

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

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

CIVIL APPLICATION NO. 53/01 OF 2019

H. H. HILAL & CO. LIMITED APPLICANT

VERSUS

**1. MEDICAL STORES DEPARTMENT }
2. THE ATTORNEY GENERAL } RESPONDENTS**

**(Application to strike out notice of appeal from the Judgment of the High
Court of Tanzania, at Dar es Salaam)**

(Kitusi, J.)

dated the 7th day of February, 2018

in

Civil Case No. 105 of 2015

.....

RULING OF THE COURT

28th September & 7th October, 2021

MWAMBEGELE, J.A.:

In this application by notice of motion taken under rule 89 (2) of the Tanzania Court of Appeal Rules (the Rules), the applicant H. H. Hilal & Co. Limited, moves the Court to strike out a notice of appeal lodged by the respondents on 27.02.2018 on the ground that they have failed to take essential steps in prosecuting the intended appeal. The application is

supported by an affidavit deposed by George Nyangusu, the applicant's advocate. It is resisted by an affidavit in reply deposed by Lydia Thomas, a State Attorney in the office of the second respondent.

At the hearing of the application, the applicant was represented by Mr. George Nyangusu, learned advocate. The respondents had the services of Ms. Alice Mtulo and Ms. Lydia Thomas, learned State Attorneys.

When we called upon Mr. Nyangusu to argue his application, he first adopted the notice of motion and the supporting affidavit as part of his oral arguments. The learned counsel then submitted that in the suit between the parties to this application, judgment was delivered in favour of the applicant on 07.02.2018. Dissatisfied, the respondents lodged a notice of appeal on 27.02.2018 seeking to assail that decision. He submitted further that on the same date, the respondents wrote the Deputy Registrar of the High Court asking to be supplied with documents for appeal purposes. That letter was copied to and served on the applicant on the same day. Mr. Nyangusu submitted further that after the respondents lodged the notice of appeal and applied for documents for appeal purposes, they did

nothing until 04.09.2018 when the Deputy Registrar of the High Court notified them that the documents they applied for were ready for collection. The learned advocate argued that after they had applied for documents for appeal purposes, the respondents, in terms of rule 90 of the Rules, ought to have followed up the documents after expiry of 90 days. They should not have stayed put until the Deputy Registrar of the High Court notified them. Failure to follow up the documents after expiry of 90 days means that the respondents failed to take essential steps towards the prosecution of their intended appeal. To buttress this proposition, the learned counsel cited to us and supplied our decision in **Beatrice Mbilinyi v. Ahmed Mabkut Shabiby**, Civil Application No. 475/01 of 2020 (unreported).

Having argued as above, Mr. Nyangusu prayed that the notice of appeal lodged by the respondents on 27.02.2018 in respect of the decision of the High Court in Civil Appeal No. 105 of 2015 rendered on 07.02.2018, be struck out with costs.

In response, Ms. Mtulo also adopted her affidavit in reply as part of her oral arguments. She added that after they were notified by the Deputy Registrar of the High Court on 04.09.2018 that the documents they applied for were ready for collection, they acted promptly and collected the documents on the same day. She added that after they collected the documents, they realized that the same were not accompanied with a certificate of delay. In the premises, she submitted, they wrote a letter asking for the same and several reminder letters but the same has not been supplied up to the date of hearing of the application. She told the Court that the letters under reference were letters with Ref. No. AGC/CIVIL/2016/24/52 of 14.09.2018, Ref. No. AGC/CIVIL/2016/24/66 of 29.01.2019 and Ref. No. AGC/CIVIL/2016/24/67 of 14.01.2021 which, she alleged, were attached with the affidavit in reply.

Ms. Mtulo argued further that they had taken essential steps towards the prosecution of the intended appeal and that they still had that intention but that the Deputy Registrar of the High Court had not supplied them with the certificate of delay up to the date of hearing of the application. She

thus asked the Court not to penalize the respondents under the pretext that they failed to take essential steps. For this proposition, she cited and supplied to us our unreported decision in **Christopher Ole Memantoki v. Jun Trade and Sellers (T) Ltd**, Civil Application No. 319/02 of 2017.

Having argued as above, Ms. Mtulo prayed that the application be dismissed with an order that each party shall bear its own costs.

Mr. Nyangusu was very brief in his rejoinder. He submitted that after the respondents applied for documents for appeal purposes, they should not have kept quiet as if they were home and dry. He argued that **Christopher Ole Memantoki** (supra) is distinguishable in that it dealt with a situation before the amendment to rule 90 of the Rules. It was thus not applicable to the present case, he argued.

The learned counsel also submitted that the letter with Ref. No. AGC/CIVIL/2016/24/52 of 14.09.2018 was not appended to the affidavit in reply as claimed. Likewise, the letter with Ref. No. AGC/CIVIL/2016/24/66 of 29.01.2019 was received by the Court on 14.03.2019 after the present

application was lodged. Mr. Nyangusu thus reiterated his prayer that the application be allowed with costs.

We have carefully considered the rival submissions by the parties. Having so done, we think the main issue for determination is whether the respondents have not taken essential steps to institute the intended appeal to warrant the Court strike out the notice of appeal as claimed by the applicant. This application, as already stated above, has been made under rule 89 (2) of the Rules which stipulates:

"(2) 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."

The provisions of rule 89 (2) cited above accords the right to any person upon whom the notice of appeal was served to apply to the Court

for striking out of the notice under reference “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”. In the matter before us, the respondents lodged the notice of appeal sought to be struck out on 27.02.2018 and applied for documents for appeal purposes on the same day. Ever since, the respondents did not do anything until 04.09.2018 when the Deputy Registrar informed them that the documents were ready for collection. The applicant submitted that by that time, the respondents had failed to take essential steps because, after they applied for the documents, they ought to have taken steps to follow the matter up after the expiry of 90 days. We think, respectfully, the applicant’s counsel is right. The law applicable at the time was rule 90 (4) of the Rules brought by the amendments to rule 90 of the Rules effected by section 13 of the the Tanzania Court of Appeal (Amendments) Rules, 2017 – GN No. 362 of 2017. It read:

"(4) Subject to sub-rule (1), the Registrar shall strive to serve a copy of the proceedings ... within

*90 days from the date the appellant requested for such copy, **and the appellant shall take steps to collect a copy on being informed by the registrar to do so, or after the expiry of 90 days**".*

[Emphasis supplied].

The foregoing provision placed the duty on the respondents to follow up the documents for appeal purposes on expiry of 90 days of making that application. The respondents did not do that until 04.09.2018 when the Deputy Registrar of the High Court told them that the documents were ready for collection. We understand the respondents claim to have written a letter bearing Ref. No. AGC/CIVIL/2016/24/52 dated 14.09.2018. However, that letter is not appended to the affidavit in reply as alleged and the respondents did not tell the Court why. That alimnt makes doubtful if at all the respondents applied for a certificate of delay as claimed. Worse more, the letter with Ref. No. AGC/CIVIL/2016/24/66 dated 29.01.2019 was received by the High Court on 14.03.2019 after the present application was lodged on 08.02.2019. We agree with the applicant's counsel that the

respondents might have stayed put all along and acted so after the present application was lodged.

Much as we agree that the Deputy Registrar of the High Court is blameworthy for his inaction to supply the respondents with the requested copies within 90 days of the application as required by rule 90 (4) of the Rules, the respondents' diligence is not only seriously put to question as they did nothing until when they were notified but also flouted the law. Even before the amendment to rule 90, the Court required the respondents to be diligent and vigilant in following up the documents for appeal purposes. In **Ahmed Mabkut Shabiby** (supra) we made reference to our previous unreported decision in **Daudi Robert Mapuga & 417 Others v. Tanzania Hotels Investment Ltd & Four Others**, Civil Application No. 462/18 of 2018, in which the Court warned about respondents' inaction after applying for documents for appeal purposes under the pretext that they were home and dry. It observed:

""While we acknowledge that the Registrar is plainly blameworthy for his inaction in supplying the

requested documents, we think the respondents' diligence is seriously in question. We are unprepared to let the respondents claim they were home and dry. It would be most illogical and injudicious we think, to accept the respondents' wait 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 inaction, in our respectful view, offends the ends of justice."

In the matter at hand, the respondents stayed put after they applied for documents. They did not make any follow up after expiry of 90 days as if they were supposed to be home and dry. Even after the Deputy Registrar notified them of the documents being ready for collection and having realised that the certificate of delay was not appended, there is no evidence brought to the fore to show that they applied for the same. The reminder letters appended to the affidavit in reply are lacking legs on which to stand in that the letter bearing Ref. No. AGC/CIVIL/2016/24/52 dated 14.09.2018 has just been alleged to have been written but is not there.

In the upshot we agree with the applicant's counsel that the respondents have failed to take essential steps toward prosecution of the intended appeal. We thus grant the application with costs and, consequently, in terms of rule 89 (2) of the Rules, strike out the notice of appeal lodged by the respondents on 27.02.2018 seeking to assail Civil Appeal No. 105 of 2015 whose judgment was pronounced by the High Court on 07.02.2018.

It is so ordered.

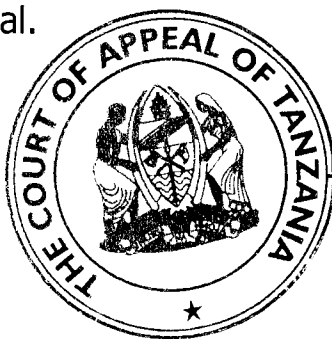
DATED at DAR ES SALAAM this 5th day of October, 2021.


J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The ruling delivered this 7th day of October, 2021 in the presence of Mr. George Nyangusu, counsel for the applicant and Ms. Lydia Thomas, learned State Attorney for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL