

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

(CORAM: WAMBALI, J.A., KOROSSO, J.A., And FIKIRINI, J.A.)

CIVIL APPLICATION NO. 31/08 OF 2021

MONICA MAKUNGU.....APPLICANT

VERSUS

DIRECTOR OF EDUCATION DEPARTMENT,

ARCHDIOCESE OF MWANZA.....RESPONDENT

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

(Madeha, J.)

dated the 29th day of May, 2020

in

Civil Revision No. 24 of 2018

.....

RULING OF THE COURT

9th & 21st February, 2022

FIKIRINI, J.A.:

The applicant, Monica Makungu, seeks an order of this Court in terms of Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), to strike out the respondent's notice of appeal lodged on 5th June, 2020, to challenge the ruling and drawn order dated 29th May, 2020, in the Civil Revision No. 24 of 2018, for failure to take essential steps to prosecute its appeal.

An affidavit affirmed by the applicant supports the application. Conversely, the respondent, through Mr. Anthony Karaba Nasimire, learned counsel, filed an affidavit in reply contesting the application.

Brief facts giving rise to this application to strike out the respondent's notice of appeal are that the respondent employed the applicant on 1st September, 1999, as an accountant and posted her to Murutunguru Secondary School. After almost six (6) years and exactly on 21st July, 2005, the respondent terminated the applicant's service. The applicant, not amused by the decision, referred the matter to the Conciliation Board protesting the termination. In the decision dated 14th February, 2007, the Conciliation Board ordered the applicant's reinstatement with payment of arrears of wages from the date of termination. Disgruntled with the Conciliation Board's decision, the respondent opted to refer the matter to the Minister responsible for Labour matters ("the Minister"), opposing the Conciliation Board's decision. On 8th August, 2007, the Minister confirmed the Conciliation Board's decision ordering the applicant's reinstatement to her employment with payment of arrears of wages.

Following the decision, the applicant moved to execute the order by instituting execution proceedings vide Miscellaneous Employment Civil Application No. 121 of 2007 on 12th November, 2007, before the Resident

Magistrate's Court of Mwanza. On 3rd December, 2007, the respondent instituted a stay of the execution application vide Miscellaneous Civil Application No. 128 of 2007, at the Resident Magistrate Court, so to await the High Court's decision in the application for Prerogative orders against the Minister's decision. The application for stay of execution was granted on 18th March, 2008, whereas the High Court decision dismissing the application with costs and affirming the Minister's decision came on 31st August, 2017.

With the above situation in place, on 12th March, 2018, the applicant revived her application for execution, including the filing of the execution forms as exhibited by annexure "A" of the affidavit. The same was served upon the respondent on 6th April, 2018. The service ignited yet another hurdle. This time the respondent filed a Notice of Preliminary Objection ("the PO") on the following points of law, namely: one, that the RM's court lacked the jurisdiction to entertain the application for execution; two, the application was incompetent for being based on a claim disallowed by the law, and three, that the judgment debtor in the said application was a non-existing entity. The PO was sustained, and the application struck out on 21st August, 2018. The applicant did not take the striking out of her application lightly; thus, on 23rd November, 2018 preferred a revision

before the High Court. In the applicant's favor, the High Court Civil Revision No. 24 of 2018 was heard and determined on 29th May, 2020, as exhibited in annexures "B" to the applicant's affidavit. The respondent outrightly by responded by lodging a Notice of Appeal to appeal to the Court of Appeal on 5th June, 2020 under Rule 83(1) of the Rules, and at the same time writing to the Deputy Registrar of the High Court (Deputy Registrar), requesting to be furnished with the copies of proceedings, ruling and drawn order. The applicant was duly served in compliance with Rule 84 (1) of the Rules on 11th June, 2020. Furthering its intention to appeal the decision, the respondent, on 10th June, 2020, filed before the High Court an application for leave to appeal to the Court of Appeal. The leave was granted on 8th December, 2020.

On 8th March, 2021, the respondent's counsel wrote the Deputy Registrar reminding him of his request to be furnished with the certified copies of the proceedings, ruling, and drawn order to prepare record of the intended appeal. The applicant also wrote to the Deputy Registrar on 30th March, 2021, inquiring whether the respondent has been availed with the requested documents. And if not, sought for the Deputy Registrar's office position on the overdue documents? After waiting for almost eight months and nothing being done about the intended appeal, the present application

was instituted, seeking to strike out the Notice of Appeal filed by the respondent on 5th June, 2020, challenging the High Court's decision in Civil Revision No. 24 of 2018.

In their respective affidavits, both the applicant and the respondent's counsel do not dispute the chronology of events. Their point of departure is nonetheless on; while the applicant believes the respondent has deliberately omitted to institute the intended appeal to date, the respondent thinks otherwise. The respondent contends that the failure to prosecute the intended appeal is not based on deliberate failure to take necessary steps or inadvertence but for reasons beyond the respondent's control.

A side from her affidavit supporting the application, the applicant also filed written submissions under Rule 106 (1) and (3) and a list of authorities under Rule 34. On the contrary, the respondent only filed a list of authorities.

At the hearing, the applicant appeared in person unrepresented and Mr. Nasimire, learned counsel appeared for the respondent.

Amplifying the contents of her affidavit and written submissions which she adopted as part of her submission, the applicant emphatically insisted on striking out of the instituted notice of appeal, as the respondent

has failed to take essential steps as obligated by the law. She contends that the respondent was supposed to file its appeal latest by 4th August, 2020, in compliance with Rule 90 (1), which requires the intended appeal to be lodged within sixty (60) days. Admitting that there could be reasons hindering that to occur, pointed out two possible explanations: one, that the respondent has not been supplied with copies of the High Court documents, and two, leave to appeal to the Court of Appeal had not yet been determined.

As for the argument that copies of the documents were not supplied, she disproved the indefinite wait opted by the respondent. On this, it was her submission that after instituting a notice of appeal, the obligation under Rule 90 (5) kicks in to both the Deputy Registrar and the respondent. She contended that under the Rule, the Deputy Registrar is obligated to supply the respondent with the documents within ninety (90) days of the notice. Failure by the Deputy Registrar to supply within the prescribed time, the obligation shifts to the party who the law obligates to take essential steps within 14 days after the expiry of ninety (90) days. The applicant further submitted that the cut-off date for the expiry of the ninety (90) days in the present application was 3rd September, 2020. However, after the ninety (90) days expiry, the respondent ought to have taken a step within the

following fourteen (14) days, which ended on 17th September, 2020, which the respondent did not do.

Extending her submission and fortifying her position, the applicant contended that all the necessary documents were ready for collection by 26th June, 2020. Concerned with the passage of time without any action taken, she wrote the Deputy Registrar to inquire whether the respondent has been furnished with the requested documents or not; and if not, what was the way forward. She was urged to go to the Deputy Registrar's office and be supplied with all the documents. The applicant referred us to page 54 of the record of the application asserting that the signature appended was that of the Deputy Registrar that the documents were ready as of 26th June, 2020.

Further in her submission, the applicant doubted the authenticity of the reminder letter addressed to the Deputy Registrar by arguing that the reminder letter annexed as "A," bears the Court of Appeal Sub-Registry stamp instead of the High Court Mwanza Registry receipt stamp. It also has been addressed to a different box number; instead of postal box number 1492, the letter has postal box number 92. In that regard, she doubted if it ever got to the Deputy Registrar. Otherwise, she argued, in his letter dated 29th June, 2021, summoning her (the applicant) to go to his office, the

Deputy Registrar would have referred to the respondent's letter when responding to the applicant's letter of 30th March, 2021, argued the applicant.

Maintaining her prayer, the applicant invited us to act under Rule 89 (2) of the Rule and strike out the notice of appeal. Buttressing her stance, in her written submission, she referred us to the case of **Siri Nassir Hussein Siri v. Rashid Musa Mchomba (Acting as Administrator of the Estate of Musa Mchomba Massawe)**, Civil Application No. 24 of 2016 (unreported). Stressing on the importance of observing the Rules in place, the applicant cited the case of **Mawazo Abeid Rija v. Joel Jelili Noah**, Civil Application No. 248/11 of 2017, in which this Court restated what it stated in the cases of **Amina Aden Ally v. Gavita Mohamed**, Civil Application No. 4 of 2009 and **Jacob Kibwana (suing through his Administratrix Veronica Kibwana) v. Khamis Ally Khamis**, Civil Application No. 207/17 of 2017 (both unreported), that Rules of the Court must be observed to avoid a miscarriage of justice.

Taking upon the cited cases in the respondent's list of authorities, the applicant pointed out that the cases of **National Insurance Corporation v. Sekulu Construction Company** [1986] T.L.R. 157 and **Pius Sangali v. Tanzania Portland Co. Limited**, Civil Appeal No. 100 of 2001

(unreported) were not relevant to the matter at hand. The third case of **Daudi Robert Mapuga & 417 Others v. Tanzania Hotels Investment Limited and Others**, Civil Appeal No. 462/18 of 2018 (unreported), though relevant, was more to her aid rather than the respondent. She, thus, urged us to apply the principles in the cited case in her favour.

We probed if she was aware that she could have filed a supplementary affidavit to the affidavit in reply and secured a Deputy Registrar's affidavit to affirm her account. She did not have such an affidavit, was her response.

Concluding her submission, she urged us to grant the application since it is almost 14 years after the decision, and yet she has not been able to enjoy the fruits of that decision in her favour.

In reply, Mr. Nasimire refuted that the respondent deliberately failed to lodge the intended appeal. He assigned the failure to act is because the Deputy Registrar has not supplied the respondent with the copies of the documents requested, despite the timely reminder after the grant of the leave to appeal to the Court of Appeal. Admitting the obligation imposed by Rule 90 (5), still, Mr. Nasimire blamed it on the Deputy Registrar as, to

date, the respondent has not been supplied with the requested documents. According to him, the respondent has taken essential steps required in law.

We inquired from Mr. Nasimire if he wrote the Deputy Registrar requesting proceedings after the grant of the application for leave, and his response was there was no rule requiring a party to request the documents twice. Addressing on the reminder letter dated 8th March, 2021, he stated it is related to the decision of in Civil Revision No. 24 of 2018, even though logically it would have included the proceedings for leave granted on 8th December, 2020.

As to the authenticity of the letter dated 8th March, 2021, Mr. Nasimire admitted it was indeed wrongly addressed. However, he quickly ascribed the error as a typing error rather than purposely concluding the letter to be fake. He also disapproved of the applicant's assertion that the respondent's letter came after the applicant's letter dated 30th March, 2021. Mr. Nasimire criticized the applicant's claim describing her allegation as a serious one that needed to be supplemented by an affidavit from the Deputy Registrar.

On being out of time contention, Mr. Nasimire maintained that even with the letter dated 8th March, 2021, his client was not, in essence, required to write another letter requesting documents. According to the

learned counsel, time starts running after the grant of the leave, in his case after 8th December, 2020.

We asked him about the respondent's compliance to the dictates of Rule 90 (5) and his position about the case of **Daudi Robert Mapuga** (supra), which is listed in the respondent's list of authorities, as well as the other two cases which were some what relevant to the argument for the intended appeal than the present application. Mr. Nasimire had nothing substantial to submit on the party's obligation after the expiry of fourteen (14) days prescribed therein. Instead, he requested us to direct the Deputy Registrar to supply the respondent with the requested documents. On costs prayed by the applicant, he argued that this being a labour matter it did not attract costs.

Responding to our query on the two cited cases of **National Insurance Corporation** and **Pius Sangali** (supra), Mr. Nasimire contended that the cited cases were in response to paragraph 22 of the applicant's affidavit. In that paragraph, the applicant complained that she had not enjoyed the fruits of the Minister's decision in her favour, as exhibited in annexure "A".

Briefly rejoining, the applicant emphatically maintained that the respondent had not taken essential steps, contending that proceedings

were ready since 26th June, 2020. In clarification, she stated that once you have applied for something, you should follow up. Instead, the respondent chose to sit back without doing anything to date. The steps claimed taken of writing a reminder letter, was according to the applicant, of no use, arguing that the letter dated 8th March, 2021 was out of time and has not reached the Deputy Registrar as it was received by the Court of Appeal (CAT) Sub-Registry. Also, she argued that even after the reminder letter, the respondent had an obligation in terms of Rule 90 (5) of the Rules to make follow-ups, which is apparent the respondent has not made any follow-up.

She concluded by emphasizing that the respondent was applying delaying tactics and urged us to strike out the notice of appeal.

We have dispassionately considered the notice of motion, affidavits, the applicant's written submission, and parties oral submissions, and we are of the view that the issues for determination are: Whether the respondent has taken essential steps as required in law; and whether the respondent had an obligation to act upon the expiry of ninety (90) days prescribed under Rule 90 (5) of the Rules.

With the first limb of argument, it is our considered view that the respondent took essential initial steps. Right after the ruling on 29th May,

2020, the respondent lodged a notice of appeal and wrote a letter requesting for the certified copies of the proceedings, ruling, and drawn order on 5th June, 2020, as exhibited by annexure "C" and "D" to the applicant's affidavit. The applicant was served on 11th June, 2020, with the two documents. The respondent was thus in compliance with Rules 83 (1) and 90 (1) of the Rules. Ordinarily, the respondent is expected to lodge the intended appeal within sixty (60) days. In the present situation, the last day would have been 4th August, 2020, by which the appeal ought to have been lodged. Thus far, we agree that the respondent took steps in the right direction up to this point. The first limb is answered in the affirmative.

On the second limb on whether the respondent had an obligation under Rule 90 (5) of the Rule. It would seem to us the steps taken were not followed through. This could be for two reasons: one, that the respondent had not at any time been notified for readiness and collection nor supplied with the requested documents. Two, the leave to appeal to the Court of Appeal lodged on 10th June, 2020, had not been determined by the time that sixty (60) or ninety (90) days had expired. The respondent has taken sanctuary in that and vehemently submitted that at no time has the respondent been furnished with the requested documents to lodge its intended appeal being the reason for failure to take further essential steps.

The applicant is entirely of a different stance and rightly argued that the respondent also had a duty to follow up and not rely on the reason that it has not been notified or supplied with the requested documents by the Deputy Registrar *ad infinitum*. Unlike the applicant, the respondent vehemently rebuts her stance, indicating that the respondent's obligation ends once the request has been filed with the Deputy Registrar. This is where the controversy lies in the second limb. In resolving it, we think it is necessary to reproduce the provision of Rule 90 (5) for ease of appreciation and comprehension. The provision states as follows:

"Subject to the provisions of sub-rule (1), the Registrar shall ensure a copy of proceedings is ready for delivery within ninety (90) days from the date of the appellant request for such copy, and the appellant shall take steps to collect copy upon being informed by the Registrar to do so or within fourteen (14) days after the expiry of the ninety (90) days."

What can be gathered from the provision and as illustrated in the case of **Daudi Robert Mapunga** (supra), is that the provision imposes obligations on both the Deputy Registrar and the appellant. As for the Deputy Registrar, the responsibility downright requires him to make sure that the respondent or a party is supplied with the requested documents within

ninety (90) days after the request for a copy of proceedings. While with the appellant, it requires that upon being informed on the readiness of the documents for collection by the Deputy Registrar, he should do so. And in case there is no notification and ninety (90) days have expired after the request made, the appellant is obliged to follow up within fourteen (14) days.

Linking the requirement to the present application, we first and foremost find no evidence on record to indicate that the respondent was ever notified of the readiness of the documents for collection. Secondly, the applicant asserts that the documents were ready since 26th June, 2020, though could be correct; the records are silent. This, however, in our view, did not exonerate the respondent from the obligation of taking essential steps after the expiration of ninety (90) days and within fourteen (14) days as dictated by Rule 90 (5) of the Rules.

In the circumstances of this case, the ninety (90) days were to end on 3rd September, 2020, upon which the Deputy Registrar was required to act, which, as pointed out above, he did not as there is no notification nor proof that the respondent collected the requested documents. And if we go by the fourteen (14) days count after the expiry of ninety (90) days, the deadline would have been on 17th September, 2020. Likewise, the

respondent did not take any steps. We can reason with the respondent's reaction of blaming the Deputy Registrar, but the bucket of blame does not stop with the Deputy Registrar only. Going by the requirement under Rule 90 (5), the intended appellant who requested to be furnished with documents has the same obligation as the Deputy Registrar. We thus equally blame the respondent for lack of diligence and his inaction, considering that they are the ones who wanted to appeal. The indefinite wait without a follow-up was, in our candid view, unreasonable. We find the extract from the **Daudi Robert Mapunga's** decision had summed it up all for us when it was stated that:

"We are unprepared to let the respondents claim that they were home and dry. It would be most illogical and injudicious, we think, to accept the respondents' wait infinitely for a copy of the proceedings while they take no action on their part to follow on their request to the Registrar. To say the least, this infinite inaction, in our respectful view, offends the ends of justice."

We take this position aware that by 3rd or 17th September, 2020, the leave applied to appeal to the Court of Appeal has not been determined. The respondent nevertheless had in our considered opinion all the reasons to find out the lateness experienced in securing those documents and not sit idle waiting for the Deputy Registrar for an indefinite period.

The respondent's complacency was again exhibited after the leave to appeal to the Court of Appeal was granted, on 8th December, 2020. In his submission, Mr. Nasimire argued that the time starts running after the grant of the leave, the argument which he could not support by any provision or the case law.

And even after the letter of 8th March, 2021, the respondent again failed to take any steps. For almost nine (9) months before the filing of this application on 30th November, 2021. The respondent's belief that after lodging the letter requesting copies of the documents, the appellant was home and dry, waiting for notification that the documents are ready for collection as stipulated in the case of **Transcontinental Forwarders Ltd v Tanganyika Motors Ltd** [1997] T.L.R 328, though valid then, no longer exist, after the 2019 amendments of Rule 90 of the Rules. The amendments have strictly imposed a duty on the appellant under Rule 90 (5) of the Rules, requiring steps to be taken within fourteen (14) days after the expiry of ninety (90) days.

The respondent lodged his notice of appeal and letter requesting for the copies of the documents on 5th June, 2020, up to 8th March, 2021 is nine (9) months, and from 8th March, 2021 up to 30th November, 2021 when this application was filed is another nine (9) months. In total, the

appellant has failed to take steps for almost seventeen (17) months which we think is unjustifiable and, without a doubt, an inordinate delay. Mr. Nasimire's submission that the respondent has no further obligation is flawed. We agree that the Deputy Registrar's inaction contributed to the mess. The respondent, in the same way, cannot escape blame. Indefinite wait does not fit well with the timely dispensation of justice mantra. We discussed this issue in the case of **Siri Nassir Siri** (supra), at length. Upon satisfying itself that the delay is inordinate and without explanation, the Court struck out the notice of appeal. In the instant application, the respondent has opted to sit back and wait, instead of taking steps as required under Rule 90 (5) of the Rules. There is no other way to interpret the inaction except that the respondent is not interested in pursuing the intended appeal, hence using delaying tactics. This Court cannot sit by and allow that to happen on its watch.

In passing, we must state our position on the two cases: **National Insurance Corporation** and **Pius Sangali** (supra) cited by Mr. Nasimire in reinforcing his submission. We are unable to find their application as far as this application is concerned, and we, therefore, did not consider them in the course of our ruling.

From the discussion above, we agree with the applicant that the respondent has undeniably failed to take the essential steps required under the law to institute the intended appeal.

We thus grant the application and proceed to strike out the notice of appeal lodged on 5th June, 2020 in terms of Rule 89 (2) of the Rules, with no order as to costs, this being a labour matter.

DATED at **MWANZA** this 18th day of February, 2022.

F. L.K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 21st day of February, 2022 in the presence of applicant in person and Mr. Patric Suluba Kinyerero hold brief of Mr. Anthony Nasimire is hereby certified as true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL