

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

**(CORAM: WAMBALI, J.A., KEREFU, J.A., And MGEYEKWA, J.A.)**

**CIVIL APPLICATION NO. 407/01 OF 2022**

**MARIA RABINGUSA.....APPLICANT**

**VERSUS**

**TULO YOHANA MSANGULA .....RESPONDENT**

**(Application for an Order to Strike out the Notice of Appeal from the  
Judgment and Decree of the High Court of Tanzania at Dar es Salaam)**

**(Ebrahim, J.)**

**dated the 25<sup>th</sup> day of November, 2020**

**in**

**PC Civil Appeal No. 140 of 2019**

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**RULING OF THE COURT**

15<sup>th</sup> & 20<sup>th</sup> November, 2023

**KEREFU, J.A.:**

By notice of motion lodged on 11<sup>th</sup> July, 2022 under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant seeks an order of the Court striking out the notice of appeal filed on 2<sup>nd</sup> December, 2020 by the respondent on the ground that the respondent has failed to take essential steps to institute the intended appeal within the prescribed time. The notice of motion is supported by an affidavit duly sworn by George Dogani Mwalali, learned counsel for the applicant. On the other side, the respondent, though duly served with the copy of the application, did not file an affidavit in reply to contest and/or otherwise support the application.

In order to appreciate the context in which this application has arisen, we find it apposite to briefly provide the material facts of the matter as obtained from the record of the application. That, sometimes, in 2018, the applicant petitioned to the Primary Court of Ukonga (the trial court) vide Matrimonial Cause No. 264 of 2018 against the respondent for dissolution of their marriage, division of matrimonial assets, custody and maintenance of one issue of the marriage. Having heard the evidence from both parties, the trial court dissolved the marriage and ordered for the division of matrimonial assets, whereby the applicant was awarded 30% and the respondent was awarded 70% of the said assets. Then, the custody of one issue was granted to the applicant and the respondent was ordered to pay TZS 30,000.00 monthly for maintenance.

Aggrieved, the respondent appealed to the District Court of Ilala at Samora Avenue (the first appellate court) challenging the decision of the trial court in respect of the division of matrimonial assets and maintenance. Upon hearing the parties, the first appellate court confirmed the decree of divorce issued by the trial court, set aside the order of maintenance and varied the order of division of matrimonial assets to the extent that, the applicant was awarded 10% and the respondent was awarded 90% of the same.

Unsatisfied, the applicant appealed to the High Court mainly challenging the division of matrimonial assets. The High Court, upon hearing the parties, reversed the order of division of matrimonial assets issued by the first appellate court by awarding 80% to the respondent and 20% to the applicant.

Undaunted, the respondent manifested his intention to appeal against that decision by lodging a notice of appeal in this Court, on 2<sup>nd</sup> December, 2020. It is also on record that, the respondent, vide a letter dated 7<sup>th</sup> November, 2020 addressed to the Deputy Registrar of the High Court, requested to be supplied with copy of the High Court's proceedings for appeal purpose. The applicant has acknowledged that the said notice of appeal was served to her on 7<sup>th</sup> December, 2020. However, it is averred by the applicant that, since that date, the respondent has not taken any essential step to institute the appeal. Thus, she decided to lodge the current application to have the said notice of appeal struck out.

At the hearing of the application, the applicant entered appearance in person. On the other side, the respondent did not enter appearance. It is on record that the respondent was initially served with the notice of hearing on 8<sup>th</sup> November, 2023 to appear in Court on 10<sup>th</sup> November, 2023, but he did not enter appearance. When he was

contacted by the Court Clerk one Issa Bakari, the respondent stated that he was not feeling well. We thus adjourned the hearing of the application to 15<sup>th</sup> November, 2023. When the notice was sent to him on 14<sup>th</sup> November, 2023, the respondent refused to receive it. On that basis, the hearing of the application proceeded under Rule 63 (2) of the Rules in the absence of the respondent.

Submitting in support of the application, the applicant adopted the contents of the notice of motion and the affidavit in support of the application. She then narrated the historical background to this application as indicated above and then emphasized that, since it is evident that from the date of lodgment of the notice of appeal, the respondent has failed to take essential steps to institute the appeal, the said notice deserves to be struck out. On that basis, she urged us to grant the application with costs.

Having examined the record of the application and considered the submission made by the applicant, the main issue for our consideration is whether or not the respondent has failed to take essential steps to institute the appeal as alleged by the applicant.

We wish to begin our determination of the above issue by stating that, an application of this nature is governed by Rule 89 (2) of the Rules which stipulates that:

***"Subject to the provisions of sub rule (1), a respondent or 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 steps in the proceedings has not been taken or has not been taken within the prescribed time."*** [Emphasis added].

The above provision is self-explanatory. It gives recourse to the relief of striking out a notice of appeal to a respondent or any other person on whom a notice of appeal has been served on account of failure by the appellant to take essential steps to institute the appeal within the prescribed time. The time to institute an appeal is stipulated under Rule 90 (1) of the Rules thus:

***"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 the 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 appellant.***” [Emphasis added].

It follows therefore that, an appeal is mandatorily required to be instituted within sixty (60) days from the date when the notice of appeal was lodged and in order for the appellant to benefit from the exclusion of time spent in preparation and delivery of documents, he must apply for copy of the proceedings in the High Court within thirty (30) days of the date of the decision against which it is desired to appeal. In the case of **Mwanaasha Seheya v. Tanzania Posts Corporation**, Civil Appeal No. 37 of 2003 (unreported) the Court emphasized that:

*“...an appeal must be instituted within sixty (60) days from the date when the notice of appeal was lodged unless the exception under sub-rule (2) applies...”*

In the instant application, it is evident that although the respondent lodged his notice of appeal on 2<sup>nd</sup> December, 2020 and

requested for copy of the High Court's proceedings on 27<sup>th</sup> November, 2020, he took no further steps to keep live his pursuit of an intended appeal. In **Olivia Kisinja Ndete v. Hilda Mtunga**, Civil Application No. 4 of 2011 (unreported), when the Court was faced with an akin situation it stated that:

*"The law is now settled, upon lodging a notice of appeal, the intending appellant must not sit back but is required to move the process forward by taking essential steps that have been clearly outlined by the Court of Appeal Rules. The applicant was entitled to move the Court under Rule 89 (2) to strike out a notice of appeal where no essential steps have been taken beyond that notice."*

The above stance was emphasized in numerous decisions of the Court including; **The Registered Trustees of Chama cha Mapinduzi v. Christina Ngilisho**, Civil Application No. 153/05 of 2017 [2020] TZCA 165: [2 April 2020: TanzLII] and **Hadrian Benedict Chipeta v. The Treasury Registrar & 2 Others**, Civil Application No. 287/01 of 2021 [2022] TZCA 332: [9 June 2022: TanzLII]. In all these applications the notice of appeal was struck out on account of failure by the respondent to take essential steps to institute the appeal within the prescribed time.

Similarly, in the instant application, since the respondent has failed to take essential steps towards instituting his intended appeal within the prescribed time, we agree with the submission made by the applicant that the notice of appeal lodged by the respondent on 2<sup>nd</sup> December, 2020 deserves to be struck out. Consequently, we grant the application and, in terms of Rule 89 (2) of the Rules, strike out the notice of appeal. On the other hand, considering the circumstances of this application, we make no order as to costs.

It is so ordered.

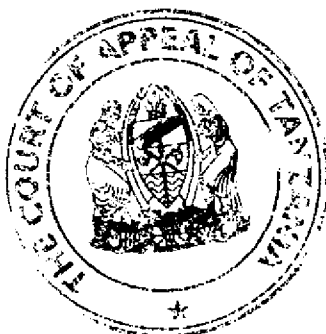
**DATED at DAR ES SALAAM** this 17<sup>th</sup> day of November, 2023.

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

The Ruling delivered this 20<sup>th</sup> day of November, 2023 in the presence of the applicant in person and in the absence of the respondent is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "J. E. Fovo", written over a horizontal line.

J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**