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. 227/17 OF 2021

COSTANCIA CHAILA .....1ST APPLICANT

GAUDENS MTEMI.....2ND APPLICANT

VERSUS

EVARIST MAEMBE ..... 1ST RESPONDENT

JULIUS MAEMBE.....2ND RESPONDENT

[Application to strike out a Notice of Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam]

(Bongole, J.)

dated the 7th day of February, 2014
in
Land Appeal No. 122 of 2012

RULING OF THE COURT

31st August, & 22nd September, 2022

KENTE, J.A.:

On 7th February, 2014 the High Court of Tanzania, (Bongole, J. (R.I.P)) sitting at Dar es Salaam, allowed an appeal in Civil Appeal No. 122 of 2012 preffered by the present applicants namely, Costansia Chaila and Gaudence Mtemi against, Evarist Maembe and Julius Maembe who, as is the case in the instant application, were the respondents.

In the substance of his judgment, the first appellate judge declared the applicants the lawful owners of two pieces of land known and described as Plot Nos. 1010 and 1011 Block "C" Sinza area Kinondoni District, Dar es Salaam Region. Accordingly, the respondents who have had a stellar start in the District Court were then required to give immediate vacant possession of the suit premises to the applicants.

Aggrieved by the said decision of the High Court, the respondents sought to challenge it. To that end, deploying the services of M/S Marando, Mnyele and Company Advocates, on 13th February, 2014 they lodged a notice of appeal and on the same day, they wrote a letter to the Registrar of the High Court requesting for copies of proceedings, the impugned judgment and the decree in accordance with Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009, (hereinafter "the Rules"). On 11th September, 2017, the respondents were finally issued with the requested documents and, again, pursuant to Rule 90 (1) of the Rules, a certificate of delay was issued by the Registrar of the High Court excluding, in computing the time within which the appeal was to be instituted, the period from 13th February, 2014 when the respondents requested for the copies of proceedings, judgment and decree to the 11th September, 2017 when they

were supplied with the said documents as a period which was required for the preparation and delivery of the said documents for appeal purposes.

Everything being equal and in terms of the same Rule 90 (1) of the Rules, the respondents were required to lodge their intended appeal not later than 10th November, 2017. However, as conceded by Mr. Mnyele learned counsel who appeared before us on behalf of the respondents to resist this application, as of today, that is, almost five years thereafter, they have not complied with this Rule.

As one would expect, the respondents' inaction prompted the applicants to lodge a notice of motion praying in terms of Rule 89 (2) of the Rules that, the notice of appeal filed by the respondents on 13th February, 2014 be struck out on the ground that they have failed to take essential steps to lodge their appeal.

To prosecute the application, the first applicant appeared before us in person. For his part, the second applicant, though duly served with a notice of hearing, he was a notable absentee. However, bearing in mind that prior to the hearing date he had lodged written submissions in support of the application in accordance with Rule 106 (1) of the Rules, we went on

to hear the first applicant who pressed us to invoke our powers under Rule 89 (2) of the Rules to strike out the notice of appeal lodged by the respondents on 13th February, 2014.

Expounding on the grounds contained in the founding affidavit, the first applicant was remarkably very brief. She took the firm view that, the failure or neglect by the respondents to institute their intended appeal immediately after they were issued with the documents requisite for appeal purposes, was a naked delaying tactic used to obstract her and her co-applicant from enjoying the fruits of their labour in this litigation which, as exhibited by the parties' affidavits, has a protracted and chequered history. She thus implored us to allow the application and strike out the notice of appeal as prayed in the notice of motion.

On the opposite side, the respondents resisted the application through an affidavit in reply sworn by their already mentioned advocate Mr. Gabriel Mnyele. We shall come to the pith of Mr. Mnyele's averments in his affidavit at a latter stage of this ruling. In the meantime, we wish first to dispose of the learned counsel's concern that the application before us was incompetent for want of the second applicant's signature on the founding affidavit.

In this connection, Mr. Mnyele invited us either to strike out the application for allegedly being incompetent contending that, the second applicant's signature appearing on the notice of motion and the supporting affidavit was at variance, or to adjourn the hearing of the application with the view to verifying the identity of the person signatory to the said documents.

To reinforce his contentions, Mr. Mnyele sought reliance on the decision of the Court in the case of **Thabitha Muhondwa v. Mwango Ramadhani Maindo and Another,** Civil Appeal No. 28 of 2012 (unreported) together with section 75 (1) of the Evidence Act. Notably, in the above-cited case, the Court took the view that, going by the above-cited provisions of the Evidence Act, one of the methods of proving a signature of a person is by comparing it with his other signature. It was the learned counsel's final contention that, as the matters stand, the application before us was incompetent for lack of a jointly-sworn supporting affidavit.

Alternatively, Mr. Mnyele implored us to order the second applicant to file a supplementary affidavit stating categorically that the signature appearing on the founding affidavit was his.

With respect to Mr. Mnyele, we find this to be a distinguishable case from the case of **Thabitha Muhondwa** (supra) which the learned counsel referred to as authority for his stance. Whereas in the present application, the issue arising out of the purely illusory dispute created by Mr. Mnyele relates to the validity of the supporting affidavit, the subject of much controversy in **Thabitha Muhondwa's** case was the authenticity or otherwise of a marriage certificate which was alleged to have been forged to justify a non-existent marriage. In those circumstances, the Court had to compare the undisputed signatures of the husband who was the first respondent appearing on some other documents with his questioned signature contained in the strongly contested marriage certificate before it could come to the conclusion that indeed the disputed signature was his. As stated earlier, in the case now under scrutiny, the contention that the second applicant's signature contained in the notice of motion and the founding affidavit is at variance and that most probably the affidavit was not signed by him, is entirely a dispute of Mr. Mnyele's own making and no one else's.

On the whole, we do not, with respect, agree with Mr. Mnyele. Admittedly, we do not profess any expert knowledge in this subject but it is

pertinent and we are not *ipso facto,* precluded from observing that, in a fitting case, the determination of authenticity or otherwise of such a signature on a questioned document is a specialized task for forensic document examiners in the forensic science field. We would like to think that, likewise, Mr. Mnyele does not profess to be a forensic scientist and therefore he cannot be heard to take advantage of the second applicant's absence to rise beyond his full measure of his profession and role as an advocate.

In the light of the above observation, we find ourselves constrained to differ with the learned counsel for the respondents. We hold instead that, the application before us is well supported by the affidavit jointly sworn by the applicants and therefore, the complaint by Mr. Mnyele has no basis both in law and in fact. We accordingly dismiss it.

Going forward to the merits of the application, when confronted with a serious question as to why the respondents had not instituted their intended appeal almost five years after they were issued with all the documents requisite for appeal purposes, Mr. Mnyele sought to get himself out of the unpleasant situation by contending that, after perusal of the said documents, he discovered that some other documents which were

supposed to form part of the record of appeal were still missing. He went on contending that, in the circumstances, on 10th November, 2017 he wrote a letter to the High Court Registrar requesting to peruse the original case files and that until the time of filing the present application, they were yet to be supplied with the missing documents.

Now, as can be gleaned from the record, the ground upon which the applicants sought to have the Notice of Appeal lodged by the respondent struck out are stated under paragraphs 4 and 5 of the supporting affidavit. The applicants averred that:

> *4. "...on 11th September, 2017 the respondents were supplied with the judgment, decree and proceedings...."*
>
> *5" ...despite being issued with all the requested documents, the respondents have not taken essential steps within the prescribed time."*

As we have already indicated, the respondents' advocate has sworn an affidavit in reply and submitted, while expounding on the cause of the respondents' unexplained inaction that, they could not lodge their appeal in time because of non-availability of some other documents which were equally necessary for the respondents to pursue a meaningful appeal.

Notably, perhaps for his own convenience, Mr. Mnyele was careful not to clearly specify which documents were yet to be supplied to him by the Registrar of the High Court as to lead to an inordinate delay by the respondents to lodge the appeal.

In the cases of **Asmin Rashid v. Boko Omari** [1997] T.L.R. 148 and **Alliance Insurance Corporation Ltd and Another v. Richard Nestory Shayo**, Civil Application No. 131/02/of 2018 (unreported) we took the stance that:

> *"...essential steps [as envisaged] under Rule 89 (2) of the Rules, entails steps which advance the hearing of the appeal, including timely collection of the necessary documents which are supposed to be relied upon by the potential appellant in preparing his appeal..."*

In view of the above-cited authorities, upon considering the facts and circumstances obtaining in the present application, we have found ourselves lacking the audacity to hold as Mr. Mnyele would want us to do that, the respondents have all along been genuinely and reasonably waiting for five years to be issued with the unspecified documents which are necessary for them to lodge an appeal. Rather, as correctly submitted

by the first applicant, it appears to us that, indeed the respondents are deploying procedural delaying tactics to clog the course of justice.

To demonstrate that indeed the respondents are using dilatory tactics to impede the course of justice, we wish to address our minds to the fact that, after receiving the copies of proceedings, judgment and decree on 11th September, 2017 it took Mr. Mnyele another sixty days to discover that there were "certain" documents which could not to be traced and subsequently to write a letter to the Registrar of the High Court (on 10th November, 2017) requesting to peruse the original records in order to satisfy himself if the records were complete. The view we take of this case is that, after being issued with the documents requisite for purposes of appeal, the respondents believed that they could still hold back the wheel of justice after lodging a notice of appeal and leaving it unattended *sine die*.

In the light of the respondents' exhibited conducts of a calculated risk, we hold the strong view that the applicants were justified in preferring the present application. Accordingly, in terms of Rule 89 (2) of the Rules, the application is allowed resulting in the notice of appeal lodged by the

respondents on 13th February, 2014 being struck out with costs. It is so ordered.

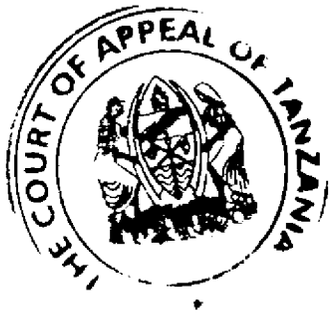
DATED at **DAR ES SALAAM** this 14th day of September, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of September, 2022 in the presence of Ms. Costancia Chaila, the 1st applicant and in the absence of 2nd Applicant, 1st and 2nd Respondents is hereby certified as a true copy of the original.



D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL