

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWANGESI, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)**

**CIVIL APPLICATION NO. 489/ 18 OF 2018**

**OLIVER MUREMBO ..... APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF  
BENJAMIN MKAPA FOUNDATION..... RESPONDENT**

**(Application for striking out Notice of Appeal from the decision of the  
High Court of Tanzania (Labour Division) at Dar es Salaam)**

**(Mipawa, J.)**

**Dated 28<sup>th</sup> day of October, 2016**

**in**

**Revision No. 395 of 2015**

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**RULING OF THE COURT**

14<sup>th</sup> & 23<sup>rd</sup> July, 2020

**LEVIRA, J.A.:**

The applicant, OLIVER MUREMBO, through the services of Mr. Abdallah Kazungu, learned advocate, brought the present application under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 as amended by Tanzania Court of Appeal (Amendments) Rules, 2017 G.N. 362 of 2017 (the Rules) seeking an order that a notice of appeal lodged by the respondent on 8<sup>th</sup> November, 2016 against the decision of the High Court

(Mipawa, J.) in Revision No. 395 of 2015 of 28<sup>th</sup> October, 2016 be struck out. The sole ground raised by the applicant herein is that, the respondent has failed to take necessary steps to institute the intended appeal within the prescribed time. The application is opposed by the respondent through affidavit in reply and oral account of her advocate, Mr. Said Adam Nyawambura at the hearing.

At the outset, when the application was called on for hearing, the counsel for the applicant adopted the applicant's affidavit and written submissions to form part of his oral submission. He submitted that the respondent lodged her notice of appeal on 10<sup>th</sup> November, 2016 with intent to challenge the above introduced decision of the High Court. However, she did not serve the applicant with the said notice of appeal until on 5<sup>th</sup> December, 2016. This, he said, was contrary to the law which requires the intended appellant to serve the respondent within fourteen days of lodging a notice of appeal. He added that, the respondent did not first apply and obtain extension of time within which to serve the applicant out of time as it ought to be.

Besides, he submitted, the respondent did not serve the applicant with a copy of letter to the Registrar applying for copies of proceedings, judgment and decree within thirty days as per the requirements of the law under Rule 90(1) of the Rules. Instead, he said, the respondent lodged application No. 505 of 2016 applying for leave to appeal to the Court, the application which was struck out on 22<sup>nd</sup> March, 2017 for being incompetent. Thereafter, he said, the respondent filed Misc. Application No. 124 of 2017 for extension of time and leave to file appeal to the Court but she withdrew the same on 1<sup>st</sup> August, 2017. Having abandoned that application, the respondent served the applicant with a copy of the letter of application for proceedings on 15<sup>th</sup> August, 2017. As a result, the applicant decided to lodge the current application on 30<sup>th</sup> October, 2018.

In addition, the applicant's counsel submitted that, on 23<sup>rd</sup> May, 2019, the applicant was served with a certificate of delay by the respondent which was sought and obtained after the institution of the present application contrary to the law. Moreover, the counsel noted that the said certificate excluded days which were not supposed to be excluded. This fact prompted the applicant to write a complaint letter to the Registrar of the High Court, Labour Division on 29<sup>th</sup> May, 2017. Upon receiving the

said letter, the Registrar withdrew that certificate. Since then, he argued, the respondent has not taken necessary steps to institute the intended appeal.

Finally, the learned counsel urged us to strike out the respondent's notice of appeal.

In reply, the counsel for the respondent having adopted the respondent's written submissions, submitted that there was no need for the respondent to apply for copies of judgment and decree to the High Court because the said copies were supplied to her counsel on the date of judgment delivery. He added that, the respondent lodged the notice of appeal on 10<sup>th</sup> November, 2016. However, efforts to serve the applicant's counsel with the copy of the said notice on the same day failed as he refused to receive it on argument that, he had no proper instructions from his client.

The counsel for the respondent submitted further that after several attempts to serve the said counsel for the applicant, he ended up getting the phone number of the applicant. He communicated with her but she was on safari and therefore, he could not serve her with the notice until

when she came back. As such, on 5<sup>th</sup> December, 2016 is when the counsel for the respondent managed to serve the applicant with the notice of appeal while it was already out of time. However, the learned counsel acknowledged that, the respondent did not apply for extension of time to serve the applicant with the said notice of appeal out of time. His reason being that, the respondent was busy applying for leave to appeal which was struck out for being incompetent. Therefore, the respondent had to file another application for leave and extension of time which was eventually withdrawn after the decision of the Court in **Tanzania Teachers Union v. Attorney General & Three Others**, Civil Appeal No. 96 of 2012 (unreported) which extinguished the requirement of applying for leave before lodging an appeal to the Court.

The learned counsel contended that the respondent had applied to the High Court for a copy of proceedings, but has not yet been supplied with the same to date despite several reminders. Therefore, according to him, this application has no merit and he prayed for the same to be dismissed.

In a very brief rejoinder, the counsel for the applicant reiterated the prayer that, this application be granted so as to pave the way for the applicant to enjoy the fruits of the decree.

Having considered the submissions by the parties and the record, we need to satisfy ourselves as to whether or not the respondent took necessary steps after lodging the notice of appeal to institute the intended appeal. It is the requirement of Rule 84(1) of the Rules that an intended appellant is required within fourteen days after lodging the notice of appeal to serve copies of it on all persons who seem to him to be directly affected by the appeal.

The respondent's notice of appeal which was lodged on 10<sup>th</sup> November, 2016 indicated clearly that, she was not satisfied with the decision of the High Court in Revision No. 395 of 2015 which dismissed her appeal against the applicant who was the respondent therein. In the circumstances, the applicant is among persons who are expected to be affected by the intended appeal. Therefore, she is well covered under Rule 84(1) of the Rules which as already alluded above, requires the intended appellant to serve all persons who seem to him to be directly affected by

the appeal within fourteen days of lodging the notice of appeal. However, the respondent did not comply with the requirement of that provision as she served the applicant beyond the prescribed time. To be precise, the notice of appeal subject of this application was filed on 10<sup>th</sup> November, 2016 and applicant was served on 5<sup>th</sup> December, 2016. By simple calculation, the applicant was supposed to be served with the said notice by 24<sup>th</sup> November, 2016. Thus, the respondent delayed to serve her for about eleven days. Failure to serve the applicant within the prescribed time in our settled view amounted to failure to take essential steps required by the law. We are guided by the position of the law we stated in **John Nyakimwi v. The Registered Trustees of Catholic Diocese of Musoma**, Civil Application No. 85/08 of 2017 (unreported) that:

*"Law is settled that service of a copy of a notice of appeal is an essential step in the proceedings non-compliance with it entitles the other party (in this case the applicant) to apply for striking out a notice of appeal under Rule 89(2) of the Rules. That Rule permits the filing of an application for striking out a notice of appeal either before or after the institution of the appeal."*



We note that counsel for both sides were at one that the respondent did not apply for extension of time before serving the applicant. We have perused the record and we agree with the learned counsel for the parties that there was no such application. We further take note that, the counsel for the respondent argued that he was not able to serve the applicant in time because his advocate refused the service. As a result, by the time he reached and served the applicant, it was already too late. However, we are settled in our mind that, the reasons for delay to serve the applicant with the notice of appeal advanced by the counsel for the respondent ought to have been advanced in an application for extension of time. It is irrelevant in the current application.

Regarding the claim by the applicant that, she was not served with a copy of the letter by the respondent applying for a copy of proceedings, the counsel for the respondent submitted that immediately after the impugned decision was delivered, the respondent was supplied with the copies of judgment and decree, so there was no need for her to apply for the copies of the same and the proceedings. Under paragraph 5 (c) of the respondent's affidavit in reply which was deposed by Alfred Roman Woiso, it is stated that, the respondent wrote a letter requesting to be supplied



with certified copies of the judgment, decree and proceedings but only judgment and decree were supplied. On 1<sup>st</sup> August, 2017 she wrote in vain another letter reminding to be supplied with the same. The counsel for the respondent claimed that he tried to serve the counsel for the applicant with a copy of the said letter but he refused service. We had an opportunity of setting an eye on the said letter. We observed that the letter to the Registrar of the High Court applying for the copies of the judgment, decree and proceedings was written by the counsel for the respondent on 13<sup>th</sup> December, 2018 and it was received by the court on 17<sup>th</sup> December, 2018.

Rule 90(1) of the Rules requires an appeal to be instituted within sixty days of the date when the notice of appeal is lodged and an application for proceedings to be made within thirty days of the date of the decision against which it is desired to appeal. In the current application, the decision against which the respondent desires to appeal against was delivered on 28<sup>th</sup> October, 2016 and the letter to request for the copy of the said decision and proceedings was written on 13<sup>th</sup> December, 2018. It is very clear that the respondent did not comply with Rule 90(1) which

required her to apply for the proceedings within thirty days of the date of the impugned decision.

For the above stated reasons, we agree with the applicant that the respondent failed to take necessary steps after lodging the notice of appeal. She did not serve the applicant with the notice of appeal and the letter requesting for the copy of proceedings within prescribed time. Therefore, we hereby strike out the respondent's notice of appeal for failure to take necessary steps. This being a labour matter, we make no order as to costs.

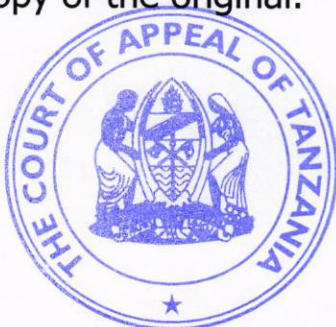
**DATE at DAR ES SALAAM** this 21<sup>st</sup> day of July, 2020


S. S. MWANGESI  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The ruling delivered this 23<sup>rd</sup> day of July, 2020 in the presence of Mr. Abdallah Kazungu, learned Counsel for the Applicant and Mr. Said Nyawambura, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



  
H. P. NDESAMBURO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**