

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MKUYE J.A., MWAMPASHI, J.A., And MDEMU, J.A.)

CIVIL APPLICATION NO. 423/01 OF 2022

MARYAM YAHYA HUSSEIN.....APPLICANT

VERSUS

FATUMATA DIANE BERETE.....RESPONDENT

[Application to strike out a Notice of Appeal from the Decision of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam]

(Mlyambina, J.)

dated the 28th day of February, 2020

in

(PC) Civil Appeal No. 102 of 2019

.....

RULING OF THE COURT

08th & 17th November, 2023

MWAMPASHI, J.A.:

This is an application for striking out a notice of appeal. It is brought by way of a notice of motion and it is predicated on rules 89 (2) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The notice of appeal sought to be struck out was lodged by the respondent on 10.03.2020 and it is intended to challenge the decision of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam (Mlyambina, J.) dated 28.02.2020 in (PC) Civil Appeal No. 102 of 2019. The application is supported by an affidavit affirmed by the applicant Maryam Yahya Hussein and it is strongly resisted by an affidavit in reply

sworn by Mr. Dennis Michael Msafiri, the learned advocate for the respondent.

The application, according to the notice of motion, is premised on two grounds, thus:

- (i) The Respondent herein failed to lodge an appeal within prescribed time.*
- (ii) Some essential step in the proceedings has not been taken or has not been taken within the prescribed time.*

The background facts from which the instant application arises, as gathered from the record, *albeit* in brief, are as follows: In Probate Cause No. 129 of 2018 before the Primary Court of Kinondoni, the parties to the instant application were jointly appointed to be the administratrices of the estate of the late Ahmed Sharif Abdulghan Idarous. In the said Probate Cause, among other orders, the Primary Court did also make an order regarding as to who were the legal issues of the deceased, the order which aggrieved the respondent. Her two appeals, firstly, to the District Court of Kinondoni in Probate Appeal No. 34 of 2018, and then to the High Court vide (PC) Civil Appeal No. 102 of 2019, were both dismissed. The appeal to the High Court was dismissed on 28.02.2020.

Undaunted and intending to challenge the dismissal of her appeal by the High Court, the respondent duly lodged a notice of appeal and requested to be supplied with a copy of the proceedings for appeal purpose on 10.03.2020. Copies of the notice of appeal and the letter requesting for the copy of the proceedings were duly served on the applicant on 18.03.2020. As her intended appeal to this Court originated from the Primary Court and would therefore be a third appeal, a certificate on a point of law had to be sought and obtained. For that purpose, the respondent did on 24.03.2020, file Miscellaneous Application No. 145 of 2020 before the High Court which was granted on 16.10.2020. Having obtained the certificate on point of law, the respondent did on 19.10.2020, apply in writing to the Deputy Registrar for the ruling and drawn order in respect of Miscellaneous Application No. 145 of 2020. This was followed by a reminder letter dated 24.03.2021 through which the Deputy Registrar was also reminded to supply the respondent with the copy of the proceedings in respect of (PC) Civil Appeal No. 102 of 2019 and a certificate of delay. There were also other three reminder letters that followed, the last one being dated 08.07.2023.

While the respondent was still waiting to be supplied with the above mentioned relevant documents she had requested, the applicant did on

02.11.2023, file the instant application applying for the notice of appeal to be struck out mainly on the ground that some essential step in instituting an intended appeal has not been taken by the respondent or has not been taken within the prescribed time.

When the application was called on for hearing, Messrs. Mvano Mlekano and Dennis Michael Msafiri, both learned advocates, represented the applicant and respondent, respectively.

Mr. Mlekano began by adopting the notice of motion, the supporting affidavit and the list of authorities he had earlier filed. He then made a lengthy two-limb submission in support of the application. On the first limb, Mr. Mlekano referred us to paragraphs 13, 14, 15 and 16 of the supporting affidavit and argued that, in terms of rule 90 (5) of the Rules, after the Deputy Registrar had failed to supply the respondent with the requested copy of the proceedings within 90 days, the respondent was required to make follow-ups by sending a reminder letter to the Deputy Registrar within 14 days. He contended that, failure to send a reminder letter to the Deputy Registrar within 14 days and serve a copy of such a letter on the applicant, amounts to failure to take essential step in the proceedings entitling the applicant to apply for the notice of appeal to be struck out in terms of rule 89 (2) of the Rules.

As on the second limb of his submission, Mr. Mlekano forcefully argued that, the respondent did also fail to take essential step in furtherance of her intended appeal because after obtaining the certificate on a point of law on 16.10.2020, the respondent's letter to the Deputy Registrar requesting for the copy of the ruling and drawn order in respect of the application for a certificate on a point of law dated 19.10.2020, was not served on the applicant contrary to rule 90 (1) and (3) of the Rules. He also submitted that, even after applying for the ruling and drawn order on 19.10.2020, no follow-ups or reminder were made by the respondent till on 24.03.2021 which was beyond the prescribed period of 14 days.

For the aforesaid reasons, Mr. Mlekano insisted that, the respondent failed to take essential step, firstly, when she failed to make a reminder in respect of the copy of the proceedings she had requested on 10.03.2020 within 14 days following the failure by the Deputy Registrar to supply the same within 90 days, and secondly, when she failed to serve on the applicant the letter to the Deputy Registrar dated 19.10.2020, requesting for the ruling and drawn order. He added that the respondent has failed to file her appeal within 60 days. Mr. Mlekano thus, prayed for the notice of appeal to be struck out as prayed in the notice of motion.

Mr. Msafiri strongly opposed the application. Having adopted the affidavit in reply and the list of authorities he had earlier filed on 02.11.2023, he submitted on the first limb of the submission by Mr. Mlekano that, essential steps were taken by the respondent by duly lodging the notice of appeal and requesting for the copy of the proceedings for appeal purpose within the prescribed period of 30 days from the date of the impugned decision as required by rule 90 (1) of the Rules. He also argued that the letter applying for the copy of the proceedings was duly served on the applicant on 18.03.2020 pursuant to rule 90 (3) of the Rules.

Mr. Msafiri contended further that, the complaint that no reminder for the requested copy of the proceedings was made within 14 days and that the applicant was not served with a copy of such a reminder letter, is not only backed by any law but it is also, under the circumstances of this case, misconceived. He explained that, since after lodging the notice of appeal and having requested for the copy of the proceedings, the respondent applied for a certificate on a point of law and as the said application was pending for determination till on 16.10.2020 when the certificate was granted, the respondent could not have pressed and reminded the Deputy Registrar for the requested copy of the proceedings which, without the record of the application for a certificate

on a point of law, would have been incomplete. He pointed out that, it was not until the certificate on point of law was obtained, that the record, for appeal purposes, were complete.

In regard to the second limb of the complaint, Mr. Msafiri urged us to simply disregard it because the same is neither part of the grounds listed in the notice of motion nor is it reflected in the supporting affidavit. He insisted that, the complaint that essential step has not been taken in respect of the application for a certificate on a point of law, is a statement from the bar. In fortifying this point, Mr. Msafiri placed reliance on our decision in the case of **Said Sultan Ngalema v. Isack Boaz Ng'iwanishi and 4 Others**, Civil Application No. 362/17 of 2021 (unreported) where, among other things, the Court emphasized that, essential steps allegedly not taken are required to be clearly spelt in the affidavit in support of the application. Mr. Msafiri did thus urge us to dismiss the application with costs.

In his short rejoinder, Mr. Mlekano reiterated his stance that the respondent did not make any follow-up or send a reminder letter to the Deputy Registrar within 14 days. He argued that the then pending application for a certificate on a point of law, did not suspend the respondent's obligation to make the relevant reminder. As for the

complaint regarding the application for the certificate on a point of law, it was Mr. Mlekano's argument that since the issue was raised by the respondent in her affidavit in reply then it is part of the record entitling him to argue it regardless of the fact that the same had not been particularized in the supporting affidavit. Finally, it was argued by Mr. Mlekano that, the case of **Said Sultan Ngalema** (supra) cited by Mr. Msafiri is distinguishable because, unlike in the instant application, an issue of failure to take essential step was not raised.

Having examined the notice of motion, the affidavits filed in support and against the application and further having considered the arguments made by the counsel for the parties, the only issue for our determination is whether, for the furtherance and initiation of the intended appeal, any essential step in the proceedings has not been taken or has not been taken within the prescribed time by the respondent.

To begin with and for ease of reference, rule 89 (2) of the Rules, from which the Court derives its mandate to strike out a notice of appeal, is hereunder reproduced thus:

"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”.

It is crystal clear that, under rule 89 (2) of the Rules, a notice of appeal can be struck out on either of the following three grounds; **One**, that no appeal lies, **two**, that some essential step in the proceedings has not been taken and **three**, that an essential step has been taken but not within the prescribed time. See, for instance, **National Housing Corporation v. Miss Lazim Ghodu Shekhe**, Civil Application No. 134 of 2005, **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 and **Kaemba Katumbu v. Shule ya Sekondari Mwilamvya**, Civil Application No. 523 of 2020 (all unreported).

In the instant application, the first limb of the applicant’s complaint is that, having duly filed her notice of appeal and requested for the copy of the proceedings for appeal purpose on 10.03.2020 and after the Deputy Registrar had failed to supply her with the requested copy within 90 days, the respondent did not make follow- ups or send a relevant reminder to the Deputy Registrar, within the prescribed period of 14

days, as required by rule 90 (5) of the Rules. The response by Mr. Msafiri to this complaint, which to our view is right, was that, since the respondent had filed an application for a certificate on a point of law which was still pending until on 16. 10.2020 when it was granted, it was unnecessary for her to remind the Deputy Registrar for the copy of the proceedings she had requested on 10.03.2020.

We agree with Mr. Msafiri that, under the circumstances of this matter, the fact that the respondent did not, within 14 days, make follow- ups or send a reminder letter to the Deputy Registrar after the period of 90 days had elapsed without being supplied with the requested copy of the proceedings, did not amount to failure to take an essential step within the ambit of rule 89 (2) of the Rules. It is common ground that immediately after lodging the notice of appeal and applying for the copy of the proceedings, the respondent did on 24.03.2010, file Miscellaneous Civil Application No. 145 of 2020 for a certificate on a point of law which remained pending until on 16.10.2020 when the certificate was issued. It is also undisputed that, since the dispute between the parties has its origin from the Primary Court, then, in terms of section 5 (2) (c) of the Appellate Jurisdiction Act [Cap.141, R.E. 2019], no competent appeal could have been preferred to this Court without a certificate on a point of law having been applied for and

obtained first. Further, in terms of rule 96 (1) (k) of the Rules, the ruling and drawn order in respect of the application for a certificate on a point of law, were necessary documents for the proper determination of the intended respondent's appeal, without which the record of appeal would have been incomplete.

It is under the above given circumstances that, we find that there was no need for the respondent to make a reminder and press for the copy she had requested on 10.03.2020 while the record regarding the application for a certificate on a point of law, which, as we have pointed out above, are necessary documents for complete record of appeal, had not yet been obtained. The first limb of complaint thus, fails.

The second limb of complaint that the respondent's letter dated 19.10.2020 requesting for the copy of the ruling and drawn order regarding the application for a certificate on a point of law, was not served on the applicant and further that the reminder in respect of the said request was not done within 14 days, should not detain us at all. The complaint is baseless and deserves no consideration by the Court. As rightly argued by Mr. Msafiri, this is a statement from the bar. The complaint is neither explicitly stated in the notice of motion nor reflected or amplified in the supporting affidavit. Paragraphs 13, 14, 15 and 16

are only about the alleged failure by the respondent to make a reminder about the copy of the proceedings she had requested on 10.03.2020 within 14 days. There is no averment in the supporting affidavit relating to the said statement from the bar by Mr. Mlekano that, the letter requesting for the ruling and drawn order was not served on the applicant and that the reminder to that effect was not made within 14 days. In the case of **Said Sultan Ngalema** (supra), the Court stated that:

"Mr. Rumisha, argued in his view, and rightly so in our mind, that, all the essential steps which the first respondent was supposed to take and did not take were required to be clearly spelt out in the affidavit in support of the application for this Court to make any informed decision and not to speculate".

In the event, we find that this application is devoid of merit. The respondent has not failed to take any essential step in furtherance of her intended appeal. From the date the impugned decision was rendered out, that is, on 28.02.2020, the respondent has never slept. She duly lodged her notice of appeal and requested for the copy of the proceedings on 10.03.2020. On 24.03.2020, she applied for a certificate on a point of law and after obtaining it on 16.10.2020, she swiftly

applied to be supplied with the relevant ruling and drawn order on 19.10.2020. This was followed by three reminders on 24.03.2021, 15.09.2022 and 08.07.2023.

For the aforesaid reasons, the application is thus dismissed with costs.

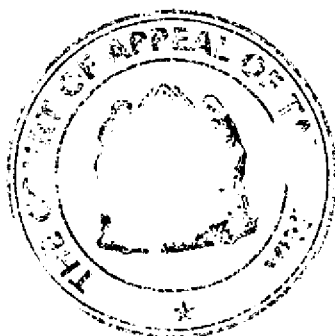
DATED at **DAR ES SALAAM** this 16th day of November, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 17th day of November, 2023 in the presence of Mr. Mvano Mlekano, learned counsel for the applicant and Ms. Kulwa Shilemba, holdings brief for Mr. Dennis Msafiri, learned counsel for the respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL