

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A., And MAIGE, J.A.)

CIVIL APPLICATION NO. 317/01 OF 2021

AFRICAN MEDICAL AND RESEARCH FOUNDATION APPLICANT

VERSUS

ANNA FRANCIS EMMANUEL 1ST RESPONDENT

ANGELINA FRANCIS EMMANUEL 2ND RESPONDENT

**(Application for striking out a Notice of Appeal against the judgment and
decree of the High Court of Tanzania at Dar es Salaam)**

(Munisi, J.)

dated the 7th day of September, 2017

in

Civil Case No. 17 of 2011

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RULING OF THE COURT

3rd & 10th May, 2023

MWANDAMBO, J.A.:

The respondents, Anna F. Emmanuel and Angelina F. Emmanuel were aggrieved by the decision of the High Court sitting at Dar es Salaam in a suit instituted by the applicant on a dispute over ownership of land. The High Court entered a judgment on 7/09/2017 in favour of the applicant which resulted into the respondents lodging a notice of appeal on 18/09/2017. The instant application seeks an order of the Court striking out that notice allegedly for failure to take essential steps towards instituting an appeal.

In terms of rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the respondents were required to institute their appeal within 60 days of the date when the notice of appeal was lodged unless they applied for certified copies of proceeding to the Registrar of the High Court for appeal purposes within 30 days of the impugned decision and a copy of their letter was served on the intended respondent. However, the respondents did not institute their appeal within the prescribed time, prompting the applicant to move the Court under rule 89 (2) of the Rules for an order striking out the notice of appeal on the ground that the respondents have failed to take essential steps towards lodging their intended appeal.

The founding affidavit sworn by Gasper Jonah avers that, the respondents did not apply for certified copies of proceedings within the prescribed time and instead, although they did so belatedly on 25/5/2018, a copy of their letter was not served on the applicant. According to the applicant, that constituted a failure to take essential steps towards the institution of the intended appeal warranting the application for striking out the notice of appeal.

Resisting the application, the respondents filed an affidavit in reply deposed to by Sauli Santu Makori, their advocate. Essentially, the deponent to the affidavit in reply avers that the respondents have not instituted the

appeal due to defects in the judgment obtained from the High Court for which they applied for rectification but in vain despite constant follow-ups. Apart from that contention, the respondents have not stated in the affidavit that they applied for certified copies of proceedings from the Registrar for appeal purposes and served a copy on the applicant within the time prescribed by the Rules.

The applicant's learned counsel lodged written submissions in support of the application so did the respondents in opposition ahead of the date of hearing. Mr. Philip Lincoln Irungu, learned advocate who appeared at the hearing of the application representing the applicant urged the Court to grant the application on the basis of the written submissions filed earlier on. The respondents' advocates did not enter appearance but the respondents did and, like the applicant's counsel, they prayed to stand by the written submissions in reply which their advocate had already filed.

We have examined the founding affidavit and the affidavit in reply in the light of rule 89 (2) of the Rules upon which the applicant relies in her application. That rule stipulates:

"(2) 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 step in the proceedings has not been taken or has not been taken within the prescribed time.”

Paragraph six of the affidavit avers that, contrary to rule 90 (1) of the Rules, the respondents applied for certified copies of proceedings on 25/5/2018 which was far beyond 30 days of the date of the delivery of the impugned judgment. Besides, it is contended that, a copy of that letter was not served on the applicant had the original been made to the Registrar within the time prescribed by the Rules.

As alluded to earlier, the fact that the respondents did not make their application to be supplied with certified copies of proceedings has not been disputed. That means that the respondents ought to have instituted their appeal within 60 days reckoned from 18/09/2017 when they lodged their notice of appeal. Since the respondents did not do so, there can be no doubt that the notice of appeal has been rendered worthless with the net effect that no appeal can lie to the Court. With respect, the respondents’ argument premised on the alleged defect in the judgment of the High Court is misplaced in so far as they have not placed any material before the Court establishing their compliance with rule 90 (1) of the Rules. On the contrary, we endorse the submissions by the learned advocate for the applicant supported by our decision in **Beatrice Mbilinyi v. Ahmed Mabkut Shabiby**, Civil Application No. 475/01 of 2020 (unreported). Like in the instant application, in the said decision, the applicant successfully moved the Court under rule 89(2) of the

Rules upon the respondent's failure to comply with 90(1) of the Rules. Satisfied that the respondents had not complied with the rule, the Court granted the application and struck out the notice of appeal. We shall do alike in this application.

Consequently, we grant the application as prayed and hereby strike out the respondents' notice of appeal lodged on 18/09/2017. The applicant shall have her costs of this application.

It is so ordered.

DATED at DAR ES SALAAM this 5th day of May, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 10th day of May, 2023 in the presence of Mr. Philip Irungu, learned counsel for the applicant, 1st respondent present and 2nd respondent reported sick, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL