

**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. 226/17 OF 2021**

**MAHMOOD SALUM CHIBANGO**

**@ MAHMOOD SALUM CHIBANGO MHINA ..... APPLICANT**

**VERSUS**

**NATIONAL BANK OF COMMERCE LTD .....RESPONDENT**

**(Application for striking out a Notice of Appeal against the decision  
of the High Court of Tanzania, Land Division at Dar es Salaam)**

**(Mgaya, J.)**

**dated the 23<sup>rd</sup> day of March, 2016**

**in**

**Land Case No. 299 of 2009**

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**RULING OF THE COURT**

25<sup>th</sup> August & 7<sup>th</sup> September, 2022

**KWARIKO, J.A.:**

The respondent, National Bank of Commerce Ltd was not satisfied with the decision of the High Court of Tanzania (Mgaya, J.), Land Division at Dar es Salaam in Land Case No. 299 of 2009 dated 23<sup>rd</sup> March, 2016. She therefore lodged a notice of appeal on 21<sup>st</sup> July, 2017 to challenge that decision following extension of time to file the same.

The applicant who was the winner in that case is moving the Court in terms of rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules") to strike out the respondent's notice of appeal on the ground that the respondent has not instituted the appeal within sixty days as provided for under rule 90 (1) of the Rules. The affidavit sworn by Mr. Deiniol Joseph Msemwa, learned advocate for the

applicant in support of the notice of motion is to the effect that, ever since the notice of appeal was lodged no memorandum and record of appeal have been filed. It is stated further that although the respondent requested for a copy of proceedings in the High Court on 13<sup>th</sup> May, 2016 and the Registrar wrote to her on 5<sup>th</sup> February, 2021 informing that the copy was ready, she has neither collected it nor lodged the intended appeal.

On the other hand, in opposition to the application the respondent filed an affidavit in reply sworn by Mr. John Laswai, learned advocate for the respondent. It is stated therein that failure to file the appeal is attributable to the Registrar's failure to supply the respondent with the corrected version of the judgment and decree. That, even before 5<sup>th</sup> February, 2021 when the Registrar wrote the said letter for collection of the documents, on 3<sup>rd</sup> March, 2020, the respondent had written to him requesting for correction of errors in the judgment and decree and the same was served on the applicant and a reminder was written on 23<sup>rd</sup> February, 2022 but nothing has been forthcoming. Thus, the respondent could not lodge the appeal in the absence of the corrected copies of judgment and decree.

At the hearing of the application, Mr. Deiniol Msemwa and Dr. Onesmo Michael Kyauke, learned advocates represented the applicant and respondent, respectively.

When he took the stage to argue the application, Mr. Msemwa adopted the notice of motion, affidavit and written submissions he had filed earlier. He amplified that, despite being supplied with the necessary documents, the respondent has failed to lodge the appeal within sixty days as required under rule 90 (1) of the Rules. He argued further that, even though the documents were defective, the respondent has not made any follow up within reasonable time or else she ought to have filed a formal application for rectification of the errors. On the basis of his submissions, the learned counsel implored us to strike out the notice of appeal for the respondent's failure to take step to institute the intended appeal within the prescribed time.

In response, Dr. Kyauke adopted the affidavit in reply and contended that having discovered the errors in the judgment and decree, the respondent wrote to the Registrar for rectification of the same but has not received any response from him. He argued that in any case, the letter of the Registrar dated 5<sup>th</sup> February, 2021 made reference to the respondent's letter dated 13<sup>th</sup> May, 2016 and not those dated 3<sup>rd</sup> March, 2020 and 23<sup>rd</sup> February, 2022.

From the contending submissions by the learned counsel for the parties, the crucial issue which beckons for our determination is whether the respondent has failed to take essential steps within the prescribed time after lodging the notice of appeal on 21<sup>st</sup> July, 2021. The applicant

has moved the Court to strike out the notice of appeal under Rule 89 (2) of the Rules which provides thus:

*"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, before or after the institution of the appeal, apply to the Court to strike out the notice of appeal or 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."*

It is not disputed that upon being supplied with the requested documents, the respondent discovered some errors and wrote to the Registrar for rectification and copied the letters to the applicant. However, the Registrar did not respond to those letters. The only response from the Registrar is the letter dated 5<sup>th</sup> February, 2021 which did not relate to the request for rectification of errors but it referred to the respondent's initial letter dated 13<sup>th</sup> May, 2016.

In that case, we agree with Dr. Kyauke that, the respondent is not to blame as the Registrar was duty bound to respond to the requests made by the respondent. It is our considered view that once the respondent wrote to the Registrar and reminded him, she was not expected to do anything more. In the circumstances, it cannot be said that no follow up was done by the respondent. A similar scenario

happened in the case of **Dr. Margwe Bitesigirwe v. General Secretary ELCT Karagwe & Two Others**, Civil Application No. 555/04 of 2019 (unreported) where the Court stated thus:

*"As rightly submitted by Ms. Lupondo, once the respondent has written a letter to the Registrar to be furnished with the necessary documents, it is expected for the Registrar to respond to the respondent's letter and its reminder, rather than keeping quiet. The reminder in in our view is sufficient proof for a follow up. The question we pose at this juncture is that suppose the Registrar does not answer the reminder letter, should the respondent keep on making a follow up? Until when? We think that the Registrar is supposed to respond and if there is any impediment, he is obliged to notify the respondent. His failure to respond is a snag which obstructs smooth administration of justice."*

See also **Raymond Costa v. Mantrac Tanzania Limited**, Civil Application No. 42/08 of 2018 and **Alfred Solobea Mwita v. National Bank of Commerce Ltd**, Civil Application 343/01 of 2019 (both unreported).

Further, the contention by Mr. Msemwa that the respondent was supposed to file a formal application for rectification of errors has no merit because it is not backed up by any law. The respondent had a

right under rule 90 (1) of the Rules to be furnished with copies of proceedings in the High Court and if they had any defects, she was justified to request for rectification as she did.

In the event, we are settled that the applicant has not satisfied the Court that the respondent has failed to take essential steps towards institution of her appeal within prescribed time from the date of lodging her notice of appeal. This application is therefore devoid of merit and is hereby dismissed with costs.

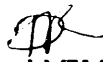
**DATED at DAR ES SALAAM this 2<sup>nd</sup> day of September, 2022.**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

P. M. KENTE  
**JUSTICE OF APPEAL**

The Ruling delivered this 7<sup>th</sup> day of September, 2022 in the presence of Mr. Deiniol Joseph Msemwa, learned counsel for the applicant and Mr. Afrika Mazoea, learned counsel for the respondent, is hereby certified as a true copy of original.

  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**