

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: LEVIRA, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CIVIL APPLICATION NO. 671/01 OF 2023

**MBILIMA CRISPO MUNYAGA..... APPLICANT
VERSUS**

VERDIANA MBILIMA..... RESPONDENT

**(Application to strike out notice of appeal against the decision of the High
Court of Tanzania at Dar es Salaam)
(Luambano, DR.)**

dated the 14th day of March, 2023

in

Civil Review No. 6 of 2022

RULING OF THE COURT

18th & 26th March, 2024

LEVIRA, J.A.:

By a notice of motion made under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant moves the Court to strike out the notice of appeal filed by the respondent on 6th April, 2023 against the decision of the High Court of Tanzania at Dar es Salaam in Civil Review No. 6 of 2022. The notice of motion is supported by the applicant's affidavit. The respondent did not file affidavit in reply.

Briefly, the background of this matter is as follows: The applicant and the respondent herein, were husband and wife, respectively. Their marriage subsisted for almost fifteen years from September 1993 to 2008, when the applicant became dissatisfied with the respondent's changed behavior and character, for according to him, the respondent no longer loved or respected him. As a result, he successfully petitioned for divorce in the Resident Magistrates' Court of Dar es Salaam at Kisutu. Aggrieved by the decision of the trial court, the respondent appealed to the High Court of Tanzania at Dar es Salaam vide Civil Appeal No. 118 of 2016. Her appeal was partly allowed. Still aggrieved, the respondent filed a review application before the High Court following the applicant's successful application for execution of the decree of the High Court. The respondent was again aggrieved by the outcome of the review application, hence filed to the Court a notice of appeal, subject of the present application.

At the hearing of the application, the applicant was represented by Mr. Kay Mwesiga Felician holding brief for Mr. Edward Maiga Liso, both learned advocates with instructions to proceed with the hearing of the

matter; whereas, the respondent had the services of Mr. Abraham Hamza Senguji, also learned advocate.

At the outset Mr. Senguji complained that although the matter was set for hearing, he was not served with any document in this matter including the notice of motion. That is why, he added, he did not file an affidavit in reply. On his part, Mr. Felician submitted that the notice of motion and the supporting affidavit were received by one Mr. Henry Kitambwa, an advocate working at Mr. Senguji's office on 12th September 2023. He also submitted that the said Mr. Kitambwa stamped with his personal stamp on the notice of motion to acknowledge service of the documents.

In rejoinder, without citing any law, although in place, Mr. Senguji stated that such service was not proper service because, the person who effected the service is not known as there was no affidavit of service submitted in Court. His point was twofold; **one**, that he did not have any documents with him otherwise he would have filed an affidavit in reply, and; **two**, legally there was no sufficient or provable service on record.

Instead of hearing the application, this Court was compelled to consider whether indeed, the notice of motion was legally served on the

respondent or her counsel. We will start off with Rule 55 (1) of the Rules.

That provision states as follows:

*"55.- (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."*

[Emphasis added]

In other words, as this application was lodged on 12th September, 2023, the notice of motion, the supporting affidavit and the documents attached to the affidavit had to be served on the respondent within fourteen days from that date. Mr. Felician was of the view that, as long as Mr. Kitambwa signed and stamped the copy of the notice of motion, then that was sufficient proof of service. Mr. Senguji was of a contrary view. At this point, we think it is appropriate to venture into the rules and see what amounts to proof of service where receipt of documents is denied and the process server is unknown.

Service of the Court process generally is covered under Rule 22 of the Rules. The specific provision on how one may prove that service of the Court process was actually effected on the recipient, is Rule 22 (6) of the Rules. That provision is to the following effect that:

"(6) Proof of service may be given where necessary by affidavit, unless in any case the Court requires proof by oral evidence."

[Emphasis added].

The onus, to prove that service was indeed carried out, lies on the person affirming that indeed the service was carried out. In terms of the above provision, proof of service ought to have been by an affidavit of the Court process server who served the notice of motion swearing that, he served the respondent or his advocate. We have inspected the record and we have not been able to trace any affidavit on that aspect. In any event, Mr. Felician had admitted that there was no such affidavit.

In our view, as the service stands contested and as Mr. Felician, did not obtain an affidavit of service of the process server, who effected the service, we are unable to agree with him that he complied with the requirements of Rule 22 (6) of the Rules. Further, as it does not seem to be any lawful service upon the respondent or her counsel, within fourteen days of filing the application, Rule 55 (1) of the Rules, was breached.

Consequently, since there is no evidence that this application was served on the respondent or her counsel within fourteen days from the date when it was filed in this Court, the same is incompetent and we strike

it out with no order as to costs as the matter stems from a matrimonial cause.

DATED at DAR ES SALAAM this 25th day of March, 2024.


M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 26th day of March, 2024 in the presence of the respondent appeared in person and in the absence for the applicant, is hereby certified as a true copy of the original.




A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL