IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KIHWELO, J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 337/18 OF 2021

EDMUND MSANGI... APPLICANT

VERSUS

THE GUARDIAN LIMITED..RESPONDENT

(An application to strike out the Notice of Appeal against the Judgment and Decree of the High Court of Tanzania, (Labour Division) at Dar es Salaam (Nangela, J.)

dated the 16th day of October, 2020 in Labour Revision No. 838 of 2019

....

RULING OF THE COURT

2nd & 24th November, 2022

MKUYE, J.A.:

Before us is an application made under Rules 89 (2), 90 (5) and 91 (a) of the Tanzania Court of Appeal Rules 2009 (the Rules). The applicant seeks to have the notice of appeal lodged by the respondent on 30th October 2020 intending to impugn the decision of the High Court (Labour Division) in Labour Revision No. 838 of 2019 struck out. The application is supported with an affidavit deponed by Nyaronyo Mwita Kicheere, the advocate for the applicant. On the other hand, the respondent has resisted it by an affidavit in reply sworn by Mbuga Jonathan, advocate for the respondent.

Before embarking on the merit of the application, we find it apt to give a brief background leading to this application as follows:

The applicant was employed by the respondent in the position of a Managing Editor of a daily Swahili Newspaper known as Nipashe. On 6th July 2018 his employment was terminated. The reason for his termination was stated to be publication of controversial headlines and, in particular, one which bore the caption "BARUA YA KKKT YAMNG'OA WAZIRI". The applicant's entitlement was calculated to the sum of Tshs.17,044,000 minus statutory deductions of Tshs.4,995,300/= which he was paid and then, the two parted ways.

The applicant then approached the Commission for Mediation and Arbitration (CMA) where he lodged a complaint citing unfair termination. The CMA after hearing both parties made a finding against the applicant on account of his admission to wrong doing and, therefore, it made no difference whether the termination was procedurally unfair or not.

The applicant, being dissatisfied with the outcome, lodged revisional proceedings in the High Court which was determined in his favour. It would appear that the respondent after being aggrieved with the High Court decision, lodged a notice of appeal intending to appeal to this Court which is now the subject of this application.

The main ground for this application as stated by the applicant is that the respondent has failed to take essential steps in filing the appeal because the copies of the proceedings of the Labour Court were ready for collection as the applicant applied for them and was granted immediately.

When the application was called on for hearing, the applicant was represented by Dr. Rugemeleza Nshalla and Mr. Nyaronyo Mwita Kicheere, both learned counsel whereas the respondent had the services of Mr. Mbuga Jonathan, also learned counsel.

When invited to amplify the application, Dr. Nshalla, after having sought to adopt the affidavit deponed by Kicheere argued that the respondent failed to take essential steps in instituting the appeal because she failed to make follow up of the matter in terms of Rule 90 (5) of the Rules. He contended that, after lodging a letter requesting for copies of proceedings and judgment for appeal purposes on 30th October 2020, she had ninety (90) days which expired on 28th January 2021 within which she was to wait for the Registrar to supply her with the relevant documents. Thereafter, the respondent had fourteen (14) days (after the expiry of ninety days) to remind the Registrar. However, the respondent did not do so. Instead, Dr. Nshalla assailed the respondent for lodging the "*so called reminder letters*" beyond the ninety days plus the fourteen days contending that they had no effect. He elaborated that the reminder letter dated 16th February 2021 and the one dated 20th April 2021 which were written beyond the period prescribed under Rule 90 (5) of the Rules, had no legal effect. To fortify his argument he referred us to the cases of **Fauzia Jamal Mohamed v. Lilian Onael Kileo**, Civil Appeal No.203 of 2016 pages 30-34; **Damas Assey and Another v. Raymond Mgonda**

Paula and Others, Civil Application No.32/17 of 2018; **Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby,** Civil Application No.475/01 of 2020; and **Tanzania Communication Regulatory Authority v. Cats-Net Limited,** Civil Application No.341/01 of 2018 (all unreported).

Dr. Nshalla went on to submit that, all the purported reminder letters to the Registrar, were not served by the respondent on the applicant and that the effect of not doing so was an error which vitiates these letters. To show that those reminder letters were required to be served on the applicant, he invited the Court to draw analogy from Rule 90 (1) of the Rules requiring the letter applying for copies of proceedings and to be served on the respondent. For that matter, he translated the failure to serve those letters on the applicant as failure to take essential step. While relying on the case of **Rehema Iddi Msabaha v. Selebhai Jafferjee Sheikh and Another**, Civil Application No. 527/17 of 2019 (unreported), he stressed that there ought to be proof that a particular step was taken.

Dr. Nshalla further assailed the certificate of delay by the Deputy Registrar dated 22nd October 2021 attached to the respondent's affidavit contending that it was not copied to the applicant and that it was issued after the application was filed. He, therefore, concluded that since the essential steps have not been taken by the respondent, the notice of appeal be struck out under Rule 89 (2) of the Rules.

In response, Mr. Jonathan prefaced his submission by stating that the issue of essential steps has no hard and fast rule and, rightly so in our considered view, since it depends on the nature of the intended appeal, such as, if it is the first, second or third appeal (See **Tanzania Bureau of Standards and Another v. Charles Nyato**, Civil Application No.315/01 of 2021 (unreported). He contended that, essential steps had been taken as stated in the affidavit in reply. He elaborated that after the judgment was pronounced, they lodged the notice of appeal and a letter requesting for proceedings and judgment within time and served on the applicant. He added that after filing the said letter, they made physical follow ups and wrote a series of reminder letters to the Registrar. He was of the view that, there is no law that prohibits to lodge reminder letters even after expiry of 90 days or to make physical follow ups. To fortify his argument, he referred us to the case of **Tanzania Bureau of Standards and Another** (supra) at page 9.

On the applicant's complaint that the respondent did not serve on them the reminder letters, Mr. Jonathan countered it contending that the applicant did not have a courtesy of signing to acknowledge receipt of the said letters just as they conceded to have been served with a letter requesting for copies of proceedings and judgment although they did not endorse it.

Regarding the assertion by the applicant's counsel that they had perused the court file but were not supplied with the documents, the learned counsel argued that they ought to have presented a formal request for the supply of the documents. To bolster his argument, he referred to us the case of **LRM Investment Company Ltd and 5 Others v. Diamond Trust Bank Tanzania Limited**, Civil Appeal No.111 of 2019 page 13 (unreported), where the Court emphasized that a document of the Court is to be obtained through the Registrar's formal communication.

In this regard, it was Mr. Jonathan's submission that the respondent took essential steps in the proceedings and beseeched the Court to find that the application is unmerited and dismiss it with costs.

In rejoinder, Dr. Nshalla insisted that any reminder letter which offended Rule 90 (5) had no effect and that the respondent had failed to take essential step. He, therefore, prayed to the Court to grant the application with costs.

We have dispassionately examined the rival submissions and, we think, the issue for this Court's determination is whether the application is meritorious to warrant the Court to grant it.

In terms of Rule 89(2) of the Rules to which this application is premised, any person on whom a notice of appeal has been served may apply to the Court, either before or after the institution of the appeal, to

have the notice of appeal struck out for the reason that no appeal lies or that no essential step in the proceedings has been taken or has not been taken within the prescribed time.

In the matter at hand, it is common ground as was contended by Dr. Nshalla that the respondent lodged a notice of appeal on 30th October 2020 following the delivery of the judgment intended to be impugned on the same day. She also applied for the copies of proceedings and other necessary documents for purposes of appeal on the same day and was served on the applicant as was conceded to by the learned counsel for the applicant. Definitely, this was in compliance with Rule 90 (1) and (3) of the Rules. If things were equal, the appeal ought to have been lodged within sixty days from the date the notice of appeal was lodged. According to the applicant, until 22 July 2021 (about 8 months and 22 days) the appeal was yet to be lodged which was translated to failure by the respondent to take essential steps towards instituting the appeal.

It is further the applicant's contention that despite the fact that the respondent filed a letter requesting for documents, she did not comply with the provisions of Rule 90 (5) of the Rules which states that:

> *"(5) Subject to the provisions of sub rule (1), the Registrar shall ensure that a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such copy and* ***the appellant shall take steps to collect copy upon***

being informed by the Registrar to do so*, or within fourteen (14) days after the expiry of the ninety (90) days."* [Emphasis added]

It is the applicant's further contention that even if the respondent lodged to the Registrar the so called reminder letters dated 23rd December 2020, 16th February 2021 and 20th April 2021, such letters are of no effect as the time required for her to be supplied with the relevant documents expired on 28th January 2021 as per the said sub-rule (5) of Rule 90 of the Rules.

On the other hand, the respondent is of the strong view that essential steps were taken as she made not only physical follow ups but also, she wrote reminder letters, the steps not prohibited by any law having regard that there is no hard and fast rule for essential steps.

In the first place we must state that we have taken note that, although the applicant predicated her application under among other the provisions, Rule 90 (5) of the Rules, nothing was averred in that respect in the affidavit in support of the application. What is clear in paragraph 5 of the affidavit, which is a substitute of evidence, is that **the major reason for the application was that the applicant had also on 12th May 2021 applied for proceedings of the Labour Court in Labour Revision No. 838 of 2019 which is the subject of the intended appeal and that he was supplied immediately which meant that they were readily available**.

In paragraphs 6, 7, 8 and 9 of the applicant's affidavit, the deponent deponed that on 18th June 2021 he applied to peruse the High Court (Labour Division) file so as to acquaint himself on the status of the respondent's intended appeal which prayer was granted on 29th June 2021; and that, on 30th June 2021 he perused the said court file where he found only two correspondences (attached as EM3) which was the respondent's letter requesting for copies of proceedings, judgment and decree and the letter from his Law Firm dated 12th May 2021 received by High Court (Labour Division) on 17th May 2021 and the order granting the supply to the respondent's advocate copies of judgment, proceedings and decree and all (documents admitted as) exhibits meaning that there were no other correspondences.

Having considered the applicant's averments and submissions on this aspect, we are unable to be convinced with such averments and submissions by the applicant. This is because, looking at the assertion under paragraph 5 of the affidavit that he applied for the copies of proceedings, judgment, decree and exhibits and was supplied immediately, is not supported by any evidence. Ordinarily, a party applying for such documents by a letter would have been expected to get a written response from the Deputy Registrar that the documents are ready for collection. In the matter at hand such communication from the Registrar is lacking. On this, we are fortified with the decision in the case

of **LRM Investment Company Ltd** (supra) where the Court emphasized that:

> *"....Therefore as earlier alluded to, in the absence of the documented Registrars official communication to the appellant's counsel that the certified proceedings were supplied to the appellants.... Besides, it cannot be ascertained if the purported copy of proceedings constituting the record of appeal was lawfully obtained."*

Apart from that, even the averment that the applicant applied for perusal of the High Court (Labour Division) case file and that the prayer was granted on 29th June 2021 is still wanting simply because, the mode of the said application which is averred to have been filed on 29th June 2021 and granted on 30th June 2021 is not annexed to the affidavit of the applicant. Moreover, such correspondences were not copied to the respondent. As it is, it is a submission from the bar. Besides that, the assertion by Kacheere that when he perused the Labour Revision case file he found only two letters, in our view is a serious allegation tending to impeach the record. It ought to be supported by some other evidence from the registry office to show that by 30th June 2021 when the applicant perused the file there were only two letters as averred by the applicant's advocate. As already hinted earlier on, we do not agree with the applicant that he made such efforts in the absence of formal communication from the Deputy Registrar in that regard.

With regard to Dr. Nshalla's contention that the respondent failed to comply with Rule 90 (5) of the Rules, we must reiterate that, institution of civil appeals to this Court is governed by Rule 90 of the Rules. According to sub-rule (1) of the said Rule, the appellant is required to lodge an appeal within sixty (60) from the date when the notice of appeal was filed. However, where the appellant had been unable to obtain the copies of proceedings, judgment and decree from the High Court while he had applied for them in writing within the period of thirty (30) days from the date of the decision sought to be appealed against, the Registrar is required to issue a certificate of delay stating the number of days requisite for the preparation and delivery of such copies to the appellant, which would entitle the appellant to the exclusion of the said number of days in computing the time within which the appeal is to be filed. This requirement is on condition that the letter requesting for proceedings must be served on the respondent. (See **Fauzia Jamal Mohamed** (supra) and **The District Executive Director, Kilwa District Council v. Bongeta Engineering Limited,** Civil Appeal No.37 of 2017 (unreported)).

We are aware of the amendment made to Rule 90 through the Tanzania Court of Appeal (Amendment) Rules 2019 (GN No. 344 of 2019) which introduced sub-rule (5) as follows:

> *"Subject to the provisions of sub rule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for* ***such copy and the appellant shall take steps to collect a copy upon being informed by the Registrar to do so,*** *or within fourteen (14) days after the expiry of the ninety (90) days."* [Emphasis added].

From the above provision, we gather that **one,** the provision is subjected to sub-rule (1). It is not a stand-alone provision. **Two,** the Registrar is required to ensure that the copy of proceedings is ready for delivery within ninety days from when the application for the same was made and that the appellant is to collect the said copy after being informed by the Registrar to do so. **Three**, in case the appellant has not received any notification from the Registrar to collect the said documents, then he is required to follow up within fourteen days after the ninety days from his application has expired.

Dr. Nshalla is at arms that this provision of the law was not complied with by the respondent and that the reminder letters dated 16th February 2021 and 20th April 2021 are wastage of time as to him the relevant documents ought to be supplied by 28th January 2021.

On the adversary side they are convinced that the essential steps were taken on the basis of reminder letters which were filed to the High Court Registry (See Annex Guardian 1) all of which were filed before this

application was lodged. On top of that, despite the existence of the application at hand, the respondent was informed by the Deputy Registrar about the availability of documents on 7th October 2021 vide letter with Ref. No. 838/2019 and upon collecting them they requested for a certificate of delay as per Annex Guardian-2 which was eventually issued on 22nd October 2021.

The provisions of Rule 90 (5) of the Rules were amply discussed in the case of **Beatrice Mbilinyi** (supra) and **Daudi Robert Mapuga and 147 Others v. Tanzania Hotels Investment Ltd and 4 others,** Civil Application No.462/18 of 2018 (unreported). In the latter case of **Daudi Robert Mapuga** (supra) the Court disagreed with the respondent's contention that having lodged the letter requesting for documents, they **remained home and dry**. The Courts' disagreement with the respondents' stance was in the wake of the provisions of Rule 90 (5) of the Rules requiring the appellant to collect the documents within ninety days upon being informed by the Registrar or to take steps within fourteen days after the expiry of ninety days from when the initial request was made. The Court also noted the Registrar's inactiveness on the matter and, therefore, apart from blaming the Registrar it stated:

> *"While we acknowledge, that the Registrar is plainly blameworthy for his inaction in supplying the requested documents, we think the respondent's **diligence is seriously in question. We are unprepared to let***

> ***the respondents claim that they were home and dry. It would be most illogical and injudicious, we think, to accept the respondents wait infinitely 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 infinite in action, in our respectful view, offends the ends of justice."* [Emphasis added].

Then, the Court struck out the notice of appeal in that case. Yet the same position was taken in the case of **Beatrice Mbilinyi** (supra) where the respondent had requested for the documents on 5th November 2018 and ought to have followed up the copy to the Registrar after expiry of 90 days on 21st February 2019. Instead, he made follow-up on 27th November 2020 after the application for striking out the notice had been lodged on 3rd November 2020 which was after a lapse of almost twenty one months from the expiry of 90 days. In our view, those cases are distinguishable to circumstances of this case as we shall explain in the due course.

Similarly, in the case of **Tanzania Bureau of Standards** (supra) when the Court was confronted with a similar scenario, the provisions of Rule 90 (5) of the Rules and the decision in **Daudi Robert Mapuga** (supra) were considered and found that the said case was distinguishable to the case under its consideration in that in **Mapuga's** case (supra), the respondent remained home and dry after lodging a letter requesting for

documents while in the case under consideration, the respondent took some steps by writing a letter to the Registrar requesting for the copy of proceedings and making several physical follow ups but ended in vain. The respondent in that case also wrote several reminder which the Court agreed that he had demonstrated enough diligence reasonably expected of him after the ninety days and fourteen days expiry.

In the first place, we must state that, essential steps towards instituting an appeal to the Court would differ depending on the nature of the appeal as alluded to earlier on. (**See Tanzania Bureau of Standards and Another** (supra). In the matter at hand, the respondent filed a notice of appeal and for the first time applied for the relevant documents on 30th October 2020. As we hinted earlier on, if things were equal, the appeal ought to have been filed on 30th December 2020 which was after sixty days following the lodgment of the notice of appeal. Alternatively, going by the provisions of Rule 90 (5) of the Rules, the appeal ought to have been filed by 28th January 2021 which was within ninety days after applying for documents as was submitted by Dr. Nshalla or by 11th February 2021 if the respondent had utilized the fourteen days period after the expiry of ninety days. However, that did not happen. There was no notification by the Registrar to the appellant within the ninety days. Neither did the appellant take steps within fourteen days after the expiry of the ninety days.

At any rate, having considered the rival submissions we agree with Mr. Jonathan that the case of **Robert Daudi Mapuga's** (supra) relied upon by Dr. Nshalla is distinguishable to this case because, unlike in that case where the respondent did remain home and dry in this case the respondent took some steps. Equally, the case of **Beatrice Mbilinyi** (supra) is distinguished because the respondent sent reminder letters to the Registrar after the application for striking out the notice of appeal was filed unlike in this case where the reminder letters were lodged even before this application was filed.

The record shows that the respondent took steps despite the fact that the Registrar did not notify her that the documents were ready for collection as required by Rule 90 (5) of the Rules. Much as the respondent might not have made a follow up within the fourteen days after the expiry of the ninety days, the record bears out that, even before this application was filed, she wrote three reminder letters including those dated 16th February 2021 and 20th April 2021 requesting to be supplied with the documents. The contention by the applicant that the said reminder letters were not served on the applicant, in our view, is not tenable and the Court is not prepared to draw analogy from the requirement of serving a copy of letter requesting for proceedings under Rule 90 (1) of the Rules because the law does not provide for such requirement, more so, when taking into account that the requirement

under Rule 90(1) was made for a purpose. Besides that, so long as Dr. Nshalla admitted to have been served with the first letter applying for the proceedings while it did not bear their endorsement, we give the respondent a benefit of doubt that the same might have happened to the reminder letters as was submitted by the respondent's counsel.

Be it as it may, the record shows that there was no response to those letters until on 7th October 2021 when the Registrar notified the respondent about the readiness of the copies of proceedings, judgment and decree for collection. To show how diligent the respondent was, after receiving the Deputy Registrar's letter on 7th October, 2021, on the same date she requested to be supplied with the certificate of delay which was eventually issued on 22nd October 2021.

In the case of **Tanzania Bureau of Standards and Another** (supra), the Court considered all the circumstances of the case and observed as follows:

> *"It is very unfortunate that all that time the respondent's follow ups, as it stands on record, not only the Registrar did not notify him to collect the requested documents, but also, he did not even in writing ask the respondent to continue waiting. This was unusual. In the absence of it all therefore, we give the respondent the benefit of doubt and do not expect this kind of casual running of the court's registry to happen again."*

Even in this case, that is what exactly happened. Despite all the letters written by the respondent, none was responded to by the Registrar. Therefore, being guided by the case of **Tanzania Bureau of Standards and Another** (supra), we are satisfied that the respondent herein took steps towards instituting the appeal only that she did not get the necessary cooperation.

That said and done, we find that the application is not merited. Consequently, we dismiss it with costs.

It is so ordered.

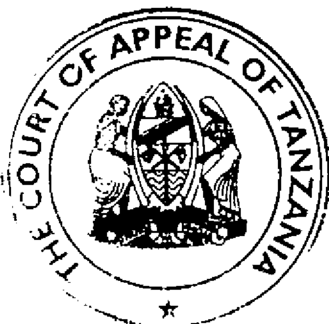
DATED at **DAR ES SALAAM** this 14th day of November, 2022.

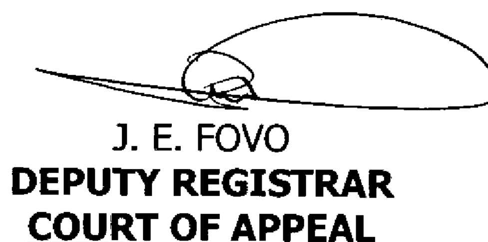
R.K. MKUYE
JUSTICE OF APPEAL

P.F. KIHWELO
JUSTICE OF APPEAL

O.O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 24th day of November, 2022 in the presence of Mr. Nyaronyo Kicheere, learned counsel for the Applicant and Mr. Alfred Rweyemamu, learned counsel for the Respondent, is hereby certified as a true copy of the original.





J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL