

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUGASHA, J.A., KITUSI, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 41/01 OF 2022

JUMANNE S. KITILA..... 1ST APPLICANT

HAMISI IDDI 2ND APPLICANT

VERSUS

GERION FRANCIS TAIRO

(As administrator of the late Francis Karuwesa Tairo) RESPONDENT

**(Application for striking out Notice of Appeal from the from Judgment the
High Court of Tanzania at Dar es Salaam)**

(Muruke, J)

Dated the 21st day of November, 2016

in

Civil Appeal No. 51 of 2016

.....

RULING OF THE COURT

2nd & 22nd November, 2022

RUMANYIKA, J.A.:

By way of notice of motion under rule 89(2) of the Tanzania Court of Appel Rules, 2009 (the Rules) the application is supported by an affidavit of Jummanne S. Kitila, the 1st applicant. The applicants seek to strike out notice of appeal filed by the respondent on 23rd November, 2016 to challenge the decision of the High Court (Muruke, J.) dated 21st November, 2016, in Civil

Appeal No. 51 of 2016. The applicants allege that the respondent took no essential step to institute an appeal, and none lies to date.

The respondent resisted the application by filing an affidavit in reply deposed by Gerion Francis Tairo.

The factual background of the matter is that the applicants successfully sued the respondent in Kinondoni District Court Civil Case No. 23 of 1998. Aggrieved, the respondent appealed before the High Court but again, he lost that battle which was Civil Appeal No. 51 of 2016. Still aggrieved as above indicated, he lodged a notice of appeal on 23rd November, 2016, which is now sought to be struck out.

Mr. Killey Mwitasi, learned counsel assisted by Mr. Pius Changámbwe also learned counsel appeared for the applicant at the hearing of the application on 2nd November, 2022. The respondent was represented by Ms. Mary Masumbuko Lamwai, learned counsel.

Mr. Mwitasi adopted the written submissions, pursuant to rule 106(1) of the Rules filed on 30th March, 2022. He submitted that no appeal lies and the blame thrown to the Registrar for failure to supply the respondent with copy of the proceedings was unfounded in law as the respondent's counsel relied on the dead "home and dry" practice which rule 96(5) of the Rules no longer took cognizance of. Instead, he further contended, the respondent

was duty bound to follow up the documents within fourteen days of the expiry of the first 90 days not, as is the case, about 4 years later. To support his arguments, he cited our decision in ***H.H. Hilal & Co. Ltd V. Medical Store Department & Another***, Civil Application No. 53/01 of 2021 (unreported). Moreover, it was submitted that the respondent's notice of appeal intended to frustrate execution of the decree as at paragraphs 5-7 of the affidavit in reply, the respondent acknowledged receipt of the Registrar's letter notifying him to collect the documents but the former doubted the genuineness of that letter. He urged the Court to strike out the abandoned notice of appeal with costs.

Ms. Lamwai adopted the written submissions, in reply filed under rule 106(7) of the Rules on 2nd May, 2022. Briefly, she contended that the Registrar's letter to notify the respondent to collect the documents was not served on the latter, and she doubted its genuineness as it referred to a letter dated 25th November, 2016 which the respondent did not author.

Having considered the learned counsel's written submissions, sufficiently heard their rival arguments, the authorities cited and the entire record, the issue for our consideration is whether the applicant has satisfied the requirement under rule 89(2) of the Rules to warrant striking out the respondent's notice of appeal.

As regards the limitation period and modality to institute civil appeal, Rule 90(1) of the Rules is masterly and a starting point and it sets sixty days' time therefor from the lodgment of the respective notice of appeal. Faced with the similar situation, and this is from an unbroken chain of authorities, the Court so pronounced itself in **Charles Masune v. Juma Mare**, Civil Application No. 479/03 of 2018 and **Mahiku A. Maharagande v. Nyamuhika A. Maharagande**, Civil Application No.571/01 of 2017 (both unreported). However, the proviso to that rule and sub-rule 5 protects the intending appellant who has applied for the necessary documents for appeal purposes within thirty days on expiry of the first ninety days of the impugned decision and the Registrar has not notified him to collect the said documents. If he is so notified but stays back and takes no essential steps required or did it but lately, that is when rule 89(2) of the Rules comes into play. It entitles a person served with the notice of appeal, in this case the applicant to apply for it to be struck out as is the case. See a long list of our unreported cases which includes- **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 and **Barclays Bank (T) Limited v. Hood Transport Limited and Another**, Civil Application No.134 of 2014.

For ease of reference and understanding, the rule under reference which also was tested in the above cited cases reads thus:

*"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 within the prescribed time**". (Emphasis added).*

In the present application, as alluded to before, it is not disputed that upon filing of the notice of appeal on 23/11/2016 the respondent took all the necessary steps in the proceedings. Also, it is undisputed that by his letter dated 20/09/2018 the Registrar notified the respondent to collect the documents requested by the respondent. It follows therefore, that the issue of the Registrar's failure to supply the respondent with the documents required as the reason for the latter's failure to file an intended appeal should not have been raised. Whether or not the said Registrar's letter was genuine, Ms. Lamwai should have inquired with the Registrar to get it from the horse's mouth rather than, as is the case, if at all doubting it and just staying back. With respect, the learned counsel ought to have exercised due diligence by

following up the matter with the Registrar, which she did not. In other words, her approach was inconsistent with a degree of follow ups reasonably expected of a seriously committed, diligent and militant litigant.

It does not need over emphasis therefore, that, in civil matters, the intending appellant's ability and vigilance to prepare and file a record of appeal timely depends on the Registrar's ability to discharge his duty timeously, as required under rule 90(5) of the Rules. It is equally noteworthy that the moment the Registrar wrote to notify the respondent to collect the documents under rule 90(5) of the Rules on 20/09/2018 he was done. It follows therefore that a party who wishes to appeal and is militantly committed to having his matter getting to the finality therefore, he is, pursuant to subrule (5) of rules required to follow up the matter. To expect anything more from the Registrar is tantamount to excessive demand from the latter which we cannot allow.

That said, we are satisfied and settled in our mind to answer the above paused issue in the affirmative. That the respondent has without good cause, failed to take essential steps to institute an appeal.

Consequently, we hereby hold that the application is merited, and, in terms of rule 89(2) of the Rules grant it. We strike out the respondent's notice of appeal filed on 23rd November, 2016. The applicant to have costs.

DATED at DAR ES SALAAM this 22nd day of November, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 23rd day of November, 2022 in the presence of Applicants appeared in person/Unrepresented and Ms. Mary Lamwai, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "J. E. Fovo", is written over a horizontal line.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL