IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPLICATION NO. 80/01 OF 2019

PAUL FRANCIS KILASARA..... APPLICANT

VERSUS

STANBIC BANK TANZANIA LTD.....RESPONDENT

(Application for struck out a Notice of Appeal from the decision of the High Court of Tanzania at Dar es salaam)

(Mgetta, J.)

dated the 6th day of December, 2018
in
Civil Appeal No. 202 of 2017

.....

RULING OF THE COURT

15th September, & 12th October 2021

MWANDAMBO, J.A.:

On 6/12/2018, the High Court, sitting at Dar es salaam, dismissed an appeal by Stanbic Bank Tanzania Limited, the respondent in Civil Appeal No. 202 of 2017. Aggrieved, the respondent lodged a notice of appeal before the High Court on 18/12/2018. Having lodged the notice of appeal, the respondent was required to institute her appeal within 60 days from the date of the impugned decision unless the Registrar of the High Court had excluded some days from the computation of the days for the institution of the appeal as necessary for the preparation of and supply of a

certified copy of the proceedings for the purposes of the appeal. However, the exclusion could be conditional upon a request for such supply being made in writing and a copy thereof delivered to the applicant within 30 days from the date of the decision pursuant to rule 90 (1) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The respondent did not institute the appeal within 60 days and this triggered the applicant moving the Court to strike out the notice of appeal under rule 89 (2) of the Rules on the ground that the respondent has failed to take essential steps in the appeal by its failure to serve a copy of the letter it wrote to the Registrar of the High Court applying for the requisite copies for the purpose of the appeal as required of her by rule 90 (2) [now rule 90 (3)] of the Rules. The applicant has done so by way of a notice of motion to which he has annexed an affidavit deponed to by Mr. Thomas Eustace Rwebangira, learned advocate representing him. It is averred in the affidavit that although the learned advocate filed a notice of address for service upon being served with a copy of the notice of appeal, the appellant had not yet served him with a copy of memorandum and record of appeal as of 11/03/2019, a period beyond 60 days from the date of the impugned decision.

The respondent opposes the application through two affidavits in reply deponed to by Mr. Makarious J. Tairo, learned advocate and Donat Pascal Mngara identified as a legal officer with Locus Attorneys a law firm having the conduct of the matter on behalf of the respondent. The affidavit in reply deponed to by Donat Pascal Mngara is to the effect that he lodged notice of appeal in the High Court and delivered a letter with the Registrar of the High Court applying for certified copies of proceedings, judgment and decree on 18/12/2018.

He avers further that on 19/12/2018, he delivered copies thereof to Mr. Rwebangira who acknowledged delivery by stamping on the documents which he came to learn much later that were two copies of notice of appeal and not the copy of the letter which he claims that the recipient retained.

Essentially, the deponent maintains that he served the applicant's advocate with the copy of the letter simultaneous with the notice of appeal but instead of the said advocate returning one copy of each of the two documents, he returned two copies of the notice of appeal but retained the copy of the letter. Para 5 of the affidavit in reply by Mr. Tairo avers that the applicant's advocate was served with the copies of the notice of appeal and returned two stamped copies and kept two copies of the notice of appeal. On the other hand, the said affidavit avers that as the impugned

decision required leave to appeal, the respondent had to obtain the requisite leave from the High Court. He avers further that, until the date of the affidavit in reply, the Registrar of the High Court had not yet supplied them with certified copies of the proceedings, judgment and decree in response to the letter delivered on 18/12/2018. In a nutshell, the deponent maintains that the application was filed prematurely as the respondent has not failed to take essential steps in the appeal and prays for its dismissal.

Ahead of the hearing date, the learned advocates filed their respective written submissions for/against the application pursuant to rule 106 (1) and (7) of the Rules. During the hearing, Mr. Rwebangira adopted the contents of his written submissions before taking the floor to highlight on some aspects with oral arguments, so did Mr. Tairo in reply.

Essentially, Mr. Rwebangira argues that the respondent has failed to prove that he served the applicant's advocate with a copy of the letter applying for copies of proceedings which constituted a failure to take essential step in the appeal within the meaning of rule 89 (2) of the Rules warranting an order striking out the notice of appeal. He challenged the affidavits in reply as contradicting each other on the type of documents served on him which, according to him did not prove that a copy of the

letter was indeed served on him, considering that he denied such service through his supplementary affidavit.

Mr. Rwebangira filed a supplementary affidavit in terms of rule 56 (2) of the Rules in which he denies having been served with a copy of the respondent's letter to the Registrar of the High Court as claimed by the affidavits in reply. The learned advocate admits having been served with a copy of notice of appeal in three originals and returned two to Donat Pascal Mngara after stamping them to acknowledge service on him.

Submitting further, Mr. Rwebangira contended that the respondent's move to shift the burden of proof with regard to service of the copy of the letter she wrote to the Registrar of the High Court has not succeeded as she failed to discharge it in the first place. As to the consequences of such failure, Mr. Rwebangira predicate his submissions on the Court's previous decisions holding that the failure is fatal to the notice rendering it ineffectual unless an appeal is instituted within 60 days from the date of the impugned decision. The cases relied upon include: **Airtel Tanzania Ltd. v. Tanzania Revenue Authority**, Civil Application No. 148 of 2014, **Omari Abdallah v. Rehema Kibaja**, Civil Application No. 1 of 2015, **Aliseo Peter Nditi v. KCB Bank Tanzania Ltd.**, Civil Appeal No. 56 of 2015, **Mondorosi Village Council & Others v. Tanzania Breweries**

Limited & Others, Civil Appeal No. 66 of 2017 (all unreported) and **Mrs. Kamiz Abdullah M. D. Kermal v. The Registrar of Buildings and Miss. Hawa Bayona** [1988] T.L.R. 199. With regard to the respondent's contention on the issue of leave to appeal, Mr. Rwebangira argued that the respondent's duty to comply with rule 90 (3) of the Rules was independent of the requirement to seek and obtain leave to appeal. He cited to us **Geofrey Kabaka v. Farida Hamza (Administratrix of the Estate of the late Hamza Adam)**, Civil Appeal No. 28 of 2019 (unreported) to reinforce his argument.

For a start, Mr. Tairo maintained that the application was filed prematurely because the institution of the appeal was subject to leave to appeal being granted by the High Court. Otherwise, Mr. Tairo contended that the respondent has not failed to take essential steps in the appeal; since the institution of the appeal was subject to obtaining leave to appeal from the High Court which was obtained after the expiry of 60 days by consent. According to him, the fact that the applicant's learned advocate did not object to the grant of leave to appeal constituted his admission of the competence of the intended appeal. The learned advocate distinguished the authorities relied upon by the applicant's learned advocate for one reason or the other. As to the time to institute an appeal

in cases where leave to appeal is required, Mr. Tairo suggested that time for doing so must be reckoned from the moment the intended appellant obtains leave to appeal. According to him, that position was reiterated by our decision in **Dar Cool Makers Limited v. John Ondolo Chacha**, Civil Application No. 123 of 2014 (unreported) reiterating the principle that an appeal is a creature of a statute.

From that decision, Mr. Tairo sought to distinguish several of the decisions relied upon by the learned advocate for the applicant particularly, **Omari Abdallah v. Rehema Kibaja**, Civil Application No. 1 of 2015 (unreported). Placing reliance on our decision in **Karagwe District Cooperative Union Ltd. v. Aaron Kabunga**, Bk Civil Application No. 3 of 2000 (unreported), Mr. Tairo was adamant that the time to appeal had not yet run out warranting the filing of the application on 18/03/2019 whereas the application for leave to appeal was granted on 12/03/2019.

In his oral submissions, Mr. Tairo reiterated that his client had taken all the essential steps in the appeal within time and argued that the application was filed to frustrate the respondent's right of appeal. According to him, the application served no purpose other than technicalities which can be cured by invoking the overriding objective

under section 3A of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], henceforth, the AJA. He thus urged the Court to dismiss the application.

Mr. Rwebangira's submissions in reply were to the effect that one, apart from the claim that the letter was delivered to him, no proof of acknowledgment has been furnished; two, the overriding objective cannot be invoked to cure non-compliance with the mandatory provisions of the law in line with **Mondorosi Village Council** case (*supra*). He wound up his submissions by urging the Court to grant the application with costs.

From the notice of motion, the founding affidavit, the affidavits in reply and the supplementary affidavit together with the written and oral submissions for and against the application, the critical issue for our determination is fairly narrow; did the respondent take essential steps in the appeal? To answer that question, we shall also be compelled to address our minds to a few related issues, namely; **one**, proof of service of the letter to the applicant said to have been delivered to his advocate by Donat Pascal Mngara; **two**, whether compliance with the requirement to seek leave to appeal checked the time limitation for the purpose of the appeal.

We shall start with proof of service. There is no dispute that the respondent's advocates wrote and delivered a letter to the Registrar of the High Court on 18/12/2018. To prove that a copy of that letter was delivered to the applicant's advocate on 19/12/2018, the respondent relies on the affidavit of Donat Pascal Mngara who has deponed at paras 4 and 5 of his affidavit that he presented two types of documents to Advocate Thomas Eustace Rwebangira; notice of appeal as well as the letter and thereafter the said advocate returned to him two copies of the said documents duly stamped as acknowledgement of receipt. The deponent avers further that he took the two documents and filed them in the relevant file and did nothing thereon as the service had been completed.

Upon our close examination of the affidavits in reply and the supplementary affidavit by Mr. Rwebangira, we are satisfied that the respondent has not succeeded in discharging her burden of proof regarding service of the letter on the applicant's advocate. This is more so because the affidavit in reply by Donat Pascal Mngara is conspicuously wanting on the type and number documents served on the applicant's advocate.

On the other hand, para 5 of the affidavit in reply by Makarious Tairo suggests that Donat Pascal Mngara presented four copies of notices of appeal to Mr. Rwebangira who stamped two of them and returned to the

said Mngara and retained two of such notices. That averment is contrary to what Donat Pascal Mngara has averred in paras 4, 5 and 7 of his affidavit claiming that the said advocate was served with the notice of appeal as well as the letter which he allegedly retained. Be it as it may, if what Mngara avers in his affidavit is correct one cannot excuse him for being reckless. This is so because, according to him, when the advocate for the applicant returned to him stamped documents, he understood them to be a notice of appeal and a letter and thereafter left to his office where he kept them in file. However, applying reason and common sense, which we are entitled to do to the facts, we are unable to buy this version of the story. We say so because the two documents are quite distinct in nature and thus, the deponent's eyes could not have been eluded so easily to confuse the two copies of notices of appeal with the copy of the letter allegedly served on the material date.

The upshot of the foregoing is that, the respondent has failed to furnish proof of service of a letter to the applicant to entitle her to a certificate of delay in terms of rule 90 (1) of the Rules. That being the case, the respondent's appeal ought to have been instituted within 60 days of the impugned decision, that is to say; by 06/02/2019, the latest.

Contrary to the submissions by Mr. Tairo, failure to serve a copy of the letter on the respondent within the prescribed period is neither a technicality nor a ploy to frustrate the respondent's right to exercise her right to appeal. It is a fatal irregularity entitling the applicant, as it were, to move the Court to strike out the notice of appeal under rule 89 (2) of the Rules. In other words, the notice of appeal has been rendered in effectual/inoperative so much so that no appeal can be instituted premised on such an inoperative notice. There is a thick wall of authorities in this regard exemplified by the cases cited by Mr. Rwebangira amongst others, **Mondorosi Village Council** and **Aliseo Peter Nditi** (supra).

Next we shall consider whether leave to appeal had the effect of checking time limitation prescribed for instituting an appeal. Mr. Tairo was adamant that since the impugned decision was appealable with leave, the time to institute the appeal could not have started running prior to the grant of leave by the High Court which was granted on 12/03/2019. Mr. Rwebangira had a different view and we respectfully agree with him. Firstly, whilst it is the law that an appeal is a creature of statute from the authorities of this Court including our decision in **Dar Cool Makers Ltd. v. John Ondolo Chacha** (supra) cited to us by Mr. Tairo, the requirement to obtain leave was independent of the respondent's compliance with rule 90

(3) of the Rules. Put it differently, the duty to institute an appeal within prescribed time under rule 90 (1) of the Rules is independent of the requirement to seek and obtain leave where one is required as it were. It would have been a different thing altogether had the respondent complied with rule 90 (3) of the Rules in which case the institution of the appeal could be subject to the High Court granting leave to the respondent. It follows thus that our decision in **Karagwe District Cooperative Union Ltd** (supra), relied upon by Mr. Tairo was cited out of context. That decision involved an application for extension of time to lodge an appeal under circumstances in which the Registrar of the High Court had not yet supplied the applicant with requisite documents neither had the High Court granted leave to appeal. That decision cannot be an authority for the proposition that leave to appeal checks time limitation for appealing in cases where the appellant fails to comply with rule 90 (1) or (3) of the Rules.

Lastly, Mr. Tairo made yet another suggestion to invoke the overriding objective to make good the failure to comply with rule 90 (3) of the Rules. With respect, as rightly submitted by Mr. Rwebangira, we cannot find any purchase in that suggestion. We say so mindful of our previous decisions in **Mondorosi Village Council** (*supra*) and **Puma Energy**

Tanzania Limited v. Ruby Roadways (T) Ltd., Civil Appeal No. 3 of 2018 (unreported) amongst others for the proposition that the overriding objective was not designed to blindly disregard mandatory procedural requirements going to the root of the matter before the Court, as it were.

That said, we find merit in the application and grant it with the effect that the respondent's notice of appeal lodged on 18/12/2018 is hereby struck out by reason of the respondent's failure to take essential steps in the appeal. The applicant shall have his costs of this application.

It is so ordered.

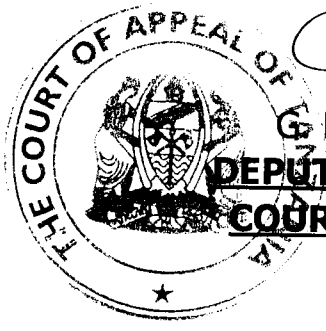
DATED at **DAR ES SALAAM** this 5th day of October, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The ruling delivered this 12th day of October, 2021 in the presence of Mr. George Ngemela, learned counsel for the applicant and Ms. Hamisa Nkya, learned counsel for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL