

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)**

**CIVIL APPLICATION NO. 105/17 OF 2021**

**AMIE SADICK SANGA.....APPLICANT**

**VERSUS**

**NATIONAL BANK OF COMMERCE LIMITED.....RESPONDENT**

**(Application to strike out notice of appeal arising from the Judgment and Decree of the High Court of Tanzania (Land Division), Dar es Salaam District Registry at Dar es Salaam)**

**(Mohamed, J.)**

**dated the 27<sup>th</sup> day of May, 2019**

**in**

**Land Case No. 150 of 2015**

**.....**

**RULING OF THE COURT**

25<sup>th</sup> August & 14<sup>th</sup> Sept, 2022

**FIKIRINI, J.A.:**

The applicant, Amie Sadick Sanga, seeks an order of this Court in terms of Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), to strike out the respondent's notice of appeal lodged on 14<sup>th</sup> June, 2019, to challenge the judgment and decree dated 27<sup>th</sup> May, 2019, in Land Case No. 150 of 2015, for failure to take essential steps to prosecute

its appeal. The respondent contested the application through an affidavit in reply sworn by Mr. John Laswai, learned advocate.

Brief facts leading to the present application are that the applicant sued the respondent and two (2) other persons (then defendants) not parties to this application before the High Court Land Division seeking the following declaratory orders:

- 1. That, the defendants' conduct to process, issue, and procure a loan without a spouse's consent is unlawful/void.*
- 2. That, the Certificate of Occupancy be given to the plaintiff by the 3<sup>d</sup> defendant.*
- 3. Payment of general damages.*
- 4. Costs of the suit.*

All the defendants denied the claim. After a full trial, the trial Judge entered judgment in favour of the applicant, as exhibited in A-1. As reflected in A-2, aggrieved by the decision, the respondent lodged a notice of appeal contesting the impugned judgment. This was followed by a letter dated 29<sup>th</sup> May, 2019 - annexure A-3, written by IMMMA advocates requesting to be supplied with certified copies of the judgment, decree, proceedings, and exhibits. The applicant was served with a copy of the

letter on 4<sup>th</sup> June, 2019. On 21<sup>st</sup> June, 2019, the applicant was served with yet, another copy of the letter written on 14<sup>th</sup> June, 2019, by Locus Attorneys requesting to be supplied with the documents. A reminder request was jotted on 26<sup>th</sup> September, 2019, as reflected in annexure A-5. Since no appeal has been lodged, the applicant preferred this application, urging us to strike out the notice of appeal for the respondent's failure to take essential steps.

On 25<sup>th</sup> August, 2022, when this application came up for hearing, Mr. John Lingopola and Mr. John Laswai, learned advocates appeared for their respective parties. Prior to the hearing date, Mr. Lingopola filed a written submission in terms of Rule 106 (1) of the Rules, and none was filed on the respondent's part. In addressing us to support the application, Mr. Lingopola prefaced his oral submission by adopting the notice of motion, the affidavit in support, and the written submission filed as part of his oral submission.

It was his submission that from when a notice of appeal was filed and letters requesting to be supplied with certified copies of the necessary documents sent, the respondent has not done anything. According to Mr.

Lingopola, the documents were ready by 2<sup>nd</sup> December, 2019, and the applicant had collected her copies. He then argued if the documents were ready by 2<sup>nd</sup> December, 2019, then how is it possible the respondent, up to March, 2020, which is about fifteen (15) months, has neither collected them nor lodged the intended appeal.

Mr. Lingopola blamed the respondent for lack of seriousness, as she ought to have obtained the documents long ago but opted not to. Instead, the respondent continued writing reminder letters despite being aware of the existence of this application. The applicant believes that the respondent is using the notice of appeal to hinder the applicant to enjoy the fruits of the decree in her favour, proclaimed the advocate.

Countering the respondent's averment in the affidavit in reply that the documents were not ready for collection, the advocate argued that the assertion had not been supported, as the court clerk who is claimed to have stated to have informed the respondent's advocate has not been mentioned or an affidavit obtained supporting the assertion. The claim was thus a mere statement which ought to be ignored, argued Mr. Lingopola.

Mr. Lingopola, further contended that before filing this application, he requested leave to peruse the Court record. From his perusal, he learnt that after the 2<sup>nd</sup> December, 2019, the respondent waited for almost eleven (11) months to react, which shows pure laxity on the respondent's part. Probed if there was any stay of execution order sought, his reaction was there was none, saying that it was because, when the applicant tried to execute the decree, a notice of appeal already lodged was raised as a defence.

He thus, on the strength of his submission, urged us to allow the application and strike out the notice of appeal with costs.

Reacting to the submission, Mr. Laswai countered Mr. Lingopola's submission that the respondent had been vigilant and diligent in following up with the court but had not been lucky to be availed with the requested documents. And that this application has been preferred before the expiry of ninety (90) days. According to Mr. Laswai, since sixty (60) days within which the respondent was required to lodge the intended appeal have elapsed, the respondent needs to be issued with documents requested and a certificate of delay, which should allow lodgment of the intended appeal.

Responding to the submission on the letters contested by the applicant's counsel, Mr. Laswai submitted that the information regarding the request letters written to the court has been stated in the affidavit. More so, the fact that all the letters written to the Registrar had court receipt stamps, there was thus no need for an affidavit from a court clerk in that regard, knowingly that the matter was still in the Registrar's hands. Mr. Laswai urged us to consider the application lacking merit and prayed for it to be dismissed with costs.

Briefly rejoining, Mr. Lingopola, maintained that this application was lodged after the expiry of more than fifteen (15) months and, thus, not correct to say that the applicant did not wait for the expiry of ninety (90) days. He also countered the submission that there was no need for an affidavit from the court clerk on the assertions made as incorrect. In several of its decisions, this Court has stipulated the need for an affidavit to prove a fact, he stressed. He thus urged us to be guided by our previous decisions.

We have duly considered the notice of motion, affidavit in support and affidavit in reply, the applicant's written submission, and rival oral submissions.

We shall commence our deliberation by looking at our previous decisions referred to by Mr. Lingopola in his submission, on the subject. The cases are **Mohamed Amour Khalid & Mohamed Ayub Ibrahim v. Issa Khalfani** [1994] T. L. R. 136, and **Barclays Bank (T) Ltd. v. Hood Transport Ltd & Another**, Civil Application No. 134 of 2014 (unreported) in which the Court with approval referred to the case of **Asmin Rashid v. Boko Omari** [1997] T. L. R. 146. In **Mohamed Amour Khalid** (supra), this Court had this to say:

*"We agree with the findings of the learned single justice that the notice of appeal was served on the present respondent in time and that the application for the copy of proceedings was in writing and was copied to the respondent. But since the proceedings were supplied to the applicants on 28 January, 1993, they should have instituted the appeal within sixty days i.e. by 29 March, 1993. They did not do so until 5 August, 1993, almost five months out of time. In these circumstances, the learned single*

*judge did not have any other alternative except to allow the application and strike out the notice of appeal.”*

In the **Barclays Bank (T) Ltd.** case (supra), the Court had an opportunity to elaborate on what essential steps entailed when it observed that:

*“We need to point out that, in essence; essential steps which advance the hearing of the appeals, including a timely collection of the necessary documents which are supposed to be relied upon by the potential appellant in preparing his/her appeal, obtaining leave to appeal in those circumstances where the appeal is not of right, etc.”*

Based on the principles set in the above decisions, we shall now determine whether the respondent indeed failed to take essential steps; hence the present application deserves granting.

The record shows that after the impugned decision was pronounced, on 27<sup>th</sup> May, 2019 the respondent wrote to the Registrar requesting to be supplied with copies of the documents. Immediately after the impugned decision was pronounced, IMMMA Advocates wrote a letter requesting to



be provided with a certified copy of the judgment, decree, and proceedings dated 27<sup>th</sup> May, 2019. The second letter was written on 14<sup>th</sup> June, 2019 by Locus Attorney, right after the lodgment of the notice of appeal. A third was a reminder letter which followed on 25<sup>th</sup> September, 2019. The applicant was duly served with copies of all three letters, yet the Registrar supplied no documents.

Under the ordinary course of business, after requesting to be furnished with documents, the Registrar is required to inform the appellant or a party who requested the documents when the documents are ready for collection. And upon payment, the appellant is supplied with documents. If the requested documents are supplied outside sixty (60) days within which the appellant ought to have lodged the intended appeal, a certificate of delay, pursuant to Rule 90 (1) of the Rules, must be furnished to the appellant. The certificate of delay is issued to allow the appellant to enjoy the exception afforded under Rule 90 (1) of the Rules. This exception is only applicable if the letters to the Registrar were duly served on the applicant, in compliance with Rule 90 (3) of the Rules, which in the present case, the applicant undoubtedly was duly served.

Indeed, in the application under scrutiny, when the applicant lodged the instant application for striking out the notice of appeal, the ninety (90) days stipulated under Rule 90 (5) of the Rules, within which the Registrar is required to ensure the copy of proceedings is ready for delivery, had long expired. Likewise, the fourteen (14) days required the respondent to make a follow-up. The problem is the law is silent as to what should follow after the period provided by Rule 90 (5) of the Rules, has elapsed without an appeal being lodged.

Mr. Lingopola, in his submission, contended that the requested documents were ready for collection on 2<sup>nd</sup> December, 2019, and the applicant was furnished with copies of the said documents. This assertion has made us wonder if the applicant was supplied with the requested documents, why was the respondent not? While we do not doubt Mr. Lingopola's claim, there is, nonetheless, no indication that the respondent has been informed of the readiness of the documents for collection or that the documents were collected but not acted upon.

We arrived at this conclusion based on the fact that although the applicant alluded to having already been supplied with documents on 2<sup>nd</sup>

December, 2019, it is also on record that she later applied to be supplied with a copy of proceedings in Land Case No. 150 of 2015 vide a letter dated 20<sup>th</sup> July, 2020, with reference number JLC/ASS/2020/01. The request was acted upon as exhibited in annexure A-7, a letter dated 12<sup>th</sup> August, 2020, from the Registrar informing the applicant of the readiness of the requested proceedings. The fact that up to 12<sup>th</sup> August, 2020, the Registrar's office was still supplying documents signified to us that the earlier supplied documents were not complete. And this made us construe that could be the reason why the respondent has not been informed of the readiness of the documents for collection. We must admit that this has created perplexity on how the office of the Registrar functions, if what Mr. Lingopola has contended is the truth of the matter, that the applicant was availed with documents on 2<sup>nd</sup> December, 2019. From the unfolding of things, we are persuaded by Mr. Laswai's version on the supply of the requested documents.

Besides, it is on record that the respondent's four (4) letters to the Registrar, between 29<sup>th</sup> May and 6<sup>th</sup> November, 2019, were not the end of the pursuit. The respondent had continued reminding the Registrar of the request for the documents even after this application was filed on 17<sup>th</sup>

March, 2021, in the letters dated 2<sup>nd</sup> June, 2021, 28<sup>th</sup> September, 2021, 23<sup>rd</sup> February, 2022, and 20<sup>th</sup> August, 2022. Also, from paragraphs 4 (f) and 5 of the affidavit in reply deponed by Mr Laswai, up to the time the affidavit in reply was filed on 18<sup>th</sup> August, 2022 the respondent had not been served with the requested documents. Since it is uncontroverted that the respondent is yet to be furnished with the requested documents from the court, it would be unfair if we grant the prayer for striking out the notice of appeal, considering the delay is not from the respondent's making.

While relevant, our previous decisions referred by Mr. Lingopola do not fit the scenario in the present application. In the case of **Mohamed Amour Khalid** (supra), since the requested documents were supplied, the responsible party failed to take action; the Court, therefore, rightly concluded that there was a failure to take essential steps. Similarly, in **Barclays Bank (T) Ltd** (supra), the appellant requested the documents but failed to collect them when they were ready. That is not, unfortunately, the case in the present application.

In the application before us, there is no proof whatsoever that the Registrar has ever informed the respondent of the readiness for collection of the requested documents. Nor the respondent failed to collect the said documents, or did collect them but failed to take action. Moreover, even after the applicant was supplied with the requested copy of proceedings on 12<sup>th</sup> August, 2020, there is no suggestion that the respondent was equally supplied with the documents requested by the applicant. Mr. Lingopola has not availed us with any evidence in that regard. We think if there is one to blame in this saga should perhaps be the Registrar for not informing the respondent of the readiness for collection of the requested documents despite all the letters written or even reacting to all the letters addressed to the court. We find it unjustified to conclude, as Mr. Lingopola would wish, that the respondent has failed to take essential steps and therefore strike out of the notice of appeal lodged on 14<sup>th</sup> June, 2019.

Mr. Lingopola also challenged the lack of affidavits from the court clerks being referenced informing the respondent that the documents were not ready. In several of its decisions, it is correct that this Court has required such affidavits from the court clerks to prove any assertion made. Although there are no such affidavits from those court clerks, we still find

in the circumstances of this application the reminder letters duly received by the court to be sufficient, proving what the respondent alleges.

In the circumstances, we are constrained to find the application without merit and proceed to dismiss it with costs.


**DATED at DAR ES SALAAM this 12<sup>th</sup> day of September, 2022.**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

The Ruling delivered this 14<sup>th</sup> day of September, 2022 in the presence of Mr. Cathbert Mbilingi holding brief for Mr. John Lingopola, learned counsel for the Applicant and Ms. Prisca Nchimbi, learned counsel for the Respondent, is hereby certified as a true copy of the original.

  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**