

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 315/01 OF 2021

TANZANIA BUREAU OF STANDARDS1ST APPLICANT

ATTORNEY GENERAL2ND APPLICANT

VERSUS

CHARLES NYATO RESPONDENT

**(Application from the Judgment and Decree of the High Court of Tanzania
at Dar es Salaam)**

(Arufani, J.)

Dated the 18th day of July, 2017

in

Civil Appeal Case No. 158 of 2015

RULING OF THE COURT

31st August, & 29th September, 2022

RUMANYIKA, J.A.:

This application has been brought under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 as amended. Tanzania Bureau of Standards and Attorney General, the applicants, move the Court for an order to strike out the Notice of Appeal filed by the respondent, Charles Nyato on 26/07/2017 against the decision of the High Court. The ground being that, the latter has failed to take some essential steps or institute an appeal within the time prescribed by the law. The application is supported by an affidavit of Hangi M. Chang'a, Principal State Attorney of the Office of the Solicitor General. The respondent opposed it by filing an affidavit in reply. During the hearing the parties also relied on the written submissions for

and against the application filed by them on 03/09/2021 and 05/10/2021 respectively.

At the hearing of the application, Mr. Deodatus Nyoni, Learned Principal State Attorney who was assisted by Mr. Evelius Mwenda, Learned State Attorney appeared for the applicant. Mr. Japhet Mmuru, Learned Counsel appeared for the respondent.

A brief background of this application as deposed in the supporting affidavit tells that before the Dar es Salaam Resident Magistrate's Court at Kisutu, the 1st applicant unsuccessfully sued the respondent for recovery of TZS. 44,317,846.05 exparte. Aggrieved, the 1st applicant appealed successfully to the High Court, at Dar es Salaam (Arufani, J.) as it reversed the decision on 18/07/2017. The respondent was not satisfied. As alluded to above, he filed a Notice of Appeal on 26/07/2017 with intention to challenge that decision and wrote a letter to the Registrar requesting to be supplied with a certified copy of the proceedings and duly served the copies of the Notice of Appeal and the letter to the 1st applicant.

Relying on his written submission filed on 23/09/2021 as intimated above, Mr. Nyoni contended that having lodged the Notice of Appeal in question on 26/07/2017, the respondent should have filed an appeal within the first sixty days on 24/09/2017 latest as an essential step for the furtherance of the intended appeal but contrary to the provisions of rule

90(1) of the rules, for no good reason, the respondent just sit back for more than three years thus having written the last reminder to the Registrar on 10/05/2018. Hence, since then he abandoned the said Notice of Appeal which Mr. Nyoni urged us to strike out with costs.

To support his point, Mr. Nyoni cited our decision in **Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020 (unreported). Additionally, with the similar moderate zeal and vigour in blaming the respondent, Mr. Nyoni submitted that the latter's inaction and laxity to the furtherance of the intended appeal is inexcusable. To drive his point home, he cited to us our unreported decisions in **Mahiku A. Maharagande v. Nyamuhika A. Maharagande**, Civil Application No. 571/01 of 2017 and **Daudi Robert Mapugu and 417 Others**, Civil Application No. 462/18 of 2018. To round up his point, Mr. Nyoni submitted that as the applicant in **Daudi Robert Mapugu** (supra) had abandoned the Notice of Appeal for nine months only, in the present application it is twenty nine months far beyond it, hence, quite unreasonably a long time from when he wrote his last follow up letter to the Registrar on 10/05/2018. Mr. Nyoni urged us to strike out the Notice of Appeal like we did in the above cited authorities.

Nonetheless, when we probed him to know whether the law provides for a number of times which the applicant should make follow ups

to the Registrar to be supplied with the copy of proceedings, Mr. Nyoni was generous to tell us, that on that aspect the law is silent.

In rebuttal, Mr. Mmuru adopted the contents of the affidavit in reply and written submissions filed on 05/10/2021 and contended that the application is devoid of merits as upon filing the Notice of Appeal the respondent took all the essential steps required of him, as deposed under paragraphs 5, 6, 7, 8 and 9 of the affidavit in reply, that, he readily applied in writing for the copy of proceedings and duly served it to the applicant. Because all this time he has not been supplied with such documents necessary for lodgement of his appeal, Mr. Mmuru argued, the respondent is not to blame. To bolster his argument, he cited our decision in **Jackson Mwaipyana v. Parcon Limited**, Civil Application No. 115 of 2017 (unreported). Finally, he submitted that the rule in **Beatrice Mbilinyi** (supra) cited by Mr. Nyoni is distinguishable under the circumstance much as the Government Notice Numbers 362 of 2017 and 344 of 2019 set the cut-off point and the authority in **Mahiku Maharagande** (supra) actually applies in favour of the respondent.

Arguing on the timing of the applicant's attempts to knock out the Notice of Appeal, Mr. Mmuru submitted that the Notice of Appeal is safe because the operation of GN. Nos. 362 of 2017 and 344 of 2019 relied

upon by Mr. Nyoni came into force on 22/09/2017 and 26/04/2019 respectively after the lodgement of that Notice of Appeal.

Having heard and considered the rival submissions of the learned counsel, the central issue for our consideration is whether, as presented to us the applicant's case is sufficient for us to strike out the Notice of Appeal.

As it has been alluded to above, Rule 89(2) of the Rules is the enabling provisions for this application. It reads as follows:

*"subject to the provisions of subrule (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**". (Emphasis added).*

What constitutes essential step or, as commonly known the necessary step, has been stated in a number of our decisions to mean those steps to be taken by a party in pursuit of and advancement of his appeal. See- our decision in **Asmin Rashidi v. Bako Omari** [1997] T.L.R. 146 which we quoted with approval in **James Bernado Ntambala v. Furaha Denis Pashu**, Civil Application No. 178/11 of 2016 (unreported).

We are settled in our minds that what constitutes an essential step for furtherance of an appeal is determinable on a case to case basis. It depends on whether the intended is a 1st, 2nd or 3rd appeal. We have taken this stance in a number of cases. For instance in **Transcontinental Forwarders Limited v. Tanganyika Motors Limited** [1997] TLR 328 we held thus:

*"... failure to take essential steps to institute the appeal could either be procedural or evidential. An example could include an omission to apply for leave to appeal or a certificate on point 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.*

As for the present application, it is not disputed by the second applicant that the respondent filed a notice of appeal on 26/07/2017, he applied for, and was granted leave to appeal on 03/05/2018, he wrote a letter to the Registrar on 26/07/2017 requesting for copies of the documents necessary for appeal purpose and served the copy of that letter upon the respondent. All things being equal, the respondent should have lodged an appeal sixty days as reckoned from 26/07/2017 when he filed the notice of appeal but failed, as he had not been supplied with the

necessary documents irrespective of several and repeated requests to the Registrar as deposed and contended under paragraphs 6, 8 and 9 of the supporting affidavits. The degree of militancy reasonably expected of the intended appellant to follow up the said necessary documents has been described by this Court in a number of cases. In **The District Executive Director, Kilwa District Council v. Bogeta Engineering Limited**, Civil Appeal No. 37 of 2017 we held as follows: -

“an appellant must lodge his appeal within sixty days from the date when the notice of appeal was lodged. The only exception to this requirement is where he has not obtained a copy of the proceedings from the High Court and has applied for the same within thirty days of the date of the decision against which it is desired to appeal. (Emphasis added).

With the above quoted stance in mind however, we are also aware of our decision in **Daudi Robert Mapuga** (supra) cited by Mr. Nyoni. We agree with him that the “home and dry” principle was abolished by the amendments of rule 90 of the Rules by the Tanzania Court of Appeal (Amendment) Rules 2017, (“G.N. No. 362 of 2017”) and the subsequent amendments which require the intending appellant’s more vigilance for furtherance of his appeal. For instance Rule 90(5) (1) of the Rules for reads thus;

...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 Registrar to do so, or within fourteen (14) days after the expiry of ninety (90) days. (Emphasis added).

Applying the above cited rule of the Court squarely to the present application, as said before, upon the delivery of the impugned decision on 18/07/2017, the respondent lodged a notice of appeal within eight (8) days later on 26/07/2017 and duly served it on the 1st applicant on 27/07/2017. It is also undisputably contended by the applicant that he wrote a letter to the Registrar requesting for a certified copy of the proceedings and served its copy to the applicant. As the Registrar turned a blind eye on it, he argued, about thirteen (13) days later, on 10/08/2017, the respondent wrote a reminder letter and served it on the applicant, and, yet, on 10/05/2018 he wrote to the Registrar another reminder which was followed by a number of futile physical follow ups until the applicants lodged this application on 09/07/2021.

From the above narrated and undisputedly timely and tireless struggles of the respondent, with all fairness one could not blame him for being home and dry because he had timely requested for the necessary

copy of the proceedings vide his letters with Reference Numbers KHA/HCLD/09/2018 and KHA/HCDDR/10/2017 dated 09/05/2018 to the Registrar which were dully received and acknowledged by him, which were he followed up physically as deposed at paragraphs 8 and 9 of his affidavit in reply. With respect, we decline to accept Mr. Nyoni's invitation to hold otherwise as the case of **Daudi Robert Mapuga** (supra) cited by him is distinguishable from the present case for three main reasons; **one**; whereas, in **Daud Robert Mapuga** (supra) upon lodging a Notice of Appeal and applying for a copy of the proceedings, the respondent just chose to sit back believing that he was home and dry, in the present case the respondent did all what was required of him. He wrote a letter to the Registrar requesting for the copy of proceedings and physically followed it up several times and repeatedly all in vain. **Two**, with all intents and purposes in **Daud Robert Mapuga** (supra) we did not mean that the promptness and diligence of the intended appellant in following up the said documents to discharge the Registrar from his duty of preparing, and, without undue delay ensuring the supply of the requested copy of proceedings as required of him under rule 90(5) (1) of the Rules, where possible, within record time nor did we mean that upon receiving written requests for a copy of the proceedings, the Registrar supply them just at his whims and leisure. We are afraid because such unprecedented business

processing would result into endless litigation which we cannot allow. **Three**, from 10/08/2017 when the respondent wrote the Registrar for the 1st time, his several reminders, including a letter dated 10/08/2018 when he requested for a copy of the proceedings last, the respondent had demonstrated enough diligence reasonably expected of him as he exhausted the first 90 days and the subsequent 14 days of follow ups allocated under rule 90(5) (1) of the Rules much as we agree with Mr. Nyoni's contention that cases belong to the parties not to the court Registrars.

Equally, again on the issue of the respondent being home and dry, the case of **Mahiku A. Maharangande** (supra) is distinguishable because, unlike in the present case, in that case, upon the respondent requesting for a copy of the proceedings and the Registrar notified him to collect the same, the former just sat back. It is very unfortunate that all that time of the respondent's follow ups, as it stands on record, not only the Registrar did not notify him to collect the requested documents, but also, he did not even in writing ask the respondent to continue waiting. This was unusual. In the absence of it all therefore, we give the respondent the benefit of doubt and do not expect this kind of casual running of the courts' registries to happen again.

Nevertheless, assuming the respondent has failed to demonstrate enough follow ups for the said necessary documents which is not the case, with respect, we would not agree with Mr. Mmuru's contention to exempt the respondent on the ground that the Government Notices Numbers 362 of 2017 and 344 of 2019 (the GNs) became operational after he had filed the Notice of Appeal. As such, the GNs would not assist the respondent. We hold so because of the retrospective nature of procedural laws including the said GNs.

With the above deliberations we find no merit in this application as it was prematurely filed. Consequently, we dismiss it with costs. Order accordingly.

DATED at **DAR ES SALAAM** this 19th day of September, 2022.


J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 29th day of September, 2022 in the presence of Mr. David Andiindile holding brief for Mr. Deodatus Nyoni, learned Principal State Attorney and holding brief for Mr. Japhet Mmuru, learned counsel for the respondent, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL