

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: NDIKA, J.A., FIKIRINI, J.A., And ISSA, J.A.)

CIVIL APPLICATION NO. 710/01 OF 2023

OILCOM TANZANIA LIMITED APPLICANT
VERSUS

ORYX OIL COMPANY LIMITED 1ST RESPONDENT

ORYX ENERGIES SA 2ND RESPONDENT

**(Appeal from the Ruling and Order of the High Court of Tanzania, District
Registry at Dar es Salaam)**

(Ismail, J.)

dated the 18th day of October, 2022

in

Miscellaneous Civil Cause No. 138 of 2022

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RULING OF THE COURT

15th March & 9th April, 2024

NDIKA, J.A.:

Oryx Oil Company Limited and Oryx Energies SA, the respondents, were dissatisfied with the decision of the High Court of Tanzania, District Registry at Dar es Salaam ("the High Court") dated 18th October, 2022 in Miscellaneous Civil Cause No. 138 of 2022. By that decision, the High Court dismissed the petition filed by the respondents seeking the removal of Prof. Mussa Juma Assad as an arbitrator in ongoing arbitration proceedings between the respondents and the applicant, Oilcom Tanzania

Limited. The respondents formally filed a notice of appeal on 28th October, 2022, informing this Court of their intention to appeal against the aforementioned decision. Conversely, the applicant now moves us to strike out the said notice of appeal on the ground that:

"the respondents have failed to institute the [intended] appeal within sixty days from the date of lodging the notice of appeal as prescribed under rule 90 (1) of the Tanzania Court of Appeal Rules, 2009."

An advocate who conducted the case before the High Court on behalf of the applicant, Mr. Thobias Laizer, swore an affidavit in support of the application. The deponent not only acknowledged that the respondents had appropriately filed the aforementioned notice of appeal but also conceded that on 19th October, 2022, the respondents had properly requested certified copies of the contested ruling, proceedings, and drawn order. In addition, the affidavit provides the following in paragraphs 5 through 11:

"5. That, on 18th October, 2022, our firm wrote a letter to the [High] Court requesting the ruling and drawn order and the same was supplied as requested."

6. *That on 10th July, 2023, our firm again wrote a letter to the Registrar of the High Court requesting copies of proceedings and we were served with the said documents on 19th July, 2023. Annexed hereto and collectively marked OC-2 are photostat copies of the said letter, covering letter from the Court and proceedings.*
7. *That it is, therefore, apparent that copies of the ruling, drawn order and proceedings were ready for collection way back, even before we collected the same from the Court on 19th July, 2023.*
8. *That more than ten (10) months have elapsed since the respondents lodged the notice of appeal and there has been no progress in advancing the appeal, nor has any plausible reason been provided for the significant delay.*
9. *That the respondents' failure to collect the ruling, proceedings' and drawn order coupled with the protracted period of inactivity signifies a lack of genuine intention to pursue the appeal and amounts to an abuse of the appellate process.*

10. *That according to my understanding and in the circumstances of this matter, the respondents should have instituted the appeal within sixty days of lodging the notice of appeal, that is to say, on 27th December, 2022 at the latest.*
11. *That the respondents have not, as of the date of this application, almost ten (10) months from the date they lodged the notice of appeal, instituted the appeal contrary to the mandatory provisions of the Tanzania Court of Appeal Rules, 2009.”*

Ms. Antonia Kilama, the Head of the Legal Department and Company Secretary of the first respondent, swore an affidavit in opposition to the application on behalf of the respondents. Ms. Kilama, noting portions of paragraphs 5 and 6 of the supporting affidavit, asserted that the applicant did not deliver copies of its letters dated 18th October, 2022 and 10th July, 2023 to the respondents. Additionally, she claimed that the respondents did not receive a copy of the drawn order until 15th January, 2024, which suggests that it was not yet ready until then. The position of the respondents is elaborated upon in the following manner in paragraphs 7 through 11 of the affidavit in reply:

"7. *The contents of paragraph 7 [of the supporting affidavit] are denied. I state that the respondents requested to be supplied with copies of the ruling, drawn order and proceedings for purposes of filing an appeal on 19th October, 2022. However, the same were not supplied to the respondents and therefore on 6th March, 2023 and 5th January, 2024, the respondents wrote letters reminding the High Court to supply the respondents the requested documents for appeal purposes. It is therefore denied that all the requested documents were ready to be provided to the respondents on any date other than 17th January, 2024 when a letter was written to the respondents' counsel advising that the documents were ready. The letter of 19th July, 2023 was never copied to the respondents. Copies of the letters dated 19th October, 2022, 6th March, 2023 and 5th January, 2024 are attached herein and marked as **Annexure Oryx-2**.*

8. *I further state that on 17th January, 2024, the High Court notified the respondents that the requested documents were ready for collection and accordingly issued a certificate of delay dated 17th January, 2024, certifying the period*

*between 21st October, 2022 and 17th January, 2024 to be excluded in computing the time for filing the appeal before the Court of Appeal. A copy of the letter and certificate of delay are attached herewith marked **Annexure Oryx-3**.*

9. *The contents of paragraphs 8 and 9 of the applicant's affidavit are denied. I state that the respondents have been diligently pursuing the appeal since the filing of the notice of appeal on 28th October, 2022 by writing to the High Court seeking to be supplied with the necessary documents for purposes of filing the appeal. The documents requested were accordingly supplied to the respondents on 17th January, 2024 through a letter dated 17th January, 2024 attached above as part of **Annexure Oryx-3**.*

10. *I further state that following receipt of the requested documents necessary for filing of the appeal, on 23rd January, 2024 the respondents filed Civil Appeal No. 47 of 2024 before the Court of Appeal at Dar es Salaam. The appeal is scheduled for hearing on 15th March, 2024. It is therefore denied that the respondents have failed to take necessary actions to pursue the appeal.*

11. the contents of paragraph 10 of the [supporting] affidavit are denied. I state that from the date the respondents were supplied with the documents necessary for filing the appeal, i.e., 17th January, 2024, the respondents had sixty days within which to file the appeal. The appeal, which was filed on 23^d January, 2024, was, therefore, well within time required for filing appeal before the Court of Appeal of Tanzania."

Mr. Laizer, who represented the applicant in conjunction with Mr. Anthony Mark and Ms. Oliver Mark, learned advocates, essentially made two points. Initially, he criticised the respondents for failing to remind the Registrar of their request for a copy of proceedings within fourteen days after the expiration of the initial ninety-days period during which the Registrar is obligated to provide the requested documents. He stated that this constituted a violation of rule 90(5) of the Tanzania Court of Appeal Rules, 2009 (hereinafter "the Rules"). Further elaborating, Mr. Laizer contended that the Registrar was obligated to provide the requested copy of proceedings within a period of ninety days, from the date of filing the request on 19th October, 2022, until approximately 26th January, 2023. That the respondents were, then, obliged to follow up with the Registrar

regarding their request within fourteen days of the aforementioned period expiring, which occurred on or around 9th February, 2023, but the respondents took no action. Although he acknowledged that the respondents submitted a reminder to the Registrar dated 6th March, 2023, he argued that the aforementioned action was made twenty-five days late with no explanation provided. He urged us to hold that following the submission of their request on 19th October, 2022, the respondents reclined back and relaxed.

The second limb of Mr. Laizer's argument was founded upon the claim in paragraph 6 of the supporting affidavit. That on 19th July, 2023, the Registrar provided the aforementioned documents to the applicant, who had refreshed its initial request for a copy of proceedings dated 18th October, 2022 by a reminder dated 10th July, 2023. We construed his statement to imply that the documents were ready by 19th July, 2023. On this basis, he argued that the respondents did not collect the documents despite being aware that they were available for collection. Mr. Laizer cited several cases to support his submission, including **Hellena Adam Elisha @ Hellen Silas Masui v. Yahaya Shabani & Another**, Civil Application No. 118/01 of 2019 [2021] TZCA 669 [11 November 2021; TanzLII], in which the court struck out an impugned notice of appeal. The

Court considered the Registrar's communication to the applicant that the documents were available for retrieval, as well as the respondents' receipt of the said communication. However, the respondents in that case dawdled for months instead of following up with the Registrar.

With the assistance of Ms. Faiza Salah, learned counsel, Mr. Gaspar Nyika, learned advocate, fervently opposed the application. Fundamentally, he contended that the applicant's argument, which was based on an alleged violation of rule 90(5) of the Rules, was not pleaded in the notice of motion. Therefore, he strongly urged us against giving it any consideration. Furthermore, Mr. Nyika asserted, with reference to the claims made in paragraphs 6 to 11 of the affidavit in reply, that the respondents conscientiously pursued their intended appeal by notifying the Registrar via reminders dated 7th March, 2023 and 5th January, 2024. Furthermore, he asserted that the Registrar delivered the complete set of the requested documents and the certificate of delay on 17th January, 2024. He insisted that while the majority of the documents may have been completed earlier, the drawn order would not be available until 17th January, 2024.

Regarding the interpretation and application of rule 90(5) of the Rules, Mr. Nyika cited **State Oil Tanzania Limited v. Equity Bank**

Tanzania Limited & Another, Civil Application No. 426/16 of 2022 [2022] TZCA 712 [18 November 2022; TanzLII] and **Kaemba Katumbu v. Shule ya Sekondari Mwilavya**, Civil Application No. 523 of 2020 [2021] TZCA 312 [16 July 2021; TanzLII]. In the preceding decision, the Court determined that the intending appellant's role in obtaining a copy of the proceedings pursuant to rule 90(5) of the Rules is auxiliary or secondary, not primary or fundamental, whereas the Registrar is responsible for processing and providing the documents. Therefore, Mr. Nyika argued that each case must be decided on its own facts while maintaining in mind that the Registrar is primarily obligated by law to provide the requested documents punctually. In reference to the applicant's cited case of **Hellena Adam Elisha** (*supra*), Mr. Nyika rejected its relevance to the present issue on the grounds that, whereas in that case all documents were prepared for collection and the respondents were duly informed of this, the drawn order for the instant case did not become available until 17th January, 2024.

In relation to the second component of the applicant's argument, Mr. Nyika argued that the respondents were previously oblivious to the correspondences between the applicant and the Registrar because they were not served with any copies of the two letters in question. He further

stated that even if the respondents had been aware of the aforementioned correspondences, the drawn order remained unavailable for collection until the Registrar informed them on 17th January, 2024, that all the requested documents were available for collection.

Initially, it is settled that the Court has the authority, pursuant to rule 89 (2) of the Rules, to strike out any notice of appeal or appeal on the grounds that *"no appeal lies"* or *"some essential step in the proceedings has not been taken or has not been taken within the prescribed time."* This authority may be exercised upon application by any person on whom a notice of appeal was served or ought to have been served. For clarity, we extract the said provision as follows:

*"(2) 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.**"* [Emphasis added]

The central question in this matter is whether the respondents violated rule 90 (1) of the Rules by failing to file their intended appeal within sixty days of the date they filed the challenged notice of appeal on 28th October, 2022. Failure to do so would render that notice of appeal susceptible to being struck out.

We have thoroughly examined the notice of motion, the supporting affidavit, and the affidavit in reply in order to reach our determination of the matter, taking into consideration the opposing arguments presented by the learned counsel.

Commencing with the assertion made by Mr. Laizer regarding the alleged failure to adhere to rule 90(5) of the Rules, we acknowledge the validity of Mr. Nyika's contention that the aforementioned complaint was not stated explicitly and specifically in the notice of motion. It unexpectedly emerged during the submission by Mr. Laizer. As previously stated, the applicant's motion was based on the broad claim that the respondents neglected to institute the intended appeal within the sixty-days period following the date on which the notice of appeal was lodged, as required by rule 90 (1) of the Rules. The applicant failed to allege any violation of rule 90(5) of the Rules in either the notice of motion or the supporting affidavit. Surely, the respondents were unaware of the matter

and can be absolved of responsibility for failing to address it in their affidavit in reply.

We now turn to the second limb of Mr. Laizer's argument. Two aspects are evident in this regard. Initially, although the supporting affidavit asserted that the Registrar notified the applicant via letter dated 19th July, 2023 that the requested copy of the proceedings was available in response to its request dated 10th July, 2023, there is no evidence to suggest that the respondents were duly copied and served with the aforementioned letter. It cannot be deduced from this that they possessed knowledge of the letter's contents. Thus, they cannot be blamed for not acting in response to the applicant allegedly being supplied with the documents on 19th July, 2023.

Furthermore, despite the applicant having obtained a set of the requested documents on 19th July, 2023, Mr. Laizer candidly admitted during the hearing that the drawn order was not contained in the set provided by the Registrar. Considering this information, we are inclined to concur with Mr. Nyika's claim that the drawn order was not ready for collection until 17th January, 2024, when the Registrar ultimately delivered the complete set of requested documents and the certificate of delay. Considering the certificate of delay's exemption of the time span from 21st

October, 2022 to 17th January, 2024 from the calculation of the prescribed sixty-days period for instituting an appeal, the appeal filed by the respondents, identified as Civil Appeal No. 47 of 2024, was properly lodged on 23rd January, 2024. Because reckoning the said prescribed period from 17th January, 2024 as per the certificate of delay, the appeal was lodged on the sixth day.

As a result, we have determined that the application lacks merit and hereby dismiss it with costs.

DATED at DAR ES SALAAM this 9th day of April, 2024.

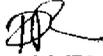
G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

Ruling delivered this 9th of April, 2024 in the presence of Ms. Oliver Mark, learned counsel for the applicant, Mr. Gasper Nyika learned counsel for the Respondents, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL