

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: MKUYE, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 273 OF 2018

MOKIRI DAMAS NGÓJA APPELLANT

VERSUS

NATIONAL HOUSING CORPORATION1ST RESPONDENT
INDEPENDENT AGENCIES &
COURT BROKERS LTD2ND RESPONDENT

**(Appeal from the decision and decree of the High Court of Tanzania
at Moshi)**

(Sumari, J.)

Dated the 19th day of October, 2017

in

Land Case No. 14 of 2015

RULING OF THE COURT

22nd & 30th September, 2021

MKUYE, J.A.:

In the High Court of Tanzania at Moshi Registry, the appellant Mokiri Damas Ng’oja had unsuccessfully sued the respondents, the National Housing Corporation and the Independent Agencies & Court Brokers Ltd (the 1st and 2nd respondents) for a forceful and unlawful eviction from the suit premises in House No. APT 002, Plot No. 12, Block H, Mawenzi Road within Moshi Municipality; loss of business; and loss of goods which were allegedly confiscated. Upon a full trial, the court found in favour of the respondents.

Aggrieved with the decision of the High Court, the appellant lodged a notice of appeal on 20th October, 2017 and on the same date wrote a letter requesting to be supplied with copies of proceedings, judgment and decree. On 30th July, 2018 he lodged to this Court a memorandum of appeal comprising three grounds of appeal. However, ahead of hearing of the appeal, the 1st respondent raised three points of objection the notice of which was filed on 16th September, 2021 to the following effect:

1. *That, the appeal is incompetent and incurably defective for failure to comply with the mandatory provisions of the laws with regard to:*
 - (a) *Service to the 1st respondent of the notice of appeal within 14 days as required by law.*
 - (b) *Service to the 1st respondent of the memorandum of appeal within 7 days as required by the law.*
2. *The appeal is time barred and thus offending the mandatory provisions of Rule 90 (1) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended as the purported written letter requesting for the copy of proceedings in the High*

Court was lodged on 20th October, 2017 but was neither copied nor served to the Respondents."

When the appeal was called on for hearing, the appellant appeared in person and unrepresented; whereas the 1st respondent was represented by Mr. Aloyce Sekule, learned Principal State Attorney assisted by Mr. Peter Musseti, learned Senior State Attorney together with Ms. Glory Issangya and Ms. Careen Masonda, both learned State Attorneys. The 2nd respondent also appeared in person without any legal representation.

It being a practice of the Court where preliminary points of objection have been raised, we had to dispose them first. We, thus, invited the parties to address us on the said points of objection as were raised by the 1st respondent.

According to the arguments (particulars) supporting the points of the preliminary objection and the submission by Mr. Musetti, although Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) imposes an obligation to the party intending to appeal within 14 days after lodging a notice of appeal to serve copies of the said notice to all persons who seem to be directly affected by the intended appeal, the notice of appeal found at page 178 of the record of appeal does not

show that it was served on the interested parties. He submitted that, failure to serve it to the respondents renders the appeal incompetent. He referred us to the decisions of this Court in **Machano Hamisi and 17 Others v. Commissioner of Police and 2 Others**, Civil Appeal No. 43 of 2010 and **Filon Felician Kwesiga v. Board of Trustees of NSSF**, Civil Appeal No. 136 of 2020 (both reported).

Mr. Musseti went on submitting that, the memorandum of appeal which is found at pages 204 to 205 of the record of appeal was not served to the 1st respondent. This, he said, contravened the provisions of Rule 97 (1) of the Rules requiring it to be served on the respondents within 7 days after its lodgment.

The learned Senior State Attorney submitted further that the letter applying for the proceedings, judgment and decree was also not served to the 1st respondent as required by Rule 90 (1) and (3) of the Rules. He pointed out that though Rule 90 (3) of the Rules requires a party applying for copies of proceedings and judgment to serve to the respondent a copy of such letter within thirty days from the date of judgment, the said letter was neither copied nor served to the 1st respondent. He said, as sub rule (3) of Rule 90 was contravened, the appellant cannot benefit from the exception under Rule 90 (1) of the

Rules as the appeal would be time barred. The cases of **Filon Felician Kwesiga** (supra) and **Jacob Bushiri v. Mwanza City Council and 2 Others**, Civil Appeal No. 36 of 2019 were cited in support.

He, thus, prayed to the Court to find that the appeal is time barred and strike it out with costs.

The 2nd respondent, on his part supported all what was submitted by the 1st respondent contending that he was also not served with any document by the appellant. He, as well urged the Court to strike out the appeal with costs.

On his part, the appellant readily conceded that the said documents were not served on the respondents. He however, prayed for the indulgence of the Court to give him an opportunity to rectify the shortcomings so as to pave way for the appeal to be heard.

In rejoinder, Mr. Musseti argued that as the appeal is time barred the issue of rectification cannot arise. He stressed for the appeal to be struck out with costs.

We have examined the submissions from both sides as well as the record of appeal.

Rule 84 (1) of the Rules requires a notice of appeal to be served on the interested parties within 14 days from when it was lodged. The said Rule provides as follows:

"84 (1) An intended appellant shall, before, or within fourteen 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; but the court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court".

We have read the record of appeal. As conceded by the appellant, the notice of appeal at page 78 of record of appeal does not bear out that it was served on the respondents. Much as the appellant indicated that it was intended to be served to the Legal Services Unit, National Housing Corporation, 6th Floor, NHC Palace, Plot No. 1, Ufukoni Street/ A.H Mwinyi RD, P.O. Box 2977, Dar es Salaam the same was not served. In the case of **Mchano Hamisi** (supra) the Court struck out the appeal for failure by the appellant to serve the respondents with the notice of appeal within time - (Also see **Filon Felician Kwesigas'** case (supra). As in this case the notice of appeal was not served on the respondents, therefore, the appeal is incompetent for failure to comply with Rule 84

(1) of the Rules. (See **National Bank of Commerce Limited and Another v. Ballast Construction Company**, Civil Appeal No. 72 of 2017 and **Wilfred Muganyizi v. Hamisi Sued Kagasheki and Another**, Civil Appeal No. 107 of 2008 (both unreported)). Hence, we find the 1st point of preliminary objection has merit.

With regard to the 2nd point of preliminary objection that the respondents were not served with the memorandum of appeal, Rule 97 (1) of the Rules is pertinent. It provides for the requirement of service of memorandum of appeal to the respondent as follows:

"The appellant shall before or within seven days after lodging the memorandum of appeal in the appropriate registry, serve copies on each respondent who has complied with Rule 86."

Essentially, Rule 86 of the Rules which has been referred to in Rule 97 (1) of the Rules, requires the person who is served with a copy of the notice of appeal within 14 days after service of such notice of appeal to lodge in the appropriate registry his address for service - (Also see **Mohamed Enterprises (T) Ltd v. Mussa Shabani Chekechea**, Civil Appeal No. 64 of 2015 (unreported)). The rationale is to afford the

respondent to provide address to be used for service for purposes of the respective matter.

Be it as it may, our reading of Rule 97 (1) of the Rules is that it is couched in mandatory terms implying that its compliance is imperative.

In the matter at hand, the memorandum of appeal at page 204 to 205 of the record of appeal does not show that it was served on the respondents by the appellant. At page 205 it is indicated that its copies were to be served on the Directorate of Legal Services Unit, National Housing Corporation, 10th Floor, NHC Palace, P.O. Box 2977, Dar es Salaam and General Manager Independent Agencies and Court Brokers Ltd of P.O. Box 8133 Moshi-Kilimanjaro but it was not served to them. In this regard, failure to serve the respondents with the memorandum of appeal in terms of Rule 97 (1) of the Rules, renders the appeal incompetent before the Court. Hence, this point of preliminary objection also has merit.

The 3rd point of preliminary objection is that the respondents were not copied or served with a letter applying for the proceedings,

judgment and decree which has the effect of rendering the appeal time barred. Rule 90 (1) and (3) of the Rules provide 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) The 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 thirty 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.

(3) An appellant shall not be entitled to rely on the exception to sub rule (1) unless his application for the copy was in writing and a copy of it was served on the respondent."

According to the above provision the appeal is required to be lodged within sixty days from the date the notice was lodged. However,

a party can benefit from exclusion of time required for the preparation and delivery of the copy of proceedings so long as he applies in writing for certified copies of the said documents in the High Court within thirty days from the date of decision sought to be appealed against provided further that the copy of the said letter is served on the respondent as per subrule (3) of Rule 90 of the Rules. This means that, the appellant cannot rely on the exception under Rule 90 (1) of the Rules if the application for copies of proceedings is not served on the respondent.

In the case of **Victoria Mbowe v. Christopher Shafurael Mbowe & Another**, Civil Appeal No. 115 of 2015 (unreported) where the letter applying for copy of proceedings was not served on the respondent, the Court stated as follows:

"...similarly, Rule 90 (2) lays it down that an appellant cannot rely on the exception clause in Rule 90 (1) unless his application for a copy is in writing and served on the respondent. Again, there is nothing in the record upon which compliance with the provisions of the said Rule 90 (2) of the Rules could be ascertained."

The Court then went on to say that:

"As matters stand, we are in agreement with Mr. Muganyizi that in the absence of a letter applying for the copy of proceedings, the appellant was supposed to institute her appeal within sixty (60) days reckoned from 7/12/2010 when she lodged her notice of appeal. Thus, we are settled in our mind that the present purported appeal which was instituted on 11/12/2012 in violation of Rule 90 (1) of the Rules is, unarguably time barred."

In this matter, the letter applying for the copy of proceedings is found at page 180 of the record of appeal. However, the same was not copied or served on the respondents. Based on **Victoria Mbowe's** case (supra) since the said letter was not copied or served on the respondents, the intended appeal ought to have been filed within sixty days of the date when the notice of appeal was lodged short of that the appeal is rendered time barred as the appellant cannot rely on the exception under Rule 90 (1) of the Rules - (See **Filon Felician Kwesiga's** (supra), **Jacob Bushiri** (supra) and **Tobacco Traders Company v. Ufuluma AMCS Ltd and 2 Others**, Civil Appeal No. 93 of 2016 (unreported). In this regard, the 3rd point of preliminary objection is also merited.

In the final analysis, we sustain all three points of preliminary objection raised by the respondent and consequently, the appeal which is incompetently before the Court is hereby struck out with costs.

DATED at ARUSHA this 29th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered on 30th day of September, 2021 in the presence of the appellant in person, and Ms. Neema Mapunda, learned State Attorney for the 1st respondent and Mr. Seleman Adinani, Principal Officer for the 2nd respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL