

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: NDIKA, J.A., LEVIRA, J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 454/02 OF 2018

GURMIT SINGH BHACHU APPLICANT

VERSUS

MEET SINGH BHACHU RESPONDENT

(Application from the decision of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

Dated the 1st day of March, 2016

in

Civil Case No. 9 of 2013

.....

RULING OF THE COURT

6th & 10th February, 2023

MAKUNGU, J.A.:

Before us is an application made under Rule 89 (2) of the Tanzania Court of Appeal Rules 2009 (the Rules). The applicant seeks to have the notice of appeal lodged by the respondent on 16th March, 2016 intending to impugn the decision of the High Court of Tanzania at Arusha in Civil Case No. 9 of 2013 dated 1/3/2016 c/f Probate and Administration Cause No. 5 of 2009 struck out on the ground that no appeal lies or some essential steps have not been taken by the

respondent to lodge the intended appeal in this Court. The application is supported with an affidavit deposed by the applicant.

At the hearing of this application on 6/2/2023, Mr. Bharat B. Chadha and Mr. Alute S. Mughwai, both learned advocates represented the applicant and respondent, respectively.

The respondent through Mr. Mughwai, learned advocate lodged a notice of preliminary objection on 30th January, 2023 to the effect that:

"The notice of motion is legally incompetent since a copy of and supporting affidavit thereof were not served at all upon the respondent in person or through his lawfully authorized agent to enable him to file an affidavit in reply (if any), contrary to rule 55 (1) of the Tanzania Court of Appeal Rules, 2009."

Briefly, the submission of Mr. Mughwai was to the effect that the application is incompetent before the Court because the notice of motion and supporting affidavit thereof were not served upon the respondent or his empowered agent according to the law. He admitted that the notice of motion was served and received by Mr. Colman Ngalo but was returned because he was not duly instructed to act for the respondent. He contended that Rule 55 (1) of the Rules mandatorily requires that the

notice of motion be served on the other party or parties within fourteen (14) days from the date of filing it.

According to Mr. Mughwai, compliance with Rule 55 (1) of the Rules is a mandatory requirement and thus the omission renders the application incompetent. To bolster his argument, the learned counsel cited the cases of **Bank of India (Tanzania) Limited v. Y. P. Road Haulage Limited and 2 Others**, Civil Appeal No. 322 of 2017 and **Mokiri Damas Ngoja v. National Housing Corporation and Other**, Civil Appeal No. 273 of 2018 (both unreported).

In reply, Mr. Chadha submitted that the notice of motion was served on the respondent within the prescribed time. He pointed out that Mr. Ngalo in his affidavit admitted that he received and signed the notice of motion. He maintained that the notice of motion was filed on 13/4/2018 and served on Mr. Ngalo on 19/4/2018, which was six days after the application was lodged. Thus, the notice of motion was duly served within 14 days as required. He urged the Court to find that the service was properly done in accordance with Rule 55 (3) of the Rules. He prayed the objection to be overruled and the hearing of the application to proceed.

In rejoinder, Mr. Mughwai stressed his argument that Mr. Ngalo is not disputing to have been served but the document was received by his assistant and thereafter returned to the applicant for being received in error. He maintained that Mr. Ngalo was not the proper person to receive the said documents and therefore the service was not done according to the law.

We have examined the notice of preliminary objection and taken account of the founding affidavit and all its attachments in the light of the submissions made by Mr. Mughwai. First and foremost, we have noted that the notice of motion was filed on 13/4/2018 and the notice of preliminary objection filed almost five years thereafter on 30/01/2023. Again, the point of objection is based on the facts in the attached affidavit of Mr. Ngalo which is not proper in our view. It is settled that a preliminary objection must be based on facts as apparent on the record. We thus disregard the entire affidavit wrongly attached to the notice of preliminary objection.

The requirement to serve the respondent, with the notice of motion is provided under Rule 55 (1) of the Rules which states thus:

"(1) The notice of motion, affidavit and all supporting documents shall, within fourteen (14)

days from the date of filing, be served upon the party or parties affected."

Clearly, this provision imposes an imperative obligation on the applicant to serve the notice of motion, affidavit and other supporting documents on the respondent within fourteen days of its lodgment. In the instant matter, it is undisputed that the notice of motion and its attachments were served on 19/4/2018 on the respondent through Mr. Ngalo as acknowledged by Mr. Mughwai. We note that following the service, Mr. Ngalo appeared before the Court at hearing on 26/8/2020 representing the respondent.

Curiously, he neither denied to have received the notice of motion and its attachments nor did he notify the Court that he was not instructed or authorized by the respondent to represent him. Without any hesitation, we find the respondent's preliminary objection an afterthought.

In the event, we overrule the point of preliminary objection raised.

We now move to the merit of the application before us, that is, determination of the application for an order that notice of appeal for the intended appeal be struck out on ground that the respondent failed to institute the appeal.

Submitting in support of the application, Mr. Chadha argued that the respondent failed to take essential steps in instituting the appeal because he failed to make follow up on the matter in terms of Rule 90 (5) of the Rules. He contended that, after lodging a letter requesting for copies of proceedings and judgment for appeal purposes, he had ninety (90) days within which he was to wait for the Registrar to supply him with the relevant documents. Thereafter, the respondent had fourteen days to remind the Registrar. However, the respondent did not do so. He, therefore, prayed to the Court to grant the application with costs.

On the other hand, the respondent did not file an affidavit in reply to contest the application. Hence, the averments in the applicant's affidavit supporting the notice of motion are rendered uncontested.

However, Mr. Mughwai in his submission contended that, essential steps had been taken after the judgment was pronounced, in that they lodged the notice of appeal and a letter requesting for proceedings and judgment within time and served copies thereof on the applicant. He added that they filed their application for extension of time before the Court which was granted and the appeal was due to come up for hearing in ongoing sessions.

In this regard, it was Mr. Mughwai's submission that the respondent took essential steps in the proceedings and beseeched the Court to find that the application is unmerited and dismiss it with costs.

In the instant application, we have found that the necessary documents for filing an appeal were ready for collection from 18th September, 2016 and the respondent was very much aware of their availability but by the time this application was filed on 13/4/2018 he had not filed any appeal to this Court. With that omission, we are settled in our mind that, the respondent failed to institute the appeal within the prescribed time. We are mindful that the respondent applied vide Civil Application No. 463/02 of 2018 for extension of time to institute his intended appeal. Although the said application, which was lodged belatedly so as to pre-empt and forestall this application, was initially granted by a single justice of the Court (Korosso, J.A.), the order in favour of the respondent was reversed upon reference to the full Court.

By every yardstick the respondent went to slumber after lodging his notice of appeal only to wake up and seek extension of time to institute the appeal after this application was lodged.

In premises, we find merit in the application. Accordingly, we make an order, in terms of Rule 89 (2) of the Rules that, the notice of appeal lodged by the respondent on 16th March, 2016 be and is hereby struck out with costs.

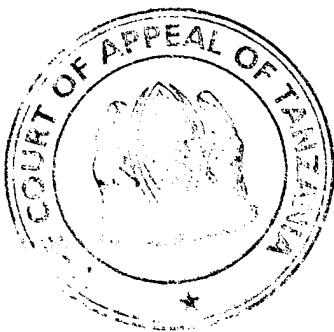
DATED at ARUSHA this 9th day of February, 2023.

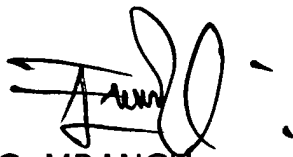
G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 10th day of February, 2023 in the presence of Mr. Bharat Chadha, learned Counsel for the Applicant and Mr. Alute Mughwai, learned Counsel for the respondent is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL