

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MMILLA, J.A., MWANGESI, J.A., And NDIKA, J.A.,)**

**CIVIL APPLICATION NO. 190 OF 2015**

**INTERBEST INVESTMENT COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**STANDARD CHARTERED BANK (T) LIMITED ..... RESPONDENT**

**(Application for striking out the notice of appeal from the judgment and  
decree of the High Court of Tanzania at Dar es Salaam)**

**(Rugazia, J.)**

**dated 16<sup>th</sup> day of June, 2010**

**in**

**Civil Case No. 463 of 2002**

**RULING OF THE COURT**

21<sup>st</sup> August, & 27<sup>th</sup> September, 2018

**MMILLA, J.A.:**

In this application, Interbest Investment Company Ltd. (the applicant), is seeking the Court's indulgence to make an order striking out the notice of appeal lodged by the respondent, Standard Chartered Bank (T) Ltd. on 15.5.2015, aimed at challenging the judgment of the High Court, Dar es Salaam Registry, dated 16.6.2010 in Civil Case No. 463 of

2002. The application is brought under Rules 89 (2), 48 (1), (2) and 49 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit sworn by Mr. Mutakyamirwa Philemon, who is one of the applicant's advocates.

The application is contested by the respondent through the services of Juriconsultants Advocates, Dar es Salaam. They filed an affidavit in reply through which they are firm that the instant application is without merit.

At the hearing of this application on 21.8.2018, Mr. Audax Kahendaguza Vedasto, learned advocate, represented the applicant; whereas the respondent company enjoyed the services of Mr. Sylvanus Mayenga, learned advocate. Both sides filed written submissions in support of their respective sides and successfully asked for their adoption.

Oh his part, Mr. Vedasto informed the Court that he had nothing more to add from what he submitted in his written submissions. We have carefully gone through his submissions; he has canvassed the matter from five angles on the basis of which he is asking the Court to find and hold that some essential steps in the proceedings have not been taken, thus entitling it to strike out the notice of appeal under focus.

Mr. Vedasto's starting point is that the respondent ought to have lodged her intended appeal within 60 days from the date he filed the notice of appeal as envisaged by the provisions of Rule 90 (1) of the Rules, but that she failed to do so. He clarified that the decision of the High Court which is the subject of the intended appeal was delivered on 16.6.2010, and that the notice of appeal thereof was filed on 15.5.2015. He adds that up to 22.9.2015 however, the respondent had not instituted the appeal, therefore that in terms of Rule 90 (1) of the Rules, the latter's right to lodge the record of appeal expired on 15.7.2015. He relied on the case of **Francis Itengeja v. Kampuni ya Kusindika Mbegu za Mafuta Ltd. [1997] T.L.R. 148.**

Mr. Vedasto pointed out similarly that in computing the 60 days, he is aware that the time required for obtaining copies of the proceedings is excluded, provided that the proceedings were applied for in writing within a period of 30 days from the date of the decision sought to be appealed against, of course, on condition that the said letter was copied to the opposite side. Here, he cited the case of **The Principal Secretary, Ministry of Defence v. Devram Valambhia [1992] T.L.R. 387** (particular reference to page 393).

Mr. Vedasto has likewise submitted that there were two letters which were served on them vide which the respondent applied for proceedings, judgment and decree, the first of which was annexure AA6. That letter, he says, was submitted to the High Court on 18.7.2010 but was served on the applicant on 21.7.2010. That was, he adds, after 32 days had elapsed counted from 16.6.2010, hence outside the statutory duration of 30 days. He also points out that it took 35 days for the said letter to be served on the applicant. Once again, relying on the case of **Francis Itengeja v. Kampuni ya Kusindika Mbegu za Mafuta Ltd.** (supra), Mr. Vedasto contended that the respondent failed to take essential steps in the proceeding, therefore warranting the Court to strike out the notice of appeal under focus.

On another point, while focusing on annexure AA8, a letter which was submitted to the High Court on 12.5. 2015 and served on the applicant on 18.5.2015 (almost 5 years after the date of the judgment of the High Court) applying for copies of proceedings, judgment and decree after the first appeal was struck out, Mr. Vedasto has submitted that except for the written submissions before the trial court which were found missing in the record of appeal that was struck out; the respondent had no

cause to re-apply for those documents because he already had them. He argued that since the act of re-applying for those documents was uncalled for, the exclusion rule cannot save the notice of appeal from the consequences of being struck out. He implored the Court to strike out the notice of appeal with costs.

On his part, Mr. Mayenga submitted that after their first appeal was struck out by the Court, it was necessary for the respondent to start everything afresh, including applying for necessary documents from the High Court. He submitted that the respondent applied for and was granted an order for extension of time from High Court and also applied for the necessary documents from that court which are yet to be supplied to them. Relying in the case of **DT Dobie & Company (T) Ltd. v. N. B. Mwatebele** [1992] T.L.R. 152, he maintained that all what has been done by the respondent cannot easily be ignored; to the contrary it strengthens her position that she was actively pursuing her appeal. Mr. Mayenga urged the Court to refuse the applicant's contention that the respondent failed to take essential steps to the appeal.

Mr. Mayenga submitted further that the case of **Francis Itengeja v. Kampuni ya Kusindika Mbegu za Mafuta Ltd.** (supra) is distinguishable to the present matter. He contended that while in that case the essential steps were never taken by the respondent, the respondent in the present case has taken all the necessary steps including reminding the High Court to supply him with those necessary documents. He therefore asked the Court to dismiss the application with costs.

In a brief rejoinder, Mr. Vedasto reiterated his concern that except for the missing written submissions which were filed in the high Court, it was improper for the respondent to re-apply to be supplied with the proceedings, judgment and decree because she already had them, therefore that she should be held to have instituted the appeal out of time. That fact, he maintains, shows that she has failed to take essential steps in instituting her appeal. He once more pressed the Court to strike out with costs the notice of appeal under focus.

We have soberly considered the rival submissions by the parties. The main issue is whether the respondent has failed to take essential steps to institute her appeal.

To begin with, we have carefully gone through the case of **Francis Itengeja v. Kampuni ya Kusindika Mbegu za Mafuta Ltd.** (supra) which has been relied upon by Mr. Vedasto. In that case, the applicant's complaints were that the respondent had failed to take essential steps in instituting the appeal because she did not serve the applicant with the notice of appeal and the letter to the Registrar of the High Court applying for copies of proceedings, judgment and a decree. After satisfying itself that the respondent did not copy the notice of appeal, and serve a copy of that letter to the applicant, the Court stated that:-

*"The net result, therefore, is that the respondent has failed to prove the allegation that the two documents i.e. a copy of the notice of appeal and a copy of the letter to the Registrar applying for the proceedings of the case, were duly served on the applicant or his counsel. Since there has been no application for extension of time to serve these documents on the applicant, the present application must succeed. As Mr. Kambamwene rightly pointed out, the respondent company cannot in terms of the exception under Rule 83 (1) of the Rules claim protection against the time running against it because the applicant was not duly served with a copy of the letter to the*

*Registrar applying for court proceedings in the case. That is to say, the time for lodging the appeal has long elapsed, and there is nothing to salvage that situation.*

*Thus, failure to serve the applicant with a copy of the notice of appeal within seven days of the notice as required by Rule 77 (1) of the Rules, and failure to lodge the appeal within 60 days of the notice as required by Rule 83 (1) are, in the absence of any evidence of extension of time by the Court to do these things, grounds which warrant the striking out of the notice of appeal, which I hereby do."*

*Ipsa facto*, from the above holding, the respondent in that case did not take the required essential steps to institute her appeal.

When we relate what transpired in the above discussed case to the present one, we hasten to state that we agree with Mr. Mayenga that **Francis Itengeja's** case (*supra*) is distinguishable to the present case because the circumstances herein are different from that case. We will illustrate.

Our starting point is paragraph 5.1 to 5.7 of the respondent's affidavit in reply. Under that paragraph, the latter has outlined the steps

which were being taken in order to file an appeal in Court. It is clear from those sub-paragraphs that following an order of the High Court granting the respondent an extension of time to appeal, they immediately lodged the notice of appeal, and also lodged a letter requesting for copies of proceedings, judgment and a decree. As it were, the respondent served the same on the applicant on time. And to be particular, since the first appeal was struck out for want of the written submissions which were part and parcel of the proceedings at the trial court, a letter was written to the Registrar of the High Court requesting to be supplied with the certified copies of her final submissions in the High Court. Nonetheless, she is yet to receive those submissions. Mr. Mayenga indicated likewise that the respondent has been following up the said documents and, as shown under paragraph 5.4 of the affidavit in reply, they wrote a reminder letter to the High Court on 7.11.2015 but so far no response.

We pose here to say that the respondent and her advocate were on the right track. We wish to revert to the case of **The Registered Trustees of Kagera Farmer's Trust Fund v. CRDB Bank Ltd.**, Civil Application No. 58 of 2015 CAT (unreported) in which the Court was faced

with a more or less similar situation to the present matter. It was stated in that case that:-

*"As this Court has clearly stated in **Transcontinental Forwarders Limited v. Tanganyika Motor Limited**, once the respondent has shown that he had applied to the Registrar for a copy of proceedings sought to be appealed against, and he had not been furnished with any, he had complied with the Rules. It is evident from the correspondences between the respondent and the Registrar of the High Court that not all documents were furnished to the respondent and some of the documents supplied to him were problematic."*

In the **Registered Trustees of Kagera Farmer's Trust Fund's** case, the Court relied on its earlier decision on the point in the case of **Foreign Mission Board of the Southern Baptist Convention v. Alexander Panomaritis** [1984] T.L.R. 146 where it was stated that:-

*"Since the inordinate delay in furnishing a certified copy of the proceedings of the High Court cannot be blamed on the respondent no cause of action existed on his part to bar him from instituting and prosecuting his appeal."*

In the premises, the respondent in the present case has so far done no dereliction of what he ought to have done to deserve any blames.

We note also that Mr. Vedasto aired his views that the nature of the respondent's appeal did not require the respondent to apply afresh for the proceedings, judgment and decree of the High Court after the striking out of his prior appeal. According to him, the Court should consider the fact that the respondent's first letter applying for the copies of those documents was submitted to the High Court beyond the required 30 days from the date of the judgment, also that the same was served to the applicant out of time.

Once again, we do not agree with Mr. Vedasto. The reason is clear that even if the respondent's letter to the Registrar prior to the striking out was lodged and served on the applicant out of time, that situation was cured by the fact that the respondent successfully applied for extension of time in which to still appeal. What matters therefore, is what was done thereafter.

Equally important, the law is clear that once the appeal is struck out as it were in the case at hand, that implies the striking out of the record of

appeal as a whole. Under such circumstances, the appellant will be duty bound to re-file the appeal afresh having in mind the requirements of the Rules of the Court – See the case of **Dhow Mercantile (EA) Ltd & Others v. Registrar of Companies & Others**, Civil Appeal No. 56 of 2005 CAT (unreported). In that case the Court emphasized that:-

*Furthermore, it is also to be observed that **it is now settled that after an appeal has been struck out upon the ground that it is incompetent, there is nothing as it were, saved with regard to the appeal including the notice of appeal.** That is, the order striking out the appeal also had the effect of striking out the notice of appeal as well. Where, as happened in this case, after striking out the notice of appeal, it is left open for the appellant to reinstitute the appeal if it is so desired, it is expected that due compliance with the requirement of the rules would be observed . . .*

*To recapitulate, we agree with Mr. Kilindu, learned counsel, that after the initial record of appeal was struck out on 23.3.2005 in Civil Appeal No. 86 of 2004, no valid notice of appeal remained as urged by Mr. Ukwong'a. It was imperative upon the appellant to apply*

*afresh to the High Court for extension of time in which to file notice of appeal."*

On the basis of the above, we find and hold that the application is without merit and we dismiss it with costs.

Order accordingly.

**DATED at DAR ES SALAAM** this 18<sup>th</sup> day of September, 2018.

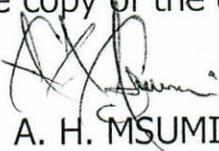
B. M. MMILLA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
A. H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**