

**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. 345/16 OF 2022**

**VODACOM GROUP LIMITED.....1<sup>ST</sup> APPLICANT**

**VODACOM TANZANIA PUBLIC LIMITED COMPANY.....2<sup>ND</sup> APPLICANT**

**VODACOM INTERNATIONAL LIMITED.....3<sup>RD</sup> APPLICANT**

**VODACOM CONGO DRC SPRL.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**MOTO MATIKO MABANGA.....RESPONDENT**

**(An application to strike out a notice of appeal from the Judgment of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)**

**(Phillip, J.)**

**dated the 25<sup>th</sup> day of June, 2021**

**in**

**Commercial Case No. 112 of 2017**

**.....**

**RULING OF THE COURT**

7<sup>th</sup> & 17<sup>th</sup> November, 2023

**MDEMU, J.A.:**

This application for striking out the notice of appeal is by way of notice of motion under the provisions of rule 48 (1) and (2) and rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is also supported by an affidavit sworn by the applicants' advocate one Gaspar Nyika. The respondent resisted the application through an affidavit in reply deposed by

Mr. Kelvin Kidifu, the advocate for the respondent. Essentially, the gist of the application is for this Court to strike out the notice of appeal lodged by the respondent for failure to take essential steps in prosecuting the intended appeal.

Briefly, in Commercial Case No. 112 of 2017, the respondent moved the High Court of Tanzania, Commercial Division to enforce the judgment and decree of the Commercial Court of Kinshasa/Gombe (the Kinshasa Court) delivered on 24<sup>th</sup> January, 2012 in Commercial Case No. RCE1819/1846. That suit in the Kinshasa Court was between Namemco Energy (Pty)Limited (NAMEMCO) and Vodacom International Limited, the third applicant in the instant application. According to the supporting affidavit, the High Court of Tanzania, Commercial Division (Phillip J.) dismissed the suit with costs because the judgment of the Kinshasa Court sought to be enforced was superseded by a settlement agreement between the respondent, first, third and fourth applicants and NAMEMCO entered in February, 2013.

Aggrieved with such findings, that is the whole judgment and decree delivered on 25<sup>th</sup> June, 2021, the respondent lodged the notice of appeal to this Court on 13<sup>th</sup> July, 2021 which was also served to the applicants on 22<sup>nd</sup>

July, 2021. Equally, the respondent through his letter dated 5<sup>th</sup> July, 2021 which was also copied to the applicants, requested to the Deputy Registrar for copies of proceedings, judgement and decree for appeal purposes. The requested documents, according to the depositions in the supporting affidavit, were supplied to the respondent on 17<sup>th</sup> January, 2022. In view of that and as the applicants were not served with the memorandum of appeal within sixty days by 18<sup>th</sup> March, 2022, this application was thus filed for failure by the respondent to take essential steps for appeal purposes as contained in the notice of motion such that:

1. *An order that the respondent's notice of intention to appeal from the decision of the High Court (Commercial Division) at Dar es Salaam in Commercial Case No.112 of 2017 between Moto Matiko Mabanga versus Vodacom Group Limited, Vodacom Tanzania Public Limited Company, Vodacom International Limited and Vodacom Congo DRC SPRL dated 25<sup>th</sup> June, 2021 (Hon. Phillip, J.) be struck out on the ground that: -*
  - a) *The respondent has failed to take necessary steps to institute the appeal within the time prescribed by rule 90 (1) of the Court of Appeal Rules, G.N. No. 344 of 2019.*
2. *An order that costs of and incidental to this application be provided for.*

Before us on 7<sup>th</sup> November, 2023 appeared Messrs. Libent Rwazo and Kelvin Kidifu, both learned advocates for the applicants and the respondent respectively arguing for and against the application.

Submitting in support of the application, Mr. Rwazo first adopted the supporting affidavit and written submissions filed earlier in that behalf. His emphasis in both oral and written submissions underscores three conditions envisioned under rule 89 (2) and rule 90 (1) of the Rules for which the notice of appeal may be struck out. He named them as want of appeal, failure to take essential steps in proceedings and taking such steps without observing time limitation. In all these, he insisted that the respondent as per annex BMA-2 to the supporting affidavit collected all the documents but did not lodge the appeal within sixty days.

In his further submission, it was the concern of the learned counsel that, the respondent may not rely in annex BMA-3 which is a letter requesting for proceedings in Miscellaneous Application No.114 of 2018 in twofold, **one** is because by that time the sixty days within which the respondent was supposed to lodge the appeal had already lapsed and **two**, interlocutory proceedings, that is Miscellaneous Application No. 114 of 2018 do not form the basis of the certificate of delay. He therefore added in this that, since

what blocked the respondent to lodge the appeal was the certificate of delay which he asked the Deputy Registrar to prepare, discoveries followed thereafter relating to absence of proceedings, ruling and drawn order in the interlocutory proceedings may not connote that the respondent have taken essential steps to appeal. He finally referred us to the cases of **James Bernado Ntambala v. Furaha Dennis Pashu**, Civil Application No.178 /11 of 2016 (unreported) and **Asmin Rashidi v. Bako Omari** [1997] T.L.R. 146 insisting that, no essential steps have been taken thus implored us to strike out the notice of appeal.

In resisting the application, Mr. Kidifu who did not file written submissions, banked on the affidavit in reply which he prayed to adopt. In general, he said, the application is devoid of substance because the applicants have failed to state essential steps not taken by the respondent. Instead, he added, the respondent lodged the notice of appeal in time and thereafter within thirty days applied to the Deputy Registrar to be supplied with proceedings, judgment and decree for appeal purposes of which he was informed on 17<sup>th</sup> January, 2021 to collect such documents. He collected them and, in the course, he learnt that there was no certificate of delay which the respondent was given on 8<sup>th</sup> March, 2022.

He continued to submit that, the respondent further discovered missing proceedings in respect of Miscellaneous Application No. 114 of 2018 in the course of processing the appeal. This, according to the learned counsel, stalled appeal processes, the reason why the respondent moved against the Deputy Registrar to supply such documents for him to have complete record. At this latter undertaking, according to the learned counsel, the respondent was intimated as the appeal was to be lodged by 7<sup>th</sup> May, 2022 while the documents were requested on 6<sup>th</sup> May, 2022. To date, according to the learned counsel, the requested interlocutory proceedings have not been availed to the respondent. He therefore concluded by distinguishing the case of **James Bernado Ntambala** (supra) cited by Mr. Rwazo in his written submission because unlike in that case, the respondent herein took essential steps in processing the intended appeal. He, therefore, urged us to dismiss the application with costs for want of merits.

Mr. Rwazo rejoined briefly that, as the respondent had in his possession the certificate of delay, that means, all the documents as per annex BMA2 were collected. In his understanding therefore, any claim relating to want of documents arose thereafter is a delaying tactic on the

part of the respondent. He concluded his rejoinder by reiterating what he submitted in chief.

We have considered facts as deposed in affidavits and also submissions by both learned counsel in determining this application. In an application for striking out the notice of appeal, as in the foregoing observation, failure to take essential steps in pursuing the intended appeal is the driving factor. In **James Bernado Ntambala** (supra) cited to us by Mr. Rwazo, at page 6, this Court made the following observation on what amounts to essential steps:

*We wish to start our determination by statement we made in **Asmin Rashidi v. Boko Omari** [1997] TLR 146 that the essential steps in the prosecution of an appeal envisioned by the provisions of rule 89 (2) of the Rules – then rule 82 of the Tanzania Court of Appeal Rules, 1979 – **were steps which advanced the hearing of the appeal.***

[emphasis supplied]

Having that in mind, the immediate issue which we are asking ourselves is whether, having lodged the notice of appeal on 13<sup>th</sup> July, 2021, the respondent has taken any step in pursuing the intended appeal. Before we embark on this, it is not disputed that, having the notice of appeal in the Court registry, the respondent applied in time to be supplied with copies of

proceedings, judgment and decree for processing the intended appeal. According to the depositions, on 17<sup>th</sup> January, 2021 the respondent was informed by the Deputy Registrar to collect the requested documents, which he did.

It is also on record that, on 8<sup>th</sup> March, 2022 the respondent was issued with a certificate of delay. That notwithstanding, by 7<sup>th</sup> May, 2022 being the last date within which to lodge the appeal, no appeal was ever filed to the Court on what the respondent deposed to have discovered missing proceedings in respect of Miscellaneous Commercial Application No. 114 of 2018 arising from Commercial Case No.112 of 2017, whose decision is challenged in the intended appeal. Here is where parties parted their ways. The applicant is contesting that averment in twofold, **first** because the respondent acknowledged to have received all the documents the reason why he requested for the certificate of delay; and **second**, the respondent did not initially request to be supplied with proceedings, ruling and drawn order in Miscellaneous Commercial Application No. 114 of 2018.

In resolving this controversy, we think it is important to reproduce relevant parts of the letter of the respondent which requested documents for appeal purposes so as to determine which documents were requested



from the Deputy Registrar. The said letter which is annexed as BMA-4 to the affidavit in reply reads in part as hereunder:

*We request your honour to avail us with the certified copies of the judgment, decree and proceedings and admitted exhibits for appeal purposes. **Please also provide us with the copies of all rulings and proceedings in interlocutory applications as they form part of the records** as per rule 90 (1) of the Court of Appeal Rules.*

[emphasis supplied]

From the reproduced part of the request letter, we are now settled that, the respondent requested all documents including those in Miscellaneous Commercial Application No. 114 of 2018 which Mr. Rwazo argued to have not been requested. This also resolves the complaint by Mr. Rwazo that the respondent was given all the requested documents the reason why he initially requested only for the certificate of delay. The fact is that, the letter of the Deputy Registrar informing the respondent to collect the requested documents did not include those in Miscellaneous Commercial Application No. 114 of 2018. Let the said letter which is annexed to the affidavit in reply as BMA-1 speak of itself in the relevant part as follows:

*This is to notify you that the copy of judgment, decree, proceedings and exhibits applied for are ready for collection free of charge.*

Now that the letter omitted documents in interlocutory proceedings requested for, unlike what Mr. Rwazo observed, it was correct therefore for the respondent to remind the Deputy Registrar (annex BMA-3)) to have the missing documents supplied, a step which he took a day before the expiry of sixty days. Mr. Rwazo, however, was not happy with the act of the respondent to discover the missing documents a day before the time limit of sixty days. In his argument, the respondent was to discover the missing documents immediately upon being supplied with the proceedings, judgment and decree of the main suit and or at the time he requested for the certificate of delay. We think this should not detain us because, **one**, the discovery of the missing documents was within the sixty days post receipt of the documents in the main suit. **Two**, as proceedings in Miscellaneous Commercial Application No. 114 of 2018 were part of the documents so requested, failure by the Deputy Registrar to include those documents in the letter notifying the respondent to collect them means the respondent received incomplete documents which stalled his appeal processes.

In the end, it is our considered view that the respondent's request to be supplied with documents for appeal purposes was made in time. As said, following discovery of the missing documents, he reminded the Deputy Registrar to re-supply such documents relating to interlocutory proceedings which, to date he has not been supplied. In our view therefore, what the respondent did, suffices to constitute essential steps in pursuing the intended appeal. That said, we find the application to have no merits and we accordingly dismiss it. Costs to be in the cause.

It is so ordered.

**DATED at DAR ES SALAAM** this 17<sup>th</sup> 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 17<sup>th</sup> day of November, 2023 in the presence of Ms. Fatuma Mgunya, learned counsel for the Applicant who is also holding brief for Mr. Kelvin Kidifu learned counsel for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT

**DEPUTY REGISTRAR**  
**COURT OF APPEAL**