IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CIVIL APPLICATION NO. 70/18 OF 2018

MARTIN D. KUMALIJA & 117 OTHERS ..... APPLICANTS

VERSUS

IRON AND STEEL LTD. ..... RESPONDENT

(Application for striking out notice of appeal from the Judgment of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Aboud, J.)

dated the 30th day of October, 2015

in

Revision No. 187 of 2015

.....

RULING OF THE COURT

26th February & 5th March, 2019

NDIKA, J.A.:

By notice of motion lodged on 8th March, 2018 under Rule 89 (2) of the Tanzania Court of Appeal Rules (the Rules), the applicants herein move the Court for striking out the notice of appeal filed on 12th November, 2015 by the respondent on the ground that "the respondent failed to take essential steps to institute the intended appeal for over two years now." The application is supported by an affidavit deposed by Mr. Juma Nassoro, learned counsel having the conduct of the matter on behalf of the applicants. On the opposite side, no affidavit in reply was lodged.

The brief history of the matter is that the respondent was the losing party in Revision No. 187 of 2015 before the High Court of Tanzania, Labour Division at Dar es Salaam (Aboud, J.) that was determined on 30th October, 2015. It is noteworthy that as the High Court dismissed the revision, it upheld the award that the arbitrator of the Commission for Mediation and Arbitration had made in favour of the applicants. The award was premised on the finding that the applicants' termination from employment by the respondent was substantively and procedurally unfair. Being aggrieved by the High Court's decision, the respondent duly manifested its intention to appeal to this Court against the judgment by filing a notice of appeal on 12th November, 2015 in compliance with Rule 83 (1) of the Rules. In terms of Rule 90 (1) of the Rules, the intended appeal was due to be lodged by presenting a record and memorandum of appeal within sixty days thereafter, that is, on or before 11th December, 2015 but none was filed. Hence, the applicants have lodged this matter to have the notice of appeal struck out.

When the matter came up for hearing on 26th February, 2019, Mr. Juma Nassoro, learned counsel, represented the applicants whereas Mr. John Seka, also learned counsel, appeared holding brief of Mr. Godfrey Taisamo, learned counsel for the respondent.

Prior to the commencement of the hearing, Mr. Seka notified the Court that he was standing in the place of Mr. Taisamo who was sick. We interpose here to note that no documentary proof of the alleged ill-health was produced to the Court.

Mr. Seka, then, moved for adjournment of the matter on the ground that the respondent could not proceed with the hearing as it was unserved with the notice of motion apart from the certificate of urgency that it received on 16th July, 2018. He further alleged that the respondent was unaware of the scheduled hearing of this matter, implying that it was also never served with the notice of hearing. In elaboration, he claimed that the respondent only became aware of the hearing after he notified Mr. Taisamo of it as he had learnt of the schedule rather fortuitously on 13th February, 2019 when he appeared in the Court on another matter.

Conversely, Mr. Nassoro strongly disputed Mr. Seka's claims. He asserted that the respondent was duly served with the notice of motion on 14th March, 2018 through one of its officials who acknowledged the service by signing and embossing the respondent's rubber stamp on a copy of the notice of motion. As proof of service, Counsel produced to the Court the said document. Mr. Nassoro contended that if, indeed, the respondent was

only served with the certificate of urgency on 16th July, 2018, as a diligent litigant, it should have detected the alleged omission of service of the notice of motion and taken appropriate action to access the said notice.

On being probed by the Court, Mr. Seka was at pains to argue that although the certificate of urgency was duly received by the respondent it was then mistakenly dispatched to the respondent's previous advocates known as HR Solutions Limited who took no appropriate action in time. He thus blamed confusion in the service of the documents and reiterated his prayer that the matter be adjourned so as to afford the respondent an opportunity to be served with the notice of motion and file an affidavit in reply.

In riposte, Mr. Nassoro maintained that all the three documents (that is, the notice of motion, the certificate of urgency and the notice of hearing) were served on the respondent as they appear to have been received and acknowledged by the same person who embossed the same rubber stamp on each document. He submitted that it was significant that his learned friend did not challenge the authenticity of the rubber stamp and signature on the documents. Accordingly, he urged us to refuse the requested adjournment.

Having carefully looked at the three documents and taken account of the learned rival submissions, we dismissed the prayer for adjournment as we found no good cause for deferring the hearing. It was our firm view that while the notice of motion was duly served on the respondent on 14th March, 2018 in terms of Rule 48 (4) of the Rules as evidenced by a rubber stamp impression and signature on that document, the notice of hearing was served on 8th February, 2019 as is evident on that document. For us, it was significant that Mr. Seka did not dispute the authenticity of the signature and rubber stamp impression on each of the documents. Both services on the respondent were, therefore, sufficient in terms of Rule 22 (2) of the Rules.

In addition, we agreed with Mr. Nassoro, for the sake of argument, that if, indeed, the respondent was only served with the certificate of urgency on 16th July, 2018 but not any other document, as a diligent litigant, it should have detected the alleged omission of service of the notice of motion and taken appropriate action to access the said notice well in advance. In our view, Mr. Seka's account of the course taken by the respondent in response to receiving the certificate of urgency was plainly implausible. It seemed to us that no concrete action was taken. All told, we thought that the respondent's plea for adjournment was plainly

disingenuous and that it was a ploy meant to frustrate swift disposal of the matter at hand. We thus ordered the hearing to proceed as scheduled.

In addressing us on the merits of the substantive application, Mr. Nassoro was very brief but focused. The gravamen of his argument, based on the contents of the notice of motion and the supporting affidavit, was that although the respondent duly lodged its notice of appeal on 12th November, 2015 and served it in time on the applicants on 17th November, 2015 as it sought to challenge the impugned judgment dated 30th October, 2015, it took no further action since then. At the time of the hearing, the intended appeal was yet to be lodged. On that basis, he thus urged us to strike out the notice of appeal.

In response, Mr. Seka tried to boil the ocean, urging us to invoke the principle of overriding objective to save the notice of appeal. He maintained that prayer even when probed by the Court whether it was right for that principle to be applied to cure a party's egregious default such as a failure to take an essential step for appeal purposes within the prescribed time.

We have keenly considered the notice of motion in the light of the arguments of the parties. As hinted earlier, the respondent, for obviously

an inexplicable cause, filed no affidavit in reply after being served with the notice of motion. We must hasten to observe, therefore, that the absence of an affidavit in reply means that averments in the supporting affidavit are uncontroverted.

We wish to begin our determination of this matter by stating the obvious that an application of this nature is governed by Rule 89 (2), which stipulates thus:

> *"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.****"*[Emphasis added]

The above provision is self-explanatory. It gives recourse to the relief of striking out a notice of appeal to a respondent or any other person on whom a notice of appeal has been served 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 – see, for instance, **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 (unreported); and **Grace Frank Ngowi v. Dr. Fank Israel Ngowi** [1984] TLR 120.

In the instant matter, it is evident that although the respondent initially lodged its notice of appeal on 12th November, 2015, it took no further action to keep live its pursuit of an intended appeal. By the time the applicants lodged this matter on 8th March, 2018, the respondent had held up its quest for over twenty-seven months. As matters stand, there is no proof that the appellant requested for a copy of proceedings from the High Court for the purpose of his intended appeal within thirty days of delivery of the impugned decision. Moreover, even if it is assumed that such a request was ever made, there is no indication that the respondent copied and served that letter on the applicants in terms of Rule 90 (2) of the Rules for it to be availed with the exclusion under the exception to Rule 90 (1) of the time required for preparation and delivery of the copy from the sixty days' limitation for instituting an appeal. There being no evidence of compliance with Rule 90 (2) of the Rules, we are inclined to hold that the respondent's intended appeal ought to have been instituted within sixty days from the date of lodgment of the notice of appeal because it was not

entitled to take advantage of the exception under sub-rule (1) of Rule 90. The said period of limitation, therefore, expired on 11th December, 2015. It is unavoidable to conclude that the respondent failed to institute the appeal within the prescribed time.

Finally, we wish to comment on Mr. Seka's plea that the overriding objective principle be applied to save the notice of appeal. We are aware that the Court is enjoined by the provisions of sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 RE 2018 introduced recently vide the Written Laws (Miscellaneous Amendments) (No. 3) Act, No. 8 of 2018 to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes. While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court. We are loath to accept Mr. Seka's prayer because doing so would bless the respondent's inaction and render superfluous the rules of the Court that the respondent thrashed so brazenly.

In conclusion, we find that the respondent as the intending appellant failed to institute an appeal within the prescribed time. For its default, we order, in terms of Rule 89 (2) of the Rules, that its notice of appeal lodged

on 12th November, 2015 be and is hereby struck out. Accordingly, the application is granted with costs.

DATED at **DAR ES SALAAM** this 27th day of February, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL