

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 46 OF 2021

BONIFACE ANYISILE MWABUKUSI APPELLANT

VERSUS

1. ATUPELE FREDY MWAKIBETE 1st RESPONDENT

2. THE RETURNING OFFICER

BUSOKELO CONSTITUENCY 2nd RESPONDENT

3. THE HONOURABLE ATTORNEY GENERAL 3rd RESPONDENT

**[Appeal from the Decision of the High Court of Tanzania (Mbeya District
Registry) at Mbeya]**

(Mambi, J.)

dated the 17st day of December, 2020

in

Miscellaneous Civil Application No. 61 of 2020

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RULING OF THE COURT

25th August and 6th September 2021

GALEBA, J.A.:

This appeal is one of democratic significance. Boniface Anyisile Mwabukusi, a member of NCCR Mageuzi political party was contesting to be elected Member of Parliament for Busokelo Constituency in the General Elections that were held all over the United Republic of Tanzania on 28th October 2020. He lost the contest to Atupele Fredy Mwakibete, the first respondent, who is therefore the incumbent Member of Parliament for that constituency. The appellant was aggrieved with the victory of his political rival

and as required by law, he lodged Election Petition No. 1 of 2020 to challenge his defeat. Along with that application to avoid the election results, the appellant filed Miscellaneous Application No. 61 of 2020 for assessment of security for costs in terms of section 111 of the National Elections Act [Cap 343 R.E. 2015] (the National Elections Act). The application was heard by the High Court sitting at Mbeya and on 17th December 2020, the court (Mambi J.) made the following order;

"The applicant is ordered to deposit Tshs. 4,000,000/= (four million) in respect of each respondent that will form the total amount of Tshs. 12,000,000/= within fourteen (14) days from the date of this Ruling."

The appellant was aggrieved by the above order and on the next day, that is on 18th December 2020, he lodged a notice of appeal and wrote a letter to the registrar of the High Court requesting to be availed with the ruling, order and the proceedings of that court for him to be able to challenge the decision of the High Court by way of appeal to this Court. There is no evidence on record that these two documents, the notice of appeal and the letter, were served upon any respondent or any of their lawyers. Nonetheless, the appellant filed the present appeal on 12th February 2021. The memorandum of appeal contained five (5) grounds of appeal to challenge the

decision of the High Court. For reasons that will become obvious shortly, we will not get into any of the grounds of appeal.

When the appeal was pending, under the provisions of Rule 107(1) of the Tanzania Court of Appeal Rules 2009, (the Rules), the respondents in unison lodged a notice of preliminary objection moving the Court to strike out the appeal on grounds that, **one**, the appeal is untenable for the appellant's failure to serve onto them the notice of appeal and the letter requesting for various documents, in fourteen (14) days as required by Rule 84(1) of the Rules and **two**, the appeal is fatally defective for being preferred without leave of the court thereby offending section 5(2)(a)(ii) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA).

At the hearing of the appeal, the appellant who, we were made to understand that he was also an admitted advocate, appeared in person without legal representation whereas the first respondent was represented by Ms. Caroline Joseph Mseja, learned advocate. The second and third respondents had the services of Mr. Gabriel Pascal Malata the learned Solicitor General assisted by Mr. Francis Rogers and Ms. Alice Ntulo both learned Senior State Attorneys. Teaming up further with the learned Solicitor General, were

also Mr. Daniel Nyakiha and Ms. Narindwa Sekimanga, learned State Attorneys.

At the outset, Mr. Malata submitted that the respondents were abandoning their complaint in respect of service of the letter requesting for the ruling upon the respondents so that his complaint in the first ground of objection would only be predicated on the omission by the appellant to serve the notice of appeal on them as required by law.

Submitting on that ground, Mr. Malata contended that although the notice of appeal was lodged on 18th December 2020, it was served on the second and third respondents on 7th February 2021, which was twenty (20) days from the day when the same was lodged. That, was offensive of Rule 84(1) of the Rules, he insisted. Relying on the case of **John Nyakimwi v. The Registered Trustees of the Catholic Diocese of Musoma**, Civil Application No. 85/08 of 2017 (unreported), he submitted that the omission, is tantamount to failure to take an essential step in the appeal within the context of Rule 89(2) of the Rules. He further relied on the case of the **National Bank of Commerce Limited and Steven R. K. Shiletiwa v. Ballast Construction Company Limited**, Civil Appeal No. 72 of 2017 (unreported), in arguing that where there is breach of taking an essential step in an appeal,

the principle of overriding objective does not apply. Finally, he moved the Court to strike out the appeal with costs for being incompetent.

In arguing the first point of law, Ms. Mseja adopted all that Mr. Malata submitted, adding that after the appellant was late, he had an opportunity under Rule 10 of the Rules to apply for extension of time to serve the respondents with the notice of appeal. Since, the appellant did not seize the opportunity, she moved the court to strike out the appeal with costs.

In reply to the submissions of counsel for the respondents, on the first limb of the objection, Mr. Mwabukuzi submitted that the respondents did not demonstrate before the Court how failure to serve them with the said notice of appeal in time prejudiced them. He submitted that striking out the appeal will not have the matter finally determined relying on the case of **TPB Bank Plc (successor in title of Tanzania Postal Bank) v. Rehema Alatunyamadza and Two Others**, Civil Appeal No. 155 of 2017 (unreported), inviting us to invoke the principle of overriding objective to rescue him from the imminent and looming predicament. The appellant submitted further that election disputes are not normal civil matters in which case handling them should be less technical adding that striking out the appeal will subject him to hardship. He argued that as this Court has powers

to grant the necessary extension, it can then extend the time for service of the notice of appeal to the respondents, in order to cure the anomaly. He finally moved the Court to spare the appeal and hear it on merits.

In rejoinder Mr. Malata submitted that the appellant is admitting the omission only that he is pleading for leniency although this Court is a Court of law not a Court of sympathy adding that as the Rule offended is couched in mandatory terms the breach must be followed by consequences provided by law. He distinguished the **TPB Bank** case (supra) and urged the Court not to apply the overriding objective in this matter.

Having considered the fact that the default is admitted by the appellant and having revisited cited authorities relevant to the circumstances obtaining in the instant appeal, we do not intend to spend much time on this point. The issue that we will be seeking to resolve is whether this Court can invoke the overriding objective principle to disregard and pay no heed to the omission by the appellant to comply with Rule 84(1) of the Rules as it happened in this case.

The point raised is straight forward as there is no dispute that the appellant lodged a notice of appeal in time but failed to serve it on the

respondents in fourteen (14) days as required by Rule 84(1). That Rule states as follows;

"An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court."

It is plain that service of the notice in fourteen (14) days in terms of the above Rule is a mandatory requirement in the proceedings as it was held in **Goodhope Hance Mkaro v. TPB Bank plc and Another**, Civil Appeal No. 171 of 2017 (unreported) and, in this case, the appellant admits not to have served the notice within that statutory time frame. At the very outset, we must defeat the temptation by the appellant that, as we have jurisdiction to extend the time for him to serve the notice of appeal to the respondents, then we should grant him that order, so that we get him out of the inevitable trouble he was at the centre of. With respect, we cannot do that because what we have before us is an appeal whose competence has been put to test, not an application for extension of time to serve the notice of appeal. Back now to the matter before us.

In the **John Nyakimwi** case (supra), after citing the cases of **D.P. Valambhia v. Transport Equipment Ltd** [1992] TLR 246; **Salim Sundeiji and Capital Development Authority v. Sadrudin Sharif Jamal**, [1993] TLR 224 and **Francis Itengeja v. Kampuni ya Kusindika Mbegu za Mafuta**, [1997] TLR 148, as regards failure to comply with Rule 84(1) of the Rules, this Court stated:

"The position being so settled as expressed in the cases cited above, we endorse the applicant's argument that the respondent's delayed service of the copy of the notice of appeal amounted to failure to take an essential step in the proceedings which must be visited by the consequences prescribed under Rule 89(2) of the Rules."

Rule 89(2) of the Rules is to the effect that an omission to serve a notice of appeal on the respondents amounts to failure to take an essential step in the proceedings and the remedy is for the other party, the party that ought to have been served with the notice of appeal, to move the Court to strike out the notice or the appeal, which prayer the respondents are moving this Court to grant.

We have gone through the **TPB Bank** case (supra) and we have found nothing suggesting that we can disregard failure to serve the notice of appeal

as required by Rule 84(1) of the Rules by invoking the overriding objective principle. We are therefore in agreement with Mr. Malata that the omission is fatal and it cannot be made good by application of the overriding objective principle. In the case of **National Bank of Commerce** (supra), on that very point, this Court stated:

*"We are therefore inclined to agree with Mr. Banzi that the copy of the notice of appeal was not served on the respondent hence contravening the mandatory provisions of Rule 84(1) of the Rules. This being a mandatory requirement, **we don't think that the overriding principle applies.** So, like in **Wilfred Rwakatare's** case (supra), we are enjoined to find that the appeal is, in view of the above irregularity, incompetent."*

[Emphasis added]

We are bound to follow the above holding at the time we will be making our definite finding on the first preliminary objection. Although the determination of this preliminary objection alone is otherwise sufficient to dispose of the entire appeal, but for the sake of completeness, we will proceed to determine the second preliminary objection raised and argued.

The other objection was that this appeal is incompetent because the same was lodged without first seeking and obtaining leave of the High Court

or of this Court. Mr. Malata contended that failure to obtain leave when it is required, is tantamount to failure to take an essential step in the appeal as per the law. To support his contention, he relied on the decision in **Yunus Kashakala v. Anthony Haji**, Civil Application No. 106/01 of 2018 (unreported). Citing the case of **Edson Oswald Mbogoro v. Dr. Emmanuel John Nchimbi and the Attorney General**, Civil Appeal No. 140 of 2006 (unreported) and **Freeman Aikael Mbowe and the Attorney General v. Alex O. Lema**, [2004] TLR 85, he moved the Court to hold that the matter before us would only be competent if the same was preceded with leave of the court under Section 5(2)(a)(ii) of the AJA. He implored us to strike out the appeal as the same, was incompetent. Mr. Malata's submission was adopted by Ms. Mseja for the first respondent.

In reply to this point, the appellant admitted that there was no leave sought and obtained, but he was quick to add that such leave was not necessary to seek in terms of article 83(4) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). He submitted that, as opposed to normal civil appeals, appeals having a bearing on elections of leaders to political positions, are matters of constitutional importance and technical rules of procedure are not applicable to them citing to us an article by C. J.

Ubanyionwu, a scholar writing on **Election Petition Cases and the Right to Fair Trial Within Reasonable Time**. He distinguished the cases of **Edson Osward Mbogoro** (supra) and that of **Freeman Aikael Mbowe** (supra) relied upon by Mr. Malata because in both cases, the Court was dealing with appeals in which main petitions had been heard but, in this appeal, what is under scrutiny is the propriety of an order passed in the proceedings seeking assessment of security for costs to be deposited. He contended that as the High Court at page 37 of the record of appeal stated that the right of appeal was explained then, it meant that leave to appeal was not required. The appellant moved the Court, to order that under section 71 of the National Elections Act read together with Article 83(4) of the Constitution, this appeal did not require leave of any court before it could be lodged. In what seemed to be an alternative move, the appellant prayed for waiver of costs in case the Court was to disagree with his position and proceed to strike out the matter.

In rejoinder to this point, Mr. Malata submitted that article 83(4) of the Constitution does not state that appeals to this Court arising from elections or election related disputes are appealable without observing the Rules providing the procedure for handling civil matters in this Court. He contended that when

the High Court stated that the right of appeal was explained it did not mean that the appellant would then appeal to the Court of Appeal without following the procedure under the law.

The issue that we are called upon to investigate and determine is whether an appeal challenging an order of the judge assessing security for costs under section 111 of the National Elections Act is appealable with or without leave under section 5(1)(c) of the AJA. Article 83(1), (3) and (4) of the Constitution in Kiswahili provides as follows:

"83. (1) Kila shauri kwa ajili ya kupata uamuzi juu ya suala-

(a) kama uchaguzi au uteuzi wa mtu yeyote kuwa mbunge ulikuwa halali au sivyo; au

(b) kama Mbunge amekoma kuwa Mbunge na kiti chake katika Bunge ki wazi au hapana;

litafunguliwa na kusikilizwa kwanza katika Mahakama Kuu ya Jamhuri ya Muungano wa Tanzania bila ya kuathiri masharti ya ibara ndogo ya (2) ya ibara hii.

(2) (haihusiki)

(3) Bunge laweza kutunga Sheria kwa ajili ya kuweka masharti kuhusu mambo yafuatayo:

(a) watu wanaoweza kufungua shauri katika Mahakama Kuu kwa ajili ya kupata uamuzi juu ya suala lolote kwa mujibu wa masharti ya ibara hii.

(b) sababu na nyakati za kufungua shauri la namna hiyo, utaratibu wa kufungua shauri na masharti yanayotakiwa yatimizwe kwa kila shauri kama hilo; na

(c) kutaja mamlaka ya Mahakama Kuu juu ya shauri kama hilo na kueleza utaratibu wa kusikiliza shauri lenyewe.

(4) Kutakuwa na haki ya kukata rufaa mbele ya Mahakama ya Rufani ya Tanzania kupinga uamuzi wa Mahakama Kuu juu ya shauri lolote lililosikilizwa kwa mujibu wa masharti ya ibara hii.”

The unofficial English translation of the above text, may be the following:

“(1) Every case concerning determination of the issue-

(a) whether the election or nomination of any person as a Member of Parliament was lawful or otherwise; or

(b) whether a Member of Parliament has ceased to be such member and his Parliamentary seat has consequently become vacant or not, shall be instituted and heard first in the High Court of the United Republic of Tanzania without prejudice to the provisions contained in sub article (2) of this article.

(2) (not applicable).

(3) Parliament may enact law providing for-

(a) the persons who may institute a case in the High Court for determination of any issue pursuant to the provisions of this article.

(b) the grounds and time for instituting such a case, the procedure for instituting and the requirements that have to be fulfilled in such a case, and

(c) the powers of the High Court in such a case and the procedure for its hearing.

(4) There shall be a right of appeal to the Court of Appeal against the decision of the High Court in respect of any case heard under the provisions of this Article.”

We will start with the decision of this Court’s Full Bench on which decisions are appealable as of right in terms of article 83(4) of the Constitution and those which are not, in the context of election disputes.

The same issue came under scrutiny of the Court in the case of **Freeman Aikael Mbowe** (supra). In that case the respondent was seeking avoidance of Parliamentary election results for Hai Constituency alleging *inter alia* corrupt practices against the first appellant. The first appellant raised preliminary objections that the allegations of corruption disclosed no cause of

action and moved the High Court to strike out the petition. Instead of striking out the petition the High Court ordered the respondent to supply the first appellant with further and better particulars of the allegations. Aggrieved, the appellant applied for leave to appeal against that order, which order was refused by the High Court. Without applying for leave as a second bite, the appellant lodged an appeal to this Court. The issue before the Court, was how could he have filed the appeal without leave of the High Court or of this Court.

In that case, this Court had opportunity to provide an interpretation and the scope of article 83(4) of the Constitution in the context of which election orders or decisions of the High Court that are appealable with leave and those that are appealable as of right. In that respect, it was held that:

"However, the right of appeal provided for in article 83(4) of the Constitution does not extend to every decision of the High Court in an election petition but only to those decisions in which the issue was legality or otherwise of the election or nomination of any person as a Member of Parliament, or whether a Parliamentary seat has become vacant or not; and the case was first instituted and heard in the High Court and the High Court finally determined the matter."

The above holdings of this Court provide us with the proper scope of the application of article 83(4) of the Constitution. In our view, in matters of

elections, a decision of the High Court is appealable as of right if it concerns: **one** determining the legality of the election or nomination of any person as a Member of Parliament, **two** where the issue is whether or not a Parliamentary seat has become vacant, and **three**, in both cases the matter must have first been instituted and heard in the High Court and that court must have finally determined it. Otherwise, all other orders in election disputes are appealable to this Court with leave, unless one can point to the Court that although the order does not fall in two categories above but it does fall within the orders listed at section 5(1)(a) or (b) of the AJA.

In **Edson Oswald Mbogoro** (supra) this Court followed its earlier decision in **Freeman Aikael Mbowe** (supra) and stated thus:

"A decision in an election petition deciding on issues relating to paragraphs (a) and (b) of sub article (1) of Article 83 may be appealed to the Court of Appeal without the need for leave as would otherwise be required under Section 5(1) (c) of the Appellate Jurisdiction Act, 1979. An appeal against any other decision of the High Court in an election petition would require leave of the High Court or the Court of Appeal."

We must state our position with certainty and precision that as the present appeal does not fall within either paragraph (a) or (b) of sub article

(1) of article 83 or section 5(1) (a) or (b) of the AJA, then the appellant has no automatic right of appeal against the order of the High Court under any written law in this jurisdiction.

There was a mention of section 71 of the National Elections Act as permitting the appellant to lodge an appeal against the order of the High Court without leave. Respectively, we found nothing in that section, not even remotely making reference to any court procedure in relation to any disputes. In fact, that section deals with counting of votes, which subject, we think is beyond the scope of the matter before us.

Finally, the appellant referred us to the Kenyan case of **Apungu Arthur Kibira v. Independent and Boundaries Commission and Two Others**, [2018] eKLR, impressing on us that we should refrain from striking out the appeal as that will subject him to pain and hardship. The appellant's lamentation could be correct, but his wailing falls short of providing us a lawful alternative order to make other than the legal consequences provided by Rule 89(2) of the Rules.

Based on the above discussion, we firmly hold that the consequences for failure to serve a notice of appeal on the respondents in fourteen (14) days after lodging it is to strike the out the notice or the appeal. Similarly, failure to

seek and obtain leave of the High Court or of this Court in terms of Section 5(2)(c) of the AJA, before lodging an appeal to challenge an assessment of security for costs in an election matter is fatal to the appeal.

In the event, as the notice of appeal was not served on the respondents in time, and the appeal having been lodged without first seeking and obtaining leave to lodge it as required by law, the appeal is incompetent and we hereby strike it out with costs.

DATED at DAR ES SALAAM, this 2nd day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 6th day of September, 2021 in the presence of Mr. Boniface Anyisile Mwabukusi, the Appellant and Ms. Narindwa Sekimanga and Ms. Joyce Yonanzi, both learned State Attorneys for the second and third respondents and also holding brief for the first respondent is hereby certified as a true copy of the original.




H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL