

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KAIRO, J.A. And MURUKE, J.A.)

CIVIL APPLICATION NO. 772/01 OF 2022

DORISIA MORRISAPPLICANT

VERSUS

**RAPHAEL NZOMUVURA RWASA (Administrator of
the estate of the late **Stephania Pelagia Minani**).....1ST RESPONDENT
HON. ATTORNEY GENERAL.....2ND RESPONDENT
COMMISSIONER FOR LANDS.....3RD RESPONDENT**

**(Application to strike out a Notice of Appeal from the decision of
the High Court of Tanzania, Dar es Salaam Registry)**

(Miyambina, J.)

Dated the 26th day of September, 2019

in

Land Case No. 64 of 2015

.....

RULING OF THE COURT

9th & 21st November, 2023

KAIRO, JA:

The applicant in this application seeks to move the Court to issue an order for striking out the notice of appeal lodged by the 1st respondent on 25th October, 2019 to challenge the decision of the High Court of Tanzania, Dar es salaam Registry in Land Case No. 64 of 2015 delivered on 26th September, 2019. The notice of motion was preferred under the provision of rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). According to the notice of motion, the application hinges on the ground that the 1st respondent has failed to

take essential steps towards lodging his intended appeal.

The application is supported by an affidavit sworn by the applicant. Further to that, the applicant on 23rd February, 2023 filed written submission to amplify the notice of motion pursuant to rule 106 (1) of the Rules.

At the hearing of the application, Messrs. Stephen Axwesso and Mpale Kaba Mpoki, both learned counsel represented the applicant and the 1st respondent respectively. The 2nd and 3rd respondents were represented by Mr. Ayubu Sanga, learned State Attorney.

Upon being invited to expound the applicant's notice of motion, Mr. Axwesso, prayed to adopt the applicant's affidavit and the written submission. In his brief submission he stated that, on 26th September, a judgment and decree which declared the applicant the lawful owner of the suit premise thereby dismissing the 1st respondent's case was pronounced by the High Court of Tanzania, District Registry in Land Case No. 64 of 2015. Dissatisfied with the decision, the 1st respondent lodged a notice of appeal on 25th October, 2019. Further, on the same day, he wrote a letter to the Registrar of the High Court requesting for certified copies of the proceedings, judgment and decree. It is further deponed in the supporting affidavit

that since then the applicant has not been served with the records of appeal or any letter reminding the Registrar to supply the 1st respondent with the requested certified records for appeal purpose. In conclusion, the learned counsel submitted that the existence of the abandoned notice of appeal by the 1st respondent hinder the applicant from enjoying the fruits of her decree issued four years back, as such it is just that the application be granted as prayed.

On his part, Mr. Sanga supported the application. He contended that the 1st respondent has not filed an affidavit in reply which would have explained what has been done by the 1st respondent in terms of Rule 90 (5) of the Rules.

As a reply, the counsel for the 1st respondent vehemently opposed the application. Since he did not file an affidavit in reply, his submission was centered only on points of law as points of facts are considered to be undisputed.

In his forceful submission, Mr. Mpoki's contention mainly centered on the construction of Rule 90 (5) arguing that it has not imposed any obligation to follow up with the Registrar by the intended appellant. To amplify his argument, he attacked the invocation of Rule 90 (5) by the applicant in two ways:

One; he argued that the provision being among the rules of procedure, should be treated as handmaids of justice with an objective of assisting the parties in attainment of substantive justice. He thus urged the Court to refrain from being more obsessed with strict compliance with procedural rules than concentrating on the merits of the dispute before it. It was his contention that Rule 90 (5) is another technicality altogether and urged us to have in mind Article 107A (2) (e) of the Constitution of the United Republic of Tanzania 1977 (the Constitution) which requires the courts not to be tied up with technicalities which may obstruct the dispensation of justice, adding that the rule should not, therefore, be interpreted to deny the 1st respondent the right to be heard in the intended appeal.

The counsel also charged that the construction of Rule 90 (5) goes against the spirit behind of the overriding objective principle (hereinafter the principle) in our jurisprudence enacted by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 whereby Section 3A of the Appellate Jurisdiction Act [Cap 141 R.E 2002] recapitulated what has been stated in Article 107A (2) (e) of the Constitution. According to him, the use of the principle in this matter would facilitate the attainment of justice as the matter would be determined on merit. He concluded his argument by stating the following to be a

way forward: **one;** inviting the Court to depart from its position as regards the interpretation and applicability of Rule 90 (5), **two;** amending the Rule by re-drafting of the same, arguing that the rule was badly drafted though its intention was good. He insisted that the amendment is necessary so as to reflect its good intention.

Responding to the counsel for the 1st respondent's submission, both Mr. Axwesso and Sanga were at one that though it is true that the Constitution requires the Courts to do away with technicalities in dispensation of justice, also it is the very Constitution which provides that the Court is obligated to act in accordance with the law in performance of its tasks. Mr. Sanga further stated that the Court has already interpreted Rule 90 (5) in various cases and it has become part of our law, since so far, no any changes has been effected to it. It was their contention that the rule is clear and in line with the article of the Constitution cited by Mr. Mpoki, as such, his argument is a misconception and should be disregarded.

Regarding the prayer by Mr. Mpoki for the Court to depart from its position regarding the applicability of Rule 90 (5), they were both of the view that there is no such a need as the same is clear. According to them, this also is not a proper forum for the said call.

Having heard the rival arguments from the counsel of the parties, the basic issue for our determination in this application is whether the first respondent failed to take essential steps in furtherance of his intended appeal thus, rendering his notice of appeal liable to be struck out.

Essentially, the Court derives powers to strike out a notice of appeal of appeal from rule 89 (2) of the Rules under which it is provided as follows:

"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".

Our judicial interpretation of the above cited provision denotes that, a notice of appeal or appeal can be struck out under rule 89 (2) of the Rules, on any of the following grounds:

- 1. That no appeal lies;*

2. *That some essential step in the proceedings has not been taken; and*
3. *That an essential step has been taken but not within the prescribed time.*

In the instant application, it is not disputed that after being dissatisfied with the High Court judgment and decree, the 1st respondent filed the notice of appeal on 25th October, 2019 and on the same day, applied for relevant certified copy for appeal purposes from the Registrar. Since then, the 1st respondent has not filed the intended appeal and no evidence was tendered to show any step taken towards the lodging of the intended appeal, including any follow up with the Registrar on the requested documents, the omission which the applicant averred to be contrary to the requirement in terms of Rule 90 (5). Mr. Sanga supported the application with no reservation as stated earlier.

On the other hand, the counsel for the 1st respondent opposed to the application and attacked the construction of rule 90 (5) of the Rules. According to him, the rule imposes no obligation to follow up with the Registrar once the intended appellant has requested the documents for appeal purpose.

For ease of reference we wish to reproduce Rule 90 (5) as follows:

*"Subject to the provisions of subrule (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 copy upon being informed by the Registrar to do so, **or within fourteen (14) days after the expiry of the ninety (90) days**".*

[Emphasis added].

In the light of the above cited provision, we are of settled mind that, rule 90 (5) of the Rules, expressly places an obligation on the intending appellant who has requested for the relevant documents for appeal purpose and who on expiry of ninety (90) days, has not been informed by the Registrar that the requested documents are ready for collection, to remind the Registrar about his request to be supplied with the documents. It is imperative that he should do so within fourteen days after the expiry of the ninety (90) days. It should also be emphasized that when the appellant takes such a step, there must be a proof to that effect. The position on rule 90 (5) of the Rules, was well articulated by the Court in **Jackson Mwaipyana vs Parcon Limited**, Civil Application No. 115/01 of 2017 (unreported).

Indeed, there is no evidence showing the 1st respondent has done anything in furtherance of his intended appeal, upon which the notice of appeal was lodged by him on 25th October, 2019 in compliance with Rule 90 (5) as rightly submitted by Messrs. Axwesso and Sanga.

We also wish to state that we do not dispute the submission by the counsel for the 1st respondent that procedures are there to serve justice and advance the cause of justice. Equally there is no dispute that the Constitution urges the courts to apply the procedural law in such a manner as to facilitate substantive justice being attained and not to impede it. Nevertheless, procedural rules are enacted to be complied with and not to let parties pay lip service to them, otherwise the very purpose of furthering substantive justice would be defeated. The counsel for the 1st respondent faulted Rule 90 (5) invoked by the applicant for what he calls "another technicality" while he gave no reason as to why he did not follow-up with the Registrar after requesting for the relevant documents for appeal purpose, four years ago, contrary to the requirement under the rule in dispute, and if he did, how and when. It is our firm conviction that the obligation to make follow imposed on the 1st respondent in terms of Rule 90 (5) is too conspicuous to miss it, contrary to what was submitted by the

counsel for the 1st respondent, with much respect. Besides, he has conceded that the intention of rule 90 (5) of the Rules was good. As such the contention of it being badly drafted is hollow and without merit.

The counsel for the 1st respondent also seemed to take refuge to the overriding objective principle in a move to rescue the 1st respondent's notice of appeal from being struck out as prayed. He charged that the objective of the principle is to facilitate just and expeditious determination of cases, which we do not deny. However, it is equally true that in order to achieve the stated goals, compliance with the laid down provisions and rules is inescapable as the principle does not operate to uproot the established procedures. Such compliance ensures one of the objectives of the principle is achieved, namely; expeditious resolution of the matter, contrary to what seemed to be suggested by the counsel with much respect. Gone are the days when intending appellants dawdled after lodging notices of appeal.

The 1st respondent counsel also interrogated the prejudice to the applicant arguing that nowhere has he indicated that he had been prejudiced by the 1st respondent's failure to remind the Registrar to supply the requested documents for appeal purpose. The contention

was strongly opposed by the applicant's counsel. We would not be detained in this issue. Suffice to state that paragraph 13 of the affidavit of the applicant in support of the application reproduced hereunder, speak for itself. It states:

"The existence of the abandoned notice of appeal by the 1st respondent impeded me from enjoying the fruits of my decree issued four years back. That I am an old person with health-related challenges and the said abandoned notice of appeal continue to frustrate me".

Basing on the uncontroverted deposition by the applicant as quoted above, we find Mr. Mpoki's argument to holds no water and we dismiss it accordingly.

Having found that Rule 90 (5) has imposed the obligation on the intended appellant; in this application the 1st respondent, to approach and remind the registrar on the requested documents for appeal purpose, and having found that the 1st respondent did to comply with requirement in terms of rule 90 (5), we are of firm view that the said non-compliance amounts to failure to take an essential step within the meaning of rule 89 (2) of the Rules by the 1st respondent. [See: **Beatrice Mbilinyi vs Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020 and **Rehema Idd Msabaha vs Salehbhai**

Jafferjee Sheikh & Another, Civil Application No. 527/17 of 2019]
(both unreported).

In fine we find the application meritorious. Consequently, in terms of Rule 89 of the Rules, we strike out the 1st respondent's notice of appeal lodged on 25th October, 2019, with costs.

It is so ordered.

DATED at DAR ES SALAAM this 20th day of November, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2023 in the presence of Mr. Mahmoud Mwangia holding brief for Mr. Stephen Axwesso, learned counsel for the applicant, in the absence of 1st respondent and Mr. Gallus Lupogo, learned counsel for the 2nd and 3rd respondents, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL