

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 427/17 OF 2021

MSAE INVESTMENT CO. LIMITED APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED RESPONDENT
(An application to strike out the Notice of Appeal Against the Judgment
and Decree of the High Court of Tanzania, Land Division
at Dar es Salaam)

(Mgeta, J.)

dated the 21st day of December, 2020

in

Land Case No. 38 of 2016

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RULING OF THE COURT

20th March & 26th May, 2023

KOROSSO, J.A.:

The application before us is by way of notice of motion made under rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant Msae Investments Co. Limited seeks to strike out the notice of appeal lodged by the respondent on 21st December 2020 against the decision of the High Court of Tanzania, Land Division at Dar es Salaam in Land Case No. 38 of 2016. The application is supported by an affidavit deposed by Alex Mashamba Balomi; the applicant's advocate.

The application is predicated on the respondent's alleged failure to institute the intended appeal within the prescribed time. The brief facts giving rise to the instant application as expounded by the applicant in the affidavits supporting the notice of motion are that the respondent instituted a suit against the applicant in the High Court Land Division at Dar es Salaam. The judgment which was in favour of the applicant was delivered on 21/12/2020. Aggrieved, the respondent, on the same day the judgment was delivered filed a notice of appeal, and on 18/01/2021 applied for copies of the impugned judgment and proceedings. A copy of the letter applying for the said documents was served on the applicant on 21/01/2021. According to the applicant, the respondent has failed to take further steps to process his intended appeal thereafter, and upon the elapse of the requisite sixty days upon filing the notice of appeal. He thus contends that taking all these factors into account, the respondent failed to take any essential steps in prosecuting the intended appeal.

On the other hand, the respondent resisted the application through two affidavits in reply deposed by John Swai, the advocate for the respondent, and Lule Oluwoch, a legal clerk who was involved in filing the necessary documents for the intended appeal. The affidavits in reply categorically deny the assertion that no essential steps had been taken by

the respondent to process the appeal. It is also averred that the letter requesting for copies of the proceedings, judgment, decree, and exhibits for appeal purposes was duly written and a copy was served on the applicant within the prescribed time. The respondent averred further that, the delay to institute the appeal was beyond her control because the Registrar had not timely provided him with the necessary documents despite the intense follow-ups she made. The respondent thus urged us to find the application to have been filed prematurely and strike it out.

On the day the application came for hearing before us, Mr. Alex Mashamba Balomi and Dr. Onesmo Michael Kyauke, learned counsel represented the applicant and the respondent respectively.

Mr. Balomi commenced his submission by adopting the notice of motion and its supporting affidavit. He urged the Court to find that the main issue for determination was whether the nonservice of the letters of reminder of the letter requesting for copies of requisite documents on the applicant amounted to failure to take essential steps in prosecuting the intended appeal.

On the adversary side, Dr. Kyauke began by adopting the two affidavits in reply. He implored the Court to be guided by its decision in the case of **Edmund Msangi v. The Guardian Limited**, Civil Application

No. 337/18 of 2021 (unreported) where it rejected the invitation to declare that service of the copies of reminders of the letter requesting for necessary documents for the intended appeal on the applicant, was mandatory and held that, it was not a requirement under the Rules. He thus prayed the application to be dismissed with costs.

Our point of departure in the determination of the application is rule 89(2) of the Rules upon which the applicant has moved the Court to strike out the respondent's notice of appeal. The said rule stipulates that:

"Subject to any provisions of subrule (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."

Considering the notice of motion and the affidavit in reply and the rival submissions before us, the issue grounding the application revolves around rule 90(5) of the Rules. Indeed, it is common ground that the respondent complied with rule 90(1) and (3) of the Rules by writing a letter to the Registrar, High Court, and serving a copy thereof on the

applicant within the prescribed time for the purpose of the intended appeal. Suffice it to say, rule 90(5) of the Rules provides:

"Subject to the provisions of subrule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such copy and the appellant shall take steps to collect copy upon being informed by the Registrar to do so, or within fourteen (14) days after the expiry of the ninety (90) days."

Certainly, the record of the application shows that upon the expiry of 90 days prescribed by rule 90(5) of the Rules, the respondent's advocate made several reminders to the Registrar to be furnished with copies of the necessary documents, a fact not disputed by the respondent. The point of departure between the parties lies in the failure to serve copies of such reminders on the applicant. Whilst, Mr. Balomi would have us hold that the duty cast on the intended appellant under rule 90(1) and (3) of the Rules extends to reminders in terms of rule 90(5) of the Rules, Dr. Kyauke disagrees, and rightly so, in our view.

This Court has had an opportunity to underscore the import of rule 90(5) of the Rules in the case of **Daudi Robert Mapuga and 417 Others v. Tanzania Hotels Investment Limited and Others**, Civil

Appeal No. 462/18 of 2018 (unreported) the Court restating the position it took in **Arthur Kirimi Rimberia & Another v. Kagera Tea Company Ltd. & 3 Others**, Civil Application No. 364/01 of 2018 (unreported) that: -

"...the above provision imposes two obligations: first, it enjoins the Registrar to ensure that a copy of the proceedings is ready for delivery within ninety days after the request is made. Secondly, it requires the intending appellant to collect a copy of the proceedings upon being informed by the Registrar to do so and that if he is not so informed, then he must take such steps within fourteen days following the expiry of the ninety days after the request was made."

The record of the instant application shows that the respondent sent a letter of reminder to the Registrar as a follow-up to its previous letter requesting necessary documents on 29/4/2021; 25/11/2020; 14/03/2022; 23/06/2022; 03/10/2022; and 27/01/2023, which were not served on the applicant. It is only the reminder letter of 8/8/2021 which was served on the then-learned counsel for the applicant; Mr. Joseph Kiyumbi Sangwa on 17/9/2021. The issue for our determination is whether failure to serve on the applicant the reminder letters is tantamount to failure to take essential steps as contended by the learned counsel for the applicant.

Later, in **Edmund Msangi case** (supra) the Court dealt with a similar issue and stated:

“The contention by the applicant that the said reminder letters were not served on the applicant, in our view, is not tenable and the Court is not prepared to draw analogy from the requirement of serving a copy of the letter requesting for proceedings under Rule 90 (1) of the Rules because the law does not provide for such requirement, more so, when taking into account that the requirement under Rule 90(1) was made for a purpose”.

In our view, the respondent having duly written its letter requesting necessary documents for the purpose of the intended appeal and served it on the applicant without delay and having written a follow-up reminder letter on 29/4/2021 within 14 days after the expiry of the 90 days from 19/01/2021 when the notice of appeal was lodged, that was sufficient compliance with the requirement of the Rules. Without any evidence to the contrary to show that the Registrar had already informed the respondent of the readiness of the requested documents, and the respondent failed to collect them and institute the intended appeal, we are inclined to give the respondent a benefit of doubt as held in the case of **Tanzania Bureau of Standards and Another v. Charles Nyato,**

Civil Application No.315/01 of 2021 (unreported), where the Court upon considering all the circumstances of the case observed as follows:

"It is very unfortunate that all that time the respondent's follow-ups, as it stands on record, not only the Registrar did not notify him to collect the requested documents, but also, he did not even in writing ask the respondent to continue waiting. This was unusual. In the absence of it all therefore, we give the respondent the benefit of doubt and do not expect this kind of casual running of the court's registry to happen again."

The circumstances described above to some extent befit the situation in the instant application. We are thus of a similar view that the respondent should enjoy the benefit of doubt since the available evidence before us shows that it has demonstrated enough diligence reasonably expected of it throughout the period it has been processing the intended appeal. There is no dispute that, up to the time this application was filed, the respondent was yet to get the requisite documents to institute the appeal as averred in paragraph 8 of the affidavit in reply deposed by John Swai.

We are thus convinced that the applicant has not made out the case to warrant an order striking the respondent's notice of appeal. For the

foregoing, we thus hold that the application is unmerited. It is dismissed with costs.

Order Accordingly.

DATED at DAR ES SALAAM this 25th day of May, 2023.


J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 26th day of May, 2023 in the presence of Mr. Alex Balomi, learned advocate for the applicant and Mr. Mazoea Africa, learned advocate for the Respondent, is hereby certified as a true copy of the original.




R.W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL