

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. 501/17 OF 2022

MEHBOOB IBRAHIM ALIBHAI

(As Legal Representative of the late

Ibrahim Gulamhusssein Alibhai) APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF CHAMA CHA MAPINDUZI 1ST RESPONDENT

ISMAIL IDRISA, THE CCM CHAIRMAN-GEREZANI BRANCH .. 2ND RESPONDENT

FATUMA ABUBAKAR, THE SECRETARY,

GEREZANI BRANCH OF CCM-DAR ES SALAAM 3RD RESPONDENT

ABDULRAHMAN TWALIBU 4TH RESPONDENT

[Application to strike out a Notice of Appeal from the Decision of the High Court of Tanzania, Land Division at Dar es Salaam]

(Mutungi, J.)

dated the 29th day of June, 2015

in

Land Case No. 81 of 2008

RULING OF THE COURT

14th & 23rd November, 2023

MWAMPASHI, J.A.:

On 29.06.2015, the applicant herein, obtained a decree against the respondents in Land Case No. 81 of 2008 of the High Court of Tanzania (Land Division) at Dar es Salaam (the High Court). According to that decree, the applicant was declared the lawful owner of House No.107, Plot 11, Block 53, Sikukuu Street, Ilala District, Dar es Salaam and the respondents were ordered to immediately give vacant

possession to the applicant. The applicant was also awarded Tshs. 50,000,000/= as general damages as well as the costs of the suit.

Aggrieved and determined to challenge the above High Court decision, the respondents lodged a notice of appeal on 10.07.2015. They also, for appeal purposes, duly applied for the copy of the proceedings from the Registrar of High Court, Land Division, on 09.07.2015. Vide High Court Miscellaneous Land Application No. 367 of 2015, the respondents, did also, apply for leave to appeal, which was granted on 02.06.2016. Since then, no appeal has been filed by the respondents hence, the instant application.

Believing that the respondents have been inactive, not diligent and have not taken essential steps in furtherance of their intended appeal, the applicant filed the instant application, praying for the notice of appeal which the respondents had earlier filed on 10.07.2015, to be struck out. The application is brought under rules 89 (2) and 48 (1) both of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit affirmed by the applicant. The application is however, strongly resisted by the respondents through an affidavit in reply sworn by their advocate Mr. Roman Selasini Lamwai.

The application, according to the notice of motion, is predicated on the following two grounds:

- 1. No appeal has been filed while documents have been ready for collection since 08.06.2017.*
- 2. That even if the respondents herein have filed the appeal, the record of appeal have not been served to the applicant.*

When the application was called on before us for hearing, the applicant was represented by Mr. Josephat Sayi Mabula, learned advocate, whereas the respondents had the services of Mr. Roman Selasini Lamwai and Ms. Mary Masumbuko Lamwai, both learned advocates.

In support of the application, Mr. Mabula began by adopting the notice of motion, the contents of the supporting affidavit and the written submissions he had earlier filed, to form part of his oral submission. In essence, the gist of the submissions made in support of the application is that, having duly lodged the notice of appeal, requested the copy of the proceedings for appeal purposes, and also having been granted leave to appeal on 02.06.2016, the respondents have failed to file their appeal despite the fact that the copy of the proceedings requested for that purpose, was ready for collection since on 08.06.2017. Mr. Mabula contended that, the relevant letter from the Deputy Registrar of the High Court, Land Division (the notification letter) which is annexure MIA-6 to the supporting affidavit, informing the respondents' advocate that the requested copy of the proceedings

was ready for collection, was served on the respondents' advocate on 15.06.2017. Regarding proof of service of the said letter to the respondents' advocate, Mr. Mabula referred us to the affidavit of the process server one Mr. Yusuph Juma Yusuph and a certified copy of an extract allegedly extracted from the High Court dispatch book, both annexed to the supporting affidavit and appearing at pages 54 and 55 of the record, respectively.

Mr. Mabula insisted that, the respondent have been inactive and not diligent in taking essential steps in the proceedings because even after being aware that the requested copy was ready for collection when the notice of motion, to which the notification letter was annexed, was served on them, they did not collect the requested copy and it took their advocate 77 days to act by perusing the relevant case file. He contended that, having been served with the notice of motion and after being aware that the requested copy was ready for collection since 08.06.2017, the respondents ought to have acted swiftly by collecting the copy and filing their appeal. To concretise this point Mr. Mabula placed reliance on our decisions in **Hellena Adam Elisha @ Hellen Silas Masui v. Yahaya Shabani and Rashid Juma**, Civil Application No. 118/01 of 2019 and **Educational Books Publishers**

Limited v. Hasham Kassam & Sons Ltd and Another, Civil Application No. 498/16 of 2018 (both unreported).

It was concluded by Mr. Mabula that, for the period of almost seven (7) years, the respondents have failed to take essential steps in the proceedings by not collecting the requested copy of the proceedings and hence failing to file their intended appeal. He thus, in terms of rule 89 (2) of the Rules, prayed for the notice of appeal to be struck out with costs.

For the respondents and in response to the submissions made by Mr. Bundala for the applicant, it was Mr. Roman Selasini Lamwai, learned advocate, who took the floor. He prefaced his submissions by first adopting the affidavit in reply and written submission filed on 22.11.2022, to form part of his oral submissions. He then submitted that, the application is baseless and should be dismissed with costs because the respondents have not failed to take any essential step in the proceedings.

Regarding the notification letter which is annexure MIA-6 to the supporting affidavit claimed by the applicant to have been served on the respondents' advocate on 15.06.2017, its service to the respondents' advocate was strongly disputed. It was argued that the letter never reached the advocate for the respondents and therefore

that the respondents were not notified and were not aware that the requested copy was ready for collection. Mr. Lamwai contended further that, he saw the said notification letter for the first time when the notice of motion was served on him. He argued that because he was doubtful about the validity of affidavit of the process server and the certified extract of the dispatch book attached to the notice of motion and also about the authenticity of the notification letter itself, it was not until on 17.11.2022 when his request to peruse the relevant court file was granted, that he became certain that really the said notification letter had been in existence though it had however, never reached them. To substantiate the argument that the request for perusal of the court file was made, reference was made to a letter dated 15.11.2022 annexed to the affidavit in reply as annexure A-1 addressed to the Registrar High Court, Land Division.

The affidavit by the process server tending to prove that the notification letter was served on the respondents' advocate on 15.06.2017 was fiercely attacked by Mr. Lamwai for being valueless for the reason that it was attested by an unqualified advocate. It was explained that, Mr. Marko Frank Mkumbo before whom the process served was affirmed, was by then, not active hence unqualified. To

substantiate this, reference was made to an extract from the judiciary e-WAKILI database annexed to the affidavit in reply as annexure A-2.

The certified extract allegedly extracted from the High Court dispatch book as a proof of service of the notification letter, was also disvalued by Mr. Lamwai. It was contended that, apart from the fact that it is not certain that the said extract was really extracted from the dispatch book of the registry of the High Court of Tanzania, Land Division, the said extract does not show that what was purportedly served on the respondents' advocate was the relevant notification letter.

It was further submitted for the respondents that, since the notice of appeal in question was lodged on 10.07.2015 and as the respondents had duly requested for the copy of the proceedings for appeal purposes through their letter dated 09.07.2015, then the respondents were home and dry. It was pointed out that, by then, once a request for the copy of the proceedings is duly made, there was no requirement for making follow-ups on the availability of the requested copy. To bolster the position, Mr. Lamwai referred us to our decisions in **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [1997] T.L.R. 283 and **Mwananchi Communication Ltd v. New Habari (2006) Limited**, Civil Application No. 61/16 of 2017

(unreported), where it was stated among other things, that, by then there was no legal provision requiring the respondent who had applied to the Registry for a copy of the proceedings to keep reminding the Registry to forward the proceedings and that once rule 83 (now rule 90) was complied with, the intending applicant was home and dry.

Mr. Lamwai concluded by urging us to find that the service of the notification letter was not effected to the respondents and further that it was not until he had perused the relevant case file but when the instant application had already been filed that it certainly came to his knowledge that there was such a notification letter informing the respondents that the requested copy was ready for collection. He pointed out that when he perused the case file, the affidavit by the process server and the extract from the dispatch book were not in the file. He thus argued that, since until then it was not to the respondents' knowledge that the requested copy was ready for collection, it cannot be said that the respondents have failed to collect the copy and file their intended appeal. Mr. Lamwai finally contended that the cases cited by Mr. Mabula are distinguishable. He pointed out that while in **Educational Book Publishers Limited** (supra) the respondents were duly served with the notification letter, in the instant case, there was no service. He also argued that in the case of **Hellena Adam**

Elisha @ Hellen Silas Masui (supra) after being served with the notice of motion, the respondents did nothing and remained totally inactive but in the instant case the respondents conducted a research to verify the status of the advocate before whom the process server was affirmed and perused the court file.

In his rejoinder, Mr. Mabula reiterated his stance that the respondents were duly served with the notification letter through their advocate and that failure to collect the copy of the proceedings amounts to failure to take essential step. He further argued that the notification letter came to the respondents' knowledge when the notice of motion was served on them and still the respondents did not take any essential step by collecting the requested copy and file their intended appeal.

Basically, the issue for our determination in the instant application is whether the application is meritorious, that is, whether the respondents have failed to institute their appeal within the prescribed time resulting in the relevant notice of appeal to be struck out. However, having examined the notice of motion, the affidavits and written submissions filed by the parties as well as the arguments made for and against the application, we are of a considered view that, in determining this application, the issue can be narrowed down to

whether the notification letter from the Deputy Registrar (annexure MIA-6 to the supporting affidavit) dated 08.06.2017 informing the respondents that the copy of the proceedings for appeal purposes was ready for collection, was duly served on the respondents through their advocate.

Before we proceed any further, we find it apt to re-state that the Court derives its powers to strike out a notice of appeal or appeal, as the case may be, from rule 89 (2) of the Rules under which it is provided that:

“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.”

Under rule 89 (2) of the Rules, a notice of appeal can thus, 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, **Kaemba Katumbu v. Shule ya Sekondari Mwilamvya**, Civil Application No. 523 of 2020 and **Maryam Yahya Hussein v. Fatumata Diane Berete**, Civil Application No. 423/01 of 2022 (all unreported).

As we have alluded to earlier, while it is the applicant's case that, despite the fact that the respondents were granted leave to appeal on 02.06.2016 and further that though they were notified through the notification letter served on their advocate on 15.06.2017, that the copy of the proceedings they had requested was ready for collection, the respondents have failed to institute their intended appeal to date. On their part, the respondents' defence has been that the notification letter was never served on their advocate and further that it became certain to them that, really the letter existed, when the case file in which the letter was contained, was perused on 17.11.2022 following service of the notice of motion upon them. The issue, as we have pointed out earlier, is therefore whether or not the notification letter was duly served on the respondents' advocate on 15.06.2017.

In proving service of the said notification letter, the applicant has relied on the affidavit of the process server one Mr. Yusuph Juma Yusuph and the certified extract allegedly extracted from the High Court dispatch book. Having examined the said two documents and after considering the relevant arguments by the counsel for the parties and the averments in the affidavits filed for and against the application, we agree with Mr. Lamwai that, on balance of probabilities, it cannot be certainly said that the notification letter was served on the respondents' advocate on 15.06.2017. Firstly, the affidavit by the process server has no evidential value for being attested by an unqualified advocate. The extract from the judiciary e-WAKILI database (annexure A-2 to the affidavit in reply) clearly show that on 21.05.2018 when Mr. Marco Frank Mkumbo purportedly affirmed the affidavit of the process server, he was not active. This fact has not been denied by the applicant.

Secondly, apart from other shortcomings, there is no evidence that the certified extract of the dispatch book was extracted from the High Court dispatch book. The worst part of it is that the said extract does not show that what was purportedly served on the respondents' advocate was the requested copy of the proceedings because the extract just bears the case number, that is, Land Case No. 81/2008

without more. As alluded to earlier, we thus find that there is no sufficient evidence to prove that the notification letter was served on the respondents' advocate on 15.06.2017 as claimed by the applicant.

We note that there was also an argument by Mr. Mabula that even if the respondents were not served with the notification letter on 15.06.2017, they became aware of it and knew that the copy of the proceedings they had requested was ready for collection in August, 2022 at the time when the notice of motion was served upon them. It was argued that, after being aware of the notification letter which was attached to the notice of motion, the respondent ought to have promptly acted by collecting the copy and filing their appeal failure of which amounts to failing to take essential step in the proceedings. Our observation on this is that, this line of argument raises a new ground which was neither stated in the notice of motion nor in the supporting affidavit. It should be borne in mind that according to the notice of motion and the supporting affidavit the main ground upon which the applicant sought the notice of appeal to be struck out is that while the requested copy of the proceedings for appeal purposes was ready for collection since 08.06.2017 and although the respondents' advocate was served with the notification letter on 15.06.2017, the respondents have failed to institute their intended appeal.

Apart from the above, we agree with Mr. Lamwai that having been served with the notice of motion and after becoming aware of the notification letter together with the affidavit of the process server and the certified extract of the dispatch book, he acted by taking measures to satisfy himself not only on the validity of the affidavit of the process server and the extracted dispatch book but also on the authenticity of the notification letter. He applied for the perusal of the relevant case file (see annexure A-1 to the affidavit in reply) and on 17.11.2022 he perused the file and learnt that it was only the notification letter which was in the file. The affidavit of the process server and the extracted dispatch book were not in the file.

Based on the above observations and considering the circumstances of this case, we are satisfied that the respondents are not to blame. The notification letter was never served on them and it was not until 17.11.2022, at the time when the instant application had already been filed, when it became certain to Mr. Lamwai after perusing the court file, that the copy of the proceedings for appeal purposes they had earlier requested, was ready for collection. The cases of **Hellena Adam Elisha @ Hellen Silas Masui** (supra) cited by Mr. Mabula is therefore distinguishable because in that case the advocate for the respondents Mr. Mtatiro, did not contest that he

became aware of the Registrar's letter notifying them that the requested documents were ready for collection when the notice of motion was served on him. In the instant case, Mr. Lamwai had doubts about the notification letter attached to the notice of appeal and it was not until when he had perused the case file that it became certain to him that the letter had really been issued by the Deputy Registrar. Likewise, the case of **Educational Books Publishers Limited** (supra) is also distinguishable from the instant case. In that case, unlike in the instant case, the respondents claimed that they were not aware of the notification letter and that the requested documents were ready for collection while their former advocate (the late Dr. M. M. Lamwai) had been notified by the Registrar that the documents were ready for collection.

It should also be borne in mind that, in the instant application, the respondents had requested for the copy of the proceedings for appeal purposes, under rule 90 (1) of the Rules on 09.07.2015, before the introduction of rule 90 (5) of the Rules. The respondents were therefore not required by the law to make any follow-ups on the requested copy. Having duly requested for the copy of the proceedings, the respondents were home and dry until when they are notified that the requested copy is ready for collection.

In the final analysis and for the aforesaid reasons, we find that the application is devoid of merit. Under the circumstances of this case, the respondents are not to blame for the delay in instituting their appeal. The application is thus dismissed and costs shall be in the cause.

DATED at DAR ES SALAAM this 22nd day of November, 2023.

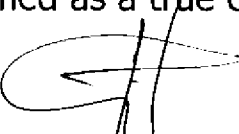
R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2023 in the presence of Mr. Joseph Mbonimpa, holding brief for Mr. Josephat Sayi Mabula, learned counsel for the applicant and Ms. Aziza Msangi, holding brief for Ms. Mary Lamwai, learned counsel for the respondents, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL