IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A., And KWARIKO, J.A.)

CIVIL APPLICATION NO. 475/01 OF 2020

BEATRICE MBILINYI.....APPLICANT

VERSUS

AHMED MABKHUT SHABIBY .....RESPONDENT

(Application for striking out a Notice of Appeal lodged on 7th November, 2018 against the decision of the High Court of Tanzania at Dar es Salaam, District Registry at Dar es Salaam)

(Magoiga, J.)

dated the 12th day of October, 2018

in

Civil Case No. 190 of 2013

RULING OF THE COURT

23rd February & 12th March, 2021

KWARIKO, J.A.:

The applicant, Beatrice Mbilinyi, has filed this application by a notice of motion under Rule 89 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules) for an order of the Court to strike out a notice of appeal lodged by the respondent on 7th November, 2018. The notice of appeal is against the decision of the High Court of Tanzania at Dar es Salaam, District Registry, dated 12th October, 2018 in which the applicant was pronounced a winner.

The notice of motion is supported by an affidavit of the applicant where she deponed that, apart from lodgement of the notice of appeal, on 5th November, 2018, the respondent wrote a letter to the Registrar requesting for a copy of the proceedings in the High Court. She averred further that since then the respondent has not taken any steps in the proceedings towards filing the intended appeal, and in fact she has not been served with a memorandum of appeal, which means the respondent has failed to lodge the appeal within the prescribed period.

In opposition to the application, the respondent filed an affidavit in reply sworn by Mr. Deiniol Joseph Msemwa, advocate of the respondent. He deposed that the respondent has failed to lodge his appeal because the Registrar of the High Court has not supplied him with the requested necessary documents and has not written to him that the same are ready for collection.

At the hearing of the application, Messrs. Killey Mwitasi and Jerome Msemwa, learned advocates represented the applicant and respondent, respectively.

Before the hearing of the application started in earnest, Mr. Msemwa intimated to us that he had preliminary points of law he intended to raise though had not filed a notice to that effect as per Rule 107 (1) of the Rules. Owing to the fact that the hearing was first adjourned on 19th February, 2021, to save time, we granted leave to Mr. Msemwa to argue his preliminary objection despite having not been filed a notice to that effect. The following are three preliminary points of law raised by the counsel for the respondent:

(a) That, the applicant's counsel has not complied with Rule 32 (1) of the Rules.

(b) That, the drawer of the application has not indicated his name contrary to section 44 of the Advocates Act [CAP 341 R.E. 2019].

(c) That, the jurat of attestation is incomplete rendering the affidavit defective.

In our bid to save time further, we decided to entertain both the preliminary objection and the main application. There was a tripartite agreement by the Court, the applicant and the respondent that when we

retreat to compose the ruling, if we find the preliminary objection meritorious, that will be the end of the matter. However, if we find it unmerited, we would proceed to compose the ruling.

Mr. Msemwa argued the first point of objection to the effect that the drawer of the application Bitaho Legal Advocates & Consultants ought to have filed a notice of change of advocate as mandatorily required under Rule 32 (1) of the Rules. He explained that Messrs. Bitaho and Kizito, learned advocates represented the applicant in the High Court but the address remained that of Mr. Kizito and the notice of appeal was served on him. He also argued that Mr. Mwitasi has no *locus standi* to represent the applicant because he has not complied with the said provision of the law. He urged us to strike out the notice of motion for being incompetent.

In respect of the second point of objection, Mr. Msemwa submitted that the drawer of the application ought to have indicated his name and not only the name of the firm of advocates which is in contravention of section 44 of the Advocates Act [CAP 341 R.E. 2019] (the Advocates Act). To support this position, the learned counsel cited

to us a Court's decision of **Maneno Abdallah v. R,** MZA Criminal Application No. 2 of 2005 and a persuasive decision of the High Court of Tanzania in **Makame Usi Ally v. Murtaza Ali Dharsee & Another,** Misc. Land Case Application No. 373 of 2015, Land Division at Dar es Salaam (both unreported).

