

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MAIGE, J.A. And MGEYEKWA J.A.)

CIVIL APPLICATION NO. 466/16 OF 2022

EQUITY BANK TANZANIA LIMITEDAPPLICANT

VERSUS

BASHASHA MERCHANDISE DEALERS LIMITEDRESPONDENT

**(Application for order to strike out a Notice of Appeal against the Ruling
and Order of the High Court of Tanzania, Commercial Division,
at Dar es Salaam)**

(Philip, J.)

Dated the 14th day of July, 2021

in

Commercial Case No. 08 of 2021

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RULING OF THE COURT

13th & 23rd November, 2023

MAIGE J.A.:

On 30th July, 2021, the respondent lodged a notice of appeal intending to challenge the decision of the High Court Commercial Division (the High Court) dated 14th July, 2021 arising from Misc. Commercial Cause No. 08 of 2021. In the said decision, which arose from a winding up proceeding, the High Court overruled the respondent's preliminary objection as to jurisdiction and sustained the applicant's preliminary objection as to propriety of the document entitled "response to the

winding up petition” filed by the respondent and thereby striking it off the record.

Believing that the respondent has not taken some essential steps to pursue the intended appeal or not taken the same within the prescribed time, the applicant filed the instant application under rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for an order striking out the notice of appeal with costs. To substantiate the application, Mr. Edward Nelson Mwakingwe, learned advocate deposed an affidavit for and on behalf of the applicant. On the other hand, Mr. Obadia Kajungu, learned advocate deposed an affidavit in reply on the respondent’s behalf.

At the hearing of the application, the applicant was represented by Mr. Emmanuel Saghan, learned advocate whereas the respondent was represented by Messers. Obadia Kajungu and Dickson Venance Mtogesewa, both learned advocates. In the same way as Mr. Saghan adopted, in his brief submission, the affidavit in support of the application with some clarifications, the two counsel for the respondent adopted in their submissions, the affidavit in reply with some clarifications.

We note from the affidavits and submissions that, the parties are not in dispute that, on 23rd day of July, 2021, the respondent requested

to Deputy Registrar of the High Court (the Deputy Registrar) for a copy of proceedings and timely served the request letter on the respondent. The contention is whether, subsequent to the request, the applicant took essential steps to pursue the intended appeal within time.

While the applicant claims in paragraph 5 of the affidavit that the requested copy of the proceedings was due as of 18th August, 2021 and the respondent was notified on the same date by the Deputy Registrar, in the affidavit in reply, the respondent vehemently refuses to have ever been served with the said letter. We note from the copy of the alleged notification letter in annexure EBTL-4 of the affidavit absence of any endorsement signifying receipt of the said letter by the respondent. At the hearing, we asked the counsel for the applicant to comment on that fact and he conceded that such evidence is not express in the said annexure. He submitted, however, basing on the fact in paragraph 5 of the affidavit in reply that, there is no dispute that the respondent was notified of the readiness of the requested proceedings on 9th October, 2022 when both parties were summoned before the Deputy Registrar. The respective paragraph reads as follows:

'5. That, it was until on the 9th of October 2022 when the Honourable Deputy Registrar suo motu summoned parties and told that the letter for collection of

proceedings was already since August 18, 2021 and every person should take necessary steps, whereas , two days later, thereafter, the Respondent through the deponent made a follow up of printed copies of the relevant documents but still was told by the Bench Clerk, one Fuataeli Cosmas that the proceedings were still pending for proof reading whereas the deponent, wrote a reminder letter for issuance of printed copies of proceedings, ruling and order.”

In line with the above deposition, it was submitted for the applicant that; even if it was not until on 9th October, 2022, when the respondent was informed that the documents were due for collection, the apparent inaction for a period of more than a year from the date of filing the request letter amounts to failure to take essential steps under rule 90(5) of the Rules. Citing the case of **Tanzania Bureau of Standards and Another v. Erythis Trading Company**, Civil Application No. 493/16 of 2020 [2022] TZCA 537 (6 September 2022, TANZLII), the counsel urged us to hold that, failure to take steps to collect the requested documents within 14 days after the expiry of 90 days, amounts to failure to take necessary steps within the meaning of rule 89(2) of the Rules.

The assertion in the affidavit in reply that the respondent’s counsel did make a follow-up but only to be told by a bench clerk that, the

proceedings were still pending for proof reading is, in the absence of an affidavit of the said clerk, nothing but a mere hearsay, the counsel further submitted. Reliance was placed on the case of **James Bernado Ntambaia v. Furaha Denis Pashu**, Civil Application No. 178/11 of 2016 [2019] TZCA 481 (5 December 2019, TANZLII). In conclusion, therefore, the counsel prayed that the application be granted with costs.

In rebuttal, Mr. Kajungu who was the first to make the submission for the respondent, while conceding that the respondent received a copy of the proceedings having written a reminder letter subsequent to 11th October, 2022, he submitted that the supplied documents could not constitute a complete record as a copy of the ruling thereof did not bear the correct citation of the relevant proceeding. He denied the assertion that the respondent had been dormant to collect a copy of the proceedings before 11th October, 2022.

In further rebutal, Mr. Mtogeswa who took over from Mr. Kajungu submitted that; it is not the law that failure to approach the Registrar of the High Court after expiry of 90 days amounts to failure to take steps to pursue the intended appeal. In his understanding, in as long as the intended appellant has requested for a copy of the proceedings, in the absence of proof that the documents were ready for collection, it cannot

be said that there was a failure to take steps on the part of the appellant. The reason according to him being that, the provision under discussion does not provide for the effect of such failure. In support of that, the counsel relied on the case of **Georgio Anagnostou & Another v. Emmanuel Marangakisi & Another** [2019] 1T.L.R. 328.

In the alternative, it was his submission that because the respondent timely filed the notice of appeal and request letter, the omission to take steps to collect a copy of proceedings after expiry of 90 days is minor irregularity which can be ignored under the oxygen principle set out in sections 3A and 3B of the Appellate Jurisdiction Act (the AJA).

Having exposed the nature of the contention, it is desirable that we consider the merit or otherwise of the application in line with the affidavits and submissions both for and against the application. It is common ground that, under rule 89(2) of the Rules, any person on whom a notice of appeal has been served or ought to have been served, can apply to the Court for an order striking out the relevant notice of appeal on the grounds *inter alia* that, some essential steps in the proceedings have not been taken at all or not taken within the prescribed time.

In this case, it is not in dispute that the notice of appeal was lodged on 30th July, 2021 while the request of a copy of the proceedings to the Deputy Registrar was on 23rd July, 2021. Therefore, if everything remained constant, the intended appeal was to be filed within 60 days from the date of lodging the notice of appeal. That is to say, on or before 30th September, 2021. This is in accordance with rule 90(1) of the Rules. The provision just referred is nonetheless not without exception. It is express in the proviso to the said provision read together with rule 90(3) that; where the intended appellant could but for the delay to be supplied with a copy of the proceedings by the Registrar of the High Court, timely file the intended appeal, the period within which he or she was waiting for a copy of proceedings can be excluded by way of a certificate by the Registrar of the High Court if the relevant documents were requested within 30 days from the date of the decision and the request letter served on the respondent. Rule 90(5) which was introduced by the amendments brought by G.N.344 of 2019 provides for additional duties on the part of the Registrar of the High Court and the intended appellant in relation to preparation and collection of a copy of the proceedings. It provides as follows:

(5) Subject to the provisions of subrule (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 upon being informed by the Registrar to do so, or within fourteen (14) days after the expiry of ninety (90) days."

As we held in the case of **Tanzania Bureau of Standards and Another v. Erythis Trading Company** (*supra*), the above provision apart from imposing obligation to the Registrar of the High Court to ensure that the requested documents are ready for collection within 90 days of the request and inform the intended appellant accordingly, it imposes obligation to the intended appellant "*to take steps to collect the documents upon being informed or within 14 days from the expiry of such period if there be no information from the Registrar*".

It was contended for the respondent that contrary to the applicant's expression, the respondent had, after filing the request letter until to 11th October, 2022 when he wrote the reminder letter, been in physical follow-ups of the requested documents but in vain. We have taken time to carefully study the affidavit in reply. With deepest respect to Mr. Kajungu, we could not come across with any factual deposition suggesting that, the respondent had ever made any follow-up before 11th October, 22 when he wrote a reminder letter to the Registrar. Thus, the

counsel's contention in that respect is a mere argument from the bar which cannot be relied upon to confirm the claim. Besides, as the current application had already been instituted on the date when the respondent wrote the so called reminder letter, we are of the view that the writing of the same was nothing else other than an afterthought.

It was submitted for the respondent that, omission to take steps to collect the documents within 90 days does not amount to failure to take necessary steps under rule 89(2) of the Rules. In the view of the learned counsel, once the applicant requests for a copy of the proceedings, her obligation under rule 90 is discharged until she is informed by the Registrar of the readiness of the requested documents. Our attention was drawn to the case of **Georgio Anagnostou & Another v. Emmanuel Marangakisi & Another** (*supra*) where it was observed:

"In our respectful view, much as the Respondent has simply stated that they made follow ups with the Registrar for supply of copies, in the absence of any proof that the copies were indeed ready for collection after expiry of 90 days, we are unable to uphold Mr. Safari's argument that the Respondents have failed to take essential steps in the appeal within the meaning of rule 89(2) of the Rules. We say so being alive to the fact that apart from sub-rule requiring the Appellant

to collect the copies after of 90 days, no consequences have been prescribed where, as in the instant application the Registrar fails to supply such copies for the reason that the same are not ready."

The above decision, in our reading, was based on the provision of rule 90(4) which was brought by the 2017 amendments of the Rules. We note that, while the Court observed at pages 337 and 338 of the report that, the provision was introduced for purpose of among others, ensuring "*an accountability on the Appellant to collect the copies after expiry of 90 days where the Registrar fails to inform him that the same are ready for collection*", it was unable to accept the proposition that failure to discharge such duty would justify striking out a notice of appeal. The reason being that there was nothing in the provision prescribing time limit within which such steps could be taken and the consequences thereof. To be specific, it was reasoned as follows:

"To our understanding, that seems to suggest that the Appellant has to approach the Registrar for collection of the copies regardless of whether the same are ready or not after expiry of 90 days. However, the sub-rule does not fix any time limit within which the Appellant will be required to collect after expiry of 90 days. Despite the absence of specific time limit, it is

expected that it must be within reasonable time but again, the sub-rule does not prescribe any consequences flowing from the failure to approach the Registrar for collection of the copies after the expiry of 90 days where the Registrar does not inform the Appellant to that effect.”

The 2019 amendments, it would appear, sought to address the above shortcomings by prescribing the time limit within which the appellant should approach the Registrar after expiry of 90 days. Admittedly, the issue of the consequences of the failure to comply with the requirement on the part of the intended appellant was not provided in the amendment. Besides, the amendment did not provide for the effect of failure of the Registrar to supply the requested documents after the intended appellant has taken steps within the meaning of rule 90(5) of the Rules.

The foregoing notwithstanding, it is our view that, as the decision just referred considered the position of the law as it was before the 2019 amendments, it is distinguishable and thus inapplicable in the instant matter. This is more so because as we held in **Monica Makungu v. Director of Education Department, Archdiocese of Mwanza**, Civil Application No. 31/08 of 2021 [2022] TZCA 49 (21 February 2022,

TANZLII), the principle that the intended appellant becomes home and dry after requesting for a copy of the proceedings until he or she is supplied by the Registrar of the High Court with the requested documents, phased out of existence after the 2019 amendments. In particular we stated as follows;

*"The respondent's belief that after lodging the letter requesting copies of the documents, the appellant was home and dry, waiting for notification that the documents are ready for collection as stipulated in the case of **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [1997] T.L.R. 328, though valid then, no longer exist, after the 2019 amendments of Rule 90 of the Rules. The amendments have strictly imposed a duty on the appellant under Rule 90 (5) of the Rules, requiring steps to be taken within fourteen (14) days after the expiry of ninety (90) days."*

The Court had previously made a similar position in the case of **Daud Robert Mapuga and 147 Others v. Tanzania Hotels Investment Ltd and 4 Others**, Civil Application No.462/18 of 2018 [2021] TZCA 11 (11 February 2021, TANZLIII). In this case, the respondents having lodged a notice of appeal and requested for a copy of the proceedings, remained dormant until the application for striking

out a notice of appeal was filed 27 months after. In opposition to the application, it was contended that, after lodging the notice of appeal and requested for a copy of the proceedings, the respondents did not have further step to take until they had received a copy of the proceedings from the Registrar. The Court refused the contention and proceeded to strike out the notice of appeal for want essential steps. In reaching to such a decision, the Court observed:

"While we acknowledge that the Registrar is plainly blameworthy for his inaction in supplying the requested documents, we think the respondent's diligence is seriously in question. We are unprepared to let the respondents claim that they were home and dry. It would be most illogical and injudicious, we think, to accept the respondents' wait infinitely for a copy of the proceedings while they take no action on their part to follow up on their request to the Registrar. To say the least, this infinite inaction, in our respectful view, offends the ends of justice."

Similarly, in the cases of **Rehema Idd Msabaha v. Salehbhai Jafferjee Sheikh and Another**, Civil Application No. 527/17 of 2019 [2022] TZCA 105 (8 March 2022, TANZLII) and **Tanzania Bureau Standards & Another v. Erythia Trading Company** (supra), it was clearly stated that, failure to approach the Registrar after expiry of 90

days is tantamount to failure to take essential steps within the meaning of rule 89(2) of the Rules. In the former decision, the Court observed as follows:

" In light of the provisions of rule 90(5) of the Rules, the consequence of the failure to approach the Registrar within the prescribed period is now clear. The failure amounts to failure to take necessary steps within the meaning of rule 89(2) of the Rules."

In this case, the decision sought to be appealed against was delivered on 14th July, 2021. The respondent lodged the notice of appeal on 30th July, 2021 and requested for a copy of the proceedings on 23rd July, 2021. Until on 10th August, 2022 when the instant application was filed, being more than 12 months from the date of the decision, the respondent had not taken any step in terms of rule 90(5) of the Rules. It is submitted that, having filed a notice of appeal and requested for a copy of the proceedings; the respondent had no step to take until she was notified by the Registrar that the documents were ready for collection. A similar plea was made in **Daud Robert Mapuga** (supra) but the Court held that essential steps in pursuit of the intended appeal had not been taken.

In view of the foregoing discussions, therefore, we are in agreement with the applicant that the respondent failed to take essential steps in pursuit of the intended appeal. The application is thus with merit and it is hereby granted. As a result, we strike out the notice of appeal with costs.

Order accordingly.

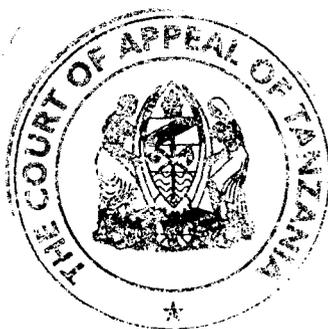
DATED at **DAR ES SALAAM** this 21st day of November, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. J. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2023 in the presence of Mr. Obadia Kajungu, learned counsel for the Respondent and also holding brief for Mr. Emmanuel Saghan, learned counsel for the Applicant, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL