

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LEVIRA, J.A., GALEBA, J.A., And ISMAIL, J.A.)

CIVIL APPLICATION NO. 747/17 OF 2023

SAID NASSOR SAID APPLICANT

VERSUS

EMMANUEL GITIGAN GHERABASTER RESPONDENT

**(Application to Strike out a Notice of Appeal in Respect of the Decision of
the High Court of Tanzania, Land Division at Dar es Salaam)**

(Msafiri, J.)

dated the 28th day of October, 2022

in

Land Case No. 190 of 2021

.....

RULING OF THE COURT

18th March, & 12th April, 2024

GALEBA, J.A.:

This application was lodged on 5th October, 2023 seeking to strike out a notice of appeal which was filed by the respondent on 2nd November, 2022. The application is predicated on rule 89 (2) of the Tanzania Court of Appeal Rules 2009 (the Rules). According to the applicant, the respondent has not taken essential steps to institute the intended appeal, to challenge the judgment of the High Court which was pronounced on 28th October, 2022.

According to the affidavit of Mlyambelele Abedinego Levi Ng'weli, counsel for the applicant, in support of the notice of motion, since delivery of the judgment in Land Case No. 190 of 2021 on the above mention date, other than service of the notice of appeal and the letter requesting for a copy of the proceedings, on 4th November, 2022, there has not been any other step taken by the respondent to lodge the appeal, up to almost a year later, on 5th October 2023, when this application was filed. According to the affidavit, the documents that were requested by the respondent were ready for collection by him since 19th December, 2022. In fact, a copy of 30-page proceedings which were certified on that date are attached to the affidavit of Pensia Mbilinyi, an advocate who carried out the official perusal of the case file on 31st August, 2023.

In terms of the respondent's affidavit in reply, he made tireless efforts to procure a letter inviting him to collect the documents, but would not get the letter from the Registrar of the High Court. In addition to following up this matter, he was also following up another 'similar and closely related case' which is Land Case No. 84 of 2014. The respondent was therefore dismissive of the allegations of the applicant, for according to him, he made sufficient efforts to follow up the necessary documents he had requested, but would not be called to collect them.

At the hearing of this application, the applicant and the respondent were represented by Mlyambelele Ng'weli and Mr. Kassim Nyangarika, both learned advocates, respectively. Mr. Ng'weli adopted his submissions without any oral elaborations. Like his colleague, Mr. Nyangarika adopted his submissions and intended not to give any clarifications, but we sought elaboration from him on several unclear points.

The submissions of both learned advocates, will be referred to in due course as we advance in this ruling, suffices it to observe that in terms of the application and the contention of the learned advocates, the issue for our determination is whether, it is true that consequent to lodging of a notice of appeal and requesting for a copy of the proceedings, the applicant failed to take essential steps to prosecute the intended appeal.

The whole point of the respondent is that, having written the letter requesting for a copy of the proceedings for appeal purposes, and delivered it to the Registrar of the High Court, the burden to ensure that he procures the documents requested, was wholly shifted to the Registrar, to the exclusion of the respondent. Seeking to justify why was it that the applicant was in possession of the documents he himself had requested, but did not have them, the respondent's counsel's written submissions at page 2, is loud and clear, on that point: -

"The respondent is a human being and is not an angel who would know in advance that the requested documents are ready for collection by the respondent for purposes of lodging the appeal."

In court practice we call that justification, the Home and Dry Principle. In terms of that principle, once a respondent requests for a copy of the proceedings for appeal purposes under rule 90 (1) of the Rules, then it is the Registrar who has to supply the requested documents, and the respondent has no obligation or duty of reminding him to supply the documents. The respondent is innocent of any consequences of any delays to deliver the documents to him, for he is "home and dry" with no blemishes on his part. The burden of sorting out any blame, real or potential, following any omission to timely supply the requested documents, squarely rests on the Registrar's shoulders. As pointed out, that was Mr. Nyangarika's strongest point.

Mr. Ng'weli maintained in the written submissions of the applicant that, the respondent had an obligation to remind the Registrar to supply him the requested documents, particularly after expiry of 90 days from when the respondent submitted the letter to the Registrar. To support his position, learned counsel, cited rule 90 (4) of the Rules and the case of **Beatrice**

Mbilinyi v. Ahmed Mabkhut Shabiby, Civil Application No. 475/01 of 2020, and; **John Nyakimwi v. The Registered Trustees of the Catholic Diocese of Musoma** Civil Application No. 85/08 of 2017 (both unreported).

From this point going forward, we will focus on a discussion, seeking to pronounce ourselves on whether the respondent's position has any legal protection under the Rules, particularly after 26th April, 2019 onwards. The significance of that date will become obvious in due course, as we proceed.

First we must confess that the Home and Dry Principle was at some point good law in this jurisdiction, and its import was clearly summarized in the case of **Saleh Abdi Mohamed v. Katibu wa Baraza la Mapinduzi And Another** [2018] T.L.R. 324, where this Court held that: -

*"(iii) The respondents have done more than what they were required to do. This is so because, reading between the lines of rule 90 (1) of the Rules, in our view does not require the respondent to remind the Registrar of the supply of copies of proceedings, judgment and decree. As the respondent had since 29th September, 2016 lodged a letter applying for the requisite documents for purposes of preparing the appeal, **they were home and dry**. They were not under any*

obligation to send reminder letters to the Registrar of the High Court."

[Emphasis added]

The above position of the law subsisted up to, but not after 26th April, 2019. On that date the Tanzania Court of Appeal (Amendment) Rules 2019 were published under Government Notice No. 344 of 2019, amending sub rule (5) in rule 90 of the Rules. The provisions of rule 90 (5) of the Rules, from that date 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 a copy upon being informed by the Registrar to do so, or within fourteen (14) days after the expiry of the ninety (90) days.**"*

The above provision, first makes it mandatory for the Registrar to deliver the documents to the prospective appellant within 90 days from the date he received the letter. The other aspect introduced, is the respondent's obligation to remind the Registrar in case 90 days expire without the latter inviting him to collect the requested documents. In an application involving **State Oil Tanzania Limited v. Equity Bank**

Tanzania Limited and Another, Civil Application No. 426/16 of 2022

(unreported), this Court observed: -

"We must state at this juncture that, our critical consideration of rule 90 (5) of the Rules in the context of the above two amendments of the Rules and the history before the amendments, reveals that the main reason for its introduction in the Rules was to get away with the Home and Dry concept which permitted laxity and inaction on the part of the intending appellant, where the Registrar of the High Court was not timely attending to the intending appellant's request for supply of a copy of the proceedings. So, the said sub rule came to introduce a certain level of involvement and responsibility of the intending appellant in the process of procurement of the documents applied for purposes of appeal.....Essentially, sub rule (5) of rule 90 of the Rules is meant to assess whether an intending appellant is serious and active on top of things in seeking to have his appeal processed, or he is indifferent, detached and disinterested with the appeal process."

That means, the submission by Mr. Nyangarika, that the respondent having submitted the letter to the Registrar, had no more duty to perform

under the Rules, in terms of following up with his appeal, could only be valid, had it been made before 26th April, 2019, before enactment of sub rule (5) of rule 90. Otherwise, from then on, a prospective appellant may be inactive for only 90 days following submission of his letter to the Registrar, but after then, an intending appellant has a statutory duty to write a reminder letter, and should do so in the next following fourteen days. If that does not happen, an essential step in pursuit of the intended appeal is skipped, and a pending notice of appeal may suffer a deadly blow in atonement for the inaction of the prospective appellant or his lawyer.

The undisputed fact is that, a notice of appeal sought to be struck out, was filed on 2nd November, 2022 and the letter requesting for a copy of the proceedings was delivered to the Registrar on 3rd November, 2022. Thus, in the context of rule 90 (5) of the Rules, the Registrar was duty bound to prepare and avail the respondent with the requested copy of the proceedings on, or before 2nd February, 2023, which is 90 days from when the letter was submitted to the Registrar. But it is not disputed, in this case, that the Registrar did not avail the documents to the respondent, in the 90 days. A million-dollar question is whether, within the fourteen days that followed after expiry of 90 days without informing the respondent to go and collect the documents, there is any provable reminder to the Registrar

to supply the documents requested. We inspected the affidavit in reply, and regrettably there is nothing useful attached to the affidavit in that respect.

We must confess, however that, there were attachments to the affidavit in reply, and they were four letters and one ruling. All the four letters including a reply from the Registrar, relate to a complaint of the respondent about a missing court file. The file missing was for the case of **Saunters Business Ventures v. CRDB Bank PLC and Bani Investment Auction Mart**, Land Case No. 84 of 2014. This case is also referred to, in clauses 5 and 6 of the affidavit in reply. The Registrar responded to one of the letters, that the Registry was trying to trace the court file in that Land Case, and once the same would be traced, the respondent would be informed. On our part, we failed to logically link the issue of the missing file in Land Case No. 84 of 2014 with this application. So, even if we wanted to, we are unable to agree with Mr. Nyangarika, that pursuing a lost court file, amounted to taking any essential step towards lodging the intended appeal seeking to challenge a judgment in a completely different court case.

It is, in our view clear also that, upon expiry of 90 days of delivery of the letter requesting for the documents, neither the respondent nor his

advocate, wrote any letter reminding the Registrar to deliver the documents earlier requested. This omission offended the law as obtains presently. The abstention amounted to not taking an essential step in pursuit of the appeal contrary to the requirements of rule 90 (5) of the Rules.

In other words, we fully agree with Mr. Ng'weli that the respondent failed to take any essential step in pursuit of the intended appeal, in the above context, and maybe that is why although the applicant attached the entire proceedings to the applicant's affidavit, still the respondent was complaining that he has not been called to collect the very documents. A reasonable litigant, upon being served with the notice of motion attached with the documents that he had requested, would have written a letter to the Registrar that he noted that the documents are ready, then demand that they be accessed to him. However, that was not the case with the respondent and when his advocate appeared before us, he even maintained the same complaint, that he has not been called to collect the documents, even though the documents were attached to the notice of motion he was holding in his hands. We think such amount of laxity and inaction was excessive in measure, and by all means inexcusable.

In the final analysis, we hold that one of the essential steps in pursuit of the intended appeal was not taken by the respondent. This application

therefore, succeeds. Accordingly, under the provisions of rule 89 (2) of the Rules, the notice of appeal that was lodged on 2nd November, 2022 as a basis for challenging the decision of the High Court in Land Case No. 190 of 2021, is hereby struck out with costs.

It is so ordered.

DATED at DAR ES SALAAM, this 8th day of April, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

Ruling delivered this 12th day of April, 2024 in the presence of Mr. Mlyambelele Ng'weli, learned Counsel for the applicant and Mr. Mlyambelele Ng'weli holding brief for Mr. Kassim Nyangarika, learned counsel for the Respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL