

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: NDIKA, J.A., KITUSI, J.A. And MASHAKA, J.A.)**

**CIVIL APPLICATION NO. 536/01 OF 2021**

**MIJE TRADERS LIMITED ..... APPLICANT**

**VERSUS**

**OMARY IBRAHIM ..... 1<sup>ST</sup> RESPONDENT**

**APRICOT GENERAL BUILDING CONTRACTORS LTD ..... 2<sup>ND</sup> RESPONDENT**

**(Application for an Order to strike out Notice of Appeal of the  
Decision of the High Court of Tanzania, Dar es Salaam  
District Registry at Dar es Salaam)**

**(Rwizile, J)**

**dated the 31<sup>st</sup> day of August, 2020**

**in**

**Civil Appeal No. 03 of 2019**

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**RULING OF THE COURT**

*19<sup>th</sup> March & 5<sup>th</sup> April, 2023*

**MASHAKA, J.A.:**

The respondents, Omary Ibrahim and Apricot General Building Contractors Ltd, lost to Mije Traders Limited, the applicant, before the High Court (Dar es Salaam District Registry) in a judgment delivered on 31<sup>st</sup> August, 2020 in Civil Appeal No. 3 of 2019. Aggrieved, the respondents lodged a notice of appeal on 29<sup>th</sup> September, 2020. The respondents were

bound to institute their appeal within 60 (sixty) days from 29<sup>th</sup> September, 2020 the date on which their advocates lodged the notice of appeal.

The application made by the applicant under rule 89 (2) and (3) of the Court of Appeal Rules, 2009 (hereafter the Rules) seeks to strike out the respondents' notice of appeal allegedly for failure to institute an appeal within the prescribed period after lodging notice of appeal. The notice of motion is supported by an affidavit duly averred by Julieth Lyimo, the principal officer of the applicant. As explained in paragraphs 3 and 4 of the affidavit that upon lodging of the notice of appeal, she expected the respondents to initiate proceedings of the intended appeal by lodging memorandum of appeal and record of appeal which the respondents have failed to do for one year now. The deponent further averred that she made perusal of the court file bearing the notice of appeal and found that the respondents have failed to take essential steps of the proceedings of the intended appeal within the prescribed time which has lapsed.

Mr. Hanta John Fuime, Operations Manager and Ms. Julieth E. Lyimo, Director represented the applicant. The respondents who were duly served

with the notice of hearing, did not enter appearance and in terms of rule 63 (2) of the Rules, hearing of the application proceeded in their absence.

During hearing of the application, Mr. Fuime prosecuted the application. He submitted in support of the application that since the respondents lodged a notice of appeal, they have not taken any essential steps to lodge an appeal within the sixty (60) days required by the law. The notice of appeal annexed to the affidavit as annexure M-1 confirmed that the respondents lodged the notice of appeal on 29<sup>th</sup> September, 2020. Mr. Fuime argued that when the applicant lodged the present application on 01<sup>st</sup> November, 2021 after the lapse of one year, the respondents had yet to file any appeal before the Court despite rule 90 (1) of the Rules requiring them to lodge it within the prescribed period of sixty days. He further argued that the respondents have not taken any action whatsoever in lodging the appeal, bolstering his submission by referring us to the case of **Life Promoters Society Tanzania vs. Hippolitus Pamphil Njau**, Civil Application No. 269 of 2019 (unreported). He prayed to the Court to grant the application and strike out the notice of appeal with costs.

We have heard the submissions by Mr. Fuime and considered the notice of motion, and affidavit in support of the motion. It is not disputed that the impugned judgment was delivered on 31<sup>st</sup> August, 2020 and the notice of appeal was lodged on 29<sup>th</sup> September, 2020. The applicant argued that failure to lodge an appeal within sixty days, the notice of appeal lodged by the respondents ought to be struck out under rule 89 (2) of the Rules.

Rule 89 (2) of the Rules provides:

*"Subject to the 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."*

The import of the said rule, is that any person on whom a notice of appeal has been served, may apply to the Court to have such notice struck out on any of the three grounds namely; one, no appeal lies, two, some

essential steps had not been taken and three, some essential steps had not been taken within the prescribed time. We have shown herein that the applicant anchored the application on some essential steps not being taken by the respondents within the prescribed time in which the appeal has not been instituted within the period of 60 days prescribed under rule 90 (1) of the Rules.

The institution of an appeal to the Court is provided under rule 90 of the Rules which states:

*"90 (1) subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, **within sixty days of the date when the notice of appeal was lodged** with –*

- a) a memorandum of appeal in quintuplicate;*
- b) the record of appeal in quintuplicate;*
- c) security for costs of the appeal, save that where an application for a copy of the proceedings in the High Court has been made within sixty days of the date of the decision against which it is desired to appeal, there shall, in computing the*

*time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant."* [Emphasis added]

The emboldened part of the excerpt in very certain terms tells it all that lodging of an appeal is preceded by the lodgment of a notice of appeal. There must be a valid notice of appeal before a valid appeal can be lodged. Such an appeal has to be instituted in the appropriate registry by lodging a memorandum of appeal in quintuplicate, a record of appeal in quintuplicate, and security for costs of the appeal within sixty (60) days from the date when the notice of appeal was lodged. Nevertheless, where the intended appellant applied in writing for the certified copies of the proceedings, judgment and decree to the High Court and such application was made within thirty (30) days which are counted from the date of the intended impugned decision and the said application had been copied and served on the respondent, the time taken for the preparation and delivery of the requested copies may be excluded by a certificate of delay issued by the Registrar of the High Court.

In the instant application, the intended impugned decision was delivered on 27<sup>th</sup> August, 2019 and the respondents timely lodged the notice of appeal on 30<sup>th</sup> August, 2019. It was filed in time as provided under rule 83 (2) of the Rules which requires the notice of appeal to be filed within thirty (30) days of the date of the impugned decision. Having filed the notice of appeal, the respondents were required to lodge the appeal within 60 days as prescribed by rule 90 (1) of the Rules, which they have failed to do so. It is worthwhile to note that the respondents did not file affidavit in reply, hence the averments in the supporting affidavit are rendered uncontested.

From the foregoing we are persuaded by the applicant's submission that the respondents had not taken some of the essential steps within the prescribed time. This is so because initially the respondents took the essential step to lodge a notice of appeal within time. However, the respondents have not made any application to the Registrar of the High Court in writing requesting to be supplied with the copies of proceedings, judgment and decree within the prescribed time or the applicant was neither copied nor served such application. We find that the respondents

have failed to take some of the essential steps in lodging the appeal within the prescribed time as it is one year since they had lodged the notice of appeal.

In the event, we are satisfied that the application is merited. Consequently, the notice of appeal is struck out with costs.

It is so ordered.

**DATED at DAR ES SALAAM this 4<sup>th</sup> day of April, 2023.**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

The Ruling delivered on this 5<sup>th</sup> day of April, 2023 in the presence of Ms. Julieth E. Lyimo, Director for the Applicant and in absence of the Respondent is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**