Arguing the third point, Mr. Msemwa submitted that the jurat of attestation of the applicant's affidavit is not complete in terms of the Oaths and Statutory Declarations Act [CAP 34 R.E. 2019] (henceforth the Act). This is so because the deponent is not shown to have been identified or personally known to the Commissioner for Oaths who witnessed the affidavit. To cement his position, Mr. Msemwa cited the Court's earlier decision in the case of **Simplisius Kijuu Issaka v. The National Bank of Commerce Limited,** Civil Application No. 24 of 2003 (unreported). He argued that the omission vitiates the affidavit rendering the application incompetent. For these submissions, the learned counsel urged us to sustain the preliminary objection and strike out the application.

In response to the first point of objection, Mr. Mwitasi argued that Rule 32 of the Rules applies where there was already an advocate in the record of the Court that is when a different advocate is obliged to file a notice of change of advocate. He submitted further that this application was filed by Bitaho Legal Advocates and Consultants who are currently representing the applicant. He added that even if the notice of appeal was served on Mr. Kizito but in this Court there is no record which shows that he was engaged to represent the applicant. He submitted that, in any case, the impugned judgment at page 4 shows that Messrs. Bitaho and Msemwa were representing the applicant and the respondent respectively. As for his appearance, he submitted that he was employed in the firm of Bitaho Legal Advocates Consultants, hence, has *locus standi* to represent the applicant.

In relation to the name of the drawer of the application, Mr. Mwitasi argued that a name of the drawer is necessary where the one who is drawing the document is an unqualified person. To support his argument, the learned counsel referred us to the decision of the Court in the case of **George Humba v. James M. Kasuka,** TBR Civil Application No. 1 of 2005 (unreported). He submitted that even if the

name was necessary, in this case it is shown in the applicant's list of authorities. He contended that, the omission, if any, is not fatal.

As regards the jurat of attestation, Mr. Mwitasi argued that since the applicant's affidavit contains options but no any has been selected it means that the deponent is personally known to the commissioner for oaths. He submitted that this requirement has not been backed-up by any law.

In his rejoinder, Mr. Msemwa argued that the name in the list of authorities cannot be the name of the drawer of the application.

Coming to the main application, Mr. Mwitasi first adopted the affidavit of the applicant to be part of his oral submissions. He submitted that following the lodgement of the notice of appeal on 7th November, 2018 and a letter applying for the copy of the proceedings in the High Court on 5th November, 2018, the respondent has not taken any steps towards filing his appeal and the applicant has not been served with a memorandum of appeal. He argued further that, had the respondent been waiting for the copy of proceedings to file his appeal as alleged in his reply affidavit, he would have followed up the same to the

Registrar of the High Court within 14 days of the expiry of 90 days within which the Registrar was supposed to supply him with the copy of the proceedings. This is in terms of Rule 90 (5) of the Rules. He argued that before the amendment of Rule 90 of the Rules, the respondent could be home and dry after lodging the letter with the Registrar. The learned counsel went on to submit that the 90 days expired an 21st February, 2019 and the respondent who was supposed to follow-up the copies did not do so. To cement his argument, the learned advocate cited to us the Court's decision in **Jackson Mwaipyana v. Parcon Limited,** Civil Application No. 115/01 of 2017 (unreported).

It was Mr. Mwitasi's further submission that when this application was lodged on the 3rd November, 2020, the respondent had not made any efforts to get the copy of the documents from the High Court. He argued that, the respondent's purported follow up of the copy was done after this application was already in Court. He argued that the respondent's inaction shows that he does not intend to appeal but only playing delaying tactics to inhibit the applicant to enjoy the fruits of her litigation. The learned counsel urged us to grant this application with costs.

In opposition to the application, Mr. Msemwa first attacked the applicant for citing Rule 89 (1) of the Rules which is in respect of the withdrawal of the notice of appeal by the appellant, instead of Rule 89 (2) of the Rules which relates to an application to strike out the notice of appeal. He argued that the applicant has not applied for the correction of the wrong citation of the enabling provision of law. The learned counsel submitted in respect of the application that the respondent has been following up the copy of the proceedings in vain and reminded the Registrar on 27th November, 2020.

He submitted further that the respondent received a letter from the Registrar dated 22nd February, 2021 informing him that the documents applied for were ready for collection, hence urged the Court to consider that aspect as one of the essential steps towards institution of the appeal.

Mr. Msemwa further argued that the case of **Jackson Mwaipyana** (supra) supports the respondent's case and that the respondent still has intention to pursue his appeal which is his constitutional right and urged the Court to do away with technicalities.

With these submissions, the learned counsel prayed for dismissal of the application with costs.

In rejoinder, Mr. Mwitasi conceded that the applicant has wrongly cited Rule 89 (1) of the Rules as enabling provision instead of Rule 89 (2) of the Rules. However, he took refuge under the proviso to Rule 48 (1) of the Rules which enjoins the Court to order insertion of correct provision of law. He added that the ailment was a slip of the pen and urged us to invoke the provision of Rule 48 (1) to rectify it.

As to whether the respondent has taken essential steps, Mr. Mwitasi argued that the respondent has not proved that he made follow-up of the copy of the proceedings from the Registrar after expiry of ninety days. He contended that the Registrar's letter dated 22nd February, 2021 is not part of the affidavit in reply hence should not be considered. After all, he contended, no essential steps had been taken as at 3rd November, 2020 when the present application was lodged. He argued that any step taken after the filing of this application, was of no effect.

He insisted that the **Jackson Mwaipyana**'s case (supra) at page 6 to 7 supports the applicant's case. To wind up he argued that the respondent's alleged intention to appeal that has been shown after the filing of this application is a futile attempt to pre-empt it.

Having heard the submissions of the learned counsel for the parties, as it is the rule of practice and as already alluded to above, we shall first determine the preliminary objection which if sustained there will be no need to go into the merits of the application.

In relation to the first point of objection regarding Rule 32 of the Rules, we find it apposite to reproduce it for ease of reference as thus:

> *"32.- (1)* ***Where any party to an application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person engages an advocate,*** *he shall, as soon as practicable, lodge with the Registrar of the change and shall serve a copy of the notice on the other party appearing in person or separately represented, as the case may be.*

(2) Upon receiving notification of the change of an advocate, the Registrar shall record the changes accordingly and bring it to the attention of the Presiding Justice". (Emphasis supplied).

Our understanding of this provision is that the change which is referred to relates to an advocate who is already on record of the case file in the Court. We think that, if the maker of the Rules intended the provision to extend to the advocate who represented a party before the High Court or any lower Court, he would have indicated so in no uncertain terms. It is our considered view that, since this application was filed by Bitaho Legal Advocates and Consultants and no other advocate has appeared to represent the applicant, it cannot be said that Rule 32 of the Rules has been contravened. On the part of Mr. Mwitasi, he introduced himself as one of the employees of the firm of Bitaho Legal Advocates & Consultants hence he needed no proof of his *locus standi.* This point is thus overruled.

The second point of objection relates to the name of the drawer of the application. Mr. Msemwa relied upon section 44 (1) of the Advocates Act. The learned counsel argued that the name of the drawer is not

shown in the application thus contravening this provision. We shall reproduce this provision thus:

> *"44. - (1) Every person who draws or prepares any instrument in contravention of section 43 shall endorse or cause to be endorsed thereon his name and address; and any such person omitting so to do or falsely endorsing or causing to be endorsed any of the said requirements shall be liable on conviction to a fine not exceeding two hundred shillings".*

Whereas section 43 referred above provides thus:

> *"43. - (1) Any unqualified person who, unless he proves that the act was not done for, or expectation of, any fee, gain or reward, either directly or indirectly, draws or prepares any instrument-*
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> *(a) relating to movable or immovable property or any legal proceeding;*
>
> *(b) ....N/A*
>
> *(c) ....N/A*

shall be liable on conviction to a fine not exceeding one million shillings or twelve months imprisonment or both and shall be incapable of maintaining any action for any costs in respect of the drawing or preparation of such instrument or any matter connected therewith".

We have dispassionately read the provisions of section 44 (1) in the light of the arguments of the learned advocates for both parties. Having so done, we have understood it to be referring to unqualified persons drawing documents for gain, fee or reward as mentioned under section 43 (1) thereof. Our view is supported by our earlier decision in the case of **George Humba v. James M. Kasuka** (supra) which was cited to us by Mr. Mwitasi, where the Court stated at page 12 thus:

> *"Assuming that section 44 (1) in the Advocates Ordinance, Cap. 341 of the Revised Laws is the correct version and it refers to instruments as mentioned in s. 43 (1), we would then say that the section deals with unqualified persons who prepare those documents for gain, fee or reward. Surely, Mr. Kayaga could not be an unqualified person for purposes of preparing the Notice of Motion and the accompanying affidavit for filing in Court."*

On his part, Mr. Msemwa referred to us to the Court's decision in the case of **Maneno Abdallah** (supra), but the same is distinguishable from the instant case. It related to non-signing of the notice of motion by the applicant or his advocate. Whereas another case of the High Court of Tanzania of **Makame Usi Ally** (supra), which the learned counsel cited, though it interpreted section 44 (1) of the Advocates Act as relating to advocates who do not indicate their names in the documents but it is not binding upon this Court and the learned advocate did not invite us to be persuaded by it. Be that as it may, we have already cited the decision of the Court which stated that the provision referred to unqualified persons drawing legal documents.

For the foregoing, this application which was drawn by a firm of advocates by the name Bitaho Legal Advocates and Consultants cannot be said that it was drawn by an unqualified person. Moreover, Mr. Msemwa did not prove that the documents were drawn by an unqualified person as envisaged under sections 43 and 44 of the Advocates Act. This limb of objection also fails.

The third point of objection relates to non-indication in the jurat of attestation whether the deponent was known to the attesting officer or identified to him by another person. As rightly argued by Mr. Mwitasi, it is our considered view that since the attesting officer did not indicate that the deponent was introduced to him by someone else, it means that he knew her personally. This point of objection also fails.

For what we have discussed herein, we find that the preliminary objection is devoid of merit and it is hereby overruled.

Now coming to the main application, we find it apposite to preface our deliberation with the issue of wrong citation of the enabling provisions of the law. The applicant cited Rule 89 (1) of the Rules which is for withdrawal of the notice of appeal by the appellant. We find this to be a slip of the pen because the prayer by the applicant is striking out the notice of appeal whose relevant provision is Rule 89 (2) of the Rules. Thus, by the authority under the provisions Rule 48 (1) of the Rules we ordered insertion of Rule 89 (2) instead of Rule 89 (1) of the Rules as the enabling provision of the law.

The issue which follows for our determination is whether the respondent has not taken essential steps following the lodgement of the notice of appeal. Rule 89 (2) of the Rules provides thus:

> *"Subject to the provisions of sub rule (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 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).

This provision gives right to any other person upon whom a notice of appeal has been served to apply for striking out of the notice of appeal 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 Court has had opportunity to interpret this provision of law in its various decisions, few of them are; **Alliance Insurance Corporation Ltd & Another v. Richard Nestory Shayo,**

Civil Application No. 131/02 of 2018; **Martin D. Kumalija & 117 Others v. Iron and Steel Ltd,** Civil Application No. 70/18 of 2018; **Edwin Kigato v. Dickson Komanzi,** Civil Application No. 360/04 of 2018 and **The Registered Trustees of Chama cha Mapinduzi v. Christina Ngilisho,** Civil Application No. 153/05 of 2017 (all unreported).

In the instant case, the respondent lodged his notice of appeal on 7th November, 2018 and applied for a copy of the proceedings in the High Court on 5th November, 2018. The applicant has contended that the respondent has not taken any steps since then towards filing of the appeal and she has not been served with a memorandum of appeal.

The respondent on the other hand, has defended his position to the effect that he was waiting to be supplied with the copy of the proceedings from the High Court before he filed the appeal and that he has still intention to do so. He relied upon the decision in the case of **Jackson Mwaipyana** (supra). In that case the respondent had filed a notice of appeal on 27th May, 2013 and had applied to be supplied with a copy of the proceedings in the High Court. The question which arose

before the Court was whether the respondent was duty bound to follow-up the copy from the Registrar. At page 6 of that decision, the Court stated thus:

> *"Prior to the amendment which was made to the Tanzania Court of Appeal Rules by Government Notices No. 362 of 2017 and 344 of 2019, the answer to the question posed above was clearly in the negative that the applicant did not bear any such duty. Once an intending appellant had lodged a notice of appeal; written a letter to the Registrar asking for the necessary documents and served on the respondent timely; he was home and dry".*

The application to strike out the notice of appeal was dismissed. It was stated that the respondent who had written a letter to the Registrar asking for necessary documents and served on the applicant timely was home and dry waiting for the Registrar to inform him that the documents were ready for collection. It should be noted that the notice of appeal in that case was lodged on 27th May, 2013 which was before the amendment of Rule 90 of the Rules brought about by the Tanzania

Court of Appeal Rules (Amendments) Rules, 2017 and Tanzania Court of Appeal Rules (Amendments) Rules, 2019 vide Government Notices No. 362 of 2017 and No. 344 of 2019 respectively. However, in the instant case the relevant amendment is by GN No. 362 of 2017 which came into effect on 22nd September, 2017 and the notice of appeal was lodged on 7th November, 2018.

For easy reference, we shall reproduce the provisions of Rule 90 as amended in GN No. 362 of 2017 as follows:

> *"90. -(4) Subject to subrule (1), the Registrar shall strive to serve a copy of the proceedings is ready for delivery 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 expiry of 90 days".*** (Emphasis supplied).

The respondent in this case requested the documents on 5th November, 2018 which means he was duty bound to follow up the copy to the Registrar after expiry of 90 days. The 90 days expired on 21st

February, 2019 without any follow up from the respondent. Mr. Msemwa argued that the respondent made a follow-up of the copy on 27th November, 2020. It does not need much interpolation to deduce that the letter to the Registrar on the said date was written after the filing of this application on 3rd November, 2020 which was after elapse of about nine months within which the respondent ought to have followed up the copy of the proceedings from the Registrar. Although the provision does not provide time frame for the follow-up after expiry of 90 days, we would not expect a party who has intention to appeal to have kept quiet for about nine months before following up the documents necessary for the institution of the appeal. We will not be out of context if we state that the appellant was not diligent enough to follow-up the matter. In the Court's decision of **Daudi Robert Mapuga & 417 Others v. Tanzania Hotels Investment Ltd & Four Others,** Civil Application No. 462/18 of 2018 (unreported), the respondents lodged a notice of appeal on 10th December, 2013 and applied for a copy of the proceedings. However, until 8th June, 2018 when the applicants filed an application to strike out the notice of appeal, the respondents had not filed their appeal. They argued that they were

waiting for the copy of the proceedings from the High Court. The Court rejected this reasoning and stated thus:

> *"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."*

With that stand view, the respondents' notice of appeal was struck out.

In the matter before us, we are of the decided view that the alleged follow up by the respondent to the Registrar on 27th November, 2020 was done after this application was already in Court. Whereas, the steps which are referred to under Rule 89 (2) of the Rules are those

taken before the filing of the application for striking out of the notice of appeal.

Furthermore, Mr. Msemwa argued that the Registrar had informed the respondent on 22nd February, 2021 that the documents were ready for collection. With due respect to the learned counsel, that is a statement from the bar which cannot be considered as the information was not included in the affidavit in reply. Even if it was included in that affidavit, it would not have served any useful purpose because it came after this application had already been in Court.

Before we conclude, we would like to respond to the applicant's prayer made in the notice of motion regarding the payment of the decretal amount paid as security by the respondent. What we can say is that we have no mandate to order anything concerning the said security because it does not relate to the instant application.

Conclusively, we find that the respondent who is the intending appellant has failed to take essential steps towards lodging his intended appeal. We, therefore, grant the application with costs and

consequently, in terms of Rule 89 (2) of the Rules, strike out the respondent's notice of appeal lodged on 7th November, 2015.

It is accordingly ordered.

DATED at **DAR-ES-SALAAM** this 8th day of March, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

This ruling delivered this 12th day of March, 2021 in the presence of Mr. Killey Mwitasi, learned counsel for the Applicant and Mr. Amon Ndunguru counsel for the Respondent, is hereby certified as a true copy of original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL