IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A., And GALEBA, J.A.)

CIVIL APPLICATION NO. 118/01 OF 2019

HELLENA ADAM ELISHA @ HELLEN SILAS MASUI ..... APPLICANT

VERSUS

1. **YAHAYA SHABANI ..... 1ST RESPONDENT**
2. **RASHID JUMA ..... 2ND RESPONDENT**

[Application to Strike out a Notice of Appeal from the Decision of the High Court of Tanzania (Land Division) at Dar es salaam]

(Ndika, J.)

dated the 6th day of June, 2016

in

Land Case No. 5 of 2010

.....

RULING OF THE COURT

26th October & 11th November, 2021

GALEBA, J.A.:

The applicant, Hellena Adam Elisha @ Hellen Silas Masui sued Yahaya Shabani and Rashid Juma, the respondents in the High Court of Tanzania, Land Division at Dar es Salaam in Land Case No. 5 of 2010 and by a Judgment dated 6th June 2016, the respondents lost and were ordered to deliver vacant possession of plot No. 368 with certificate of title no. 34239 Mikocheni Medium Density Kinondoni Dar es Salaam to the applicant. The latter was also declared the lawful owner of the suit property and was awarded TZS. 25,000,000/= as general damages and costs of the suit. The respondents were aggrieved and

on 16th June 2016 they lodged a notice of appeal to this Court under Rule 83(1) of the Tanzania Court of Appeal Rules 2009, (the Rules) in order to challenge the above decision of the High Court.

It is the above notice of appeal that the applicant by this application is moving this Court to strike out under Rule 89(2) of the Rules, because according to her, the respondents have failed to take essential steps in the appeal process. The grounds upon which the application is premised as per the notice of motion are, **one,** that for over three years the respondents have failed to take an essential step, to wit, to lodge the appeal after obtaining leave to do so and**, two,** the respondents have not made any diligent efforts to collect certified copies of proceedings, judgment and decree from the High Court to enable them to appeal although the documents are ready for collection from the High Court. **Three,** that interests of justice demand that a litigation that started in 2010 comes to an end. The notice of motion is supported by the affidavit of Ms. Nakazael Lukio Tenga, counsel for the applicant.

In response, the respondents lodged a joint affidavit in reply disputing the application on grounds that although on 7th June 2016, their advocate requested for the documents for appeal purposes under Rule 90(1) of the

Rules, the High Court has not availed them the documents. In addition to the affidavit in reply, the respondents lodged a notice of preliminary objection under Rule 107(1), (2) and (3) of the Rules moving the Court to dismiss the application for impleading parties who are unknown to the respondents and which act is contrary to the notice of appeal and the original records of the case.

At the hearing of the application on 26th October 2021, the applicant was represented by Ms. Nakazael Lukio Tenga learned advocate, whereas the respondents had the services of Mr. Juma Mtatiro, also learned advocate.

The Court intimated to parties and the latter agreed to argue both the objection and the main application such that the main application will only be considered for determination if the preliminary objection will be overruled and *vice versa*. As a rule of practice, we started to hear parties on the preliminary objection raised, and in that respect, Mr. Mtatiro submitted that the essence of the objection was that parties to this application are different from those on the notice of appeal sought to be struck out. He contended that the proper parties in the notice of appeal were **Yahaya Athuman** and **Rashid Ally** as appellants, and **Hellena Adam Elisha** and **Hellen Silas Masui** as two different respondents, adding that **Yahaya Shabani** and **Rashid Juma,** the

respondents in this application are not his clients because they are completely different people whose instructions he does not have. To bolster his point, Mr. Mtatiro relied on the case of **Christina Mrimi v. Coca Cola Kwanza Bottles Ltd,** Civil Appeal No. 112 of 2008 (unreported). He moved the court to sustain the objection and strike out the application with costs for being incompetent.

In reply, Ms. Tenga submitted that, the respondents in this application are the same as the judgment debtors in Land Case No. 5 of 2010. She referred us to clause 2 of the respondent's joint affidavit in Miscellaneous Land Application 630 of 2016 in which the present respondents were applying for orders of stay of execution stated that they are the judgment debtors in Land Case No. 5 of 2010, which judgment is sought to be challenged on the appeal to which the notice of appeal sought to be struck out intends to commence. She added that it is counsel for the respondents who lodged a notice of appeal with new names with an intention of confusing parties and misleading the Court. As for the case of **Christina Mrimi** (supra), Ms. Tenga submitted that the authority sought to be relied upon by Mr. Mtatiro was irrelevant as the appropriate authority was **Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd,** Civil Application No. 113 of 2011 (unreported), which was a decision in an application for reviewing the decision that Mr. Mtatiro supplied to the Court.

Thus, Ms. Tenga implored us to overrule the objection for being misplaced and hear her on the main application. For the time being we will leave the issue of preliminary objection at that and digress to the main application for a while.

As indicated earlier on, we also heard parties on the main application. Ms. Tenga was brief in her oral submission because she had lodged written submission supporting her application. According to her oral account, the notice of appeal ought to be struck out under Rule 89(2) of the Rules because the respondents have failed to lodge an appeal without any clear justification or reason to account for the failure. She contended that the judgment in Land Case No. 5 of 2010 which they intend to challenge was delivered on 6th June 2016 and on 7th June 2016 the respondents requested for certified copies of the judgement, the proceedings, the decree, exhibits and pleadings, which documents according to her were available in the High Court ready for collection by any party on 12th July 2016 when she collected her set of the documents. To fortify her argument that the documents had for a long been ready for collection at the High Court, she submitted that she received a formal letter from the Registrar dated 17th October 2018 inviting her to collect the documents although she had collected them earlier on. According to her, had the respondents made keen efforts to follow up the documents like she

did, they would have collected their set of the documents from the High Court and lodged the appeal by the time she lodged the present application in April 2019. She moved the Court to strike out the application with costs.

In response, Mr. Mtatiro submitted that since 7th June 2016 when he requested for the certified documents, the Registrar's office at the High Court has neither availed him the documents nor replied to his letter to date. As for the allegations that there was negligence on his part for failing to collect the documents which were ready from the Registrar's office, he argued that he has throughout been making tireless efforts to procure the documents from that office but he was being advised that the documents necessary for him to appeal to this Court were defective. According to him, time for the respondents to appeal has not started to run, because they cannot appeal without being accessed with the necessary documents from the Registrar's office.

In rejoinder, Ms. Tenga submitted that, all that Mr. Mtatiro was submitting was evidence from the bar, which she contended, was unlawful. She argued further that as the documentation docket of this application, including annexure A-11 which is a letter from the Deputy Registrar of the High Court informing her that documents were ready for collection then the respondent became aware of the fact that documents were ready for collection

on 30th April 2019 when she served this application to him. She argued that from that date Mr. Mtatiro or the respondents could go and collect them and lodge the intended appeal. Ms. Tenga concluded that the respondents had no definite resolve to appeal, as had they such determination, they would have appealed long ago. She finally moved the Court to grant the application and strike out the appeal.

This application calls first for determination of whether the preliminary objection has merit or not before we can move on to determine the application itself because, if the objection succeeds there would be no application to resolve. We shall therefore start with the preliminary objection.

In this matter, when the respondents lost in the High Court, in Land Case No. 5 of 2010, Mr. Mtatiro lodged a notice of appeal with the following title:

"YAHAYA ATHUMANI.....1ST APPELLANT
RASHID ALLY .....2ND APPELLANT
VERSUS
HELLENA ADAM ELISHA.....1ST RESPONDENT
HELLEN SILAS MASUI.....2ND RESPONDENT"

We will refer to this title as *Caption A.* However, when this application was lodged it did not bear the same caption or title, instead it was titled:

"HELLENA ADAM ELISHA @ HELLEN SILAS MASUI.....APPLICANT

VERSUS

YAHAYA SHABANI ..... 1ST RESPONDENT
RASHID JUMA ..... 2ND RESPONDENT."

The latter title is the caption not only to this application, but also to the proceedings, judgment and the decree sought to be challenged. This will be referred to as *Caption B.*

It was Mr. Mtatiro's argument that caption B was unlawful because it had respondents who never participated in the High Court and they were not even his clients. Ms. Tenga's response was that the unlawful caption was caption A because the latter title was Mr. Mtatiro's own creation after his clients lost in the High Court.

We have reviewed the documentation in this application and have as well considered submission of parties' advocates. In this matter, the respondents in the notice of appeal with caption A, are seeking to challenge a decree of the High Court passed in Land Case No. 5 of 2010 with a judgment and decree bearing the title in caption B. It, therefore, means that when the respondents wanted to appeal after losing in the High Court, they lodged a notice of appeal with names that are different from those in the decree and the judgment they wanted to challenge.

Mr. Mtatiro's other interesting position was that his clients in caption A are different from those in this application (Caption B). By that, he meant that his clients are not those in the decree in Land Case No. 5 of 2010. Although that was Mr. Mtatiro's position, his clients' understanding of the identity of defendants and judgment debtors in Land Case No. 5 of 2010 was diametrically opposed to their own lawyer's view. For instance, paragraph one of the affidavit in reply lodged in this application affirmed by **Yahaya Athumani** and **Rashid Ally**, who are, according to Mr. Mtatiro, his genuine clients, affirmed;

> *"1. That, we were defendants in the main Land Case No. 5 of 2010 and plaintiffs in the counter claim of the said case. We are conversant with the facts which we are about to dispose herein."*

In Land Case No. 5 of 2010 the defendants were **Yahaya Shabani** and **Rashid Juma** the same as respondents in this application. That is, however, not the first time for **Yahaya Athumani** and **Rashid Ally** to affirm that they are the same as **Yahaya Shabani** and **Rashid Juma,** contrary to the contention by Mr. Mtatiro. In Miscellaneous Land Application No. 630 of 2016 in which the respondents were applying for stay of execution of a decree issued in Land Case No. 5 of 2010, at paragraph 2 of the affidavit, which

affidavit is part of annexure NA-6 appended with the notice of motion in this application, they affirmed:

> *"2. That, we are judgment debtors in Land Case No. 5 of 2010 which was determined by the High Court of Tanzania. Thereafter, we lodged a notice of appeal of our intention to challenge the decision of the court."*

As clearly seen in the above quoted paragraph of the affidavit, **Yahaya Athumani** and **Rashid Ally**, have always affirmed that they were judgment debtors in Land Case No. 5 of 2010, whereas looking at annexure NA-2 appended with this application, which is a decree in that land matter, it shows that the judgment debtors are **Yahaya Shabani** and **Rashid Juma.**

In resolving this preliminary objection, we have been guided by the principle of law that court records are deemed authentic and cannot be easily impeached. In the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 it was held that:

> *"(i) A court record is a serious document. It should not be lightly impeached.*
>
> *(ii) There is always a presumption that a court record accurately represents what happened."*

The other cases on this point are **Paulo Osinya v. R** [1959] EA 353 and **Shabir F. A. Jessa v. Rajkumar Deogra,** Civil Reference No. 12 of 1994 (unreported).

In this matter, the caption to the proceedings, the judgment and the decree in the High Court bears the same title as the caption in this application which is caption B. Whereas the applicants are stating that they are judgment debtors in the decree issued in Land Case No. 5 of 2010, Mr. Mtatiro, strangely is opposing them. When we asked him why is he defending the matter that does not involve his genuine clients, he informed us that he had appeared because he was summoned. However, had that contention been authentic he would have informed us further that he did not have instructions to represent **Yahaya Shabani** and **Rashid Juma** and he would not have agreed to argue a matter to which his clients are strangers. We are unable to agree with Mr. Mtatiro, that the respondents in this application are not the same persons as the judgment debtors in Land Case No. 5 of 2010, because that is what the court record reveals and that is what the respondents have affirmed on two different occasions as indicated above. To us, the appellants in the notice of appeal with caption A, are the same people as the respondents in this application. The new names in the notice of appeal were an introduction of the

respondents' advocate in the aftermath of the judgment in Land Case No. 5 of 2010 and not the applicant or her advocate. It would, therefore, be unfair to condemn the applicant for a messy resulting from insertion of wrong names in the notice of appeal, an act that is clearly not hers. The case of **Christina Mrimi (supra)** cited by Mtatiro is of no consequence to the course he pursued because on review in **Christina Mrimi (supra)** cited by Ms. Tenga this Court permitted the use of the correct name of the company.

In the circumstances, the preliminary objection is overruled and we will henceforth proceed to consider the submissions of parties in respect of the substantive application.

The issue in the main application is whether the reason advanced by the respondents' counsel that they have failed to lodge an appeal because they have not been accessed with the documents necessary for that purpose, accords them sufficient excuse.

Rule 90(1) of the Rules requires an intending appellant to lodge an appeal within sixty days of lodging a notice of appeal. According to that Rule an intended appellant may still lodge an appeal after the sixty days, provided that the time period of delay beyond the sixty days is excluded by a certificate of delay issued by the Registrar certifying that such time was necessary for

him to prepare the documents, which must have been requested by the appellant in thirty days of delivery of the judgment to be challenged. The law is further that for the applicant to benefit from that exclusion the letter requesting for the documents must be copied and served onto the respondent or respondents. Rule 90(1) of the Rules provides:

> *"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 the 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."*

An appeal therefore was supposed to be lodged in sixty days of lodging the notice of appeal as indicated above but in this case the appeal was not

lodged since June 2016 to date. As indicated above, Mr. Mtatiro's shield was that he wrote a letter requesting for the documents but the registry at the High Court has not availed him the documents to enable him to lodge the appeal.

We agree, that the respondent took initial steps to initiate the appeal particularly by lodging the notice of appeal in time and also lodging a letter requesting for documents to enable him to appeal. As for the availability of the documents requested for appeal purposes, Ms. Tenga submitted that, as for her, she was accessed with the documents on 12th July 2016 and about a year later 17th October 2018 she was formally informed that the documents were ready for collection although she had collected them previously upon follow up. She added that the record of this application was served on the respondents on 30th April 2019 with a letter from the Registrar marked as annexure NA-11 indicating that the documents necessary for appealing were ready for collection. The applicant's point was that the documents were ready for collection since the year 2016, but the respondents decided not to make the minimum follow up to go to the High Court registry and collect the documents. Mr. Mtatiro had two contradicting reactions to this aspect, one version was that he was not aware that the documents were ready as the

Registrar had not responded to his letter, but the second was that he visited the registry and the registrar, whose name he did not disclose, informed him that the documents had defects and, on his part, he advised the former to refer the matter to this Court for appropriate directives.

Admittedly, a respondent, like in this case, who has written a letter requesting for the documents for appeal purposes under Rule 90(1) of the Rules, was at that time before the introduction of Rule 90(5) of the Rules, not by law required to make any follow up with the registrar. In the same breath such a respondent would not be blamed for any inaction of the Registrar if the latter did not act on his letter to notify him that documents were ready, because then the respondent would be home and dry see – **Francisca Mbakileki v. Tanzania Harbours Authority**, Civil Reference No. 14 of 2004, **Christopher Ole Memantoki v. Jun Trade and Sellers (T) Ltd,** Civil Application No. 319/02 of 2017 and **Mwananchi Communication Ltd v. New Habari (2006) Ltd,** Civil Application No. 61/16 of 2017 (all unreported).

We have thoroughly inspected the record and considered arguments of parties' counsel. According to Ms. Tenga, she served this application on Mr. Mtatiro on 30th April 2019 attached with the Registrar's letter to Ms. Tenga advising her that the documents are ready for collection. Mr. Mtatiro did not

contest that submission. We are, therefore, satisfied that at the latest, the respondents were made aware that the documents necessary for them to appeal were ready for collection on 30th April 2019. The argument that the Registrar told Mr. Mtatiro that the documents had defects and that the Registrar did not know how to handle the issues, are not of any relevance, for we did not see any affidavit or letter from the Registrar on any such details as maintained by Mr. Mtatiro. When Mr. Mtatiro received this application, he became aware that the documents he had requested were ready for his collection but he did not do any convincing efforts to collect the document for him to lodge an appeal. If the respondents or their advocate were to be diligent, they would have inquired as to why is it that the other party has the documents while they do not have the same documents. Nonetheless, there is nothing on record to suggest that any serious step was proved to have been taken.

In the circumstances, we hold that the respondents or their advocate were negligent in following up the documents with the office of the Registrar having known that the same were ready for collection on 30th April 2019 when they received this application containing a letter to the applicant that documents in the same case were ready for collection. Diligence demands that

a determined appellant would not have sat back waiting for the letter from the Registrar, because in any event the purpose of the letter from the Registrar would be to convey information to the respondents as to the readiness of the documents for collection.

In the upshot, this application succeeds, the notice of appeal is hereby struck out with cost.

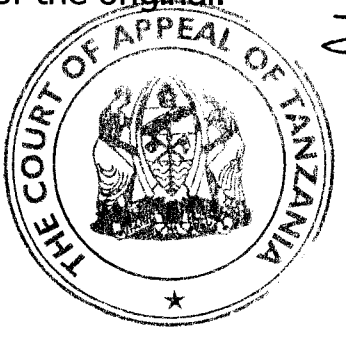
DATED at **DAR ES SALAAM**, this 8th day of November, 2021

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered this 11th day of November, 2021 in the presence of Mr. Hamis Mfinanga, learned counsel for the applicant, and in the presence of 1st and 2nd Respondents who appeared in person, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL