

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., MWAMBEGELE, J.A., And SEHEL, J.A.)

CIVIL APPLICATION NO. 178/11 OF 2016

JAMES BERNADO NTAMBALA APPLICANT

VERSUS

FURAH DENIS PASHU RESPONDENT

**(An application to strike out a notice of appeal from the Judgment of the
High Court of Tanzania at Tabora)**

(Rumanyika, J.)

dated the 9th day of May , 2013

in

Land Appeal No. 17 of 2010

.....

RULING OF THE COURT

28th November & 5th December, 2019

MWAMBEGELE, J.A.:

The applicant, James Bernado Ntambala, was the respondent in Land Appeal No. 17 of 2010 before the High Court of Tanzania at Tabora in which the respondent Furaha Denis Pashu was the appellant. That appeal was decided in favour of the applicant on 09.05.2013 by Rumanyika, J. Dissatisfied, the respondent lodged a Notice of Appeal on the following day; that is, on 10.05.2013 to be particular, seeking to assail the decision of the High Court and thereafter, he obtained leave to appeal to this Court

on 29.05.2015. The certified copies of documents for appeal purposes were ready for collection on 29.05.2019. However, so the applicant deposes in the founding affidavit, the respondent or his counsel dilly-dallied and took no further action to collect them and lodge the intended appeal. The applicant also deposes in the founding affidavit that the respondent has hitherto failed to take any essential step towards the prosecution of the intended appeal.

In view of the foregoing, the applicant lodged the Notice of Motion at hand on 24.11.2016 seeking an order of the Court striking out the respondent's Notice of Appeal on account that he has not taken essential steps towards the prosecution of the intended appeal. The Notice of Motion has been taken out under the provisions of rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules"). The same has been supported by an affidavit deposed by the applicant and resisted by an affidavit in reply deposed by Musa Kassim, the respondent's counsel.

When the application was placed before us for hearing on 28.11.2019, both parties were in appearance. The applicant was in person and the respondent was represented by Mr. Musa Kassim, learned

advocate. The applicant intimated to us that, initially, he had the representation of Mr. Method R. G. Kabuguzi, learned advocate, but that he was at the moment financially down in the dumps to the extent of not being able to engage him to enter appearance in arguing the application for him. Given the circumstances, he told us, he would fend for himself. We allowed him so to do.

The applicant, through Mr. Kabuguzi, learned advocate had earlier; on 14.12.2016, lodged in the Court written submissions in support of the application which he sought to adopt together with the founding affidavit as part of his oral arguments without more. The respondent filed an affidavit in reply titled "Counter Affidavit" but lodged no reply written submissions for the reason that he was not served. Be that as it may, upon being served, Mr. Kassim was of the view that he was ready to proceed with the hearing of the application and prayed for, and was granted, leave to resist the application orally and adopted the affidavit in reply as part of the oral arguments.

In the founding affidavit and the written submissions in support of the application adopted by the applicant at the hearing, he, mainly,

submits that the respondent, being dissatisfied with the decision of the High Court which was rendered on 09.05.2013, he promptly lodged in the Court a Notice of Appeal on the next day; 10.05.2013, applied for certified copies of documents for appeal purposes and obtained the requisite leave of the High Court to appeal to the Court on 29.05.2014. The applicant deposes further that the respondent was notified by the Deputy Registrar vide a letter which was received by the respondent's advocate on 20.05.2015. Ever since, the applicant contends, the respondent has not instituted the intended appeal. In the circumstances, he argues, the respondent has failed to take essential steps towards the prosecution of the intended appeal. He thus implores the Court to strike out the notice of appeal in terms of rule 89 (2) of the Rules.

Against the application, in a three-paragraph affidavit in reply, the respondent's advocate deposes at para 3 thereof:

"That, paragraphs 3 and 4 of the Applicant's affidavit is vehemently disputed. The documents allegedly to be ready for collection by us from the High Court Deputy Registrar were incomplete contrary to what we requested, to wit Exhibit P.1; document showing that the 1st Respondent is the

lawful owner of the premises in dispute and Exhibit P.2; Demand Letter to the 2nd Respondent as written by M.K. Mtaki Advocate were missing. I further state that since then up to now we are still making follow-up and the respective court files from which the missing documents could be obtained are misplaced and untraceable by the High Court the fact that has created to us difficult in preparing competent record for appeal up to now.”

The respondent amplified the depositions in the affidavit in reply that he did not stay put but took further necessary steps to further the prosecution of the intended appeal. He submitted that, for instance, he filed in 2017 Civil Application No. 182/11 of 2017 in the Court for extension of time to file the intended appeal. However, that application was withdrawn before Mugasha, J.A on 19.02.2018 so he could apply from the High Court for supply of a complete record and a certificate of delay thereof. Mr. Kassim added that these details could not feature in the affidavit in reply because they were endeavours made after the same was filed. He added that those efforts by the respondent bore fruits in that the relevant appeal has already been lodged and it is pending in the Court. In the premises, the respondent's counsel beseeched us to dismiss the

application with a view to paving way to the hearing of the pending appeal as we did in **Tahera Somji v. National Housing Corporation**, Civil Application No. 18 of 2014 (unreported). Prodded on the number of the pending appeal referred to, the learned counsel told the Court that they have not received it yet from the Court of Appeal headquarters in Dar es Salaam but that they lodged it on 15.10.2018 vide ERV No. 20648907 of that date; that is, 15.10.2018 and that the parties to the appeal have already filed written submissions therein.

The applicant had nothing useful to add in rejoinder. He only pleaded with us that the notice of appeal lodged in respect of the intended appeal which is the subject of the application at hand should be struck out. Otherwise, the applicant, a lay person fending for himself, left any decision to the contrary in the wisdom of the Court.

We wish to start our determination by a statement we made in **Asmin Rashidi v. Boko Omari** [1997] TLR 146 that the essential steps in the prosecution of an appeal envisioned by the provisions of rule 89 (2) of the Rules - then rule 82 of the Tanzania Court of Appeal Rules, 1979 - were steps which advanced the hearing of the appeal. The question which

immediately comes to the fore at this juncture is whether the respondent has taken those steps.

As can be discerned from para 3 of the affidavit in reply, the respondent's advocate has deposed that when they were supplied by the Deputy Registrar with the certified copies of documents for appeal purposes, the same were short of some documents which were tendered as Exh. P1 and Exh. P2; which showed that the respondent was a lawful owner of the disputed premises (Exh. P1) and a demand letter by M. K. Mtaki, advocate (Exh. P2). Those documents, the respondent's advocate deposed, were misplaced and could not be traced. When we probed Mr. Kassim if he wrote the Deputy Registrar requesting for the missing documents in the documents supplied to him, he, quite honestly, as a true officer of the court, admitted that he did not.

We have carefully considered the respondent's depositions and having so done, we think, he has not demonstrated to our satisfaction if he has taken any essential steps towards the prosecution of the intended appeal after he lodged the Notice of Appeal and after he received the Deputy Registrar's letter with Ref No. Land App. No. 17/2010 of

13.03.2015 which he admits to have received on 20.03.2015 as endorsed on it. That letter is an annexure to and part of the founding affidavit. What we discern from para 3 of the affidavit in reply is sheer allegations and hearsays. The respondent merely alleges that the certified copies of the documents supplied to him were short of Exh. P1 and Exh. P2. We are not shown any effort made to require the Deputy Registrar supply the missing documents to the respondent. Moreover, the respondent merely states that the documents referred to; Exh. P1 and Exh. P2 were misplaced and could not be traced. This averment, with respect, is a mere hearsay, for the source has not been disclosed and no affidavit of the one, if any, who told the respondent's counsel that the files were so misplaced and could not be traced. That averment is thus a mere hearsay. The situation is exacerbated by the fact that Mr. Musa Kassim; the deponent of the affidavit in reply, is not legally placed to depose on the affairs of the Deputy Registrar or any officer under him that the exhibits were misplaced and could not be traced. In the circumstances, we are of the considered view that the respondent has not plausibly shown essential steps taken towards the prosecution of the intended appeal.

For the avoidance of doubt, we are alive to the reasons advanced by Mr. Kassim from the bar on the steps allegedly taken after the affidavit in reply was filed. We haste the remark that those statements from the bar are legally unacceptable. If anything, that, in our view, is purely an afterthought, for had it not, the respondent would not have failed to request the same from the Deputy Registrar and show that detail in the affidavit in reply. Besides, he would not have failed to require the District Registrar or any court officer under him to swear an affidavit on the missing documents to the effect that they were misplaced and could not be traced.

We think **Tahera Somji** (supra), cited and supplied to us by the respondent is distinguishable from the present case. In that case, unlike here, there was a deposition at para 7 of the affidavit in reply to the effect that the respondent had filed an application for extension of time to file an application for leave to appeal to the Court. That is the reason why we decided that that statement was not from the bar and we ruled that the application for striking out the Notice of Appeal had been overtaken by events. In the case at hand there is no such deposition in the affidavit in reply. Thus the respondent's averments that the appeal has been lodged

in the Court and all endeavours made which do not appear in the affidavit in reply are mere statements from the bar and are unacceptable - see: **Irene Temu v. Ngasa M. Dindi & 2 Others**, Civil Application No. 278/17 of 2017 (unreported). In that case, one of the respondents did not file an affidavit in reply but offered from the bar a very convincing and plausible explanation that unveiled essential steps that had been taken by one of the respondents in the prosecution of the intended appeal. A single justice of the Court held that despite the plausibility of the statement from the bar, it was not acceptable for the very reason that it was made from the bar. That observation fits in the application at hand in all fours.

We wish to observe as a postscript that the respondent has referred to the document filed to counter the founding affidavit as a "Counter Affidavit". We wish to remark here that the Rules understands that document as an "Affidavit in Reply". Calling it a counter affidavit was therefore a misnomer. We understand that it is a mere matter of nomenclature; that document is referred to as an affidavit in reply in this Court, the same document is referred to as a counter affidavit in courts below. It is desirable that the Rules are followed to the letter.

For the reasons stated earlier, we find this application meritorious and grant it. In consequence whereof, we order that the Notice of Appeal lodged in the Court on 10.05.2013 seeking to impugn the decision of the High Court of Tanzania (Rumanyika, J.) in Land Appeal No. 17 of 2010 be, and is hereby, struck out with costs to the applicant.

Order accordingly.

DATED at **TABORA** this 4th day of December, 2019.

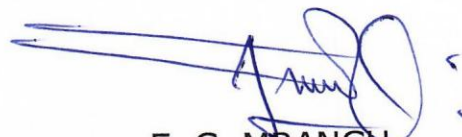
S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 5th day of December, 2019 in the presence of the applicant in person unrepresented and Mr. Musa Kassim, learned advocate appeared for the respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL