

**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. 189/01 OF 2021

ISSA OMARI MAPESA.....APPLICANT

VERSUS

JUMANNE SEBARUA.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Kakolaki, J.)

dated the 17th day of July, 2020

in

Civil Appeal No. 202 of 2019

.....

RULING OF THE COURT

18th Aug & 13th Sept, 2022

FIKIRINI, J.A.:

This is an application for striking out the respondent's notice of appeal in respect of Civil Appeal No. 202 of 2019. The application was filed by a notice of motion predicated on Rules 89 (2), 48 (1) and (2) and 49 (1) of the Tanzania Court of Appeal Rules 2009 (the Rules). The application is supported by an affidavit of Mr. Protace Kato Zake, learned advocate, and the written submission filed on 17th June, 2021 pursuant to Rule 106 (1) of the Rules. Contesting the application, the respondent, through Mr. Burton

Mayage, learned advocate filed an affidavit in reply under Rule 56 (1) of the Rules and filed written submission on 20th July, 2021 in terms of Rule 106 (7) of the Rules.

The applicant, Issa Omari Mapesa is moving this Court to strike out the notice of appeal for the following reasons:

1. That, no essential step has been taken by the respondent in compliance to Rule 84 (1) of the Rules.
2. That, no appeal lies against the applicant upon expiry of sixty days from the date the notice of appeal was lodge.

The genesis of this application as it can be captured from the record, is that the applicant sued the respondent for breach of contract before the Resident Magistrates Court at Kisumu in Civil Case No. 188 of 2006. On 20th May, 2013, judgment was entered in the applicant's favour. Disgruntled, the respondent unsuccessfully appealed to the High Court in Civil Appeal No. 202 of 2020. Undeterred, the respondent filed a notice of appeal on 24th July, 2020, at the High Court, intending to challenge the High Court decision. On 26th October, 2020 the respondent served the applicant with the notice of appeal and an application for leave to appeal. The respondent did not apply, or if he did, then the applicant was not served with the letter

to the Registrar applying for copies of the proceedings. After the expiration of the statutory period of sixty (60) days within which the respondent should have lodged a record of appeal and memorandum of appeal, which he had not, the applicant filed this application for striking out the notice of appeal on the ground that no essential steps required had been taken by the respondent and therefore no appeal lies against the applicant.

When this application came on for hearing, Mr. Zake learned advocate appeared and argued the application on behalf of the applicant. The respondent and his advocate did not enter appearance. Mr. Zake urged us, to which we agreed and proceeded to determine the matter in the absence of the respondent in terms of Rule 106 (12) (b) of the Rules.

Addressing us, Mr. Zake, focused his submission on paragraphs 3, 4, and 6 of the affidavit in support that the respondent served the applicant with the notice of appeal out of time. The notice of appeal lodged on 24th July, 2020, was served on the applicant on 26th October, 2020, out of the fourteen (14) days prescribed. He also pointed out that the respondent has not served the applicant with a copy of the letter requesting copies of judgment, decree, and proceedings, hence failing to take such essential steps, leading to failing of lodgment of a record of appeal and

memorandum of appeal. Based on his contention, Mr. Zake prayed for the Court to grant the application by striking out the notice of appeal with costs.

We have dispassionately considered the notice of motion, affidavit in support, and affidavit in reply, as well as written submissions filed by learned advocates for the parties and oral submission by Mr. Zake. We wish to start with the application of Rule 84 (1) of the Rules on service of notice of appeal. The Rule states thus:-

*“84.-(1) An intended appellant shall, **before, or within fourteen (14) days** after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal.....”* [Emphasis added]

The respondent, in paragraph 3 of the affidavit in reply, averred that he tried to communicate with the applicant in person without success until October, when he got hold of him via phone, who directed the applicant to effect service through the respondent’s Law firm. This exercise took place in October, 2020. We find the respondent’s unsubstantiated averment hard to fathom. *One*, the affidavit does not disclose how and when the respondent communicated with the applicant or mentioned a date he was

instructed to serve the said notice of appeal to the applicant's lawyer without naming the Law firm or the name of the advocate he was asked to serve. No details of the attempts made were given neither in the affidavit nor in the written submission. *Two*, the respondent did not mention when exactly and how he came by the applicant's new number.

In his written submission, the respondent stated to have approached Mr. Zake, learned advocate who represented the respondent before the High Court with the intentions to serve him with the notice of appeal. However, this account does not feature in the respondent's affidavit. In paragraph 3 of his affidavit, which supposedly illustrated that point, had this averment:-

"That the contents of paragraph 3 of the applicant's affidavit are vehemently disputed and the respondent wishes to state that the notice of appeal was filed to court within time and several time we tried to communicate with the applicant in person without success but on October, 2020 we successfully got a new phone number of the applicant of which he directed us to serve the same notice of appeal to his lawyer's law firm that is why same notice reached to the firm in October, 2020."

We have stated in our previous decisions that submissions are not evidence but information expounding on the general features of the party's case. See: **Khalid Mwisongo v. M/S Unitrans (T) Ltd**, Civil Appeal No. 56 of 2011 (unreported). From the paragraph, we gather no information to support the respondent's assertion on the efforts made to serve the applicant timely.

Assuming that what the respondent is stating in his affidavit in reply is correct, the position we do not align ourselves with, the respondent was nevertheless, required to do so with a leave of the Court. In the instant case, no leave was sought and granted by us. The notice of appeal was inevitably served out of time, hence non-compliance to section 84 (1) of the Rules.

Failure by the respondent to take this essential step consequently renders the notice of appeal lodged incompetent. This is not the first time this Court has been faced with a such a challenge regarding unserved or belatedly served notice of appeal without leave. There is a list of authorities like **D.P. Valambhia v. Transport Equipment Ltd.** [1992] T.L.R. 264, **Salim Sunderji and Capital Development Authority v. Sadrudin Shariff Jamal** [1993] T.L.R 224; all referred to in **John**

Nyakimwi v. The Registered Trustees of the Catholic Diocese of Musoma, Civil Application No. 85/08 of 2017 (unreported) to name a few.

Failure to serve the notice of appeal in compliance with Rule 84 (1) of the Rules cannot be described otherwise but one of the grounds in failure to take essential step as envisioned under Rule 89 (2) of the Rules.

Aside from serving the other party with a notice of appeal, the intending appellant is equally required to write a letter to the Registrar requesting to be availed with copies of judgment, decree, and proceedings. A copy of the letter must be served on the respondent under Rule 90 (3) of the Rules, if the appellant desires to enjoy the advantage to be gained under Rule 90 (1) of the Rules. The Rule provides as follows:

*" 90. (1) subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, **within sixty days of the date when the notice of appeal was lodged** with-*

(a) a memorandum of appeal in quintuplicate;

(b) the record of appeal in quintuplicate;

(c) security for costs of the appeal,

save that where an application for a copy of the proceedings in the High Court has been made within sixty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.”[Emphasis added]

What can be deduced from the provision, is that the intending appellant is expected to lodge a record of appeal and memorandum of appeal within sixty (60) days, unless there is a letter written to the Registrar requesting to be furnished with the necessary documents and that has been served upon the applicant. The consequence of serving the opposite party with the copy of the letter written to the Registrar, is to allow the intending appellant to take advantage and enjoy the exclusion of time provided under Rule 90 (1) of the Rules by being issued with a certificate of delay, which will allow filing the intended appeal.

In the case of **Tanzania Rent-A-Car Ltd. v. New Africa Hotel (1993) Ltd**, Civil Application No. 38 of 2005 (unreported), the Court

stressed the need for proof of receipt of service by the respondents of the letter to the Registrar of the High Court, requesting for the copy of proceedings. Relating the above decision with the scenario in the present application, the respondent has not said anything, neither in the affidavit in reply nor the written submission, on the request and service of the letter to the Registrar. At most in his submission the respondent persuaded us to ignore the omission and afford him opportunity to lodge his intended appeal, arguing that the courts are not in place to punish parties for failure to observe rules and procedures in place. Flouting of this another mandatory procedure confirms the respondent's failure to take essential step as required under the Rules.

Rule 90 (1) of the Rules requires that a record of appeal and memorandum of appeal be filed within sixty (60) days, from the date of filing a notice of appeal, in the absence of any credible explanation, we agree with Mr. Zake that sixty (60) days within which the respondent ought to have lodged his appeal have long expired from 24th July, 2020. See: **Victoria Mbowe v. Christopher Shafurael Mbowe & Another**, Civil Appeal No. 115 of 2012.

For the reasons above, we find the application merited and proceed to strike out the notice of appeal lodged on 24th July, 2020 under Rule 89 (2) of the Rules, with costs.

DATED at **DAR ES SALAAM** this 12th 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 13th day of September, 2022 in the presence of Mr. Protace Kato Zake, learned advocate for the Applicant and Respondent is absent, is hereby certified as a true copy of the original.


C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL