IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., GALEBA, J.A. And KAIRO, J.A.)

CIVIL APPLICATION NO. 426/16 OF 2022

STATE OIL TANZANIA LIMITED ..... APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED ..... 1ST RESPONDENT
EQUITY BANK KENYA LIMITED ..... 2ND RESPONDENT

(Application to Strike out a Notice of Appeal in respect of the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Magoiga, J.)

dated the 1st day of October, 2021

in

Commercial Case No. 105 of 2020

.....

RULING OF THE COURT

4th October & 18th November 2022

GALEBA, J.A.:

In this application, by a notice of motion preferred under rules 48 (1) and (2), 49 (1), 89 (2) and 90 (5) of the Tanzania Court of Appeal Rules 2009, (the Rules), State Oil Tanzania Limited, the applicant has moved this Court to strike out a notice of appeal lodged by the respondents on 3rd November 2021 on the ground that an essential step has not been taken within the prescribed time. The notice of motion is supported by the affidavit of **Nilesh Suchak**, the applicant's Chief Executive Officer. The application was strongly resisted by lodging an

affidavit in rely affirmed by one **Jasbir Kaur Mankoo,** an advocate who had been employed by Kesaria & Company Advocates when the judgment was delivered, but who, at the time this application was filed, was employed by FB Attorneys, a law firm currently representing the respondents.

The brief version of the facts material to this application, is that the applicant initiated Commercial Case No. 105 of 2020, claiming various declaratory and financial reliefs against the respondents. The latter disputed the claims in the suit and put up two separate counter claims against the applicant. Following a full hearing of the matter, the applicant's reliefs were mainly granted with costs. As for the outcome of the respondents' counter claims, both were dismissed with costs by the High Court (Hon. Magoiga J.). The respondents were aggrieved by that decision which was handed down on 1st October 2021. The notice of appeal was lodged and a letter requesting for a copy of the proceedings under rule 90 (1) of the Rules was also served on the Registrar of the High Court, quite in time. However, ninety (90) days expired without the Registrar of the High Court notifying the respondents that the documents requested were ready for collection. The respondents did not remind the Registrar of the High Court of their request for the

documents within fourteen (14) days that followed the ninety (90) days of the Registrar's delay. We will come to the full account of the detailed actions or inactions of the respondents in the appeal process, but for now, it suffices to hint that all arguments and submissions of parties in this matter oscillate around that respondents' omission, and the decision in this ruling is meant to address the very point.

At the hearing of this application, Mr. Frank Mwalongo learned advocate, on one hand appeared for the applicant, while Mr. Timon Vitalis and Dr. Abel Mwiburi, both learned advocates, appeared for the respondents, on the other.

After moving the Court to adopt the notice of motion and the affidavit supporting it, while capturing the substance of his written submissions, Mr. Mwalongo argued that at the expiry of ninety (90) days from 27th October 2021, when the respondents requested for a copy of the proceedings, they were supposed to make a written reminder to the trial court in order to comply with rule 90 (5) of the Rules. According to him, upon expiry of the ninety (90) days, the reminder was supposed to follow within fourteen (14) days thereafter. If, the intended appellant does not make a follow up within that time, an essential step in the appeal process is skipped and upon an application like this one under

rule 89 (2) of the Rules, a notice of appeal that initiated the appeal process is liable to be struck out. After underscoring the point, Mr. Mwalongo cited to us a few authorities to bolster his argument. The authorities included **Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby,** Civil Application No. 475/01 of 2020, **Monica Makungu v. Director of Education Department, Archdiocese of Mwanza,** Civil Application No. 31/08 of 2021, **Hadrian Benedict Chipeta v. The Treasury Registrar and Two Others,** Civil Application No. 287/01 of 2021 and **Japhet Machumu v. National Bank of Commerce Limited,** Civil Application No. 95/01 of 2020 (all unreported).

The submissions above were resisted by Mr. Vitalis. He submitted that the intention of rule 90 (5) of the Rules is to check whether the intending appellant is serious with his appeal or not, and that the rule was not enacted to be complied with like an item on the checklist such that if it is not complied with, then the appeal process is vitiated. He submitted that the mere failure to comply with it, is not conclusive proof of lack of diligence on the part of the intending appellant. He contended that although the respondents did not write a letter within the disputed fourteen (14) days, there was a reminder on 9th May 2022 and that nine (9) days after receiving the requested documents, Civil Appeal No. 294

of 2022 was lodged. He argued that an interest to pursue an appeal or lack of it, is a factual matter and it all depends on peculiar circumstances of a given case.

Mr. Vitalis contended, presumably in the alternative to the above submission, that since this application was filed after an appeal was filed, this matter is overtaken by events, particularly in this case where a certificate of delay places the entire blame of the delay squarely on the Registrar of the High Court. To support his argument in his written submissions, he referred us to **Kaemba Katumbu v. Shule ya Sekondari Mwilamvya,** Civil Application No. 523 of 2020, **Dr. Wahida Shangali v. Pendo Fulgence Nkwenge,** Civil Application No. 52/17 of 2020 and **Jackson Mwaipyana v. Parcon Limited**, Civil Application No. 115/01 of 2017 (all unreported).

In rejoinder, Mr. Mwalongo, reiterated his previous position stressing that according to rule 89 (2) of the Rules, where an essential step in the appeal has been taken out of the prescribed time, it does not matter that the application, like the one at hand, is filed after an appeal has been lodged. So, he insisted that the application was properly before the Court notwithstanding that it was lodged after an appeal was filed. The other point he clarified was that, rule 90 (5) of the Rules

imposes a strict duty upon the Registrar of the High Court, to inform the intending appellant of the readiness for collection of such a copy within ninety (90) days of receiving the letter requesting for the proceedings. However, he added that upon expiry of the said ninety (90) days without the Registrar of the High Court informing the intending appellant of the readiness of the proceedings, the duty shifts to the intending appellant in the next fourteen (14) days, to remind the Registrar of his duty to supply the documents requested. Failure to perform the duty in the said fourteen (14) days, according to Mr. Mwalongo, violated rule 90 (5) of the Rules. He added that the omission constituted lack of diligence and seriousness on the part of the respondents to pursue the appeal for which he beseeched us to strike out the notice of appeal with costs, because the inaction amounted to the failure by the respondents to take an essential step in the appeal process, within the prescribed time.

Acquainted with the above material relevant for determination of this matter, there is no doubt that one fact is not contested; the fact that the respondents did not remind the Registrar of the High Court to supply them with a copy of the proceedings within fourteen (14) days following expiry of the ninety (90) days within which the Registrar of the

High Court was required by rule 90 (5) of the Rules to inform them of the readiness of a copy of the proceedings.

We think the starting point should be the law, under which this application is preferred, that is rule 89 (2) of the Rules. That rule provides:

> *"Subject to the provisions of subrule (1), any other person on whom a notice of appeal was served or ought to have been served may at any time,* ***either before or after the institution of the appeal, appiy to the Court to strike out the notice of appeal or the appeal,*** *as the case may be,* ***on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.***"*
> [Emphasis supplied]

Two points are clear in this rule. The **first** is that an application to strike out a notice of appeal under the rule, may be filed before or after an appeal has been lodged. So, Mr. Vitalis' contention that the application is overtaken by events because it was lodged after the appeal had been filed, is, with respect, not a strong argument. The **second** point is that, the rule may be invoked by a respondent who alleges and proves existence of one or more of three scenarios; **one**,

that either no appeal lies or; **two,** that an essential step in the appeal process has not been taken or; **three**, that although the step has been taken, it has been taken out of the prescribed time. The issue before us concerns the third scenario, that the respondents took an essential step, but they did that out of the prescribed time. The prescribed time, according to the applicant, is the fourteen (14) days provided for under rule 90 (5) of the Rules.

It is logical, we propose, for a moment to turn our focus to rule 90 (5) of the Rules and consider what it entails. The rule provides as follows:

> *"Subject to the provisions of subrule (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 copy upon being informed by the Registrar to do so,*** *or* ***within fourteen (14) days after the expiry of the ninety (90) days.***"
> [Emphasis supplied]

In an endeavour to give meaning to this rule, this Court has construed it as creating duties to both the Registrar of the High Court and the intending appellant. The Registrar of the High Court is obligated

under the rule, to inform the intending appellant that the requested copy of the proceedings is ready for collection. And he must do that within ninety (90) days from when the intending appellant requested for the copy. The question which always confronts the Court is on the duty imposed upon the intending appellant to ensure that the Registrar of the High Court complies with the Rules and the consequences of noncompliance.

It is noted that before sub rule (5) of rule 90 was enacted, there was what was referred to as the Home and Dry concept. According to that concept, after the intending appellant lodged a letter with the Registrar of the High Court, then it was the obligation of the Registrar of the High Court to prepare a copy of the proceedings from which an appeal is intended and inform the intending appellant to collect it. The intending appellant had no obligation to do anything including reminding the Registrar of the High Court to supply the documents requested. The concept is captured in many decisions of this Court including **Saleh Abdi Mohamed v. Katibu wa Baraza la Mapinduzi And Another** [2018] T.L.R. 324 where the principle was echoed, thus:

> *"(iii) The respondents have done more than what they were required to do. This is so because, reading between the lines of ruie 90 (1) of the*

Rules, in our view does not require the respondent to remind the Registrar of the supply of copies of proceedings, judgment and decree. ***As the respondent had since 29th September, 2016 lodged a letter applying for the requisite documents for purposes of preparing the appeal, they were home and dry. They were not under any obligation to send reminder letters to the Registrar of the High Court."***

[Emphasis supplied]

That was the position of the law up to 22nd September 2017 when the Tanzania Court of Appeal (Amendment) Rules 2017 were published under Government Notice No. 362 of 2017 placing also a duty on the intending appellant.

That new sub rule however, survived only for about 18 months, because *vide* rule 19 of the Tanzania Court of Appeal (Amendment) Rules 2019, Government Notice No. 344 of 2019 published on 26th April 2019, the sub rule was deleted and replaced by the present rule 90 (5) of the Rules which has been quoted above and which is a focal point for discussion in this application.

We must state at this juncture that, our critical consideration of rule 90 (5) of the Rules in the context of the above two amendments of

the Rules and the history before the amendments, reveals that the main reason for its introduction in the Rules was to get away with the Home and Dry concept which permitted laxity and inaction on the part of the intending appellant, where the Registrar of the High Court was not timely attending to the intending appellant's request for supply of a copy of the proceedings. So, the said sub rule came to introduce a certain level of involvement and responsibility of the intending appellant in the process of procurement of the documents applied for purposes of appeal.

We think also it is opportune to emphasize one point here, namely, that the role of the intending appellant in the process of procurement of a copy of the proceedings, under sub rule (5) of rule 90 of the Rules, is secondary rather than primary and basic. The duty of processing and ensuring that the requested documents are ready for collection is inherently by and large, that of the Registrar of the High Court, and not of the intending appellant. The role of the latter is ancillary and marginal. The role comes in only where the Registrar of the High Court does not act, within ninety (90) days, otherwise the obligation of the intending appellant in that sub rule does not arise.

Essentially, sub rule (5) of rule 90 of the Rules is meant to assess whether an intending appellant is serious and active on top of things in seeking to have his appeal processed, or he is indifferent, detached and disinterested with the appeal process.

If, the above is the rationale for the introduction of sub rule (5) of rule 90 of the Rules, we think the issue we will seek to resolve in this matter is whether the respondents exercised diligence and industry in seeking to have the documents supplied to them or they sat back, demonstrated laxity and were indifferent with the appeal process. A correct answer to that issue entails a thorough examination of the level of action or inaction of the appellant immediately after delivery of the judgment to the time of lodging the appeal.

In this matter, as briefly indicated earlier on, in their pursuit to challenge the decision of the High Court dated the 1st October 2021, the respondents took the following steps; **first**, on 27th October 2021, through Kesaria & Company Advocates, they lodged a notice of appeal in compliance with rule 83 (1) and (2) of the Rules. **Second,** on the same day, in compliance with rule 90 (1) of the Rules, they applied for a copy of the proceedings for purposes of appeal. **Third,** the next day, that is on 28th October 2021, in compliance with rule 84 (1) of the Rules,

the said advocates effected service of the notice of appeal to Apex Attorneys Advocates, learned advocates for the applicant. **Fourth,** on 28th October 2021 counsel for the respondents served a copy of the letter they lodged with the Registrar of the High Court, to Apex Attorneys Advocates.

Fifth, noting that they were not being notified of the readiness of the documents, on 23rd December 2021 the respondents wrote a reminder letter demanding to be availed with a copy of the proceedings earlier requested. This was about 56 days of inaction of the Registrar of the High Court. That letter which is included in the record of this application reads as follows in the second paragraph:

> *"Almost two months have elapsed and we are yet to receive the requested documents. You are humbly reminded that pursuant to rule 90 (5) of the Tanzania Court of Appeal Rules Cap 141 R.E. 2019 (sic) you are required to ensure that the requested proceedings are ready for delivery within ninety (90) days from the date of the request.*
>
> *Kindly expedite delivery of the requested documents as per my attached letter of 27th October 2021.*
>
> *Yours faithfully.*

Sgd

D. Kesaria."

Sixth, according to paragraph 7 of the affidavit in reply of Jasbir Kaur Mankoo, after delivering the above letter to the High Court on 23rd December 2021, he personally made follow ups at the Commercial Court concerning the requested documents, but the proceedings would not be available.

Seventh, as there continued to be total silence from the High Court, on 9th May 2022, through FB Attorneys, the successor legal counsel for the respondents, in the place of Kesaria & Company Advocates following demise of Mr. D. Kesaria, the respondents wrote a third letter reminding the Registrar of the High Court to avail them with the requested documents. It was not until about 40 days later, that is, on 20th June 2022, that the Registrar of the High Court notified the said successor advocates for the respondents, that a copy of the proceedings and the exhibits which were requested on 27th October 2021 were ready for collection from the court, free of charge.

Eighth, on the same day they were notified, FB Attorneys collected the proceedings and; **nineth,** within only ten (10) days, that

is, on 30th June 2022 Civil Appeal No. 294 of 2022 was lodged in this Court on behalf of the respondents.

Tenth, on 20th June 2022, the Registrar of the High Court indicated in the certificate of delay that all the time from 27th October 2021 when he received the request from the respondents to 20th June 2022, (a total of 237 days) was the time he spent in preparing the court documents.

The above background constitutes the relevant material upon which we will decide whether the respondents were diligent, dutiful and keen to pursue their appeal or they were lousy and negligent.

In this application, although they did not write any reminder within fourteen (14) days after expiry of ninety (90) days after the initial request of the documents, the respondents made several actions including reminding the Registrar of the High Court to deliver the documents around two (2) months following their first request. Writing such a letter even before expiry of ninety (90) days demonstrated vigour and zeal to pursue the appeal. The fact that the respondents reminded the Registrar of the High Court before expiry of ninety (90) days is also acknowledged by the applicant as revealed under paragraphs 6 and 7 of the affidavit supporting the notice of motion. The applicant's assertion

however, is that thereafter the respondents remained silent, although according to Jasbir Kaur Mankoo's affidavit in reply, he stated that he continued to remind the Registrar of the High Court orally, but still the documents would not come forth.

To us, the persistent non-response to their letters, meant that even if the respondents would have written the letter of reminder to the Registrar of the High Court within fourteen (14) days after expiry of ninety (90) days, still he would not have supplied the requested copy of the proceedings as it happened because, even after the second reminder on 9th May 2022, he remained silent until when they were supplied with the proceedings. We are thus of a firm position that, if the Registrar of the High Court needed all that time inclusive of the disputed fourteen (14) days to prepare the documents, then the reminder of the respondents ceased to be of any essence or of any use towards progressing the appeal. That is so, in our view, because the reminder in the circumstances would be of no effect be it negative or positive.

We have also considered Mr. Mwalongo's submission that the contents of paragraph 7 of the affidavit in reply of Jasbir Kaur Mankoo that he was making a follow up at the Commercial Court were mere assertions, which, should not be believed. Here, there are two points we

should make in association with that argument. **One,** it is good court practice that statements made on oath or affirmation be contradicted by statements on oath or affirmation too. Thus, accepting Mr. Mwalongo's submissions as credible in contradicting affirmation of Jasbir Kaur Mankoo in his affidavit in reply, is tantamount to permitting affidavits to be contradicted by statements of counsel from the floor, which is not good court practice. **Two,** taking into consideration the communications and actions taken by the respondents consequent to losing in the High Court, Jasbir Kaur Mankoo's affirmation at clause 7 of his affidavit in reply is consistent to the rest of the respondent's persistent acts in pursuit of the requested proceedings. Thus, with much respect, we are unable to agree with Mr. Mwalongo's point of view.

After having considered all the circumstances of this matter, we are fully convinced that upon losing the case in the High Court, as demonstrated above the respondents did not sit back and relax Home and Dry. They were zealously active almost all the time, and did all that was possible within their powers to procure the documents, but the Registrar of the High Court, did not act within reasonable time. In the circumstances, though we acknowledge the decisions of the Court referred to us by the applicant's and the respondents' counsel, we hold

that they cannot apply in the present application for the reasons we have stated above. Indeed, each case must be decided on its own merits.

For the above reasons, we hold that this application has no merit and we dismiss it. In view of the circumstances of this matter, we order that each party bear her own costs.

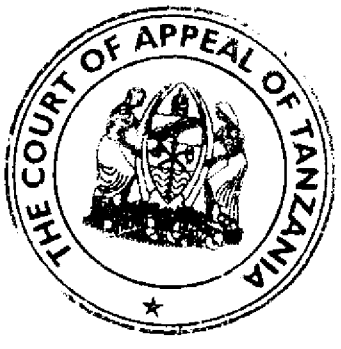
DATED at **DAR ES SALAAM** this 15th day of November, 2022

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered on this 18th day of November, 2022 in the presence of Mr. Frank Mwilongo, the counsel for the Applicant and Mr. Baraka Msana, the learned counsel for the Respondents is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL