

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., RUMANYIKA, J.A. And MGONYA, J.A.

CIVIL APPLICATION NO. 110/01 of 2022

THE NATIONAL MICROFINANCE BANK PLCAPPLICANT

VERSUS

SHANA GENERAL STORE LTD 1ST RESPONDENT

ABDALLAH MSHANA.....2ND RESPONDENT

(Application to strike out Notice of Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Miyambina, J.)

dated the 26th day of March, 2020

in

Civil Appeal No. 1 of 2019

RULING OF THE COURT

4th & 10th October, 2023

RUMANYIKA, JA:.

This is an application to strike out notice of appeal filed by Shana General Store Ltd and Abdalah Mshana, the 1st and 2nd respondents respectively filed on 26th March, 2020. It is by way of notice of motion made by the National Microfinance Bank PLC, the applicant on 23rd March, 2022 under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). The applicants alleged that the respondents have failed to take such essential steps within the prescribed time to institute an appeal. The

application is supported by an affidavit sworn by Ms. Lilian Komwihangiro, who is the applicant's Head of Legal Services and Company Secretary.

Ms. Josephine Sifael learned Counsel appeared for the applicant. The respondents had the services of Mr. Audax Kahendaguza Vedasto learned Counsel. The respondents did not file affidavits in reply to resist the application.

A brief historical background of this application is as follows: On 13th March, 2020, the High Court of Tanzania, at Dar es Salaam delivered a decision in Civil Appeal No. 1 of 2019 against the respondents. Aggrieved by that decision, on 26th March, 2020 the respondents lodged a notice of appeal in the Court. They needed leave to appeal but were late. They successfully sought an extension of time vide Miscellaneous Civil Application No. 236 of 2020 to lodge an application for leave to appeal. It was on 23rd March, 2021 when the Court gave them an extra grace period of 14 days to file that application. It is also on record that, despite being granted the said extension of time, the respondents neither lodged an application for leave nor filed an appeal. It is from this background that the instant application to strike out the respondent's notice of appeal got its way to Court.

At the hearing of the application on 4th October, 2023, Mr. Vedasto took the floor first and readily conceded to the application. However, he prayed to be spared from the costs.

Ms. Safiel welcomed Mr. Vedasto's concession to the application and did not press for the costs. Thus, she stressed for the uncontested application to be granted, for it has met the threshold.

The notice of motion, essentially raises, one ground, that the respondents have not taken essential steps, such as to seek leave within the prescribed time to institute appeal.

The applicant's depositions, in the supporting affidavit were expounded in its written submission, pursuant to rule 106(1) of the Rules filed on 8th April, 2022. Mr. Vedasto asserted that, being aggrieved by the impugned judgment and decree dated 26th March, 2020 the respondents lodged a notice of appeal instantly, as deposed in paragraph 4 of the supporting affidavit. However, as were late, they sought, and were granted an extension of 14 days counted from 23rd March, 2021 to apply for leave to appeal. Nonetheless, for the reasons known to the respondents, that order was not complied with since the 14 days given to them lapsed on 6th April, 2021. Further, the applicant's counsel asserted that, in itself, the said respondents' inaction constituted a failure to take the essential step.

Therefore, Ms. Safiel implored us to find merits in this application and grant it.

On the other hand, as earlier intimated, the respondent did not oppose the application.

Having considered the notice of motion, its supporting affidavit and the applicant's written submission on one hand, and the concession by the respondents' counsel on the other, the pertinent issue for our determination is whether the respondents have failed to take essential steps in the proceedings to institute an appeal to warrant striking out the respective notice of appeal, as alleged and prayed by the applicant's counsel.

The filing of an application of this nature is governed by rule 89(2) of the Rules. For ease of reference, we take liberty to reproduce the said rule thus;

*"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 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. [Emphasis added].*

From the rule cited above, it is imperative that, striking out a notice of appeal comes at the instance of a person upon whom the respective non-progressive notice was served, such that, no appeal lies or, as agreed by the parties in this case, that no essential step has been taken or it was taken belatedly in the proceedings. Luckily, this is not our first time to test rule 89(2) of the Rules. See for instance- **Grace Frank Ngowi v. Dr. Frank Israel Ngowi** [1984] T.L.R. 120, **Birr Company Ltd v. C-Weed Corporation**, Civil Application No. 7 of 2003 (unreported) and **Elias Marwa v. Inspector General of Police**, Civil Application No. 11 of 2012 (unreported).

While faced with a similar situation and called upon to define an essential step, in **Asmin Rashidi v. Bako Omari** [1997] TLR 146, we stated it to be an action taken by a party to advance institution of, or for a determination of an appeal. The Court has reiterated that stance in a number of its subsequent decisions including one in **James Bernado Ntambala v. Furaha Denis Pashu**, Civil Application No. 178/11 of 2016 (unreported).

In the instant application, we have noted that, the parties' learned counsel have agreed that, the respondents failed to make use of the first 14 days prescribed under rule 45(b) of the Rules and the said 14 days' extension which was subsequently granted by the Court for them to apply

for leave to appeal. It is clear to us that, until on 23rd March, 2022 when this application was lodged, the respondents were yet to apply for leave to appeal. Indeed, that omission, constituted the respondents' failure to take an essential step in the proceedings. Since the respondents could not appeal as of right against the impugned decree and Judgment.

In conclusion, we find the present application to be merited and grant it. Consequently, and in terms of rule 89(2) of the Rules, we hereby strike out the notice of appeal lodged on 26/03/2020. We make no order for the costs. Order accordingly.

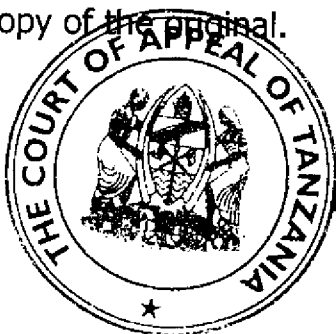
DATED at DAR ES SALAAM this 9th day of October, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 10th day of October, 2023 in the presence of Mr. Joseph Rugambwa holding brief for Ms. Josephine Sifael, learned counsel for the Applicant also holding brief for Mr. Audax Kahendaguza Vedasto, learned counsel for the first and second Respondents, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL