

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MBAROUK, J.A., LUANDA, J.A. And MUSSA, J.A.)

CIVIL APPLICATION NO. 29 OF 2015

GEORGE ZACHARIA..... APPLICANT

VERSUS

**1. MARIETHA LOHAY KIBASA
2. THE REGISTERED TRUST OF
TANZANIA NATIONAL PARKS (TANAPA) } RESPONDENTS**

**(Application to strike out a notice of appeal from the Judgment
and Decree of the High Court of Tanzania at Arusha)**

(Massengi, J.)

Dated the 8th day of July, 2013

In

Civil Appeal No. 11 of 2013

.....

RULING OF THE COURT

15th & 19th February, 2016

MUSSA, J.A.

The applicant seeks to move the Court for an order to strike out a Notice of Appeal lodged by the respondents on the 23rd July, 2013 with respect to the decision of the High Court (Massengi, J.) in Civil Appeal No. 11 of 2013. The application is by way of a Notice of Motion which was taken out and filed to the Court on the 30th July, 2015 under the provisions

of Rule 89 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is accompanied by an affidavit, duly sworn by the applicant.

The application is being resisted by the respondents through an affidavit in reply sworn by Mr. Ezra Joshua Mwaluko, learned Advocate who, at the hearing before us, was retained to resist the application on behalf of the respondents. On the adversary side, the applicant had the services of Mr. Ephraim Koisenge, also learned Advocate. In support of the application, the latter fully adopted the Notice of Motion as well as its accompanying affidavit, on the strength of which he urged us to allow the application and grant the relief sought with costs. Mr. Mwaluko just as well fully adopted the affidavit in reply and strenuously contended that the application is wholly without a semblance of merit. To appreciate the force behind the rival contentions of the learned counsels, we think it is necessary to briefly explore the factual background giving rise to the application at hand.

The applicant successfully sued the respondents for malicious prosecution in the District Court of Monduli. Dissatisfied, the latter

preferred an appeal to the High Court where they, again, lost. The decision of the High Court was pronounced on the 8th July 2013 (Massengi, J.), following which on the 18th July, 2013 counsel for the respondents put pen to paper requesting the District Registrar to avail him certified copies of proceedings, judgments and decrees of the two courts below.

On the 23rd July, 2013 the respondents duly lodged a Notice of Appeal to this Court, just as they, contemporaneously, filed before the High Court, an application seeking leave to appeal against the July 8th decision. The requested leave was eventually granted by the High Court (Moshi, J.) on the 18th September, 2013. According to the affidavital appendices of the applicant, a little later, on the 28th October, 2013 the District Registrar, purportedly, wrote a letter addressed to Mwaluko & Co. Advocates informing the firm of lawyers thus:-

"Be informed that the proceedings, judgment, Decree and Order which you pray (sic) to be supplied for the purposes of preparation of Record

(sic) of Appeal to the Court of Appeal is ready. You are required to collect it by paying court fees.

Signed

W. R. Mashauri

***DISTRICT REGISTRAR
ARUSHA."***

We have purposefully used the word "purportedly" the more so as, in his affidavital reply, Mr Mwaluko categorically denies ever receiving that letter which he says was not within his knowledge prior to the institution of the application at hand. No wonder, a good deal later, on the 19th September 2014, that is, almost a year after the letter was wrote, the learned counsel for the respondents wrote to remind that he was still awaiting to be supplied with the requested documents; and according to his affidavit in reply, it was not until the 31st July, 2015 when a Principal Legal Officer of the second respondent was supplied with the documents. To buttress this detail, Mr. Mwaluko appends to his affidavit two exchequer receipts against which the documents were supplied. Then, finally, it is beyond question that on the 3rd August, 2015 a certificate of delay couched as follows was issued:-

"CERTIFICATE OF DELAY

*Under Rule 90(1) of the Court of Appeal Rules
2009 (sic).*

*This is to certify that 684 days from 23rd July
2013 has passed when appellants advocates lodged
notice of appeal and a letter requesting be supplied
with certified copies of proceedings judgment and
decree (sic)*

*And on 31st July, 2015 the appellants
advocate was supplied with the required
documents. Given under my hand and seal of this
(sic) 3rd August, 2015.*

Signed

DEPUTY REGISTRAR"

As hinted upon, having lodged the present application on the 30th July 2015, it is patently obvious that by the time when the certificate of delay came about, the applicant had already instituted the present

application and, accordingly, the learned counsel for the respondent refrained from taking any further step towards the institution of the appeal, lest he be misunderstood for trying to preempt the applicant's present course of action.

Against this backdrop, the applicant insistently builds his case on the strength of the letter which was allegedly written by the District Registrar on the 28th October, 2013. Going by that letter, the learned counsel for the applicant contends that on that date the requested documents were ready for collection and, supposedly, time began to run against the respondents from that date. Thus, to him, counted from that date, the respondent has failed to institute the appeal within the requisite sixty days from the date when the Notice of Appeal was lodged.

With respect, the suggestion by the learned counsel for the applicant is, on the face of it, seemingly attractive but, as we shall soon demonstrate, we are not in the least persuaded. We say so because the authenticity of the October 28th letter is, after all, doubtful and debatable.

To begin with, some of the details comprised in the letter are diametrically in contrast with the certificate of delay which was issued by the same Registrar on the 3rd August, 2015. Whereas, for instance, the letter informs that the proceedings, judgment and decree were ready for collection as far back as the 28th October 2013, in the certificate of delay the information relayed was that the documents were actually supplied to the respondents on the 31st July, 2015. The latter detail augers well with the two exchequer receipts appended to the affidavit in reply, both of which post the 31st July 2015 as the date of issue of the documents.

Furthermore, as already intimated, Mr. Mwaluko categorically denied ever receiving the October 28th letter prior to the institution of this application. The learned counsel for the respondents contended that, if at all, the letter was not copied to the applicant and that he was, actually, at a loss as to how the applicant became seized of the letter. With respect, Mr. Mwaluko has a valid point and, in this regard, it is noteworthy that, indeed, in the respective copies of the Notice of Motion which were supplied to the respondents as well as the Court, the October, 28th letter

which was appended therein does not expressly indicate to have been copied to the applicant or any person, for that matter. The only exception was in one copy of the Notice of Motion which was allocated to one of the panel members wherein the appended October 28th letter had an extra detail to this effect:-

*"Copy to:-
MS Law Bridge,
Plot No 173C
BEN BELLA ROAD,
P.O. Box 260,
ARUSHA."*

The fact that the letter had an extra detail in one of the copies of the supplied Notice of Motion further plunges the genuineness of the document into doubt. A question looms: Was this copy of the letter with an extra detail generated from a different source? To say the least, we found ourselves increasingly reluctant to rely on this letter in support of the contention that the documents were ready for collection as far back as the 28th October, 2013. As hinted upon, the available material is more consistent with the claim by the learned counsel for the respondent to the

effect that the documents were actually availed and supplied to the respondents on the 31st July, 2015.

To this end, the applicant's claim that the respondents failed to take essential steps towards the institution of the appeal is founded upon a doubtful document. In the final result, this application fails and is, accordingly, dismissed with costs. It is so ordered.

DATED at **ARUSHA** this 18th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL



B.M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL