

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. 605/01 OF 2022

NASSER EDWARD MWAKAMBONJA

(the Legal Representative of **MAGRETH MKIMA**).....**APPLICANT**

VERSUS

SAADA BAKARI.....RESPONDENT

**(Application from the decision of the High Court of Tanzania at
Dar es Salaam)**

(Wambura, J.)

dated the 10th day of October, 2010

in

Civil Appeal No. 140 of 2008

.....

RULING OF THE COURT

15th March & 9th April, 2024

FIKIRINI, J.A.:

The applicant, through a notice of motion, has preferred this application according to rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), seeking the Court to strike out the notice of appeal lodged on 26th November, 2018, as the respondent failed to take essential steps to ensure the intended appeal was filed. An affidavit, sworn by Nasser Edward Mwakambonja (the Legal Representative of Magreth

Mkima), supports the application. Mr. Florence Aloyce Tesha, a learned advocate, swore an affidavit in reply on behalf of the respondent, contesting the application.

In the affidavit supporting the application, the applicant stated that the respondent, whose notice of appeal was lodged on 25th October, 2010, was struck out on 8th September, 2016 by this Court. Following that the respondent, through omnibus applications in Miscellaneous Civil Application No. 699 of 2016, sought various orders, including an extension of time to lodge a new notice of appeal and service of the intended notice on the applicant out of time. Other prayers were extension of time to lodge and serve the applicant out of time with a letter to the Deputy Registrar of the High Court (the Registrar) requesting to be furnished with copies of proceedings, judgment, decree and extension of time to apply for leave to appeal to the Court of Appeal out of time. All the prayers were granted on 19th November, 2018.

On the 30th November, 2018, the respondent vide Miscellaneous Civil Application No. 759 of 2018, applied for leave to appeal to the Court of Appeal out of time. The application was granted on 22nd October, 2019.

Subsequently, on 23rd October, 2019, the respondent wrote to the Registrar requesting copies of the proceedings, ruling, and order made in Miscellaneous Civil Application No. 759 of 2008. However, this letter was not served on the applicant within the prescribed time, thus violating the law. Since then, the respondent has been unable to collect the necessary documents or lodge the intended appeal within the prescribed period of sixty (60) days. And, if any appeal was lodged, it was done out of time and without service on the applicant. Due to the failure to take essential steps, no appeal lies before this Court. The notice of appeal lodged on 26th November, 2019 should thus be struck out.

In the affidavit in reply, accompanied by a notice of preliminary objection, which was later withdrawn, the respondent admitted, under paragraphs 8, 9, and 13, that leave was granted as requested and efforts were made to secure the necessary documents from the Registrar. The respondent claimed to have served the applicant with the initial letter and subsequent reminders.

During the hearing, Messrs. Francis Mgare and Florence Aloyce Tesha, learned advocates, represented the applicant and the respondent, respectively.

Addressing the Court, Mr. Mgare argued that there was no proof that the letter to the Registrar, dated 23rd October, 2019, requesting necessary documents, was received by the Registrar and served on the applicant, therefore benefits enjoyed under rule 90(1) of the Rules, would not apply. Reinforcing his point Mr. Mgare cited the case of **Mapesa Saidi Matambo & Another v. Rose Ally Nyabange** [2017] T. L. R. 300. And relying on **The Principal Secretary, Ministry of Defence v. Devram Valambhia** [1992] T. L. R. 387, he underscored his submission that the consequences of failure to serve the letter requesting the supply of the necessary documents within the prescribed time could lead to striking out the notice of appeal under rule 89 (2) of the Rules, for failure to take essential steps.

Adamant that no essential steps were taken, Mr. Mgare referred us to the case of **Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby, Civil Application No. 475/01 of 2020** (unreported) in which the Court considered the failure to serve the notice of appeal and/or a letter

requesting for a copy of the certified proceedings and collecting the requested documents upon notification that they were ready for collection, tantamount to failure to take essential steps.

Disputing the submissions, Mr. Tesha insisted that the applicant was duly served with a notice of appeal and the letter requesting necessary documents and reminders thereof as averred in paragraph 13 of the affidavit in reply. These include the letters dated 5th December, 2018 right after the grant of the application for leave to lodge appeal out of time. This was followed up with a reminder letter dated 7th March, 2019 and served on the applicant on 8th March, 2019. A second reminder, dated 12th March, 2021 was served on the applicant on the same day, he was thus wondering why Mr. Mgare did not want to highlight that position. Regarding the applicability of rule 90 (1) of the Rules, Mr. Tesha argued that even after the initial notice of appeal was struck out, the Registrar still had the authority to issue a certificate of delay. Mr. Tesha concluded by stating that the respondent could only apply for an extension of time once all necessary documents were supplied to the party. Since they were not provided, nothing could be done. He prayed for the application to be dismissed and

urged the Court, pursuant to rule 4 (2) of the Rules, to examine the record of proceedings and consider the irregularities and illegalities.

In rejoinder, Mr. Mgare maintained that there was no service of the notice of appeal or the letter to the Registrar, as averred in the respondent's affidavit and counsel's oral submission. He disputed the validity of the letter marked as annexure "D," stating that it lacked a stamp to show it was received by the Registrar. Mr. Mgare also dismissed the relevance of other reminder letters, as some were sent after more than a year had passed.

From the affidavits filed and submissions made, we have gathered a couple of uncontested facts which are: that the initial notice of appeal, lodged on 25th October, 2010 after the first appellate court had rendered its decision on 15th October, 2010, was struck out on 8th September, 2016. Although Mr. Mgare in paragraph 3 of the affidavit in support of the application averred to have annexed both the notice of the appeal and this Court's order striking out the notice of appeal collectively marked as annexure "C", unfortunately, the copy of this Court's order was not annexed. The respondent, has however, not contested the assertion, that

the previously lodged notice of appeal was struck out. There is also no dispute that after the striking out of the notice of appeal the respondent as a practice was to start afresh. And indeed, that is what the respondent did. As averred in paragraph 4 of the affidavit in support the respondent sought and was granted extension of time among other things to file for leave to lodge a notice of appeal out of time, the application which was granted on 22nd October, 2019. The applicant's main argument in his application is that the letter requesting the necessary documents was not served on the applicant or his counsel. The respondent cannot therefore benefit from the exclusion of the period within which the requested documents were under preparation by the Registrar, under rule 90 (1) of the Rules.

The contention was controverted by Mr. Tesha, arguing that the Registrar has not availed the respondent with the requested documents. According to the notice of motion, affidavits and submissions, we are invited to determine whether the notice of appeal lodged on 26th October, 2018 merits to be struck out or not for failure to take essential steps.

With that task, we think our first point of reference should be rule 89 (2) which provides that:-

"(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 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."

What can be deduced from the above provision is that only a party who has been served with a notice of appeal can seek for the said lodged notice of appeal to be struck out. While the application to strike out the notice of appeal under the rule, can be lodged before or after an appeal has been lodged, all the same, in granting the application the Court would look at the following: **one**, that no appeal lies, **two**, that some essential steps in the proceedings has not been taken and **three**, if taken then it has been taken outside the prescribed time. As alluded to above, the applicant disputes being served with the said notice of appeal and the letter requesting for documents from the Registrar.

On the contrary, Mr. Tesha maintained that the applicant was served with the notice of appeal and letter requesting the documents and in the affidavit in reply specifically in paragraphs 9, 13 and 14, he referred to and annexed copies of the letters indicating were duly served and received by the applicant's counsel. If that is so why is the applicant insisting on not being served?

We endeavoured to examine the notice of appeal lodged on 26th November, 2018 and those letters. Starting with the notice of appeal, it is evident from the copy annexed marked "A1" though had receipt stamp of the Court of Appeal Dar es Salaam sub-registry, and that the copy was served on Mr. F. A. M. Mgare, but the said copy had no signature, date or official receipt stamp from Mr. Mgare advocate's office.

Similarly, the letters dated 22nd November, 2018, 7th March. 2019, 23rd October, 2019 and 12th March, 2021, even though they had High Court receipt stamp, the copies served on Mr. Mgare were short of the features connoting proper service. For example: the letter dated 23rd November 2018, lacked an official stamp from Mr. Mgare's advocate office, despite being signed as received by Violeth Simtowe on 5th December 2018. The

letter dated 8th March 2019, received on the same day, only bore a signature and date without a name or official stamp from Mgare's advocate office. The reminder letter dated 12th March 2021, received on the same day, lacked the name of the recipient and the official stamp of the applicant's counsel's office. Neither Mr. Mgare nor Mr. Tesha provided any explanation for these omissions. In line with our decision in case of **Saidi Matambo** (supra), that a notice of appeal and letter requesting to be supplied with the necessary documents must be served on the other party properly and as emphasized in the **Devram Valambhia's** case (supra) within the prescribed time, cannot be under stated. We thus find the complaint by Mr. Mgare is justified, as indeed there was no service as required in law effected on the applicant.

Mr. Mgare and Mr. Tesha had in mind that rules 90 (1) and (3) of the Rules apply in the circumstances of the present application, the contention we find incorrect, this is because the wording of the provision, does not suggest so. Rule 90 (1) and (3) states:-

"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 for the costs of the appeal,

*save that where an **application for a copy of the proceedings in the High Court has been made within thirty 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.***

*(3) An appellant shall not be entitled to rely on the exception to sub-rule (1) **unless his application for the copy was in writing and a copy of it was served on the Respondent.***” [Emphasis added]

Our understanding of the wording of the provision does not read to us that the application of this rule goes beyond the original lodgement of notice of appeal. Normally, after the striking out or withdrawal of the

appeal order, the respondent is expected to apply for an extension of time for leave to file a notice of appeal out of time, if need be, and request for a copy of the certified proceedings therefrom.

Once the leave to lodge a notice of appeal out time has been granted as it was in Miscellaneous Civil Application No. 759 of 2018, and the respondent has been supplied with a certified copy of the said proceedings, the respondent is left with the task of seeking an extension of time to lodge her appeal in terms of rule 10 of the Rules. This is on the assumption that the respondent already had, all the necessary documents since there was an appeal instituted albeit struck out previously.

In the case of **Daudi Robert Mapuga & 417 Others v. Tanzania Hotels Investment Ltd & 4 Others** (Civil Application No. 462/18 of 2018) [2021] TZCA 11 (11th February, 2021), in which the case of **Mohsin Mohamed Taki Abdallah v. Tariq Mirza & Four Others**, Civil Application No. 100 of 1999 (unreported) was cited, the Court discussed at length the responsibility placed on the intending appellant. It concluded that rather than waiting indefinitely for the requested documents, the

appellant has to be vigilant and keep on following up with the Registrar.

The Court quoting from **Mohsin** (supra) had this to say:-

*"There was no problem with the first sentence; there is indeed no provision which requires the applicant to keep reminding the Registry of his application for copies of the proceedings. I do not think, though, that the second proposition is intended to be general, otherwise it would defeat the principle of diligence which parties are required to show in the conduct of their cases. Moreover, the delay in Transcontinental was merely six months as opposed to three years in the instant case and the respondents' refusal to go for a copy of the ruling although they knew it is ready. **I would say that while the High Court is duty bound to supply documents applied for and to supply them without unreasonable delay, it behooves the parties concerned to exercise diligence in the conduct of their cases, otherwise, they cannot escape blame.**"* [Emphasis added]

Further in the decision, Lugakingira, J.A. went on to state that:-

*"I am satisfied that the respondents, in this case, have **by their inaction virtually abandoned any***

intention to appeal and should be deemed to have withdrawn the notice of appeal in terms of rule 84 (a) [now rule 91 (a)]."

Applying the principle to the present application, we find that it resonates with the situation currently under consideration. Computing from 22nd October, 2019 when the leave was granted up to 7th October, 2022 when this application was lodged it is almost three (3) years, the respondent has been unable to lodge her intended appeal. Moreover, while it is not disputed that the Registrar has an obligation within a reasonable time to supply the requested documents, it nevertheless, does not mean the respondent is absolved from the responsibility to keep on following up on her request. After all, she is the one interested in pursuing her appeal. At this juncture we find it relevant to emphasize the stance taken in the **Daudi Robert Mapuga & 417 Others** (supra), that:-

"It would be most illogical and injudicious, we think, to accept the respondents' wait infinitely for a copy of the proceedings while they take no action on their part to follow up on their request to the Registrar."

In light of what we have discussed above, we are without a doubt of the finding that the respondent has failed to take essential steps towards seeing her intended appeal instituted. We thus proceed to grant the application with costs in terms of rule 89 (2) of the Rules and proceed to strike out the notice of appeal lodged on 26th October, 2016.

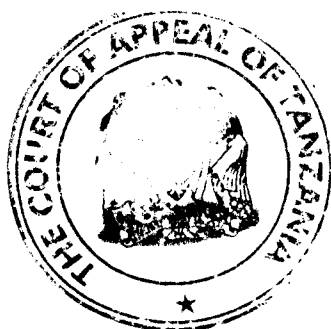
DATED at DAR ES SALAAM this 8th day of April, 2024.


G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Ruling delivered this 9th day of April, 2024 in the presence of the Mr. Florence Tesha, learned advocate for the respondent, also holding brief for Mr. Francis Mgare, learned advocate for the applicant, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL