

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 103/01 OF 2021

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

MAIMUNA RAJABU SOKA.....APPLICANT

VERSUS

TUWAHA SAMSON MUZE.....RESPONDENT

**(Application from the Judgment of the High Court of Tanzania,
(District Registry) at Dar es Salaam**

(Miyambina, J.)

dated the 21st day of October, 2019

in

Civil Appeal No. 10 of 2019

RULING OF THE COURT

29th August & 14th September, 2022

LEVIRA, J.A.:

The applicant, Maimuna Rajabu Soka has moved the Court by way of notice of motion preferred under Rule 89 (2) of the Tanzania Court of Appeal Rules 2009 (the Rules), to strike out the notice of appeal lodged to the Court by the respondent on 19th November 2019 on the ground that, no appeal lies or that essential step has not been taken by the respondent to prosecute the intended appeal. The notice of motion is supported by the applicant's affidavit, who also filed written submissions in support of the application on 3rd April 2021. The respondent filed an affidavit in reply to oppose the application together with reply written submissions.

The factual background leading to the present application is straight forward. The respondent and the applicant were husband and wife respectively from 2009 up to 2018 and they were blessed with two issues during the subsistence of their marriage. However, as hinted above, their marriage did not last long following its dissolution by the District Court of Kinondoni (the trial Court) in Matrimonial Cause No. 66 of 2017, the matter which was initiated by the respondent against the applicant. Apart from dissolving the parties' marriage, the trial court went further to order for division of matrimonial properties, custody and maintenance of the two issues of the marriage.

The respondent was aggrieved by the decision of the trial court. Therefore, he appealed to the High Court in Civil Appeal No. 10 of 2019. His appeal was not successful as it was found to be devoid of merits. This decision impelled the respondent to file to the Court a notice of appeal on the 19th November, 2019 with the intention to challenge the decision of the High Court on appeal. It is the applicant's contention in this application that since the filling of the notice of appeal, the respondent has not taken further steps to prosecute his appeal according to the law, hence, the present application.

At the hearing of the application, Messrs. Richard Mathias Kinawari and Michael J. Nyambo, learned advocates entered appearance for the

applicant and the respondent respectively. Mr. Kinawari adopted the notice of motion, the supporting affidavit and the applicant's written submissions as the only material before the Court without seeking to exercise the applicant's right under rule 106 (10) (a) of the Rules of clarifying the written submissions. Likewise, Mr. Nyambo had nothing to add to the respondent's affidavit in reply and reply written submissions having adopted them as only that he had for the respondent.

We have thoroughly perused the entire record of the application with a view of satisfying ourselves as to whether the respondent took any further step to prosecute his appeal after lodging the notice of appeal under consideration. That is, in fact, the issue we will endeavour to resolve in this application. The applicant claimed under paragraphs 4 and 5 of the supporting affidavit that on 19th November, 2019 she was served with the notice of appeal but the respondent has not taken further step to apply for necessary documents for appeal purposes and serve her with a copy of the letter to that effect. Besides, there is no appeal that has been filed by the respondent to the date of this application. In her written submissions, the applicant elaborated that in terms of Rule 90 (2) of the Rules, it is mandatory for the intended appellant to write to the Registrar to apply for the necessary documents for appeal purposes and to copy the respondent; but this is not the case

in the present matter. She fortified her argument with the decision of the Court in **Mkombozi Centre for Street Children & Others v. Attorney General**, Civil Appeal No. 30 of 2014 (unreported), where the Court emphasized on the need of making a formal application for proceedings and copy of it to be served on the other party or respondent.

As regards leave to appeal, under paragraph 6 of the supporting affidavit, the applicant contended that the respondent has not sought and obtained leave to appeal to the Court which is also a requirement of the law and a step towards the intended appeal. She argued that, this being a matrimonial matter which originated from the District Court, the law, particularly, section 5 (1) (c) of the Appellate Jurisdiction Act, [Cap141 R.E. 2019] (the AJA), put it in mandatory terms that leave must be obtained in order to appeal to the Court.

In reply, the respondent stated under paragraph 4 of his affidavit in reply that after lodging the notice of appeal, the advocate who was representing him in the High Court wrote to the Registrar a letter requesting to be supplied with copies of necessary documents for appeal purposes of which the same are yet to be supplied to him. Elaborating on this assertion, the respondent stated in his written submissions that, his efforts to trace the documents did not bear fruits as the said

advocate has relocated from his previous office and the respondent was informed that some documents were misplaced during his relocation exercise.

In response to the applicant's claim that the respondent has not applied for leave to appeal, it is stated under paragraphs 7 and 9 of the affidavit in reply that leave is not required for an appeal in respect of matrimonial appeal from the High Court. In his written submissions, the respondent argued that, although section 5 (c) of the AJA requires leave to be sought for appeal from the High Court to the Court, it is not mandatory when the intended appeal originates from matrimonial proceedings in terms of section 80 (4) of the Law of Marriage Act, [Cap 29 R.E. 2019]. To buttress his argument, the respondent cited the decision of the Court in **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 (unreported). Finally, he urged us not to grant the application.

Having considered the notice of motion, the parties' affidavits and written submissions, the issue as to whether the respondent took essential step(s) after lodging his notice of appeal should not consume much of our time. The record is very clear as intimated above that, the notice of appeal under consideration was filed on 19th November, 2019 and in terms of Rule 90 (1) of the Rules, the intended appeal was

supposed to be filed within sixty (60) days of the filing of the said notice. The proviso to that Rule provides for exceptional circumstances within which time may be excluded in computation of the ninety (90) days. This is when a written application for a copy of proceedings in the High Court has been made within thirty (30) days of the date of decision against which it is desired to be appealed against; in which case, the Registrar of the High Court certifies the time to be excluded which he spent for preparation and delivery of that copy to the appellant.

We take note that the respondent stated under paragraph 4 of his affidavit in reply that after lodging the notice of appeal, his then advocate wrote to the Registrar of the High Court requesting to be supplied with necessary documents for appeal purposes, but they are yet to be supplied to him. We are of the decided mind that, the respondent's mere assertion to that effect does not hold water as the same is not backed up with evidence. The said letter was neither attached to his affidavit in reply nor was it served on the applicant as required by the law. Also, the respondent claimed that his then advocate was the one who wrote the said letter to the Registrar but he misplaced some of the documents during relocation of his office; probably, including a copy of the letter to the Registrar requesting for documents, the information which its source was not disclosed. Such

assertion is as well uncalled for. It remained to be an empty and hearsay assertion as the respondent failed to attach an affidavit from the said advocate to substantiate his assertion. Apart from that, the respondent did not even bother to attach the affidavit of the person who informed him of his advocate's relocation and misplacement of the documents in order to back up his assertion.

In the circumstances, we agree with the applicant that since the notice of appeal subject of the present application was filed on 19th November, 2019, up to 18th March 2021 when this application was filed in Court, the respondent failed to comply with the requirements of the law under Rule 90 (1) and (3) of the Rules, it amounts to failure to take essential step to prosecute his intended appeal. Thus, the application is merited.

Having made that finding, which we think is sufficient to dispose of this application, we find no point of engaging in discussing the issue pertaining to whether or not the respondent was supposed to seek leave to appeal.

Consequently, we grant the application. The notice of appeal lodged by the respondent on 19th November 2019 with intention to challenge the decision of the High Court in Civil Appeal No. 10 of 2019, is hereby struck out.

Lastly, we have considered circumstances of this matrimonial matter and we decide not to make any order for costs. Each party shall bear its own costs.

DATED at DAR ES SALAAM this 2nd day of September, 2022.

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

M.C. LEVIRA
JUSTICE OF APPEAL

S.M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 14th day of September, 2022 in the presence of Mr. Shafii Samiri holding brief for Mr. Richard Kinawari, learned counsel for the Applicant, also holding for Mr. Michael Nyambo for the Respondent, is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL