

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A., And MGEYEKWA, J.A.)

CIVIL APPLICATION NO. 678 OF 2023

JACKSON LEKEIYA NNKO..... APPLICANT

VERSUS

ASANTAELI SIONE..... RESPONDENT

(Application for an order to strike out the notice of appeal from the Judgment and Decree of the Resident Magistrate Court of Arusha at Arusha)

(Massam, DR – Ext. Jur.)

dated the 22nd day of August, 2022

in

in Land Appeal No. 70 of 2021

RULING OF THE COURT

16th & 23rd February, 2024

MGEYEKWA, J.A.:

By notice of motion made under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant is seeking an order of this Court to strike out the respondent's notice of appeal which was lodged on the 30th August 2022 intending to challenge the decision of Massam, SRM with extended jurisdiction (SRM - Ext. Jur) dated 22nd August, 2022. The notice of motion is supported by an affidavit sworn by Jackson Lekeiya Nnko, the applicant. The thrust of the applicant's prayer is the respondent's

alleged failure to institute the intended appeal within the prescribed time, evidenced by his failure to take essential steps to lodge his intended appeal. The application is not, factually, resisted as the applicant did not file an affidavit in reply.

The facts giving rise to the application are that the respondent had unsuccessfully sued the applicant before the District Land and Housing Tribunal (DLHT) for Arusha at Arusha in Application No. 71 of 2017, in which the applicant was declared the lawful owner of the suit land. Aggrieved, the respondent appealed before the High Court of Tanzania at Arusha. His appeal to the High Court was transferred to the Resident Magistrate's Court of Arusha to be heard by Massam, SRM with extended jurisdiction (SRM -Ext. Jur). The appeal was dismissed. Dissatisfied, on the 30th August, 2022 the respondent lodged the notice of appeal to the Court.

In paragraphs 5 and 6 of the affidavit supporting the notice of motion, the applicant contends that the respondent has failed to do any meaningful action to prosecute the intended appeal. According to the applicant, striking out the notice of appeal is imperative as the same has

been lodged in order to abuse the court process. There is no affidavit in reply from the respondent to dispute the applicant's factual contentions.

At the hearing of the application, the applicant was represented by Mr. Joseph Moses Oleshangay and the respondent appeared in person, unrepresented.

When prompted by the Court as to why he was yet to file an affidavit in reply despite being served with the notice of motion, he informed the Court that he could not lodge it because he was unwell. He prayed for an adjournment to lodge the affidavit in reply. Having reflected on the respondent's prayer for adjournment, we were satisfied that it was evidently without any justification. One year has lapsed since the application was lodged and served on the respondent. On the premises, we declined the prayer for adjournment. On this basis, the respondent was required to argue points of law only.

Submitting in support of the application, Mr. Oleshangay commenced his submission by fully adopting the contents of the notice of motion and the affidavit in support of the said notice of motion. The learned counsel was brief and reiterated that todate, the respondent has not taken any

essential steps to lodge an appeal in respect of the notice of appeal lodged by him on 30th August 2022. He valiantly contended that the respondent lodged the notice of appeal on 30th August, 2022 and since then, he has not taken any essential steps to lodge the intended appeal. To reinforce his submission, Mr. Oleshangay referred to us the case of **Rehema Iddi Msabaha v. Salehibhai Jafferjee Sheikh & Another**, Civil Application No. 527/17 of 2019. He forcefully argued that the applicant cannot proceed to execute the High Court decree.

In conclusion, Mr. Oleshangay beckoned upon us to grant the applicant's application and strike out the notice of appeal on account of the respondent's failure to take essential steps in filing the intended appeal.

In reply, the respondent admitted that he has not taken any further steps from when he lodged his notice of appeal. However, he beseeched the Court's indulgence to salvage her notice of appeal and had no legal points to argue in respect of the application.

We have dispassionately considered the submissions of the parties in support and opposition to the application. The main issue 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), a respondent or other person on whom a notice of appeal has been served may at any time, either before or after institution of the appeal, apply to the Court to strike out the notice or 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"

Guided by the above provision of the law, it is imperative to stress that, in an application for striking out the notice of appeal, the Court is required to consider, whether the respondent has taken any essential step to lodge the intended appeal before the Court. That is the essence of rule 89 (2) of the Rules. See, **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 30th August 2022, and the instant application was lodged on 14th August 2023. The applicant's counsel informed the Court that to-date, after a lapse of approximately one year now, the applicant has not taken any essential steps to lodge his intended appeal before the Court. In terms of rule 90 (1) of the Rules, after the respondent has lodged the notice of appeal, the law requires him to lodge his appeal within sixty days from the date on which the notice of appeal was lodged. In its words the provision which has been coached in mandatory terms reads;

"90(1)- subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate Registry, within sixty days of the date when the notice of appeal was lodged with-

- (a) A memorandum of appeal in quintuplicate:*
- (b) The record of appeal in quintuplicate:*
- (c) Security of the costs of the appeal.*

Save that where an application for a copy of the proceedings in the High Court has been made within 30 days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as

may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.”

It is apparent in line with the wording of the above quoted provision of the law that, the respondent was obliged to institute the intended appeal in respect of the notice which he lodged, within sixty days from 30th August 2022 which he has failed to do to date. The respondent could only be spared, if he fell within the exception provided under the proviso to the above quoted Rule that is, if he was waiting to be supplied with copy of proceedings to facilitate the lodgment of the appeal.

Unfortunate, on the part of the respondent, there is no evidence to establish that he can benefit from the exception provided under the proviso to rule 90 (1) of the Rules, in that there was no application to the High Court asking for such documents and a copy served to the applicant.

Under the circumstances, undoubtedly, there is merit in the application by the applicant that, the respondent has failed to take essential steps to prosecute his appeal. Faced with similar situation, this Court in the case of **Asmin Rashid v. Boko Omari** [1997] T.L.R 146 held that:

"Nothing essential had been done since 25th April 1996 to prosecute the appeal for the whole year and the notice had to be struck out."

In the same vein, in the case of **Olivia Kisinja Ndete v. Hilda Mtunga**, Civil Application No. 4 of 2011 (unreported) the Court held:

"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."

The above stance was also emphasized in the decisions of the Court in **The Registered Trustees of Chama Cha Mapinduzi v. Christina Ngilisho**, Civil Application No. 153/05 of 2017 and **Timothy Daniel Kilumile Co. Ltd v. Hillary Patrice Otaigo t/a Nyakanga Filling Station**, Civil Application No. 365/16 of 2017 (both unreported).

Concluding, we find that the respondent has failed to take essential steps towards lodging his intended appeal. We, therefore, grant the

application with costs and consequently, in terms of Rule 89 (2) of the Rules, we strike out the respondent's notice of appeal lodged on 30th August, 2022.

It is so ordered.

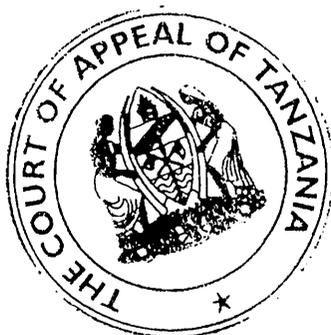
DATED at **ARUSHA** this 23rd day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the presence of Mr. Joseph Moses Oleshangay, learned counsel for the Applicant, and Mr. Asantaeli Sione Respondent unrepresented present in person, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL