

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
(CORAM: LILA, J.A., SEHEL, J.A., And LEVIRA, J.A.)
CIVIL APPLICATION NO. 627/08 OF 2021

MWAY AREGO JOMBO APPLICANT

VERSUS

NMB BANK PLC RESPONDENT

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

(Manyanda, J.)

dated the 30th day of March, 2021
in
Labour Revision No. 59 of 2019

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RULING OF THE COURT

8th & 13th November, 2023

LEVIRA, J.A.:

This is an application to strike out notice of appeal filed by the respondent against the decision of the High Court of Tanzania at Mwanza dated 30th March, 2021 in Labour Revision No. 59 of 2019. The notice of motion is brought under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by the applicant's affidavit. The ground upon which this application is based is that the respondent has failed to take essential steps to institute the intended appeal within the prescribed time. The application is opposed by the respondent through affidavit in reply which was filed in Court on 22nd December, 2021.

The background of this application, albeit briefly, is to the effect that: The applicant was employed by the respondent from the year 2006 to 2018 when his employment was terminated on allegation of misconduct. Following that termination, he filed a labour complaint against the respondent before the Commission for Mediation and Arbitration (the CMA). Having heard the parties regarding the applicant's complaint, the CMA delivered its award in favour of the applicant. The respondent was aggrieved by that decision. He therefore filed Labour Revision No. 59 of 2019 against the CMA award in the High Court of Tanzania at Mwanza (the High Court) which was partly allowed. Still aggrieved, on 22nd April, 2021 the respondent filed a notice of appeal with intention to challenge the decision of the High Court on Revision, subject of the present application.

At the hearing of the application, the applicant was represented by Mr. Deya Paul Outa, learned advocate, whereas the respondent had the services of Mr. Paschal Kamala, also learned advocate.

In support of the application, Mr. Outa, first adopted the notice of motion, supporting affidavit and the applicant's written submissions to form part of his submission. Thereafter, he submitted that the applicant is making this application under Rule 89 (2) of the Rules requesting the Court to strike out the respondent's notice of appeal for failure of the respondent to take

essential steps to institute the intended appeal. It was his argument that, in terms of Rule 90 (1) and (2) of the Rules, the respondent was supposed to institute his appeal within sixty (60) days from the date of lodging the notice of appeal, unless otherwise, she possesses a certificate of delay from the Registrar excluding the days of delay. He went further arguing that, the respondent failed to institute the intended appeal for more than seven (7) months from the time when she filed the notice of appeal. That failure, he insisted, amounted to failure to take essential steps to lodge the intended appeal as stated in paragraph 8 of the supporting affidavit. However, he acknowledged that the applicant has not shown anywhere in this application that he was supplied with the applicant's letter to the Registrar requesting for necessary documents for appeal purposes.

He expounded further that, the respondent ought to have complied with the requirements of Rule 90 (5) of the Rules to remind the Registrar to supply her with the necessary documents for appeal purposes which she had applied on the date of filing the notice of appeal, but she failed. However, he admitted that this argument featured nowhere in the applicant's pleadings, which in essence were confined under Rule 90 (1) and (2) of the Rules. According to him, from 22nd April, 2021 to 21st July, 2021 was a period of ninety (90) days within which the respondent ought to have collected

necessary documents for appeal purposes after being informed by the Registrar to do so. He added that, from 21st July, 2021 to 4th August, 2021 was a period of fourteen (14) days within which the respondent was supposed to make a follow up of the requested documents to the Registrar, if was not supplied with, but nothing was done. In the circumstances, he argued, there was no need for the applicant to specifically indicate in his application that the respondent did not comply with that provision because that is the law which is supposed to be adhered to. As such, he said, by raising this argument in the course of his submission before the Court does not, in any way, mean to take the respondent by surprise because that is the law. He emphasised that the applicant's complaint in this application, though not specifically stated in the supporting affidavit and the applicant's written submissions, is based on fourteen (14) days provided for under Rule 90 (5) of the Rules within which, the steps were not taken.

Basing on his submission, he urged us to grant the application and strike out the respondent's notice of appeal.

In reply, Mr. Kamala adopted the respondent's affidavit in reply and written submissions. He began his submission by restating the established position of the law that, parties are bound by their pleadings and it is from the pleadings where the adverse party knows the nature of complaint of the

other party. He referred us to the notice of motion, supporting affidavit and the applicant's written submissions, where he said, it is glaring that the applicant did not acknowledge in the supporting affidavit that he was served with the respondent's letter to the Registrar requesting for the necessary documents for appeal purposes. As a result, while responding in paragraphs six (6) and seven (7) of the affidavit in reply, the respondent deposed extensively the steps taken to pursue the intended appeal.

Elaborating, he stated that in paragraph 6 (iii), the respondent deposed that on 5th July, 2021 and 18th November, 2021 she wrote to the Registrar reminding him to supply her with the remaining documents for appeal purposes, but until this time has not been supplied. It was his argument that the act of the respondent reminding the Registrar on 5th July, 2021 even before the expiry of ninety (90) days which the Registrar was supposed to supply the respondent with those documents, in itself, was a diligent action indicating that the respondent intended to pursue the intended appeal. He went on highlighting that the respondent wrote to the Registrar three letters before the applicant lodged the present application requesting the Court to strike out her notice of appeal.

Vehemently, he contended that the ground falling under Rule 90 (5) of the Rules which has been raised by the counsel for the applicant was a new

fact which the respondent had no time to respond to it in her affidavit in reply. He added, had it been that it was raised in the applicant's pleadings, the respondent would have responded to it. Otherwise, he said, the argument by the counsel by the applicant that this is a requirement of the law does not hold water. He submitted that, since the respondent did not know exactly what was the applicant's complaint, she responded according to the complaint in the applicant's pleadings. However, he did not see any injustice being occasioned on the part of the applicant if this application is dismissed and he so prayed.

Rejoining, Mr. Outa submitted that the counsel for the respondent does not dispute that the respondent did not take essential steps after the expiry of ninety (90) days and within fourteen (14) days prescribed under Rule 90 (5) of the Rules. According to him, the letter written by the respondent to the Registrar of 5th July, 2021 was redundant because it was written within the period the Registrar was mandated to supply her with the requested documents. As such, he said, the law does not require the appellant to remind the Registrar within such period but he should collect the documents applied for. Therefore, he argued that the respondent was supposed to remind the Registrar within fourteen (14) days and the letter which she wrote on 18th November, 2021 was ineffectual. Consequently, he said, it

remained that the respondent failed to take essential steps within statutory time, that is, fourteen (14) days.

Finally, he urged us to strike out the notice of appeal on account of the respondent's failure to take essential steps to institute the intended appeal.

We have respectfully considered the rival submissions by the parties, the notice of motion, parties' affidavits and written submissions. The crucial issue which we need to address in this matter is whether paragraph eight (8) of the applicant's supporting affidavit can legally be interpreted to be referring to fourteen (14) days under Rule 90 (5) of the Rules. For ease of reference the said paragraph reads:

8. "That from 22nd day of April, 2021 to date now it is more than 7 months from when the Respondent was allowed to lodge an appeal at the Court of Appeal."

Rule 89 (2) of the Rules under which this application is brought provides as follows:

" (2) 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."

In the current application, the applicant's complaint is general as demonstrated in the above quoted paragraph. We also learn from paragraph seven (7) of the supporting affidavit and the applicant's written submissions that, all along there has been a complaint that the respondent has failed to comply with the requirements of Rule 90 (1) and (2) of the Rules. Paragraph seven (7) of the supporting affidavit reads as follows:

"That the respondent herein filed the notice of appeal to the Court of Appeal as a delaying tactic, as requirement of the law the respondent has not yet complied with the provisions of Rule 90 (1) and (2) of the Court of Appeal Rules, 2009 as amended by G.N. No. 344 of 2019 which sets out the time limit within which an appeal has to be lodged subsequent to the filing of the notice of appeal."

The Rule that was referred by the applicant in paragraph seven (7) of the supporting affidavit provides:

"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 thirty 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 applicant.

(2) The certificate of delay under rules 45, 45A and 90(1) shall be substantially in the Form L as specified in the First Schedule to these Rules and shall apply mutatis mutandis."

As intimated above, this Rule only provides for the time limitation within which the intended appellant can file his appeal, that is, within sixty (60) days of the date when the notice of appeal was lodged, exceptions and the format of the certificate of delay. The applicant's pleadings do not mention anything regarding Rule 90 (5) of the Rules which was mentioned by the counsel for the applicant during his submission before us. It is established principle and we agree with the counsel for the respondent, that parties are bound by their own pleadings - see: **Charles Richard Kombe t/a Building v. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012; **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019

and **Martin Fredrick Rajab v. Ilemela Municipal Council**, Civil Appeal No. 197 of 2019 (all unreported). In **Barclays Bank (T) Ltd** (supra), while resolving the issue regarding facts which were not pleaded, the Court restated the above principle in the following terms:

"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."

Being guided by the above established principle, we observe that the issue regarding the fourteen (14) days specified by Mr. Outa from 21st July 2021 to 4th August, 2021 in his oral submission before us, was not so specifically pleaded in the applicant's pleadings. In fact, it was an argument from the bar which we are inclined to ignore as per the above quoted decision as we continue to determine this application. We are fortified by our previous decision in **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman of Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2006 (Unreported), where we held that:

"Submissions are generally meant to reflect the general features of a party's case. They are elaborations and explanations on the evidence"

already tendered. They are expected to contain arguments on the applicable law. They are not intended to be substitute of evidence.”

We further observe that, following the applicant’s general claim in his pleadings, the response of the respondent in her pleadings was also general to the extent that, she indicated that she served the applicant with her letter to the Registrar requesting for the necessary documents for appeal purposes, which in our considered view was a necessary step toward filing the intended appeal, a fact which was not revealed by the applicant in his pleadings.

Nevertheless, the respondent also indicated that she wrote reminder letters to the Registrar on 5th July, 2021 and 18th November, 2021 on the same subject matter as it can be seen at paragraph 6 (iii) of the affidavit in reply. Although the applicant’s counsel argued that the letter of 5th July, 2021 was redundant as it was not necessary, we do not think so. In our opinion, the letter demonstrated the urge of respondent of filling the intended appeal and thus it cannot be undervalued. This we hold taking into consideration that some of the documents were already supplied to the respondent and by that letter, she was reminding the Registrar to supply her with the remaining documents. We as well observe that, apart from arguing that the letter was within ninety (90) days that the Registrar was supposed to supply

the respondent with the requested document, the counsel for the applicant did not cite any law restricting the applicant to do so. We do not need to overemphasize here that, paragraph eight (8) of the supporting affidavit under which this application lies only states that the respondent failed to take essential steps to lodge the intended appeal for more than seven (7) months.

On the face of it, such complaint does not tell that the applicant intended to peg his complaint under Rule 90 (5) of the Rules as claimed by the counsel for the applicant. We think, had it been that the applicant was so specific in his pleadings would have moved the respondent to respond accordingly. We tend to agree with the respondent's counsel that parties are bound by their pleadings. The respondent's reply to the applicant's pleadings, in our view, was sufficient as the interpretation of paragraph eight (8) of the supporting affidavit cannot be overstretched to fall squarely under Rule 90 (5) of the Rules. The respondent has stated categorically in the affidavit in reply and her written submissions that, some of the documents she applied for appeal purposes are yet to be supplied to her. The only supplied documents as stated at paragraph 6 (ii) of the affidavit in reply are the Judgment and decree. Therefore, it was difficult for her to prepare the record of appeal and file it within time.

We are alive of the stance we have been taking in some of our decisions regarding the applicability of Rule 90 (5) of the Rules, that a party who applied for necessary documents for appeal purposes if not supplied within ninety (90) days has a duty to make a follow up within fourteen (14) days after expiry of those ninety (90) days – see: **Monica Makungu v. Director of Education Department, Archdiocese of Mwanza**, Civil Application No. 31/ 08 of 2021; **Kigozi Amani Kagozi (Administrator of the estate of the late Juma Selemani) v. Ibrahim Seleman and 6 Others**, Civil Application No. 290/11 of 2021 and **Tanzania Bureau of Standards and Another v. Erythia Trading Company**, Civil application No. 493/ 16 of 2020 (all unreported). However, we wish to note that circumstances of those cases are distinguishable from the current application in the sense that, the respondent herein applied for the necessary documents for appeal purposes within time and was supplied with only the copy of judgment and decree before the expiry of ninety (90) days. Immediately thereafter, on 5th July, 2021 she reminded the Registrar to supply her with the remaining documents in vain even before the expiry of ninety (90) days. Therefore, the actions of the respondent herein cannot be equated with the action of a party who applies for documents for appeal purposes and sit back waiting for the Registrar to discharge his responsibility of supplying him with the same even after expiry of ninety (90) days.

In the circumstances, we are satisfied that the respondent has taken some essential steps towards instituting the intended appeal sufficient to counter the applicant's complaint in this application. The issue we have raised is answered in the negative and we do not find merit in this application. We therefore dismiss it. Having considered circumstances of this matter, we make no order as to costs.

DATED at **MWANZA** this 10th day of November, 2023.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 13th day of November, 2023 in the presence of Mr. Deya Paul Outa for the Applicant, also holding brief for Mr. Paschal Kamala, learned counsel for the Respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL