

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

(CORAM: MWAMBEGELE, J.A., KITUSI, J.A. And MGONYA, J.A.)

CIVIL APPLICATION NO. 78/02 OF 2023

**JULIUS FANUEL MOLLEL (As Administrator of the
Estate of the Late FANUEL LOISHOOKI NOAH) APPLICANT**

VERSUS

SAMWEL SIMEL LAIZER 1ST RESPONDENT

SAIGILU SIMEL LAIZER 2ND RESPONDENT

OLODI SIMEL LAIZER 3RD RESPONDENT

EDWARD SIMEL LAIZER 4TH RESPONDENT

SAID SIMEL LAIZER 5TH RESPONDENT

**(Application to strike out a Notice of Appeal from the Judgment and
decree of the High Court of Tanzania at Arusha)**

(Mzuna, J.)

dated the 17th day of September, 2021

in

Land Case No. 21 of 2017

RULING OF THE COURT

13th & 15th November 2023

KITUSI, J.A.:

On 17th September, 2021 Mzuna, J. dismissed Land Case No. 21 of 2017 which had been instituted by the respondents. Dissatisfied, the respondents lodged a notice of appeal on 4th October, 2021 intending to challenge the decision of the High Court. However, no appeal had been filed as of the date of filing this application.

The applicant has therefore filed this application under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) praying for an order striking out that notice of appeal on the ground that the respondents have failed to take some essential steps to institute the appeal.

Mr. Elvaison Erasmo Maro, learned advocate, took an affidavit in support of the motion citing essential steps which the respondents allegedly failed to take. The learned counsel also argued the application before us when it was called for hearing, adopting the written submissions he had earlier filed. Similarly, Mr. Lengai Nelson Merinyo, learned advocate took an affidavit in reply on behalf of the respondents and entered appearance to contest the application.

The thrust of Mr. Maro's argument both written and oral is that, apart from writing a letter to request for the necessary documents on 5th October, 2021, the respondents did nothing in terms of follow ups with the office of the Registrar. Even the filing of this application on 14th November, 2022 was not enough to stir the respondents into action, submitted the learned counsel. He went on to demonstrate that in terms of rule 90 (5) of the Rules when the Registrar does not supply an intending appellant with the documents within 90 days, it becomes the duty of that party to follow up with that office. He further submitted that in this case the statutory 90 days expired on 3rd January, 2022 and argued that the

respondents ought to have written a reminder letter within 14 days of the expiry of those 90 days, but did not. The learned counsel pointed out that only when this application was cause - listed did the respondents spring into action by writing a letter dated 8th November, 2023 to remind the Registrar.

Addressing the law, Mr. Maro submitted that there would be no qualms in the old legal position where it was enough for an intending appellant to make a written request for documents and wait for the Registrar to supply the same which was dubbed "home and dry rule". However, he submitted, that era is no more, as the position changed in 2019 vide the Tanzania Court of Appeal (Amendment) Rules, 2019 GN. No. 344 of 2019 which introduced rule 90 (5) of the Rules which stipulates:-

*"(5) Subject to the provisions of sub- rule (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 a copy upon being informed by the Registrar to do so, or **within fourteen (14) days after expiry of the ninety (90) days**". [Emphasis ours].*

Mr. Maro cited the cases of **Rehema Idd Msabaha v. Salehbhai Jafferjee Sheikh & Another**, Civil Application No. 527/17 of 2020 and; **Kagozi Amani Kagozi (Administrator of the Estate of the late Juma Selemani) v. Ibrahim Seleman & 6 Others**, Civil Application No. 290/11 of 2021 (both unreported), to bring home the point that after the enactment of rule 90 (5) of the Rules, an intending appellant is not expected to sit back and relax.

On the other hand, Mr. Merinyo was candid to admit that the respondents are to blame for not reminding the Registrar. He, however, pleaded with us to bear in mind that the applicants having written a letter requesting for the documents, are entitled to a certificate of delay so that they lodge and prosecute their intended appeal. He made this submission while appreciating that the home and dry rule no longer exists.

Secondly, he cited the case of **Georgio Anagnostou & Another v. Emmanuel Marangakis & Another**, Civil Application No. 464/01 of 2018 (unreported), to argue that where the parties are not prejudiced, the court may turn a blind eye to a party's failure to remind the Registrar.

In a short rejoinder, Mr. Maro submitted that the case of **Georgio Anagnostou & Another** (supra) is inapplicable in the circumstances of this case and pointed out that under rule 89 (2) of the Rules allows the

striking out of notice of appeal even when an appeal has been lodged and further insisted that these rules must be complied with.

We agree with counsel that prior to the coming of rule 90 (5) vide GN. No. 344 of 2019, an intending appellant who files a notice of appeal and has written a letter requesting for the requisite documents could just sit back and wait. However, in the advent of rule 90 (5) of the Rules the court as well as a party have duties. In his written submissions, Mr. Maro has ventured to state the wisdom behind the enactment of rule 90 (5) by saying; *The spirit behind introduction of rule 90 (5) of the Rules is to expedite appeal process for the benefit of the parties involved in litigation at the appellate stage.* We agree with the learned counsel and we would add that it provides an opportunity for litigants to actively participate in speedy disposal of their cases. After all, cases belong to the parties. In the case of **Abdallah Juma Kambale v. Noradi Tiliko Mongelwa**, Civil Appeal No. 231 of 2018 (unreported) though in a slightly different setting, having demonstrated the duty of an advocate, we stated:-

"... the party to a case who engages the services of an advocate, has a reciprocal duty to closely follow up the progress and status of his case".

From the foregoing discussion, it is our conclusion that, the respondent allowed grass to grow under their feet for more than 21

months, and if such inaction for such a long time would be tolerated as suggested by Mr. Merinyo, then intention of enacting rule 90 (5) of the Rules would be defeated and that rule would be no better than ornamental. The fact that the respondents wrote a letter of reminder to the Registrar hardly five days before this application came for hearing, speaks volumes as to their inaction.

For the reasons shown above, we grant this application and hereby strike out the Notice of Appeal lodged by the respondents on 5th October, 2021 intending to challenge the decision in Land Case No. 21 of 2017, High Court, Arusha Registry. Order with costs to the applicant.


DATED at **ARUSHA** this 15th day of November, 2023

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered on this 15th day of November, 2023 in the presence of Mr. Valentine J. Nyalu, learned advocate for the applicant who also took brief of Mr. Lengai Nelson Merinyo, counsel for the respondent, is hereby certified as a true copy of the original.


A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL