

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

**(CORAM: MUGASHA, J.A., GALEBA, J.A. And MAIGE, J.A.)**

**CIVIL APPLICATION NO. 35/01 OF 2021**

**THOBIAS PASCHAL MWACHA (as the administrator of  
The estate of the late PASCHAL JONH MWACHA) ..... APPLICANT**

**VERSUS**

**ACCESS BANK TANZANIA LIMITED .....1<sup>ST</sup> RESPONDENT  
TULVIN INVESTMENT COMPANY LIMITED .....2<sup>ND</sup> RESPONDENT**

**(Application for order to strike out a Notice of Appeal lodged by the  
respondent on 2<sup>nd</sup> September, 2019 against the Judgment of the  
High Court of Tanzania, Commercial Division)**

**(Hon. Myambina, J.)**

**Dated 15<sup>th</sup> day of August, 2019**

**in**

**Civil Case No. 151 of 2013**

.....

**RULING OF THE COURT**

*28<sup>th</sup> April & 9<sup>th</sup> May, 2023*

**MAIGE J.A.:**

Pursuant to rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant has moved the Court for an order to strike out the notice of appeal lodged by the respondents on 2<sup>nd</sup> August, 2019 on the ground that; essential steps to pursue the intended appeal have not been

taken within the prescribed time and thus no appeal lies. The application as it is the procedure, was brought by a notice of motion which was substantiated by the affidavit deposed on the applicant's behalf by advocate Thomas Eustace Rwebangira.

The material facts characterizing this application can be narrated as follows. The respondents having lost a suit at the High Court of Tanzania in Civil Case No. 151 of 2013, requested in writing through their advocate, on 16<sup>th</sup> August, 2019, for certified copies of the judgment, decree and proceedings for the purpose of advice. On 30<sup>th</sup> August, 2019, the respondents wrote a reminder letter requesting, for essentially, the same documents now for the purpose of appeal. This was followed by another reminder letter dated 22<sup>nd</sup> November, 2019. On 5<sup>th</sup> October, 2020, it is not in dispute, the respondents received a letter from the Registrar dated 2<sup>nd</sup> October, 2020 to the effect that the documents in question were due for collection.

The applicant claims that; despite the said notification, the respondents had not, until on 16<sup>th</sup> December, 2020, collected the said proceedings and instead, they wrote another letter to the Registrar, on 5<sup>th</sup> November, 2020, suggesting that the documents were not ready for collection which, in view of the applicant and his counsel, was not true. The applicant claims further that; having been supplied with a copy of the

proceedings on 16<sup>th</sup> December, 2020, she, through her advocate, informed the respondents' advocate to that effect, but the latter only insisted that the documents were not ready for collection. The applicant contends that; since the respondents had not, until the date of lodging of the application, instituted the appeal and the 60 days period within which they would have instituted the same had already expired, there is an apparent failure to take essential steps and as such, no appeal lies against the decree in question.

In opposition to the application, the respondents deposed, through advocate Sauli Santu an affidavit in reply and subsequently a supplementary affidavit in reply through advocate Burton Mayage. Essentially, while the respondents admit that indeed they were served with the notification, it is their claim that, after going to the Registrar to collect the same, they discovered that the prepared copy of the proceedings was incomplete in as much as essential documents such as pleadings, exhibits, affidavits of proof, ruling and orders were missing. Therefore, on 5<sup>th</sup> November, 2020, they informed the Registrar on the anomaly as per annexure ABT-1 to the supplementary affidavit and reminded the Registrar thereabout on 28<sup>th</sup> January, 2021 as per annexure ABT-1 thereof. In paragraph 7 of the supplementary affidavit in reply, it is deposed as follows:

*"7. That the 1<sup>st</sup> Respondent had made numerous follow ups which includes meeting with the Registrar/Deputy Registrar and court clerks to be told "we are tracing the file (tunatafuta faili), later on was told "the file has been found but some exhibits are missing we are tracing the same please wait."*

On the date when the matter came before us for hearing, Mr. Thomas Eustace Rwebangira, learned advocate appeared for the applicant whereas Messrs. Sylvester Mlokozi, Humphrey Mwasambona and Howard Msechu, learned advocates appeared for the respondents.

In his oral submissions, Mr. Rwebangira adopted the notice of motion, affidavit and written submissions with some clarifications. In their oral submissions in rebuttal through advocates Mulokozi and Msechu, the respondents adopted the notice of motion, affidavit in reply and supplementary affidavit and reacted on what were submitted for the applicant.

From the notice of motion, affidavit and submissions in chief, the applicant's complaints on the failure of the respondents to take essential steps in pursuit of the appeal is based on two propositions. The first one being that; the applicant's initial request for a copy of the proceedings was irrelevant in so far as the documents were sought for the purpose of advice and not appeal. Mr. Rwebangira on this, placed heavy reliance on the case

of **Mahiku A. Maharagande v. Nyamuhika A. Maharagande**, Civil Application No. 571/01 of 2017 (unreported) to support his view that disclosure of the purpose for which a copy of the proceedings is requested, is an essential element of the request envisaged in the proviso to 90(1) of the Rules.

The second proposition was that; as the respondents had not, until the date of filing the instant application, instituted the intended appeal despite being notified by the Registrar on 5<sup>th</sup> October, 2020 that a copy of the proceedings was due for collection and the 60 days period from the lodging of the notice of appeal having lapsed, the respondents are time barred to institute the intended appeal and, therefore, the notice of appeal should be struck out for failure to take essential steps. In support of his contention, the counsel referred us to the cases of **Puma Energy Tanzania Ltd. v. Diamond Trust Bank Tanzania Ltd**, Civil Appeal No. 54 of 2016 and **Daud Robert Mapunda & 417 Others v. Tanzania Hotel Investment Ltd. & 5 Others**, Civil Application No. 462/18 of 2018 (both unreported). The reminder letter written subsequently, Mr. Rwebangira further submitted, does not add anything in as much as there was no request letter on which a reminder letter could be issued. The counsel invited us in the circumstances, to hold that, the respondents did not request for a copy of

the proceedings and thus, the intended appeal should be deemed time barred and the notice of appeal struck out for want of essential steps.

For the respondents, it was submitted that; although in the initial letter dated 16<sup>th</sup> August, 2019, it was suggestive that the documents were requested for advice, in a subsequent letter dated 30<sup>th</sup> August, 2019, it is was express that the said documents were sought for the purpose of appeal. It was submitted further that; since both the two letters were written within the time limit of 30 days from the date of the judgment sought to be appealed against, it cannot be said that, there was failure on the part of the respondents to timely request for a copy of proceedings.

On the second proposition, it was contended for the respondents that; contrary to what is submitted for the applicant, the respondents did, soon after being notified, take steps to collect a copy of the proceedings but only to establish that some core documents such as pleadings and exhibits were missing. The respondents, it was further submitted, did not remain dormant after establishing missing of some essential documents. Conversely, they notified the Registrar of the High Court to that effect and requested to be availed with a complete record. For the time being, it was added, the intended appeal has already been instituted after the respondents had been supplied with the record on 25<sup>th</sup> October, 2022. He submitted however that, the record availed to the respondents is still incomplete as there are some

missing documents which according to the Registrar got lost. He submitted further that, the issue of loss of such documents is *sub-judice* to the pending appeal.

Having heard the contending submissions between the parties and upon scrutiny of the notice of motion the affidavits both in support and opposition of the motion, we shall hereinafter consider the merit or otherwise the application.

The application at hand, as we said above, has been brought under rule 89(2) of the Rules which allows a person on whom a notice of appeal has been served or ought to have been served, to apply to the Court for the notice to be struck out on the grounds, *inter alia* that, some essential steps in the proceedings have not been taken at all or taken beyond the prescribed time. Under 90(1) of the Rules, the intended appeal has to be instituted within 60 days from the date of lodging of the notice of appeal. Nevertheless, in the same provision, there is a proviso excluding in computation of time limit, upon certification by the Registrar of the High Court, the period when the intended appellant was awaiting to be supplied with a copy of the proceedings. The exclusion, it is express in the said provision read together with sub-rule (3) thereof, conditional upon the intended appellant requesting, in writing, of the said documents, within 30 days from the

decision and serving a copy thereof on the respondent within the same period.

That respondents timely requested for a copy of the proceedings is not in dispute but whether the request falls within the purview of the proviso to rule 90(1) of the Rules is that which is debatable. The complaint here is that, the initial request was for the purpose of advice not appeal. Mr. Rwebangira would wish us to hold that, failure to disclose that, the documents are requested for the purpose of appeal, renders the request letter irrelevant. To that effect, we have been referred to the case of **Mahiku A. Maharagande v. Nyamuhika A. Maharagande** (*supra*) where we observed:

*"The institution of an appeal to this Court envisages a number of processes, including but not limited to, an intended appellant to apply in writing from the High Court to be supplied with the copies of the proceedings, judgment or ruling and decree or order for the purpose of preparing a record of appeal".*

With respect to Mr. Rwebangira, our reading of the above statement does not suggest that it establishes as a principle of law that; failure to state in the request letter that a copy of the proceedings is sought for the purposes of preparing a record of appeal, is a serious omission which denies the intended appellant an exclusion in terms of the proviso to rule 90(1) of the



Rules. Assuming, for the sake of argument that it is, yet the authority is not of any assistance to the applicant as the respondents, before expiry of 30 days, did write another letter to the Registrar of the High Court requesting for a copy of the proceedings. Mr. Rwebangira criticises the letter because it is entitled “a reminder letter” while there was nothing to remind. With respect, we are unable to agree with him. For, there is no format in the Rules of what a request letter should be. That being the case, therefore, what is relevant is the contents and not the form. The title thus does not matter. On that account, we shall dismiss the first proposition.

We now turn to the second proposition. In here, the respondents are blamed to have failed to institute the appeal within the prescribed time despite being notified by the Registrar on the readiness of the records. It is trite law, and the counsel are at consensus that; failure to collect a copy of the proceedings and to institute the intended appeal in time when the documents are due, amount to failure to take necessary steps within the meaning of rule 89(2) of the Rules. We held so in a number of cases including **Mahiku A. Maharagande v. Nyamuhika A. Maharagande** (supra) and **Transcontinental Forwarders Limited v. Tanganyika Motors Limited** [1997] TLR 328. In the latter case we observed as follows:

*"Failure to take essential steps to institute the appeal could either be procedural or evidential. An example could include omission to apply for leave to appeal or certificate on a point of law when one was required: or failure to collect copies of proceedings, judgment or order necessary for the institution of an appeal or failure to lodge an appeal within the prescribed time where the documents are ready."*

Again, whether the respondents were notified on 5<sup>th</sup> October, 2020 that a copy of the proceedings was due for collection is not at issue but the effect of that is that which is contentious. For the respondents, it is submitted, the notification was ineffectual as some of the essential documents were not incorporated in the record. This contention is not unsubstantiated. It is supported by the undisputed letters in annexures ABT-1 and ABT-2 which establish that, the respondents through their counsel, notified the Registrar on the deficiency on 5<sup>th</sup> November, 2020 and 28<sup>th</sup> January, 2021. There was also physical follows up according to paragraph 5 and 7 of the supplementary affidavit in reply both before and after. In the circumstances, it cannot be said that, the respondents remained dormant after being notified by the Registrar on 5<sup>th</sup> October, 2020 of the readiness of a copy of the proceedings which were deficient.

There was also a claim that, the applicant's counsel collected the proceedings and informed the respondents to that effect but the latter

ignored. The applicant could not however plead any document in the affidavit to the effect that he was supplied with a complete record of the proceedings. Such a bare assertion can thus not defeat the claim by the respondents which is substantiated by formal correspondences between them and the Registrar and which were copied to the applicant and his counsel.

In view of the foregoing discussion, we are satisfied that the application is devoid of any merit. It is accordingly dismissed with costs.

Ordered accordingly.

**DATED at DAR ES SALAAM this 5<sup>th</sup> day of May, 2023**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**  
Z. N. GALEBA  
**JUSTICE OF APPEAL**  
I. J. MAIGE  
**JUSTICE OF APPEAL**

The Ruling delivered this 9<sup>th</sup> day of May, 2023 in the presence of Mr. Howard Macfarlane Msechu holding brief for Mr. Thomas Rwebangira, learned counsel for the applicant, and Mr. Howard Macfarlane Msechu learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**