

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MMILLA, J.A., MZIRAY, AND J.A.)

CIVIL APPLICATION NO. 68 OF 2012

SUZANA MSIGALA..... APPLICANT

VERSUS

ERICK MSIGALA..... RESPONDENT

**(Application for striking out Notice of Appeal from Decision of the
High Court of Tanzania at Dar es Salaam)**

(Muruke, J.)

Dated 22nd day of November, 2011

In

Civil Appeal No. 88 of 2011

RULING OF THE COURT

25th July, & 3rd August, 2016

MZIRAY, J.A.:

By Notice of Motion filed in this Court on the 25th day of August, 2012, the Applicant, represented by Mr. Mpale Mpoki from Mpoki and Associates Advocates, applied to this Court to have the Notice of Appeal filed by the respondent on 29th November, 2011 be struck out for failure to take essential steps in instituting the intended appeal.

The grounds on which the application is based are:-

- (i) No application for leave to appeal to the Court of Appeal against the decision of the High Court in Civil Appeal No. 88 of 2011 has been lodge at the High Court by the respondent within 14 days as required by the law.*
- (ii) The respondent has not applied to the Registrar for certified copies of the Judgment, Decree and Court proceedings in Civil Appeal No. 88 of 2011, High Court and even if the same has been filed with the Registrar, the respondent has not served the applicant with the said letter.*
- (iii) The respondent has not instituted the appeal within sixty days (60) from the date of lodging the Notice of Appeal.*

In support of the Notice of Motion, Mr. Daimu Halfan, learned counsel from Mpoki and Associates Advocates affirmed an affidavit on behalf of the applicant and the same is attached to the Notice of Motion filed. Quite unfortunately the respondent did not file the affidavit in reply. He only filed written submission challenging the merits of the application.

When the application was called on for hearing, the respondent did not turn up in Court for no apparent reason for which and upon the applicant's application and with the approval of the Court, the hearing proceeded in the absence of the respondent pursuant to the provisions of Rule 63(2) of the Court of Appeal Rules, 2009 (the Rules).

During the hearing, Mr. Mpoki insisted that the respondent has not taken the essential steps required in pursuing the appeal. He pointed out that it is unprocedural to file written submission without first filing affidavit in reply. On that basis therefore, the learned counsel urged the Court not to consider the written submission filed by the respondent and that the Notice of Appeal be struck out with costs as the respondent failed to take the essential steps necessary to allow him file the appeal.

We have taken the arguments advanced before us and considered them seriously. Indeed, we entirely agree that it is unprocedural to file written submission without first filing affidavit in reply, in which, the averments in the affidavit in support of the application would have been

countered. In the circumstances therefore, the written submission filed unprocedurally cannot be accorded due weight.

Having disregarded the respondent's written submission, we are left only with the evidence in the affidavit of the applicant which on carefully going through it, we find it to have merit in that essential steps have not been taken to pursue the appeal, the consequences of which, the Notice of Appeal is to be struck out. (See **Grace Frank Ngowi v. Dr. Frank K. Israel Ngowi** [1984] TLR 120 and **D.V. Valambhia v. Transport Equipment Ltd** [1992] TLR 249), wherein the Court, in similar cases, struck out the Notice of Appeal and the appeals for failure to take essential steps.

This indeed is the position in the case at hand. Although the respondent filed a Notice of Appeal on 29/4/2011 to challenge the decision of the High Court in Civil Appeal No. 88 of 2011, he has not to date filed application for leave to appeal to the Court of Appeal against that decision and he has also not instituted the appeal since then. Likewise he has not

served the applicant with copy of the letter demanding for certified copies of judgment, decree and Court proceedings on the same.

In view of the above, we strike out the Notice of Appeal under Rule 89(2) of the Rules upon the respondent's failure to take essential steps in instituting the intended appeal. The application is accordingly allowed with costs.

DATED at **DAR ES SALAAM** this 28th day of July, 2016.

B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL