serve the notice of appeal on time for reasons he advanced and now being challenged by the applicant.

We have keenly examined the averments in the affidavit in reply and Mr. Ngowi's submission before us. We are inclined to agree with him that the respondent did not remain idle after lodging the notice of appeal. The

efforts deployed to effect service of it cannot by any stretch of imagination be diluted. It is evident that the respondent's effort to serve the applicant through Advocate Haidery Mwinyimkuu at his office located at Fundikira Street proved futile on account of his refusal to accept service. Such a contention was resisted by Mr. Jamal on account of contradicting the process server's averment in his affidavit proving service where he stated that he found the office closed. We do not think if this has merit. There is, in our view, no contradiction. Actually, the process server stated in paragraph 4 that:-

*"4. THAT, on 19<sup>th</sup> day of August 2021 at 12:00 am and again on 21<sup>st</sup> day of August 2021 at 1:00pm I present the said documents to the said Law firm but unfortunately **the office was closed and when I called Mr. Hider Twahir via his mobile Number +255788144174 same has never been responded till to date.**"*

Read closely, the above excerpt discloses two distinct efforts made by the process server to serve the learned advocate. First, he visited the office and he found it closed and, two, he made calls but did not receive any response. Mr. Jamal did not refute that the alleged mobile number was of the applicant's former advocate, Mr. Hiday. It would not be too remote

to conclude that failure to respond to a call by the process server amounted to refusal to accept service. The alleged contradiction, therefore crumbles.

The above is not all, there is clear evidence that another attempt to serve the applicant was done by DHL [ISON-1(b)]. That fact is not contradicted save for the time as Mr. Jamal claimed that it was done about 74 days after. Mr. Ngowi was of a different view. We had a glance on ISON-1(b) which shows that it was dispatched on 24/8/2021. We entirely agree with Mr. Ngowi that that manner of service was not deployed late alive of the fact that just three to four days prior to, efforts to serve the applicant physically had proved futile as discussed above. Much as we cannot with certainty hold that service by DHL amounts to proper service in view of the fact that there was nothing to prove that the notice of appeal truly reached the intended person, yet it cannot be held to be able to displace the fact that an effort was done to serve the applicant.

All said, on the facts and circumstances demonstrated by the respondent, we are inclined to agree that the respondent manifested his efforts to discharge his obligation under Rule 84(1) of the Rules by the myriad attempts he vainly made to serve the applicant with the notice of

appeal timeously. He did not remain idle as Mr. Jamal wanted us to believe.

The second limb of the applicant's assertion that the appeal was lodged out of time hence the notice of appeal should be struck out poses no difficult to determine. The applicant put reliance on Rule 90(1) and (3) of the Rules. If we understood well Mr. Jamal, his contention is that a copy of the letter requesting for requisite documents for appeal purposes was not served to the applicant hence he cannot rely on the certificate of delay issued by the Registrar of the High Court excluding days spent in the preparation of the requested documents. Mr. Ngowi, briefly and focused, discounted the contention on the basis that there is no sufficient materials before this Court to ascertain it. Our reading of the cited Rule makes it obvious that determination of this issue requires examination by the Court of the said letter written to the Registrar of the High Court and the certificate of delay issued. Such crucial documents are not before us as we are not seized of the record of appeal in Civil Appeal No. 485 of 2021. Given the undisputed fact that there is an appeal which is still pending in this Court, we think Mr. Ngowi's argument is very valid that the issue of the appeal being lodged out of time should be pursued before a proper forum

and an appropriate time, that is to say when the appeal shall be scheduled for hearing.

For the foregoing reasons, we are convinced that the respondent has demonstrated efforts which unerringly show that she took necessary steps to serve the applicant but in vain. The applicant should not therefore be let to benefit from circumstances beyond the respondent's control. Accordingly, the application is hereby dismissed. Bearing in mind the circumstances obtaining in this application, we make no order for costs.

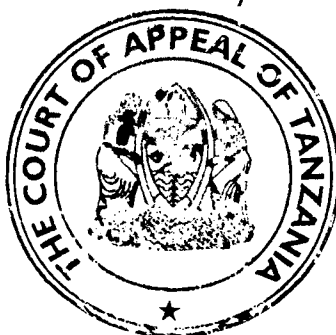
**DATED at DAR ES SALAAM** this 27<sup>th</sup> day of July, 2022.

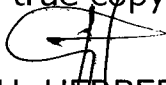
S. A. LILA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

The Ruling delivered this 29<sup>th</sup> day of July, 2022 in the presence of Mr. Henry Mwangwala, learned counsel holding brief of Mr. Ali Jamal, learned counsel for the appellant and Mr. Emmanuel Miage, learned counsel holding brief of Mr. Peter Paul Ngowi & Mercy Grace Kisinza, all learned counsel for the Respondent is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**