IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KIHWELO, J.A. And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 362/17 OF 2021

SAID SULTAN NGALEMA.....APPLICANT

VERSUS

ISACK BOAZ NG'IWANISHI.....1ST RESPONDENT

CLEMENT GODFRAY MALLYA.....2ND RESPONDENT

VICENT DONALD.....3RD RESPONDENT

P/S MINISTRY OF NATURAL RESOURCES & TOURISM....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

(Application to strike out Notice of Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Rwizile, J.)

dated the 15th day of January 2021
in
Civil Case No. 42 OF 2016

.....

RULING OF THE COURT

27th October & 4th November, 2022

KIHWELO, J.A.:

This is an attempt by the applicant, Said Sultan Ngalema, to dislodge the first respondent's Notice of Appeal from the annals of this Court for reasons that the first respondent has failed to take some essential steps towards instituting the appeal.

The notice of motion is taken under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is backed by the affidavit of the applicant himself affirmed on 10th August, 2021.

In order to appreciate the essence of the application, we find it desirable to reproduce paragraphs 2, 3, 4, 5 and 6 of the applicant's affidavit. It reads:

> *" 2. That, the applicant sued the respondents for damages at the High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam in Civil Case No. 42 of 2016 in which the judgment was delivered in favour of the applicant on 15th January, 2021 by Hon. A. K. Rwizile, Judge.*
>
> *3. That the 1st respondent being aggrieved with the decision of the High Court filed a Notice of Appeal to the Court of Appeal on 18th February, 2021 thereby the application (sic) is still pending.*
>
> *4. That the 1st respondent has failed to take essential further steps in an application (sic) for the proceedings and there is no appeal that has been filed to date.*
>
> *5. That to date we have failed to proceed with this matter with execution at the High Court of Tanzania, at Dar es Salaam.*

6. That my advocate has advised me in which, I believe to be true, that the 1st respondent was required to serve me with other subsequent proceedings thereto."

The respondents on their part, did not file any affidavit in reply but as we shall observe shortly in the course of this ruling, the application was gallantly resisted. We have deliberately reproduced the above paragraphs of the applicant's affidavit for reasons that we shall explain later.

Before us, the applicant entered appearance through Mr. Amani Joachim, learned counsel and Mr. Erigh Rumisha, learned State Attorney appeared for the fourth and fifth respondents. The first, second and third respondents did not appear but according to the affidavits of service of the process servers Mr. Mbayi Kikwa and Mr. Ismael Lulambo the notice of hearing were duly served upon the respondents. Mr. Joachim prayed and was granted leave to proceed with the hearing of the application in the absence of the first, second and third respondents.

Arguing in supporting of the application Mr. Joachim was fairly brief and contended that the first respondent lodged the notice of appeal on 8th February, 2021 and since then has not served the applicant with subsequent proceedings as averred in paragraph 6 of the affidavit. Elaborating, he referred to rules 90 and 97 of the Rules which require institution of an appeal to be done within sixty days of the filing of the notice of appeal and service of the memorandum of appeal within seven

days of filing the memorandum of appeal respectively. He went on to submit that, the steps referred to under rules 90 and 97 are the subsequent proceedings referred to in paragraph 6 of the affidavit which the first respondent did not take.

He further argued that from 8th February, 2021 up to and including 17th August, 2021 when the applicant lodged the instant application is almost six months and the first respondent is yet to lodge an appeal before the Court. He, therefore, prayed that the application be granted and the notice of appeal be struck out with costs.

When prompted by the Court on whether the applicant ably indicated in clear terms the essential steps which the first respondent did not take, Mr. Joachim at first, he insisted that paragraphs 5 and 6 of the affidavit of the applicant indicated by necessary implications that the first respondent did not take essential steps. However, in a surprising turn of events, he admitted that, the affidavit in support of the application did not explicitly and vividly indicate which steps the first respondent was required to take and did not actually take. He further admitted that, the submission that rules 90 and 97 of the Rules on filing the appeal within sixty days as well as serving the memorandum of appeal within seven days was a submission from the bar.

In reply to the application, Mr. Erigh Rumisha, made a brief but focused submission. He prefaced his reply by contending that, the fourth and fifth respondents did not file any affidavit in reply but their submissions are based on points of law. In his considered opinion, first and foremost there was no proof that the applicant duly served the notice of motion as required under rule 55 (1) of the Rules. He went further to submit that, even if, we assume, for the sake of argument in our considered opinion, that the respondents were duly served in terms of rule 55 (1) of the Rules, yet an affidavit is a substance of the evidence hence it ought to be very explicit as to which essential steps the first respondent ought to have taken and did not actually take towards instituting the appeal.

Illustrating further, he contended that an affidavit is evidence of the deponent which cannot be supplemented by the statement of the counsel from the bar for things which were not deponed in the affidavit by the deponent. In his view, all the essential steps which the first respondent was supposed to take and did not take were required to be clearly spelt out in the affidavit in support of the application. Failure to do so, the applicant left the Court to speculate as to what exactly ought to be done and was not done which is not the spirit of rule 89 (2) of the Rules. He therefore submitted that because the affidavit in support of the application

did not sufficiently contain material particulars relevant to support the application and since submission from the bar by counsel is not evidence, the evidence on record is not sufficient to support the granting of the application and therefore the application should be dismissed with costs.

In a brief rejoinder, Mr. Joachim did not respond on the insufficiency of the evidence but rather he prayed that, in the event that the Court finds that the application is not meritorious, the applicant should not be condemned to costs this being a legal aid case.

We have dispassionately considered the submissions of the parties in support and opposition to the application and the main issue which we are invited to address is whether or not the instant application is meritorious. In so doing, we think we should first appreciate what the law on an application for striking out notice of appeal provides:

> *"89-(2). 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.****"* [Emphasis supplied]

It is imperative to stress that, in an application for striking out the notice of appeal, the Court is invited to consider, on its own perspective whether there is any appeal that lies in respect of the impugned decision or whether the respondent has taken any essential step in the proceedings and if taken whether those steps have been taken within the time prescribed by law. That is the essence of rule 89 (2) of the Rules which has, time and again been interpreted by this Court. See, for instance, **National Housing Corporation v. Miss Lazim Ghodu Shekhe**, Civil Application No. 134 of 2005, and **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 (both unreported).

In the application under our consideration the first respondent lodged his notice of appeal on 8th February, 2021 and the instant application was lodged on 17th August, 2021. However, surprisingly and for an obscure cause the affidavit in support of the application is conspicuously silent on which essential steps have not been taken to date in instituting the appeal and as rightly argued by Mr. Rumisha, that leaves us with no any option other than speculating the possible steps that might not have been taken by the first respondent or taken but out of the time prescribed by law, a course which is not safe for proper administration of justice.

Looking at the affidavit in support of the application and in particular paragraphs 5 and 6, the applicant is merely stating that the first respondent did not take essential steps and serve other subsequent proceedings thereon. Mr. Rumisha, argued in his view, and rightly so in our mind, that, all the essential steps which the first respondent was supposed to take and did not take were required to be clearly spelt out in the affidavit in support of the application for this Court to make any informed decision and not to speculate. The application is completely silent on this aspect. This is very crucial for the Court to make determination of the application on whether to strike out the notice of appeal or not.

On his part Mr. Joachim admittedly, argued that the affidavit in support of the application did not explicitly state all the essential steps which the first respondent was supposed to take but went ahead to explain in brief what was required to be done in terms of rules 90 and 97 of the Rules. We think, with great respect, the submissions by Mr. Joachim are misconceived and misplaced. As rightly argued by Mr. Rumisha, submission by counsel from the bar is not evidence. In the often-cited case of **Trasafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** (2002) E.A 627 the Court of Appeal of Uganda from which we take inspiration stated that:

"As is well known a statement of fact by counsel from the bar is not evidence and therefore the court cannot act on it".

We wish to state without mincing words that the affidavit in support of the application is so skeletal and scanty as such the evidence on record is not sufficient to support the application.

That said and done, we find that the application is devoid of merit. It is accordingly dismissed. However, this being a legal aid case, the interest of justice requires that, we give no order as to costs.

DATED at **DAR ES SALAAM** this 3rd day of November, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The ruling delivered this 4th day of November, 2022 in the presence of Mr. Amani Joachim, learned counsel for the Applicant and Mr. Erigh Rumisha, learned State Attorney for the fourth and fifth Respondents and in the absence of the first, second and third Respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL