

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

(CORAM: MMILLA , J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CIVIL APPLICATION NO. 555/04 OF 2019

DR. MARCO BITESIGIRWE APPLICANT

VERSUS

**1. GENERAL SECRETARY ELCT KARAGWE }
2. THE HONOURABLE MINISTER FOR } RESPONDENTS
 LABOUR AND YOUTH DEVELOPMENT }
3. THE HON. ATTORNEY GENERAL }**

**(Appeal from the decision of the High Court of Tanzania
at Bukoba)**

(Mwangesi, J.)

dated the 13th day of August, 2015

in

Misc. Civil Cause No. 5 of 2011

.....

RULING OF THE COURT

26th November & 2nd December, 2019

MZIRAY, J.A.:

The applicant through the services of Mr. Aaron Kabunga, learned advocate, is moving the Court to strike out a Notice of Appeal lodged by the first respondent on 13/8/2015 on the sole ground that the said

respondent has failed to take some essential steps to lodge an appeal to this Court within the prescribed time.

The notice of motion is made pursuant to the provisions of Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), as amended. The motion is supported by a deponed affidavit of Mr. Aaron Kabunga, advocate for the applicant on which in paragraphs 2 – 7 he has averred as follows:-

2. *That, the High Court of Tanzania Bukoba Registry delivered its Ruling in favour of the Applicant on **13th August, 2015** almost 4 years ago in Misc. Civil Cause No. 5/2011.*
3. *That, the Respondent lodged **Notice of Intention to appeal to the Court on 4th September, 2015** to impugne the High Court decision. That having no essential steps taken by the 1st Respondent the Applicant filed Notice of Motion to the Court vide Civil Application No. 551/4/2018 to struck (sic) out the Notice of Appeal but was struck out on 10th May, 2019 for being incompetent.*
4. *That, on the **14th September, 2015** the Respondent made service of Notice of Appeal to the Applicant and*

that service was within statutory time and also served a letter applying for Judgment, decree and proceedings.

5. *That, the Applicant made also application to be supplied with a Copy of Ruling of the High Court and proceedings and were supplied to us on **21st August, 2015** as per Excheque **Receipt No. 7228521** but a months later the Applicant collected a Copy of Proceedings as it was ready.*
6. *That, since the Respondent had lodged the Notice of Appeal sometimes 4 years ago has not taken essential steps to apply for leave to Appeal nor lodged the Appeal. The Ruling, Proceedings, Notice of Appeal with proof of service signed thereon and Exchequer receipt No. 7228521 dated 21st August, 2015, and order of the Court striking (sic) out Civil Application No. 551/4/2019 are attached herewith to form part of this Affidavit; it is marked as **KB "1" collectively.***
7. *That, this Affidavit is in support of the prayers made in the Notice of Motion.*

The notice of motion is seriously opposed by the first respondent through an affidavit in reply deponed by Mr. Mathias Rweyemamu, learned advocate. Basically he is maintaining that all legal steps have been met to

facilitate the lodging of the Memorandum of Appeal and the Record of Appeal but the effort of the first respondent has been frustrated by the Registrar who has failed to supply him the necessary documents despite reminder to supply the same.

At the hearing of the application the applicant was represented by Mr. Kabunga, learned advocate and on the part of the first respondent she had the services of Mr. Rweyemamu, learned advocate. The second, third and fourth respondents enjoyed the services of Mr. Abubakar Mrisha, learned Senior State Attorney, assisted by Ms. Grace Lupondo, learned State Attorney.

Before the commencement of the hearing, Mr. Kabunga sought leave to amend the application in terms of Rule 50(1) of the Rules by deleting the date 13th August, 2015 where ever it appears in this application and substituting thereon with the date 4th September, 2015. This application was not resisted by the counsel for the respondents, which led for the Court to grant it as prayed.

Mr. Kabunga having adopted the notice of motion and its accompanying affidavit proceeded to argue that the first respondent is in

breach by failing to lodge the appeal in Court within a period of 60 days as required by Rule 90(1) of the Rules. He contended that by delaying for four years now, shows lack of seriousness on the part of the first respondent to pursue the intended appeal. He argued that there is no requirement of the law which compels the Registrar to supply these documents to a party and on the contrary the first respondent had an obligation to make a constant follow up to obtain the documents from the Registrar. To support his argument he referred us to the cases of **David Majola v. Juma Abdallah Chembea and Another**, Civil Application No. 01 of 2017 and **Saleh Abdi Mohamed v. Katibu Baraza la Mapinduzi and Another**, Civil Application No. 1 of 2014 (both unreported), where the Notices of Appeal were struck out after expiry of 60 days for failure to take essential steps. He argued that the circumstances in the cited cases were almost similar to the present case; hence we should apply the principle laid in the above cases and strike out the notice of motion with costs.

On the other hand, Mr. Rweyemamu submitted that after they had lodged the Notice of Appeal, the first respondent wrote a letter on 24/8/2015 to the Registrar applying to be supplied with copies of

proceedings, judgment decree and drawn order and the said letter was served upon the applicant on 4/9/2015 together with the Notice of Appeal as admitted in paragraph 4 of the applicant's affidavit. He said that after their letter was received by the Registrar on 2/9/2015, the first respondent made a follow up but to no avail as deponed in paragraph 11 of the affidavit in reply. On 10/5/2019 a reminder was made but according to the learned advocate, to date, the Registrar has not taken any action to furnish the first respondent with the requested documents. He concluded by stating that the fault is not of his own as it lies somewhere. He supported his position with the cases of **Raymond Costa v. Mantrac Tanzania Ltd**, Misc. Civil Application No. 191 of 2016; **Thobias Andrew and Abdul Mziray v. Jacob Bushiri**, Civil Application No. 422/08 of 2017 and **Samwel Mgonja v. Total (T) Limited**, Civil Application No. 400/16 of 2017 (all unreported). He rested his submission and prayed for the application to be dismissed with costs.

Ms. Lupondo argued for the second, third and fourth respondents. She was brief but focused. She submitted that in order for the applicant to benefit from the provisions of Rule 89(2) of the Rules, it must be proved

that the respondent did not take any necessary step to initiate the appeal. She believes that the first respondent took the necessary steps because after filing the Notice of Appeal, which she served to the other parties, she wrote to the Registrar to be supplied with the necessary documents for appeal purposes; a copy of the said letter was also served to the other respondents. She submitted that, considering the several decisions of this Court the first respondent was not duty bound to make follow ups, once she sent a letter to the Registrar to ask for those documents. She said that in the instant case there is no proof that the Registrar did inform her that the documents were ready for collection. For that reason, the applicant cannot benefit from Rule 89(2) of the Rules, she argued. She therefore join hands with the first respondent that the application deserves to be dismissed with costs.

In rejoinder Mr. Kabunga submitted that the referred cases are distinguishable because in the instant case the documents were ready for collection four years ago but the first respondent for no reasons at all, (has) neglected to collect them. He reiterated his position by asking the Court to allow this application with costs.

After taking into consideration the notice of motion and its accompanying affidavit, the affidavit in reply and the oral submissions of all the parties, we think that there is only one issue for determination, which is, whether the first respondent failed to take essential steps after lodging her notice of appeal on 4/9/2015.

The applicant moved the Court under Rule 89(2) of the Rules which states:-

"Subject to the provisions of sub rule (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, apply 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."

The applicant contended that the first respondent lodged the notice of appeal on 4/9/2015 but he never took any essential step to institute the appeal; whereas on the part of the first respondent he asserted that he did not institute the appeal for almost four years because he was not supplied by the Registrar with the necessary documents for no apparent reasons.

He attached a letter seeking for the documents and a reminder letter showing his seriousness in pursuing the appeal. All these efforts proved unsuccessful. He was expecting a reply and compliance by the Registrar but that was not done.

As rightly submitted by Ms. Luondo, once the respondent has written a letter to the Registrar to be furnished with the necessary documents, it is expected for the Registrar to respond to the respondent's letter and its reminder, rather than keeping quiet. The reminder in our view is a sufficient proof for a follow up. The question we pose at this juncture is that suppose the Registrar does not answer the reminder letter, should the respondent keep on making a follow up? Until when? We think that the Registrar is supposed to respond and if there is any impediment he is obliged to notify the respondent. His failure to respond is a snag which obstructs smooth administration of justice.

In this matter, in so long as there is proof that the first respondent applied to the Registrar to be supplied with the necessary documents for appeal purposes and he made a reminder which was not responded, he could not keep reminding the Registrar to perform his duty, and on his part

he cannot be blamed for the inordinate delay of four years in instituting the appeal. We are increasingly of the view that the applicant has failed to demonstrate any fault on the side of the 1st respondent to warrant the grant of the application.

We find the application devoid of merit and the same is dismissed.
We make no order as to costs.

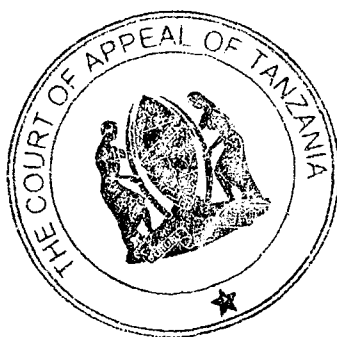
DATED at **BUKOBA** this 30th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2019 in the presence of Mr. Frank Kaloli, learned Counsel for the Applicant and Mr. Mathias Rweyemamu, learned Counsel for the 1st Respondent, Mr. Gerald Njoka, learned State Attorney for the 2nd & 3rd Respondents is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL