

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: WAMBALI J.A., SEHEL, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 260 OF 2021

LWIIYISO JOEL MAGAVA..... APPELLANT

VERSUS

TANZANIA TELECOMMUNICATIONS

CORPORATION LTD (TTCL).....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Iringa)**

(Matogolo, J.)

dated the 19th day of March, 2021

in

Labour Revision No. 13 of 2019

RULING OF THE COURT

24th & 29th March, 2023

MAIGE, J.A.:

This ruling pertains to the points of law raised by the respondent by way of a notice of preliminary objections, challenging the competence of the appeal against the decision of the High Court of Tanzania at Iringa (Matogolo, J) on the following points:

- 1. That the appeal is incompetent for failure to comply with Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 as amended by failing to serve the notice of appeal to the respondent.*
- 2. That the appeal has been lodged out of the prescribed time as it violated Rule 90 (1) and (3) of the Tanzania Court of Appeal Rules, 2009.*

The brief facts from which this appeal traces its origin, can be portrayed as follows. The appellant had been, since 1985, in the service of the respondent, a public corporation in terms of the Public Corporations Act, No. 2 of 1992 as amended. He was, therefore, a public servant within the meaning of the Public Service Act [Cap. 298 of the laws of Tanzania]. On 8th May 2017, the respondent suspended the appellant's salary pending further process, for the reason that, he used a forged Form Four Secondary Education to secure employment. Subsequently, the appellant treated the suspension of his salary as constructive termination of his service and, therefore, commenced a complaint at the Commission for Mediation and Arbitration (the CMA) for unfair termination of service.

On preliminary objection, the CMA struck out the complaint for want of exhaustion of the available remedies under the public service laws. Aggrieved, the appellant preferred a revision to the High Court of Tanzania, Labour Division at Iringa (the Labour Court). The Labour Court upheld the decision of the CMA and, therefore, dismissed the appeal. Still aggrieved, the appellant has instituted the instant appeal faulting the decision of the Labour Court on the following grounds:

- 1. That the High Court Judge erred in law by ruling that the CMA has no jurisdiction to determine the matter concerning public servant who has exhausted all known local remedy available.*

2. That the High Court Judge erred in law by ruling that it is proper for the arbitrator who did not hear the matter to prepare an award.

At the hearing of the appeal, the appellant appeared in person without representation while the respondent was represented by a team of four learned State Attorneys namely; Ms. Joyce Yonazi, Mr. Joseph Tibaijuka, Ms. Ansila Makyao and Ms. Asha Walladya. As it is the procedure, we are obliged to determine the preliminary points first as we shall do hereunder.

In address of the first point of objection, Ms. Yonazi submitted that, the appeal is incompetent for the reason of the notice of appeal not being served on the respondent as rule 84(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) requires. She submitted that, the requirement in the respective provision is mandatory, non-compliance of which renders the appeal incompetent and thus liable of being struck out. To that effect, the learned counsel cited the case of **Raphael Ologi Andrea v. Musoma Urban Water Supply and Sanitation Authority** Civil Appeal No. 468 of 2020 [2020] TZCA 344; [14 June 2022; TANZLII].

On the second point, it was her submission that; as the judgment of the Labour Court was delivered on 19th March, 2021 and the notice of appeal lodged on 16th April, 2021, the appeal having been instituted on 2nd July, 2021, it was outside the prescribe period of 60 days from the date of notice as per rule 90(1) of the Rules. The appellant, she submitted,

cannot benefit from the exclusion under the proviso to rule 90(1) of the Rules as the letter requesting for a copy of the proceedings appearing at page 162 of the record of appeal does not indicate to have been served on the respondent so as to meet the condition for the exclusion under rule 90(3) of the Rules. Reference was made in the case of **Tanzania Telecommunications Co. Ltd v. Stanley S. Mwabulambo**, Civil Appeal No. 26 of 2017 [2021] TZCA 272; [30 June 2021; TANZLII] to the effect that without the said letter being served on the respondent, the appellant cannot benefit with the exclusion under discussion. She prayed, therefore that; the appeal be struck out for being incompetent.

In reply, the appellant while admitting that; the notice of appeal and the letter requesting for a copy of the proceedings included in the record of appeal, have no indication of service, he insisted that he served the documents on the respondent and if allowed, he would wish to produce copies of the documents having indication of service. To him, failure to include the documents with proof of service in the record of appeal was a mere trivial irregularity which could be cured by having the correct documents included in the record of appeal.

Let us start our deliberation with the first preliminary point as to failure to serve a notice of appeal. It is common ground that, under rule 84 (1) of the Rules, the appellant is obliged to, within 14 days of the lodgment

of the notice of appeal, to serve a copy of the notice on all persons who seem to be directly affected by the appeal. The provision is couched in mandatory terms. It provides as follows: -

"84 - (1) An intended appellant shall, before or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex-parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court" .

There is unbroken chain of authorities to the effect that, failure to comply with the requirement under the above provision is a fatal irregularity which renders the appeal incompetent. It would suffice to cite the case of **Bank of India (Tanzania) Limited v. Y.P. Road Haulage Limited & Others**, Civil Appeal No. 322 of 2017 [2021] TZCA 463; [03 September 2021; TANZLII], where the Court, having cited the decision in **Hamis Paschal v. Sisi Kwa Sisi Panel Beating and Enterprises Ltd**, Civil Appeal No. 165 of 2018 [2020] TZCA 1899; [17 December 2020; TANZLII], observed that:

"The above stated position is in line with the effect of failure by an intended appellant to serve a notice of appeal on the respondent within the prescribed time. Failure to do so amounts to

*failure by him to take essential steps in the appeal and thus under Rule 89(2) of the Rules; such failure warrants a striking out of the notice-see **Oliver Murembo v. The Registered Trustees of Benjamin Mkapa Foundation**, Civil Application No. 489/18 of 2018 and **John Nyakimwi v. The Registered Trustees of Catholic Dioceses of Musoma**, Civil Application No. 85/08 of 2017 (unreported)."*

It is manifestly apparent that, the notice of appeal appearing at pages 160 and 161 of the record of appeal does not indicate that it has been served on the respondent. The appellant admits on this but only that he calls upon the Court to exercise its indulgency and allow him to submit a copy of a notice appeal with an indication of service. Equally so, for the letter requesting for a copy of the proceedings. The appellant contends that, the omission to incorporate the said documents in the record of appeal is not a serious irregularity.

We faced more or less a similar issue in the case of **National Microfinance Bank v. Muyodeso**, Civil Appeal No. 289 of 2019 [2021] TZCA 533; [28 September 2021; TANZLII] where the appellant, though conceded that the notice of appeal on the record of appeal had no indication of service on the respondent; contended that, the same was served on the respondent through his former counsel. The Court rejected

the submission because in the absence of a copy of a notice in the record of appeal in proof of service, it cannot be said that the same was served.

In particular, the Court reasoned as follows:

"What is certain here is that, if indeed Mr. Malangalila was served with the notice of appeal at that time, the copy appearing in the record of appeal would have provided proof to that effect."

We took a similar approach in the case of **National Bank of Commerce Limited & Another v. Ballast Construction Company Ltd**, Civil Appeal No. 72 of 2017 [2019] TZCA 17; [06 March 2019; TANZLII], where we stated:

*"In the instant case, it is indeed clear that the notice of appeal in the record indicates that it was copied to the respondent. There is, however, no indication whatsoever that the same was served to the respondent. It cannot therefore be said with certainty, it was served on the respondent. The allegation by Mr. Rwazo is not thereby backed by the record. An identical infraction was considered by the Court in the case of **Salim Sunderji and Capital Development Authority v. Sadrudin Shariff Jamal** (supra) and it was stated that a bare assertion by the respondent that he served the appellant with a copy of the notice of appeal without a signature on it signifying acknowledgement of receipt is not convincing and*

that non-compliance with Rule 77(1) of the Court of Appeal Rules 1979 (Now Rule 84(1) of the Rules) nullifies the notice of appeal or the appeal”.

See also, the case of **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 [2018] TZCA 303; [13 December, 2018; TANZLII] where we observed that; in the absence of a document in the record of appeal proving service, *“it is impossible for the Court to know if there has been compliance with the law.”*

For the foregoing discussions, therefore, we are of the considered opinion that, as the notice included in the record of appeal has no indication whatsoever that, it has been served on the respondent, this appeal is incompetent for non-compliance of the requirement under rule 84(1) of the Rules. The first point is thus sustained and in effect, the appeal should be struck out for being incompetent.

Even if we were to assume, for the sake of argument that, the first point is meritless, yet, on account of the second point of preliminary objection, the appeal would be hopelessly time barred thus liable, in the same way, of being struck out. As rightly submitted for the respondent, the time limit for instituting a civil appeal to the Court is 60 days from the date of lodging a notice of appeal. This is in accordance with rule 90(1) of the Rules. We are alive that, the requirement in the respective provision

is not absolute because under the proviso thereto, the time spent by the Registrar of the High Court in preparing the record of appeal, can, by a certificate of exclusion issued to that effect, be excluded. Nonetheless, for the appellant to be entitled exclusion under the respective proviso, he should have requested, in writing, for a copy of the proceedings and a copy of the request served on the respondent. This is in accordance with rule 90(3) of the Rules.

In this case, it is clear and the appellant has admitted that, a request letter appearing at page 164 of the record of appeal, has no indication whatsoever of the service of the same on the respondent. We have already held in relation to the first preliminary point that; in the absence of such document into the record of appeal, the same is rendered unserved. Consequently, the certificate of exclusion appearing at page 116 of the record of appeal is of no assistance to the appellant since under rule 90(3) of the Rules, it would only be relevant if the requirements therein was duly complied with. Thus, in the case of **Geofrey Kabaka v. Farida Hamza (Administratrix of the Estate of the late Hamza Adam)**, Civil Appeal No. 28 of 2019 [2019] TZCA 407; [30 October 2019; TANZLII], dealing with a similar issue, we observed:

"In any event, as rightly submitted by the respondent, even if the appellant had that certificate, he would not benefit from the

exclusion because his letter requesting for the requisite documents was not copied to her as provided by sub-rule (2) of Rule 90 of the Rules [now Rule 90 (3) of the Rules)".

It follows, therefore, that; since the notice of appeal was lodged on 16th April, 2021 and this appeal instituted on 2nd July, 2021; it was out of time for about 15 days.

In the final result and for the foregoing reasons, we strike out the appeal for being incompetent. This being a labour dispute we shall not give an order as to costs.

DATED at IRINGA this 29th day of March, 2023.

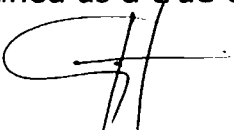
F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The ruling delivered this 29th day of March, 2023 in the absence of appellant while duly notified and Bryson Ngulo, learned State Attorney for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL