

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

(CORAM: MWANGESI, J.A, NDIKA, J.A And SEHEL, J.A)

CIVIL APPLICATION NO. 571/01 OF 2017

MAHIKU A. MAHARAGANDE.....APPLICANT

VERSUS

NYAMUHIKA A. MAHARAGANDE.....RESPONDENT

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

(Wambura, J.)

dated the 28th day of June, 2012

in

PC Civil Appeal No. 7 of 2009

RULING OF THE COURT

20th October, & 11th November, 2020

SEHEL, J.A.:

The applicant through the services of Mr. Fulgence Massawe, learned advocate filed a Notice of Motion under Rule 89 (2) of the Tanzania Court of Appeal Rules 2009 ("the Rules") seeking an order of the Court that the notice of appeal filed by the respondent on 10th July, 2012 against the judgment and decree in PC Civil Appeal No. 7 of 2009 be struck out as no appeal lies or that some essential steps in the proceedings have not been taken by the respondent to institute the appeal despite being supplied with

all documents necessary for instituting the intended appeal. The notice of motion is supported by an affidavit of the applicant.

The respondent, on the other hand, resisted the application by filing an affidavit in reply affirmed by the respondent.

The background to the present application is that; the applicant was appointed by the Morogoro Urban Primary Court in Probate Administration Cause No. 114 of 1995 to administer the estate of his late father, Abdallah Maharagande. In the process of administering the estate, he faced difficulties in discharging the deceaseds' liabilities. He proposed to the beneficiaries for the sale of the sole property left behind by the deceased, a house on Plot No. 81/214 Block 'B' (92B) Uhuru Street in Morogoro Municipality. The proposal was not very much welcomed by all the beneficiaries. There was a divided opinion. Half of them supported the administrator's proposal while the other half did not want the house to be sold. This prompted the applicant to seek direction from the Primary Court. The Primary Court having heard all the beneficiaries concurred with the administrator. Hence, it made an order for the sale of the house. The respondent and other beneficiaries were aggrieved with that decision. They appealed to the District Court but their appeal was dismissed. They further filed an appeal in the High Court which was also unsuccessful. It was dismissed with costs. Still aggrieved, the respondent lodged his notice of

appeal to this Court on 10th July, 2012. As the matter originated from the Primary Court, leave was sought and granted on 28th January, 2016 and on 18th July, 2019 the respondent was notified by the Registrar that the requested documents are ready for collection.

Having seen nothing was forthcoming, the applicant filed the present application for striking out the respondent's notice of appeal.

At the hearing of the application, Mr. Fulgence Massawe, learned advocate, appeared for the applicant, whereas, the respondent appeared in person, unrepresented.

Mr. Massawe commenced his submission by adopting the notice of motion and affidavit filed in support of the application and briefly submitted that the grounds for the application had been well articulated in the affidavit. He highlighted that from the time the respondent lodged his notice of appeal on 10th July, 2012 and served it upon the applicant he had not taken any essential steps to see to it that the appeal is lodged in time. He added that the respondent had been making several applications in the lower court and that even after their completion the respondent has not taken any action whatsoever in filing the appeal. He further argued that on 18th July, 2019 the Registrar of the High Court informed the respondent that the copies for proceedings, judgment and decree were ready for collection

but up to the time the applicant filed the present application which is after the lapse of six (6) months no appeal was filed within the prescribed period of sixty (60) days and no action whatsoever had been taken to date by the respondent in filing the appeal.

With that submission, Mr. Massawe prayed for the application to be allowed with no order for costs by striking out the notice of appeal lodged by the respondent on 10th July, 2012.

The respondent being a layperson simply urged us to consider his affidavit in reply and that he could not file the appeal in time because there was a pending application for amendment of the notice of appeal. It suffices to point out here that the applicant in his affidavit in reply does not dispute the fact that on 18th July, 2019 he was notified by the Registrar that the documents necessary for the lodging an appeal were ready for collection.

Mr. Massawe rejoined by adverting to the Court that the application which the respondent was referring had been withdrawn and in any event the applicant acknowledged he was informed on documents being ready for collection by the Registrar. He, therefore, reiterated his earlier submission that the respondent failed to take essential steps in instituting the appeal within a period of sixty (60) days from the date he was notified that the necessary documents were ready for collection.

We gather from the submission of the parties, the issue for our determination is whether the respondent had failed to take essential steps in instituting his 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 which provides:-

"89 (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 of appeal 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."

It follows that any person on whom a notice of appeal has been served may apply to the Court, either before or after the institution of the appeal, to have the notice of appeal struck out on ground that, no appeal lies or that some essential step has not been taken or has not been taken within the prescribed time. 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 Rule 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."

The institution of an appeal to this Court envisages a number of processes, including but not limited to, an intended appellant to apply in writing from the High Court to be supplied with the copies of the proceedings, judgment or ruling and decree or order for the purposes of preparing a record of appeal. The law has tasked the Registrar to prepare the documents and ensure that they are ready for delivery to the party who sought them. Sometimes the preparation of the requested documents might take more time than specified in filing an appeal but it is expected not to exceed ninety (90) days counted from the date the intended appellant lodged his request. Where the Registrar of the High Court fails to perform his obligation within the stipulated period of ninety (90) days the intended appellant is required by law to make a follow up with the Registrar. For

better appreciation of the whole process we take the liberty to reproduce Rule 90 of the Rules as hereunder:

"90 (1) subject to the provisions of rule 128, an appeal shall be instituted by lodging in the appropriated 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.

(2).....Not Relevant.....

(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.

(4) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals in the exercise of its bankruptcy jurisdiction.

(5) Subject to the provisions of sub-rule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such copy and the appellant shall take steps to collect copy upon being informed by the Registrar to do so, or within fourteen (14) days after the expiry of the ninety (90) days."

It follows that an appeal has to be instituted in the appropriate registry within sixty (60) 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 that 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 leave to appeal and a certificate on point of law. Pursuant to Rule 96 (2) of the Rules, leave and the certificate on point of law are amongst the vital documents to be included in the

record of appeal. Therefore, to us, those are amongst the necessary steps envisaged by the law to be taken by the intended appellant.

In the case of **Atlantic Electric Ltd. v. Morogoro Region Cooperative Union** [1993] TLR 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 respondent filed and served the applicant with a copy of the notice of appeal on 10th July, 2012. It is also not disputed that the respondent obtained leave to appeal on 28th January, 2016 and that on 18th July, 2019 he was notified by the Registrar of the High Court that the requested documents are ready for collection. Even though there is no indication that the respondent requested for copies of the proceedings, judgment and decree but we inferred from that letter of the Registrar, as it was suggested by Mr. Massawe, there was one written by the respondent. On account that the respondent was notified that the documents necessary for filing the record of appeal were ready and he has not yet filed one we are inclined to agree with the submission of Mr. Massawe that the respondent has failed to take necessary steps in filing the

appeal. He had been lingering around on the pretext that there was a pending application to this Court to amend the notice of appeal. While we agree with him that there was such an application but that does not, in our view, stop the running of the period in filing the intended appeal. We believe that the amended notice of appeal could have been lodged in a supplementary record of appeal after the respondent had lodged his appeal. But as the matter stands now, the respondent has failed to lodge his appeal within the prescribed period of sixty (60) days counted from the date he was notified by the Registrar.

In the case of **Transcontinental Forwarders Limited v. Tanganyika Motors limited** [1997] TLR 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 appoint 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 the instant application, we have found that the necessary documents for filing an appeal were ready for collection from 18th July, 2019 and the respondent was very much aware of their availability but by the

time the application was filed he has not filed any appeal to this Court. With that omission, we are settled in our mind that, the respondent has failed to institute the appeal within the prescribed time and no any essential steps have been taken in filing 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 respondent on 10th July, 2012 be struck out. We make no order as to costs because the applicant did not press for it.

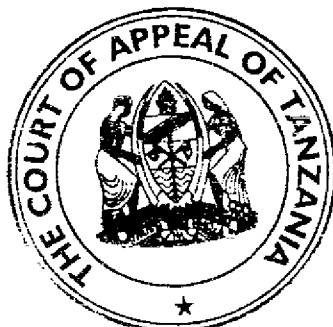
DATED at DAR ES SALAAM this 9th day of November, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 11th day of November, 2020 in the Presence of Mr. Richard Kinawari holding brief for Mr. Fulgence Massawe, learned counsel for the applicant and Mr. Richard Kinawari, Advocate appeared for the respondent, is hereby certified as a true copy of the original.




D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL