

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 584/17 OF 2022

JUVENARY MUGYABUSO
(Administrator of the estates of Francis Kaigwa and
Arodia Francis Kaigwa) APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LTD.....RESPONDENT

**(Application to strike out notice of appeal from the Judgment and Decree
of the High Court of Tanzania, Land Division, at Dar es Salaam)**

(Makuru, J.)

**dated the 12th day of September, 2017
in**

Land Appeal No. 83 of 2016

.....

RULING OF THE COURT

10th November & 7th December, 2023

MURUKE, J. A:

The applicant, Juvenary Mugyabuso, the administrator of the estates of the late Francis Kaigwa and Avodia Francis Kaigwa has filed this application by a notice of motion under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the rules) for an order of the Court to strike out a notice of appeal lodged by the respondent on 19th September, 2017. The notice of appeal is against the decision of the High Court of Tanzania Land Division dated 12th September, 2017, in which the decree was in favour of the applicant.

The application is supported by an affidavit deposed by Genoveva Nomatovu Kato, learned counsel having the conduct of the matter on behalf of the applicant. The respondent filed replying affidavit sworn by John Ignace Laswai, learned counsel, representing the respondent.

Apart from adopting Notice of Motion and supporting affidavit, the applicant's counsel submitted briefly that, the respondent has failed to pursue this Judgment and Decree dated 22nd September, 2017. Notice of Appeal was filed on 19th September, 2017. On 13th September, 2017 and 18th February, 2019, the respondent wrote letters requesting to be supplied with copy of Judgment, Decree and Proceedings for filing an intended appeal. Since then, no further step was taken by the respondent for almost four (4) years. It was further insisted by the applicant's counsel that, the respondent who filed notice had to make a follow up, not just sit and wait.

The applicant's counsel argued that, the respondent was served with Notice of Motion on 22nd October, 2022 but she did not file any affidavit in reply within time. That she waited until the morning of the hearing to serve the applicant with a copy of the affidavit in a reply lodged on 9th November, 2023. In the replying affidavit, it is averred that the respondent wrote several letters to the Registrar, but those letters were

not even copied and served on the applicant contrary to rule 90(3) of the Rules. Four letters attached to the replying affidavit were written after being served with the Notice of Motion. Since the letters requesting necessary copies to the Registrar not copied to the applicant's counsel, it is a proof that no steps were taken. In essence the four letters attached but not served on the applicant should not be considered in the affidavit in reply, insisted Mrs. Kato, counsel for the applicant. In totality, the applicant urged the Court to strike out notice of appeal filed on 19th September, 2017 for failure by the respondent to take essential steps.

Replying, Mr. Laswai counsel for the respondent submitted that, the respondent requested for necessary documents but they were not furnished, as demonstrated by the second letter dated the 18th February, 2019, which is self explanatory.

That, Rule 56 (1) did not specify time to file replying affidavit, thus the respondent cannot be blamed. There is no requirement to serve reminder to the respondent after the first letter being written and served on the respondent. Mr. Laswai further insisted that, they made follow up but they were told that the file cannot be traced.

Having heard both counsel's submissions and gone through the records, the issue is whether the respondent has taken all essential steps after lodging her notice of appeal.

Rule 89 (2) of the Rules provides 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, before or after the institution of the appeal, apply to the Court to strike out the notice of appeal or 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".

There is no dispute that the respondent applied for requisite documents for appeal purposes within prescribed time as evidenced by annexure **JM3** and further reminder annexure **JM4** attached to affidavit in support of the application.

Equally so, there is no dispute that, the respondent further reminded the Registrar, through several letters, the last one is dated 12th October, 2023, few days before hearing of this application.

The applicant's counsel complaints are, one; the replying affidavit was filed out of time, two; subsequent letters written by the respondent's counsel were not copied and served on her.

Starting with issue of time to file replying affidavit. There is no any rule that prescribes the limitation period within which to lodge an affidavit in reply. In our view, such an affidavit must be lodged within reasonable time. In the instant case, we are satisfied that the replying affidavit was duly filed. It is within reasonable time, which the respondent's counsel did after being served, upon change of her advocate.

On the issue of not being copied and served with other subsequent letters insisting supply of requisite documents, this is very clear, there was no requirement to do so. Arguments by the applicant's counsel, that, the four (4) letters not copied to her as counsel for the respondent does not hold water. With respect, the law under Rule 90(5) of the Rules, provides for the first letter and the second letter, to remind the Registrar after expiry of 90 days. For the other letters, although it is prudent to be served on the respondent, however failure to do so, cannot render the same invalid.

The respondent applied in writing for a copy of the proceedings from the Registrar and followed up that request with a reminder to the

Registrar. In our view, the respondent duly complied with the requirements under Rule 90 (5) of the Rules. Thus, the respondent cannot be blamed for not taking any essential step.

In the result, the application to strike notice of appeal is without merits. It stands dismissed with costs.

DATED at DAR ES SALAAM this 29th 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 7th day of December, 2023 in the presence of Ms. Genoveva Kato, learned counsel for the Applicant and in the absence of the Respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL