

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
(CORAM: JUMA, C.J., MKUYE, J.A. And MWAMPASHI, J.A.)**

CIVIL APPLICATION NO. 418/08 OF 2022

ELIUDY GICHAINÉ..... APPLICANT

VERSUS

GEITA GOLD MINE LIMITED.....RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania
at Mwanza)**

(Tiganga, J.)

dated the 18th day of June, 2021

in

Miscellaneous Labour Application No. 05 of 2021

.....

RULING OF THE COURT

21st & 22nd February, 2024

JUMA, C.J.:

By a notice of motion dated 22/05/2022 made under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant, Eliudy Gichaine, is moving the Court to strike out the notice of appeal the respondent Geita Gold Mine Limited filed on 23/06/2021. The respondent's notice of appeal arises from the Ruling of the High Court at Mwanza in Miscellaneous Labour Application No. 05 of 2021. While Mr. William E.

Chama, learned advocate, swore an affidavit to support the application, the respondent did not file an affidavit in reply.

Before reaching the High Court, the applicant and the respondent had presented their labour dispute at the Commission of Mediation and Arbitration (the CMA). The CMA's decision dated 16/9/2020, went in the applicant's favour. Aggrieved by the CMA's decision, the respondent filed Misc. Labour Application No. 05 of 2021 in the High Court at Mwanza to seek an extension of time to enable the respondent company to file revision proceedings against the CMA's decision. However, on 18/6/2022, Tiganga, J. declined the respondent's request for an extension of time to file a revision proceeding. On 23/6/2021, the aggrieved respondent filed a notice of appeal to come to this Court, and on 24/6/2021 served that notice on the applicant.

In the instant notice of motion before us, the applicant complains that after filing a notice of appeal on 23/6/2021, the respondent has not taken essential step to prosecute his appeal.

At the hearing of this motion to strike out the respondent's notice of appeal, Mr. Mwita Emmanuel, learned counsel, represented the applicant. Mr. Bruno Msangi, learned counsel, represented the respondent under a brief for Mr. Benard Otieno, learned counsel. According to Mr. Msangi, his brief

allowed him to oppose this application. Both parties did not file written submissions.

Before making his oral submissions, Mr. Emmanuel informed us that on 4/9/2023, the respondent served the applicant with a record and memorandum of appeal signifying that this Court has registered an appeal whose notice to appeal is subject of the applicant's prayer to strike out. The learned counsel asked for our direction and wisdom because he was not sure whether he should continue with the prosecution of his application to strike out the respondent's notice of appeal, or he should withdraw this application and wait for the substantive hearing of the appeal the respondent had just filed.

After a brief exchange with the Court, Mr. Msangi, learned counsel for the respondent, urged us to withdraw this application on the reason that the respondent has already filed an appeal in this Court, in Civil Appeal No. 787 of 2023. Ultimate, after consulting the applicant Eliudy Gichaine who was present, Mr. Emmanuel decided to proceed with this application to strike out the respondent's notice of appeal.

The learned counsel for the applicant began his oral submissions by adopting the applicant's supporting affidavit of facts, which the respondent failed to counter through an affidavit in reply.

Mr. Emmanuel submitted that after the respondent company had filed its notice of appeal on 23/06/2021, the company sat back and did not take further essential steps to appeal to this Court. He pointed out that there is nothing on record of this application to show the respondent taking the first step of writing a letter requesting the Deputy Registrar to supply the respondent company with certified copies of proceedings, Judgment, and Decree of the High Court. There is nothing on record, he added, to show that the Deputy Registrar issued any Certificate of Delay to justify the way the respondent belatedly filed the record of appeal and the memorandum of appeal to initiate the Civil Appeal No. 787 of 2023, which Mr. Msangi alluded to. As far as Mr. Emmanuel is concerned, from 23/06/2021, when the respondent filed the notice of appeal, to 31/8/2023, when the applicant filed this application to strike out the notice of appeal, the respondent did not take any essential steps towards filing an appeal to this Court.

On the Civil Appeal No. 787 of 2023, which the respondent filed, the learned counsel for the applicant urged us to regard that appeal as an incompetent appeal and in no way prevents this Court from granting the motion to strike out the respondent's notice of appeal under sub-rule (2) of rule 89. The learned counsel for the applicant insisted on us to strike out the respondent's notice of appeal because the respondent failed to take essential

steps to appeal to this Court within sixty days of filing its notice of appeal prescribed by the Rules.

The learned counsel for the applicant next addressed the fate that he thinks, should befall what he described as an incompetent appeal that the respondent filed in this Court and the Registrar registered as Civil Appeal No. 787 of 2023. He asked us to invoke sub-rule (3) of Rule 89 and deem that appeal as struck out. In addition, he asked us to direct the Registrar to mark that appeal as struck out formally. He ended his submissions by imploring us to let each side bear its costs because the application arose from a labour dispute.

In his brief reply submissions to this Court, Mr. Bruno Msangi, learned counsel for the respondent, reminded us that he was holding brief for another learned counsel, Mr. Benard Otieno. He conceded that because the respondent company did not file an affidavit in reply, he, the learned counsel, could not oppose or refute the facts that the applicant swore in his supporting affidavit.

While conceding that the Court should strike out the respondent's notice of appeal, Mr. Msangi, however, faulted the applicant for filing a notice of motion under Rule 89(2) of the Rules to strike out the notice of appeal and

at the same time ask the Court to deem the respondent's notice of appeal as withdrawn. Like the learned counsel for the applicant, Mr. Msangi urged each party to cover its costs.

In rejoinder, Mr. Emmanuel, learned counsel for the applicant, agreed with Mr. Msangi on a minor point to the effect that this application before us, is moving the Court to strike out the notice of appeal but not to both strike out and withdraw the notice of appeal simultaneously.

After hearing from Mr. Emmanuel and Mr. Msangi, both learned counsel agree that the Court should strike out the respondent's notice of appeal because the respondent failed to take essential steps towards appealing to this Court. Mr. Msangi readily conceded the prayer to strike out the notice of appeal.

To move the Court to strike out the respondent's notice of appeal, the applicant relied on sub-rule (2) of rule 89 of the Rules, and during his oral submissions, Mr. Emmanuel in addition urged us to strike out the respondent's incompetent Civil Appeal No. 787 of 2023 under sub (3) of Rule 89 of the Rules. Sub-rules (2) and (3) state:

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 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.*

(3) Where the Court strikes out a notice of appeal under sub rule (2) after an appeal has been lodged, the appeal shall be deemed to have been struck out and the Registrar shall mark it accordingly. [Emphasis added].

Sub-rule (2) of Rule 89 ensures that the intended appellant who lodges a notice of appeal follows through on that intention by taking all essential steps and ultimately files the intended appeal within the timelines prescribed by sub-rules (1), (2), (3), (4) and (5) of Rule 90 of the Rules.

Sub-rule (3), on the other hand, is for striking out filed appeals whose notice of appeal the Court strikes out under sub-rule (2) of Rule 89 of the Rules. For purposes of instant application before us, the striking out of the notice of appeal under Rule 89 (2) of the Rules, renders the Civil Appeal No. 787 of 2023 incompetently before the Court and should be struck out.

We have not seen the memorandum and record of appeal, which the respondent filed as Civil Appeal No. 787 of 2023. We do not understand how the Deputy Registrar at the High Court at Mwanza could register the Civil Appeal No. 787 of 2023 when the respondent did not take any action beyond the notice of appeal it filed on 23/06/2021.

After the respondent company had filed a notice of appeal, sub-rule (1) of Rule 90 required the respondent to institute an appeal within sixty days of the notice of appeal by lodging the memorandum of appeal, record of appeal, and security for the costs of the appeal and other documents as specified under Rules 90 (1) and 96 of the Rules. The sixty days of notice of appeal ran out on 22/08/2021. As the record of this application stands, there is no certificate of delay or any order of the court extending time to the respondent to file the Civil Appeal No. 787 of 2023 outside the sixty days (60) of the notice of appeal.

From what we have said, we conclude that after filing the notice of appeal, the respondent failed to take essential steps toward instituting its appeal in this Court. For failing to take the essential steps, we invoke sub-rule (2) of Rule 89, and we, as a result of this, strike out the respondent's notice of appeal, which the respondent filed on 23/06/2021.

Further, we deem the Civil Appeal No. 787 of 2023, which the respondent filed in this Court, as struck out. We direct the Registrar to mark the Civil Appeal No. 787 of 2023 as struck out. Each party shall bear its costs.

DATED at **MWANZA** this 22nd day of February, 2024.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of February, 2024 in the presence of the applicant appeared in person and in the absence of the respondent, is hereby certified as a true copy of the original.


G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL