

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., KIHWELO, J.A. And MGONYA, J.A.)

CIVIL APPLICATION No. 498/17 OF 2022

MASOUD MSABAHA ABDALLAH.....APPLICANT

VERSUS

ALLY KONDO MGAIWE.....RESPONDENT

(Application to strike out a Notice of Appeal from the decision of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Maige, J.)

dated the 30th day of October, 2020

in

Misc. Land Application No. 431 OF 2018

.....

RULING OF THE COURT

7th & 14th February, 2024

KIHWELO, J.A.:

The respondent was dissatisfied by the decision of the High Court of Tanzania (Land Division) which was pronounced on 30th October, 2020. In response, he duly filed a Notice of Appeal on the 30th November, 2020 which was served upon the counsel for the applicant on 12th December, 2020.

Thereafter, the respondent took no further action, hence the application at hand in which the applicant seeks to dislodge the respondent's

Notice of Appeal from the annals of this Court for reasons that some essential step in the proceedings has not been taken within the prescribed time.

The application is by notice of motion taken under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is backed by the affidavit of the applicant himself affirmed on 4th July, 2022. The respondent on his part, did not file any affidavit in reply.

Before us, the applicant entered appearance through Ms. Esther Elias Shoo assisted by Ms. Mary Masumbuko Lamwai, both learned counsel. The respondent did not appear despite the fact that notice of hearing was duly served on 19th January, 2024, according to the affidavit of the court process server. Ms. Shoo prayed and was granted leave to proceed with the hearing of the application in the absence of the respondent in terms of rule 63 (2) of the Rules.

Ms. Shoo fully adopted the Notice of Motion as well as the accompanying affidavit in support of the application. Elaborating the applicant's application, Ms. Shoo contended that since the Notice of Appeal was lodged, the applicant has not received a copy of the letter applying for a copy of the proceedings in the High Court in terms of rule 90 (1) of the Rules. To that end, Ms. Shoo submitted that, since the respondent has not

instituted the appeal within the prescribed time as required by rule 90 (1) of the Rules he cannot enjoy the exclusion under rule 90 (3) of the Rules. Accordingly, the learned counsel entreated us to strike out the Notice of Appeal with costs. To support the proposition of her argument, Ms. Shoo cited to us the case of **Rehema Idd Msabaha v. Salehbhai Jafferjee Sheikh and Another**, Civil Application No. 527/17 of 2019 and **Pardeep Singh Hans v Merey Ally Saleh and Others**, Civil Application No. 422/01 of 2018 (both unreported).

Having heard the learned counsel for the applicant, it seems clear to us that the respondent was duly served with the notice of hearing on 19th January, 2024 and yet, for some obscure cause, he adopted a passive stance and made no effort whatsoever to appear nor file any affidavit in reply. Thus, to this end, the factual averments as contained in the applicant's affidavit stand uncontested.

We have dispassionately considered the brief but focused submissions by Ms. Shoo and the main issue which we are invited to address is whether or not the instant application is meritorious. In so doing, we think we should first appreciate what the law on an application for striking out notice of appeal provides:

*"89-(2). Subject to the provisions of sub-rule (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.**"*

[emphasis supplied]

Clearly, the provision above demonstrates that, in an application for striking out the notice of appeal, the Court is invited to consider, on its own perspective whether there is any appeal that lies in respect of the impugned decision or whether the respondent has taken any essential step in the proceedings and if taken whether those steps have been taken within the time prescribed by law. That is the essence of rule 89 (2) of the Rules which has, time and again been interpreted by this Court. See, for instance, **National Housing Corporation v. Miss Lazim Ghodu Shekhe**, Civil Application No. 134 of 2005 and **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 (both unreported).

In the application under our consideration, the respondent lodged his notice of appeal on the 30th November, 2020 which was received and

acknowledged by counsel for the applicant on 12th December, 2020. The instant application was lodged on 26th August, 2022. However, surprisingly and for an obscure cause the applicant has not been served with a copy of the letter indicating that the respondent has applied for a copy of the proceedings in the High Court within the prescribed thirty days as required by rule 90 (1) of the Rules. That being so, it was incumbent upon the respondent to institute the appeal within sixty (60) days from the date when the Notice of Appeal was lodged. As we have already indicated, the Notice of Appeal was lodged on 30th August, 2020 but, having done so, the respondent did not take any further step and, more specifically, he did not, at all, institute the appeal. As to what results from such inaction, we need do no more than reiterate our holding in the case of **Olivia Kisinja Mdetete v. Hilda Mkinga**, Civil Application No. 4 of 2011 (unreported):

"The law is now settled, upon lodging a Notice of Appeal, the intending appellant must not sit back but is required to move the process forward by taking essential steps that have been clearly outlined by the Court of Appeal Rules. The applicant was entitled to move the Court under Rule 89 (2) to strike out a notice of appeal where no essential steps have been taken beyond that notice".

All said, we find merits in the application which we, accordingly, allow.
The Notice of Appeal filed by the respondent is hereby struck out with costs.
It is so ordered.

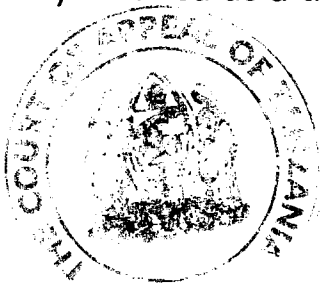
DATED at DAR ES SALAAM this 13th day of February, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 14th day of February, 2024 in in the presence of Ms. Mary Lamwai, learned counsel holding brief for Esther Elias Shoo, learned counsel for the Applicant and in the absence of the Respondent, is hereby certified as a true copy of the original.



A. S. Chugulu
A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL