

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J, MKUYE, J.A. And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 622/08 OF 2022

**FRED MASATU (The Administrator and Beneficiary
of the Estate of Samwel Masatu) APPLICANT**

VERSUS

NIC BANK (T) LIMITED RESPONDENT

**(Application for striking out a notice of appeal from the decision of the
High Court of Tanzania at Mwanza)**

(Ebrahim, J.)

dated the 21st day of December, 2018

in

Land Case Appeal No. 01 of 2015

.....

RULING OF THE COURT

21st & 23rd February, 2024

MKUYE, J.A.

This is an application for striking out a notice of appeal made under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant, herein, seeks to have the respondent's notice of appeal that was lodged on 21/1/2019, struck out on the grounds that:

- 1. No appeal lies to this Honourable Court; and*
- 2. Some essential steps in the proceedings have not been taken in prosecuting the intended appeal within the prescribed period of time.*

The application is supported by the applicant's own affidavit whereas the respondent did not file any affidavit in reply.

Briefly, the applicant instituted a suit in the High Court where the respondent was dragged into that suit as a necessary party. The applicant who had been appointed the administrator of the estate of his late father, before he could embark on distributing the deceased's property, he learnt that one of his siblings had interfered with a house built on Plot No. 94, Block 'F' located at Nyakato, within Mwanza City by selling it to a third party. Before the High Court, among other reliefs, the applicant sought for the setting aside of the sale, perceived by him, to have been illegal.

Having heard both parties, the High Court found in favour of the applicant. It declared the purported sale illegal and the transfer to the buyer, as *null and void*.

Dissatisfied with the decision of the High Court and for purposes of appealing to this Court, the respondent lodged a notice of appeal, which is now the subject of this application.

At the hearing of the application, the applicant was represented by Mr. Anthony Nasimire whereas the respondent enjoyed the services of Mr. Godfrey Daniel Goyayi, both learned advocates.

Before the hearing of the appeal could commence in earnest, Mr. Goyayi rose to inform the Court that they had only been served with the notice of hearing and nothing more. According to him, the applicant was unaware of this application.

On the other hand, Mr. Nasimire was quick to respond by stating that the application was initially served through the respondent's former advocate, one Mr. Mapembe, who had the conduct of the matter in the High Court and it is him, who had filed the impugned notice of appeal. Mr. Nasimire, maintained that, the applicant was aware in advance of this application and prayed that we should proceed with hearing. On reflection, Mr. Goyayi, left it to the Court to make a determination. Considering that the respondent had an obligation to make a follow up over his case, we decided to proceed with the hearing of the application.

On the merits of the application, Mr. Nasimire submitted that besides this matter having been lingering in court for long, the documents (certified copies of proceedings, judgment and decree)

together with a certificate of delay which could have enabled the respondent to lodge the intended appeal had already been issued on 4/3/2020. As for the way forward, upon being directed by the Court to address it on Rule 91(a) of the Rules, he contended that it provides for deeming that the respondent has withdrawn the notice of appeal for failure to file an appeal within the prescribed time. He, thus, beseeched upon the Court to invoke the provisions of Rule 91(a) of the Rules, and deem that the respondent has withdrawn her notice appeal because she has not filed the appeal within the prescribed time. He did not press for costs.

In his response, Mr. Goyayi did not have much to say. He joined hands with Mr. Nasimire and left the matter to the Court to determine.

Having heard the brief submissions of the parties, we are now in a position to tackle the matter. Our determination will be guided by the observation that the respondent does not forcefully resist the application. We wish also to state that, in the absence of an affidavit in reply by the respondent, Mr. Goyayi is precluded from addressing in rebuttal, the issues of fact, save, only, on matters of law. See: **William Getari Kegege v. Equity Bank and Another**, Civil Application No. 24/08 of 2019, **Fransisca Mbakileki v. Tanzania Harbours**

Corporation, Civil Application No. 71 of 2002 and **Finn Von Wurden Petersen and Another v. Arusha District Council**, Civil Application No. 562/17 of 2017 (all unreported). In the latter case, it was stated;

*"... it is settled that where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the contents of the applicant's affidavit.....
Therefore, the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law." [Emphasis added]*

We wish to begin by reciting the obvious that an application for striking out notice of appeal is governed by Rule 89 (2) of the Rules, which stipulates thus:

"Subject to the provisions of subrule (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."

The above provision provides for the relief of striking out a notice of appeal to any other person on whom a notice of appeal has been served 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. This provision in our view, is self-elaborate.

Nevertheless, the scope of applicability of the two scenarios was well discussed in the case of **Hassan Jambia (by his Legal Personal Representative Shafii Ali Num v. TANESCO**, Civil Application No. 78 of of 2013 (unreported), where it was stated as follows:

"...there are two major grounds on which the application to strike out a notice of appeal could be brought. The first is where no appeal lies. This, in our view is a question of law. A simple illustration is where, the order or decision sought to be appealed against is not appealable. The second one is failure to take essential steps to institute the appeal. Essentially, these could either be procedural or evidential. An example would include omission to apply for leave to appeal or a certificate on point of law, where 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."

At this juncture, we pose, and take the liberty to deliberate on the right course to pursue, in light of the observation by Mr. Nasmire which is supported by Mr. Goyayi, that the respondent be deemed to have withdrawn the notice of appeal under Rule 91(a) of the Rules. In our view, much as we may agree that the respondent has not taken essential steps in prosecuting the appeal, there was a revelation from Mr. Nasimire that the documents together with a certificate of delay which could have enabled the respondent to institute the intended appeal had already been issued. It can be taken that the respondent had failed to lodge his appeal even after the necessary documents had been supplied. Rule 91 (a) of the Rules provides:

"91. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time -

(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court orders otherwise be liable to pay the costs of any persons on whom the notice of appeal was served arising from the failure to institute the appeal."

According to the above cited provision of the law, where a party who had initially lodged his notice of appeal fails to lodge his appeal within the prescribed time, he shall be deemed to have withdrawn it. The purpose of this provision, can be said, is to be used to flush out the notices of appeal which have outlived their usefulness. This Court took such stance in the case of **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 (unreported), where like in the matter at hand, the respondent had been supplied with the copy of proceedings together with a certificate of delay but failed to institute the appeal. In its deliberation, the Court did not take the route of striking out the notice of appeal, but rather it deemed it to have been withdrawn. The Court stated that:

"Since the effect of default in instituting the appeal is provided under rule 91(a), we find that the respondent's notice of appeal should be, and it is hereby deemed to have been withdrawn sixty days after its lodgment."

According to what is gathered from the affidavit information, the decision intended to be impugned was handed down on 21/12/2018. Intending to appeal against that decision, the respondent lodged a notice of appeal on 21/1/2019. He also applied for the copies of

proceedings, judgment and decree on the same date. As a general rule, in terms of Rule 90 (1) of the Rules, an appeal thereto ought to have been lodged within sixty days after lodging a notice of appeal. Where an appeal is not filed within the sixty days, and is not excepted under the proviso to Rule 90 (1), the notice of appeal becomes purposeless and lifeless and unless its existence is extended, it must be deemed to be withdrawn. See: **Ramadhani Maabadi and Another v. Maka Serafini**, Civil Application No. 12 of 2015.

In the present case, according to averments from the affidavit and the submission by Mr Nasimire in this Court, the documents together with a certificate of delay which could have enabled the respondent to lodge the intended appeal had already been issued since 4/3/2020. However, up to 13/ 7/2022 when this application was filed, the respondent had taken no essential steps in the proceedings with a view to instituting the appeal. That was a period of almost two years and four months from when the documents and the certificate of delay had been issued. In view of what we have observed above, the said notice has now outlived its usefulness and can no longer be left to remain.

Therefore, in terms of Rule 91 (a) of the Rules, we order that the said notice of appeal is deemed to have been withdrawn upon the expiry of the prescribed period of sixty days after its lodgment for failure by the respondent to institute the appeal upon been issued with the certificate of delay. Given the circumstances of the matter, we order each party to bear its own costs.

DATED at **MWANZA** this 22nd day of February, 2024.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the presence of Mr. Godfrey Daniel Goyayi, learned counsel for the respondent and in the absence of the applicant, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL