

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

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

CIVIL APPLICATION NO. 130/08 OF 2021

DAMAS KATENYA APPELLANT

VERSUS

JACKSON WILLIAM RESPONDENT

**(Application to strike out the notice of appeal against the decision of the
High Court of Tanzania at Mwanza)**

(Matupa, J.)

dated the 3rd day of May, 2019

in

Misc. Land Appeal No. 02 of 2018

.....

RULING OF THE COURT

22nd August & 20th September, 2023

KOROSSO, J.A.:

In the application before us, the applicant, Damas Katenya has moved us to strike out the notice of appeal of 28/5/2018 lodged by Jackson William, the respondent against the decision of the High Court in Mwanza delivered on 3/5/2019 in Land Appeal No. 02 of 2018.

The application is by way of notice of motion predicated under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), supported by an affidavit deposed by the applicant. The thrust of the applicant's prayer is the respondent's alleged failure to institute the intended appeal within the

prescribed time evidenced by his failure to take some essential steps to process the appeal.

The facts giving rise to the application are that the respondent had unsuccessfully sued the applicant at Irenza Ward Tribunal in Land Application No. 24 of 2016 regarding a piece of land "shamba" (the disputed land). Aggrieved by the decision of the trial tribunal the respondent appealed to the District Land and Housing Tribunal for Geita District (DLHT) and was unsuccessful. His appeal to the High Court in Land Appeal No. 2 of 2018 was also unsuccessful. Dissatisfied by the High Court decision, the respondent filed a notice of appeal on 28/5/2019, subject of the instant application and also prosecuted Misc. Land Application No. 96 of 2019 seeking certification on points of law, which he was granted on 12/6/2020 (Manyanda, J.). In paragraph 6 of the affidavit supporting the notice of motion, the applicant contends that the respondent has failed to institute his appeal within the legally prescribed time that is, within sixty (60) days from the date of filing the notice of appeal on 28/5/2019. The applicant states further that such failure contravenes rule 90(1) of the Rules which requires that upon filing a notice of appeal, the appeal is to be instituted within 60 days thereafter, unless the Registrar of the High Court has excluded such days as necessary for the preparation and delivery of the requested copy of proceedings, judgment and decree to the intended appellant by way of a certificate of

delay. To be noted is the fact that the issuance of the said certificate of delay is subject to proof of an application for such necessary documents having been made within 30 days from the date of the impugned decision and its copy served on the opposing side.

There is no affidavit in reply from the respondent to dispute the applicant's contention.

At the hearing of the application on 22/8/2023, Mr. Mussa K. D. Mhingo, learned counsel, appeared for the applicant. The respondent was absent. The affidavit of the process server deponed on 22/8/2023 avers that on 18/8/2023 on being served in the presence of the Village Executive Secretary Majengo Village, Ilemela Mwanza, the respondent refused to be served. To be noted is the fact that when the application came for hearing the first time on 17/8/2023, the learned counsel for the applicant mentioned above did enter appearance for the applicant, and the respondent was nowhere to be seen which prompted the Court to adjourn the hearing and direct the applicant to assist in tracing the respondent so that he can be served.

Before the commencement of the hearing, the applicant's counsel prayed that in the absence of the respondent having refused service of notice of hearing, the Court proceed with hearing of the application vide rule 63(2) of the Rules. We granted the prayer and ordered the hearing proceed

in the absence of the respondent upon his refusal to receive notice of hearing of the application.

When the applicant's counsel was called upon to expound on the essence of the application, he commenced by adopting the affidavit supporting the notice of motion and the written submission filed under rule 106(1) of the Rules. He contended that the application should be granted since as averred in the supporting affidavit, the respondent has neither lodged his appeal within the time specified nor taken essential steps to process the intended appeal. He thus prayed that the notice of appeal be struck out with costs.

Having heard the learned counsel for the applicant's arguments, what is clear is that the respondent who was dissatisfied with the decision of the High Court in Land Appeal No. 2 of 2018 dated 3/5/2019 did file a notice of appeal on 28/5/2019. In the absence of an affidavit in reply there is no other information available on any step taken by the respondent to process the appeal and thus no available evidence or information that the respondent complied with the provisions of rule 90(1), (2) and (3) of the Rules upon filing the notice of appeal. Rule 89(2) of the Rules, which the applicant has invited us to invoke, states:

"Subject to the provisions of sub-rule (1), any other person on whom a notice of appeal has 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 proceedings has not been taken or has not been taken within the prescribed time."

Undoubtedly, the rule obliges an intended appellant upon lodging a notice of appeal to take necessary steps to institute the appeal within the prescribed time. As correctly submitted by Mr. Mhingo, since the respondent failed to serve the applicant with a copy of the letter requesting copies of proceedings, judgment and decree, it thus follows that under the circumstances, the respondent cannot rely on the exception under rule 90(1) of the Rules.

Indeed, this being the situation, the respondent's intended appeal should have been instituted within 60 days from the date when the notice of appeal was lodged. In the case of **Olivia Kisinja Ndete v. Hilda Mtunga**, Civil Application No. 4 of 2011 (unreported) the Court held:

"The law is now settled, upon lodging a Notice of Appeal, the intending appellant must not sit back but is required to move the process forward by taking essential steps that have been clearly outlined by the Court of Appeal Rules. The applicant was entitled to move the Court under Rule 89(2) to strike out a notice of appeal where no essential steps have been taken beyond that notice."

In the instant application, as averred in the supporting affidavit, the respondent, in processing his appeal, upon filing a notice of appeal, we have failed to gather any evidence to show that thereafter, he did apply for a copy of the proceedings from the High Court within the prescribed 30 days after the date of the impugned Judgment or that the respondent did serve a copy of the said letter to the applicant. In the supporting affidavit and submission in Court, the applicant denied having been served the same. In the circumstances, certainly, the respondent is not eligible to benefit from any exclusion of the days of delay envisaged in the proviso to rule 90(1) of the Rules in terms of rule 90(3) of the Rules, a stance reiterated in the case of **Mwanaasha Seheya v. Tanzania Posts Corporation**, Civil Appeal No. 37 of 2003 (unreported), where the Court stated:

"...an appeal must be instituted within sixty (60) days of the date when the notice of appeal was lodged unless the exception under sub-rule (2) applies... he must have sent a copy of such application to the respondent. Under the circumstances, the appellant was not entitled to rely on the exception."

The fact that the respondent upon filing the notice of appeal on 28/5/2018 was yet to file an appeal by 18/3/2021 when the instant application was filed, which is a 2 years and 10 months lapse. A lapse that exceeds 60 days without any evidence of the possibility of the respondent relying on the proviso to rule 90(1) of the Rules, and in the absence of

evidence of the letter envisaged under rule 90(3) of the Rules having been processed or served to the applicant, renders the instant application to have substance. We are of the view that under the circumstances, the applicant has properly moved the Court to be granted the prayer sought for reasons that vital essential steps have not been taken by the respondent to process the intended appeal.

All in all, we find merit in the application and thus grant it. In consequence, the notice of appeal filed by the respondent on 28/5/2018 is hereby struck out with costs. Order Accordingly.

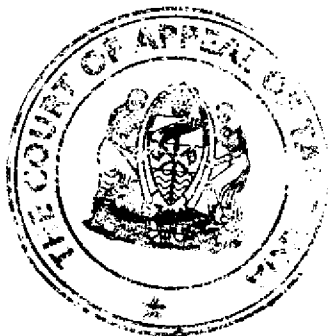
DATED at DAR ES SALAAM this 14th day of September, 2023.


R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 20th day of September, 2023 in the presence of Applicant, via video link from High Court Mwanza, and in the absence of the Respondent, is hereby certified as a true copy of the original.




C.M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL