

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J. A., MWANDAMBO, J.A. And KENTE, J.A.)

CIVIL APPLICATION NO. 288/16 OF 2021

BETWEEN

A CASTE CORPORATION..... APPLICANT

VERSUS

THE BOARD OF TRUSTEES OF THE

PUBLIC SERVICE SOCIAL SECURITY FUND.....RESPONDENT

**(Application for striking out a notice of appeal from the decision of the
High Court of Tanzania (Commercial Division) at Dar es Salaam)**

(Mansoor, J.)

dated the 30th day of October, 2015

in

Miscellaneous Commercial Cause No. 16 of 2009

.....

RULING OF THE COURT

29th August & 07th September, 2022

MWANDAMBO, J.A.:

Before us is an application in which the applicant, A Caste Corporation, moves the Court to strike out a notice of appeal lodged by the defunct Board of Trustees of PPF Pension Fund, the respondent, from a decision of the High Court, Commercial Division made on 30/10/2015 in Miscellaneous

Commercial Cause No. 16 of 2009. By an order of the Court made before the commencement of hearing, the name of the respondent was substituted with the name of The Board of the Public Service Social Security Fund (PSSSF) in pursuance of section 85 of the provisions of the Public Service Social Security Act, No. 2 of 2018.

The application is predicated upon the respondent's alleged failure to institute her appeal within the prescribed time. The facts giving rise to the application are, by and large, not in dispute. The respondent lost to the applicant in a petition for setting aside an arbitral award in a decision made on the aforementioned date. Thereafter, on 13/11/2015 the respondent lodged a notice of appeal in her quest to assail that decision. Similarly, the respondent wrote to the Registrar, Commercial Division, applying for certified copies of proceedings for the purpose of the intended appeal. This she did through M/S Asyla Attorneys in a letter dated 13/11/2015 a copy of which was duly delivered on the erstwhile advocate for the applicant in compliance with rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Subsequently, the applicant successfully moved the Court to strike out the respondent's notice of appeal. Having applied for and obtained an order from the High Court extending time, the respondent lodged a fresh notice of appeal on 31/08/2017. In terms of rule 90 (1) of the Rules, the respondents had 60 days to institute her appeal reckoned from the date she lodged her notice of appeal unless the Registrar of the High Court excluded such days as necessary for the preparation and delivery of the requested proceedings to her by way of a certificate of delay subject to proof of an application for such proceedings having been made within 30 days from the date of the impugned decision. Paragraph 6 of the affidavit contends that the respondent has not instituted her appeal within 60 days from the date of the notice of appeal; 31/08/2017.

The applicant's contention has been disputed by the respondent's affidavit in reply. The respondent relies on her erstwhile advocate's letter dated 13/11/2015 and avers that despite several reminders, the Registrar has not furnished her with requisite copies of the documents she had requested for the purpose of the intended appeal. In a nutshell, the respondent's case is that time for appeal has not yet started running by

reason of the Registrar's failure to supply her with the necessary documents for the purpose of the intended appeal.

At the hearing of the appeal, Mr. Richard Rweyongeza, learned advocate represented the applicant assisted by Mr. Elisaria Mosha, learned advocate. Stripped of other details, the learned advocate's argument was that the respondent cannot rely on her letter to the Registrar delivered prior to the order striking out of the first notice of appeal to benefit from limitation because that letter was rendered worthless upon the Court striking out the first notice of appeal. The learned advocate contended that the respondent was bound to seek extension of time to make a fresh application for the supply of copies of certified proceedings and since she did not do so, the consequences under rule 89 (2) of the Rules must fall squarely on her, to wit; striking out her notice of appeal.

Mr. Joshua Webiro who teamed up with Messrs Hemed Said Mkomwa and Stephen Biko all learned State Attorneys representing the respondent reiterated the stance in the affidavit in reply. The essence of his argument was that since the Registrar of the Commercial Court had not yet furnished the respondent with the certified copies of proceedings in response to the

letter referred to above neither had acted on several reminders, time for instituting the appeal had not yet started running against her. It was the learned State Attorney's argument that, the respondent had no obligation to write another letter to the Registrar after the order of the Court striking out her first notice of appeal. This is so, he argued, the first letter remained intact considering that the said letter had not yet been acted upon prior to the order striking out the notice of appeal.

We understood Mr. Webiro arguing that the application for striking out the notice of appeal was premature the more so when the respondent had taken steps to remind the Registrar to supply her with copies of the documents she had requested for appeal purposes. Two of the Court's decisions were cited to reinforce the learned State Attorney's stance namely; **Kaemba Katumbu v. Shule ya Sekondari Mwilamvya**, Civil Application No. 523 of 2020 and **Jackson Mwaipyana v. Parcon Limited**, Civil Application No. 115/01 of 2017 (both unreported). Mr. Webiro urged us to dismiss the application as no cause exists for taking such a drastic measure of striking out the respondent's notice of appeal.

Mr. Rweyongeza could not be moved in rejoinder. He reiterated his stance that the respondent cannot rely on her letter to the Registrar which went away with the first notice of appeal. He distinguished the cases cited as inapplicable to the instant application.

Having heard the learned counsel's arguments, it has become plain that contrary to the initial understanding, the issue in this application is not one which has been dealt with oftenly by the Court. That explains why Mr. Rweyongeza could not cite to us any authority in that regard. Neither could we land into any such decision from our research. Be it as it may, the determination of this application turns out to be whether, upon the order striking out the first notice of appeal the respondent's letter applying for certified copies of proceedings remained intact and capable of checking time limitation for the purposes of the institution of an appeal after the lodgment of the notice of appeal sought to be struck out.

Our starting point will be rule 90 (1) of the rules setting 60 days' time limit for institution of appeals from the date of the lodgment of a notice of appeal. However, the proviso to that rule affords protection to a litigant who has made an application to the Registrar of the High Court within 30

days of the decision appealed against to be supplied with the necessary documents for appeal purposes. In simple terms, the time for institution of an appeal stops running against a litigant who has complied with the proviso to rule 90 (1) and 90 (3) of the Rules until such time the Registrar notifies such litigant to collect the documents requested. That should ordinarily be less complicated and that is the respondent's trump card.

Naturally, since there is no dispute that the respondent requested the High Court Registrar to be supplied with certified copies of proceedings on the aforementioned date for appeal purposes, the applicant would not have sought to invoke rule 89 (2) of the Rules had the first notice of appeal remained intact. She has moved the Court on the assumption that upon the striking out of the first notice of appeal, everything in connection with the appeal process collapsed and so the respondent had to start it afresh. That assumption seems to be derived from the Court's previous decisions, amongst others, **Haruna Mpangaos and Others v. Tanzania Portland Cement Company Limited**, Civil Application No. 98 of 2008, **Dhow Mercantile (EA) Ltd. & 2 Others v. Registrar of Companies & 4 Others**, Civil Appeal No. 56 of 2005 and **Azaram Dadi v. Abilah Mohamed Babu**, Civil Appeal No. 74 of 2016 (all unreported).

Through the cases cited, the Court has stated categorically that an order striking out an appeal places the parties at the position they were before the institution of such appeal and a litigant interested in pursuing his appeal has to start the whole process afresh commencing with the initial step of lodging a notice of appeal. This the respondent did after obtaining an order extending time to lodge a notice of appeal following the striking out of her first notice of appeal. Was she required to make a fresh application to be supplied with the certified copies of proceedings? Mr. Rweyongeza would have us answer that question affirmatively.

We understood the learned advocate saying that starting the appeal process afresh extended to making a fresh request for copies of documents considering that the Registrar had not yet supplied her with the said documents in response to the request made on the date already referred to above. Apparently, the cases which we have laid our hands on involved fresh appeals after the initial ones had been struck out. Naturally, in such situations, it cannot be disputed that the initial journey to appeal had come to an end after the completion of the steps involved towards that destination. Quite the opposite, the instant application involves a situation in

which the appeal process had not been fully consummated. As submitted by Mr. Webiro, not only did the Registrar fail to furnish the respondent with the copies requested prior to the order striking out the notice of appeal, he has not done so to date. Under the circumstances, the decisions we have referred to above are, with respect, distinguishable.

In as much as Mr. Rweyongeza did not place any authority to support his contention, the cases on which we have laid our hands do not advance the applicant's quest. For instance, in **Azaram Mohamed Dadi** (supra), the issue involved failure to seek leave to appeal after the striking out of the first appeal. On the other hand, **Dhow Mercantile (EA) Ltd.** (supra), the appellant omitted to seek extension of time to lodge a notice of appeal after the striking out of the first appeal. In our view, since the Registrar had not yet acted on the respondent's letter requesting to be supplied with copies of necessary documents for appeal purposes, we do not share the same view with Mr. Rweyongeza that the order striking out the respondent's notice of appeal had a bearing on the respondents' letter in compliance with rule 90 (1) of the Rules.

It is our firm view that the position would have been different had the whole process of appeal been completed involving institution of an appeal upon the Registrar furnishing the respondent with copies of certified proceedings and issuance of a certificate of delay in pursuance of the proviso to rule 90 (1) of the Rules. Neither of them happened in the instant application and thus we respectfully endorse Mr. Webiro's submission that the respondent had no obligation to make a fresh application to be furnished with documents following the striking out of her notice of appeal as it were. All the respondent did was to remind the Registrar to furnish the documents even though at the material time she had no obligation to do so. That means, the decisions cited to us by Mr. Webiro; **Kaemba Katumbu** and **Jackson Mwaipyana** (supra) have very limited application to the instant application because they are premised on the provisions of rule 90 (5) of the Rules introduced by GN. No. 344 of 2019.

On the whole, we are satisfied that the applicant has not made out a case to warrant a finding that the respondent has failed to institute her appeal within 60 days as required by rule 90 (1) of the Rules. Contrary to the applicant's contention, the respondent has not been placed in a position to institute her appeal by reason of the Registrar's failure to furnish her with

the requisite documents in response to her letter. In our view, unlike in situations where the appeal is struck out in which case all the documents go away with the abortive appeal, it is not the case in cases where a notice of appeal is struck out as it were in the instant application.

That said, we find no merit in the application and dismiss it with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 06th day of September, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 07th day of September, 2022 in the presence of Mr. Protace Kato Zake, learned advocate for the Applicant and Ms. Dorine Mhina, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.


D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL