

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: MKUYE, J.A., KAIRO, J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 410/04 OF 2023

HANATH RUTHA HASHIM APPLICANT

VERSUS

STEVEN MAGANGA 1ST RESPONDENT

HASSAN SAID 2ND RESPONDENT

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED 3RD RESPONDENT

**(Application to strike out notice of appeal for the intended appeal from
the judgment of the High Court of Tanzania at Bukoba)**

(Mugetta, J)

dated the 30th day of November, 2021

In

Civil Appeal No. 01 of 2020

RULING OF THE COURT

20th & 22nd March, 2024

MAKUNGU, J.A.:

Hanath Rutha Hashim, the applicant has by way of notice of motion moved the Court under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). It is sought to strike out a notice of appeal from the decision of the High Court sitting at Bukoba in Civil Appeal No. 01 of 2020 made on 30th November, 2021. The application is supported by the applicant's own affidavit.

The respondents, on the other hand, resisted the application by filing an affidavit in reply affirmed by one Theresia Dick Masangya, the Principal Officer of the 3rd respondent on their behalf.

Briefly, the respondents lost to the applicant in the Resident Magistrate's Court in Civil Case No. 43 of 2017. The respondents were aggrieved with that decision. They filed an appeal in the High Court which was also unsuccessful. It was dismissed on its entirety. Still aggrieved, the respondents lodged their notice of appeal to this Court on 3rd December, 2021. Earlier on, the respondents had applied for copies of judgment and decree for the purpose of appeal. According to the applicant, on 29th August, 2022 the respondents were notified by the Registrar that the requested documents were ready for collection.

Having seen nothing was forthcoming, the applicant on 24th January, 2023 filed the present application for striking out the respondents' notice of appeal.

At the hearing of the application, Mr. Peter Joseph Matete, learned advocate appeared for the applicant. The respondents' advocate did not appear before the Court despite the fact that she was duly served with the notice of hearing. The Court decided to proceed with the hearing of the application in her absence in terms of Rule 63 (2) of the Rules.

Mr. Matete commenced his submission by adopting the notice of motion, affidavit and a supplementary affidavit filed in support of the application and briefly submitted that the grounds for the application had been well articulated in the affidavits. He highlighted that the letter dated 8th March, 2022 purported to have been served on the applicant vide Kabunga & Associates Advocates was not received by the applicant as she was not represented by the said law firm. Therefore the respondents failed to serve the applicant according to law. He referred us to the case of **Jacob Bushiri v. Mwanza City Council and Two others**, Civil Appeal No. 36 of 2019 (unreported).

The learned advocate further argued that on 29th August, 2022 the documents requested by the respondents for appeal purposes were ready for collection as the applicant collected them as per *annexture ORBA – S1*. However, up to the time the applicant filed the present application which is after the lapse of five (5) months, no appeal was filed within the prescribed period of sixty days and no action whatsoever had been taken to date by the respondents in filing the appeal.

With that submission, Mr. Matete prayed for the application to be granted with costs by striking out the notice of appeal lodged by the respondents on 3rd December, 2021.

The respondents have filed an affidavit in reply deposed to by their advocate disputing the applicant's averment that they have failed to take essential steps towards the institution of their appeal. In particular, the respondents contend that they have not instituted their appeal because the Registrar of the High Court has not yet availed to them certified copies of judgment, decree and proceedings for the purpose of the intended appeal. The respondents further aver that they had been making several reminders to the Registrar with no success.

We gather from the submission of the applicant, the issue for our determination is whether the respondents had failed to take essential steps in instituting their appeal that would warrant for the applicant to make an application for striking the notice of appeal in terms of the provisions of Rule 89 (2) of the Rules. It should be noted that, in terms of Rule 90 (1) of the Rules, a civil appeal is instituted by lodging, in the appropriate registry, a memorandum of appeal in quintuplicate, a record of appeal in quintuplicate, and security for costs of the appeal within sixty days from the date when the notice of appeal was lodged. We stated so in the case of **Charles Masune v. Juma Mare**, Civil Application No. 479/03 of 2018 (unreported) where we were faced with an akin application thus:

"... we think it apt to observe that unlike a Criminal Appeal which is instituted by a Notice of Appeal, in terms of Rules 90 (1) of the Rules, a Civil Appeal is actually instituted by lodging, in the appropriate registry, a memorandum of appeal in quintuplicate, a record of appeal in quintuplicate and; security for costs of the appeal within sixty days of the date when the Notice of Appeal was lodged".

It follows that an appeal has to be instituted in the appropriate registry within sixty (60) days from the date of lodging a notice of appeal but where an intended appellant has applied in writing for a copy of the proceedings in the High Court within thirty (30) days, copied and served that letter on the respondent within thirty (30) days, the time spent for the preparation and delivery of the copy would be excluded by a certificate of the Registrar of the High Court. The intended appellant is also required to collect the necessary documents after having been informed by the Registrar that the documents are ready for collection. Indeed, in certain circumstances the intended appellant is required to obtain a certificate on point of law. Therefore, to us, those envisaged by the law as per Rule 96 (2) of the Rules to be taken by the intended appellant.

In the case of **Atlantic Electric Ltd v. Morogoro Region Cooperative Union** [1993] T. L. R. 12 the Court held:

"Under Rule 83 of the Court of Appeal Rules 1979 an appeal should be instituted within 60 days of filing the Notice of Appeal; as to institute an appeal the record of appeal has to be filed, applying for and obtaining a copy of proceedings from the High Court are necessary steps to be taken well in time before the appeal can be instituted".

In the present application, there is no dispute that the respondents filed and served the applicant with a copy of the notice of appeal on 3rd December, 2021. However, the respondents are disputing that they were notified by the Registrar of the High Court that the requested documents are ready for collection. The applicant maintained that the documents requested by the respondents for appeal purposes were ready since 29th August, 2022 and she collected them. On account that the respondents were notified that the documents necessary for filing the record of appeal were ready and they have not yet filed one we are inclined to agree with the submission of Mr. Matete that the respondents have failed to take necessary steps in filling the appeal.

In the case of **Transcontinental Forwarders Limited v. Tanganyika Motors Limited** [1997] T. L. R. 328 we said:

*"... failure to take essential steps to institute the appeal could either be procedural or evidential. An example could include omission to apply for leave to appeal or a certificate on point of law when 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**".*

[Emphasis is added].

In this application, we have found that the necessary documents for filing an appeal were ready for collection from 29th August, 2022 and the respondents were very much aware of their availability but by the time the application was filed on 24th January, 2023 they have not filed any appeal to this Court. With that omission, we are settled in our mind that, the respondents have failed to institute the appeal within the prescribed time and no any essential steps have been taken in filling the appeal.

In the end, we find merit in the application. Accordingly, we make an order, in terms of Rule 89 (2) of the Rules that, the notice of appeal

lodged by the respondents on 3rd December, 2021 be struck out. The applicant shall have her costs of the application.

Order accordingly.

DATED at BUKOBA this 22nd day of March, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered on this 22nd day of March, 2024 in the presence of Mr. Peter Joseph Matete, learned counsel for the applicant and in absence of the 1st, 2nd and 3rd respondents, is hereby certified as a true copy of the original.




O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL