IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., SEHEL, J.A. And LEVIRA, J.A.)

CIVIL APPLICATION NO. 395/18 OF 2019

HECTOR SEQUIRAA ..... APPLICANT

VERSUS

SERENGETI BREWERIES LIMITED ..... RESPONDENT

(Application to strike out Notice of Appeal from the decision of the High Court of Tanzania (Labour Division) at Dar es Salaam)

(Mipawa, J.)

dated the 2nd day of June, 2016
in
Revision No. 287 of 2015
.....

RULING OF THE COURT

24th August & 13th November, 2020

LEVIRA, J.A.:

The applicant, HECTOR SEQUIRAA is seeking an order of the Court striking out the notice of appeal lodged by the respondent on 23rd May, 2019 on account that, the respondent has failed to take essential steps in prosecuting the intended appeal. The application is brought by way of Notice of Motion made under Rules 89(2) and 91(a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and it is supported by the applicant's affidavit. The application is opposed by the respondent

through affidavit in reply duly deposed by Lucia Minde, Legal Services Director of the respondent.

It is on the record of the application that the applicant, an Indian National, was employed by the respondent at the position of General Manager Human Resource since July, 2008. On 10th February, 2009 his work permit expired and the same was not renewed by the responsible authority. As a result, the respondent terminated his employment. The applicant was aggrieved and thus he filed a complaint for unfair termination against the respondent before the Commission for Mediation and Arbitration for Temeke (the CMA). The CMA determined the matter in favour of the applicant.

Dissatisfied with the decision of the CMA, the respondent filed in vein Civil Revision No. 287 of 2015 in the High Court of Tanzania, Labour Division (the High Court). Still dissatisfied, the respondent on 29th June, 2016 lodged a notice of appeal intending to challenge the decision of the High Court. Subsequently, the respondent's counsel wrote a letter to the Registrar of the High Court requesting for copies of the judgment and proceedings in Revision No. 287 of 2015; the CMA award, proceedings and copies of exhibits which were tendered in the proceedings before the CMA. On 20th September, 2016 the Registrar

informed the respondent that the requested documents were ready for collection. The respondent collected the said copies. However, after collection of the said copies, the respondent made two fruitless applications before the Court for extension of time to serve the applicant with the copy of the notice of appeal; these were, Civil Application No. 217 of 2016 and Civil Application No. 469/18 of 2016 respectvely.

Following the outcome of those two applications, the applicant on 29th June, 2017 filed Civil Application No. 259 of 2017 seeking for an order striking out the respondent's notice of appeal for failure to take essential steps. On 1st November, 2017 the Court granted the said application and the respondent's notice of appeal was struck out. Immediately thereafter, the respondent filed in the High Court Misc. Civil Application No. 402 of 2017 seeking extension of time within which to file a fresh notice of appeal. However, the High Court declined to grant that application through its ruling delivered on 13th July, 2018. Dissatisfied, by way of a second bite, on 17th May, 2019, the respondent successfully sought for extension of time to file a notice of appeal vide Civil Application No. 373/18 of 2018.

It is also on record that on 22nd May, 2019, the respondent wrote a letter to *"the Judge in Charge of Main Registry of the High Court"*

requesting to be supplied with certified copies of Proceedings, Ruling, and Order in respect of Revision No. 287 of 2015; the Proceedings and Award in CMA/DSM/TEM/157/2011 for the purposes of preparing a record of appeal. Subsequently, on 23rd May, 2019 the counsel for the respondent filed a notice of appeal with intention to impugn the decision of the High Court. On account of the foregoing events, it is the applicant's contention that 90 days have elapsed and the respondent has not taken essential steps to institute the intended appeal.

We take note that, on the same date (22nd May, 2019) when the respondent lodged a fresh notice of appeal, the applicant also filed Civil Reference No. 12 of 2019 in the Court challenging the decision of the Single Justice granting the respondent extension of time in Civil Application No. 373/18 of 2018 which is yet to be determined by the Court.

At the hearing of this application the applicant was represented by Mr. Sabas Kiwango, learned advocate, whereas the respondent enjoyed the services of Mr. Alex Mgongolwa, also learned advocate.

Mr. Kiwango adopted the applicant's notice of motion, supporting affidavit and the written submissions. He was quick to inform the Court about his intention to add the fourth ground of the application which

was also indicated in the pleadings. The Court advised him to raise it at the appropriate time which he did. In the event, the application was thus predicated upon four grounds summarised as hereunder:

1. *That, the respondent failed to file Memorandum of Appeal, record of appeal and security for costs within 60 days from 23rd May, 2019 and therefore, his notice of appeal is deemed to have been withdrawn under Rule 91(1) of the Rules.*
2. *That, the time for the respondent to request to be supplied with certified documents in order to prepare and file Memorandum of Appeal, record of appeal and security for costs as required under Rule 90(5) has expired and the respondent has failed to ensure that it collects the said documents within prescribed time.*
3. *That, 104 days has expired since the respondent wrote its initial letter to the Registrar of the High Court and the respondent has not followed up with any other communication.*
4. *That, the letter requesting for copies of intended documents for appeal was defective for being addressed to a wrong addressee.*

Submitting on the first ground, Mr. Kiwango argued that the respondent has failed to file the memorandum of appeal, record of appeal and security for costs within sixty (60) days prescribed by the law

since when he filed the notice of appeal and wrote a letter requesting for various documents ostensibly necessary to institute an appeal. He argued further that, the letter to the Registrar of the High Court requesting for those documents cannot operate to trigger Rule 90(1) of the Rules and thereby stop time within which the respondent is required to lodge his appeal because all the document's requested by the respondent had already been previously supplied to the respondent and they were used in the previous applications by the respondent. Mr. Kiwango faulted the respondent for failure to particularise which documents they are waiting for as it aversively made a denial that was not supplied with the requested documents.

Regarding the second ground, Mr. Kiwango submitted that the prescribed time of 90 days under Rule 90 (5) of the Rules for the Registrar of the High Court to comply with the respondent's request to be supplied with certified documents in order to prepare and file memorandum of appeal, record of appeal and security for costs has expired. In addition, he stated that, even the fourteen (14) days prescribed under the said Rule for the respondent to ensure that it obtains the said documents from the Registrar has also expired. He cited the case of **Georgio Anagnoston and Another v. Emmanuel**

Marangakis and Another, Civil Application No. 464/01 of 2019 (unreported) which insisted on the need for the appellant to abide by sub rule (1) of Rule 90 of the Rules and introduced accountability to both, the Registrar and the applicant of the certified copies of Judgment, decree and proceedings.

Mr. Kiwango argued further that, the obligation of the Registrar of the High Court after receiving the letter applying for those documents was to act within 90 days to supply; and if the respondent was not supplied within that time, it ought to have made a follow up within 14 days. And, if the copies were not ready within those 14 days, then the respondent was required to apply either formally or informally for extension of time to continue making follow up. Therefore, he said, since the respondent did not apply for extension of time after expiration of 14 days it amounted to failure to take essential steps and thus, the notice of appeal should be struck out. It is important to note that, the counsel's assertion was not backed up with any law and/ or decided cases.

The counsel for the applicant abandoned the third ground as it was closely related to the second ground.

Submitting on the fourth ground which was added as a new ground, Mr. Kiwango argued that the respondent's letter dated 22nd May, 2019 requesting for necessary documents was defective for being addressed to *"the Judge-In-Charge, High Court of Tanzania, (Main Registry), Dar es Salaam"*, instead of the Registrar of the High Court. He added that the said letter was addressed to the Judge-In-Charge while the head of the High Court, Main Registry is the Principal Judge. According to him, since the said letter was not addressed to the correct officer, it contravened Rule 90(1) and (3) of the Rules which requires such letter to be addressed to the Registrar of the High Court. He argued further that, the effect of the above defects is that, the said letter does not exist. It is as good as if the application letter for those documents was never made. This defect, he said, is fatal as it goes to the root of the application. Finally, he urged us to allow this application and strike out the respondent's notice of appeal.

When probed by the Court to argue on the validity of the documents applied by the respondent to the intended appeal, Mr. Kiwango submitted that, the said documents have no purpose at all because leave had already been granted and the said documents do not fall within the documents listed under Rule 96(1) of the Rules.

In reply, Mr. Mgongolwa adopted the respondent's affidavit in reply and written submissions. He submitted at the outset that the application before us was brought prematurely and it is misconceived. According to him, the applicant is trying to ride two horses at the same time due to the fact that, immediately after the respondent was granted extension of time to file notice of appeal out of time, the applicant rushed to file Reference No. 12 of 2019 challenging the grant of extension of time for filing the notice of appeal. He argued, if the said Reference will succeed, it means there will be no more pending notice of appeal. Under the circumstances, he said, the proceedings and decision which granted extension of time are very important for preparation of the record of appeal because Rule 90(1) of the Rules, requires the notice of appeal to be contained in the record of appeal. Moreover, he argued that since Reference No. 12 of 2019 is still pending, there is no conclusive determination on the validity of the notice of appeal. It was his further argument that, even if the respondent had all the documents necessary for the appeal, still it could be premature to file the record of appeal because of the pendency of Reference No. 12 of 2019.

According to Mr. Mgongolwa, the applicant abuses the Court process because he filed Reference and now he has filed this application. He

insisted that, there was no way the respondent could prepare the record of appeal without having all the necessary documents. The notice of appeal which initiates the process of appeal is attacked by the applicant, so the respondent cannot prepare the record of appeal without the record of Reference No. 12 of 2019. According to him, 90 days starts to run after all the documents are complete. He thus argued that, since the respondent does not have all the documents, time (90 days) cannot start to be counted.

As regards to the second ground, Mr. Mgongolwa stated that the position of the law stated in the case of **Georgio Anagnoston and Another** (supra) cited by the applicant is still the same because in that case, the Court held that there is no consequences to the Registrar of the High Court who fails to supply relevant documents to a party or parties. In addition, he said, there is no enforcement mechanism under the Rules on how the Registrar of the High Court can be forced to supply documents after lapse of 90 days. However, he said, the respondent was required to take administrative measures to make follow ups to the Registrar of the High Court which it did in vein. Besides, he argued, it is impracticable for the respondent to keep on writing letters to the Registrar on the same subject matter.

On the fourth ground, Mr. Mgongolwa submitted that the highlighted defects of the letter by the counsel for the applicant do not go to the root of the matter because the said letter was received by the Registrar of the High Court, stamped and its contents were very clear as it referred to the case which was very much known to the High Court Registry. It was Mr. Mgongolwa's argument that, this ground was raised as an afterthought. However, he said, the identified defect is curable. He added that, Rule 90 of the Rules is only stating that the letter will be addressed to the Registrar of the High Court with no more.

Finally, he submitted that the requested documents from the Registrar of the High Court are very important to the preparation of the record of appeal. Therefore, he insisted that this application is premature because the respondent is yet to be supplied with the necessary documents. He urged us to dismiss the application because its determination will pre-empt Reference No.12 of 2019.

In rejoinder, Mr. Kiwango stated that it is impossible for an order of a Single Justice of the Court to be stayed pending Reference in Court. The respondent ought to have proceeded with his appeal because these are two different things.

He also rejoined on the second ground that, the case of **Georgia Anagnoston and Another** (supra) he cited is very clear and relevant to the current application. He said, the Registrar is obliged to serve the requested documents to the applicant within 90 days, equally the party who applies for the same has the obligation to make a follow up within 14 days after expiry of 90 days. He insisted that this is an obligation under the law and thus cannot be taken as an administrative matter as stated by the counsel for the respondent.

Regarding the fourth ground, he said, the defect is serious as it goes to the root of the matter because the proper addressee is not mentioned in the letter. He thus reiterated his previous prayer he made in the submission in chief.

We have respectfully considered the grounds of application, parties' affidavits, written submissions and oral submissions made by the counsel for the parties. Before examining the grounds of application advanced by the applicant, we find it instructive first to deliberate on the ground raised by the respondent's counsel that the instant application was prematurely lodged as there is pending Reference No. 12 of 2019 within which, the applicant is challenging the decision of the single Justice extending time to the respondent to lodge a notice of appeal

subject of this application. According to him, an attempt by the applicant moving the Court to strike out the notice of appeal is an abuse of Court process because the applicant is riding two horses at the same time. This is due to the fact that, the applicant rushed to challenge the decision of the single Justice of the Court granting the respondent leave to lodge notice of appeal out of time on a date of lodging it through Reference No. 12 of 2019 which is still pending in Court. He also added that there was no way the respondent could prepare the record of appeal without accompanying the notice of appeal and the record of Reference No. 12 of 2019.

That stance by Mr. Mgongolwa was adamantly resisted by Mr. Kiwango, the learned counsel for the applicant that the respondent ought to have proceeded instituting the appeal because the said Reference would have no bearing to the present application. The issue therefore, is whether the present application is premature.

We think the answer to this issue is not farfetched. The parties are not disputing the fact that on 23rd May, 2019 the applicant filed to the Court Reference No. 12 of 2019 challenging the decision of the single Justice granting the respondent with extension of time to lodge notice of appeal. It is also not in dispute that the said Reference is still pending;

and subsequently thereof, the applicant lodged the present application moving the Court to strike out the notice of appeal. Based on the circumstances, with all respect, we find no substance in Mr. Kiwango's invitation that the Reference has no bearing to the application under discussion. As discerned from the parties' affidavit and their respective submissions, it is evident that the notice of appeal sought to be struck out in this application is also a subject of contention in the Reference No. 12 of 2019. While in one hand, in the said Reference the applicant is attacking the notice of appeal that it was not justifiably lodged as he challenges the decision of the single Justice which granted the respondent leave to file the same out of time; on the other hand, the current application implies that, the notice of appeal is properly before the Court except that essential steps have not been taken by the respondent to institute the intended appeal. Without deciding, assuming we decide to strike out the notice of appeal as prayed by the applicant, what will then be the usefulness or fate of the Reference? Certainly, its determination will become superfluous. Similarly to the Reference, if it succeeds, there will be no more pending notice of appeal subject of the current application and hence, it will render the present application nugatory. In our considered view, since the application for Reference

was filed before the current application, prudence requires the Reference to be determined first.

Considering the circumstances, we observe that, the act of the applicant to lodge this application calls to be discouraged because it turns the Court's proceedings to be a game of chances in finding lee ways to succeed by filing unwarrantable applications. We are in agreement with Mr. Mgongolwa that this application was prematurely lodged and indeed the applicant is riding two horses at the same time. On this position, we are not travelling in a virgin land but we have found comfort from our previous decision in **Hamis Said Mkuki v. Fatuma Ally**, Civil Appeal No. 147 of 2017 (unreported) at page 33, where we held that the law does not allow riding two horses at the same time because it amounts to an abuse of court process. A similar stance was also expressed in the case of **Harrison Mandali & Others v. The Registered Trustees of the Archdiocese of Dar es Salaam,** Civil Application No. 482/17 of 2017 (unreported). Had the applicant been candid enough, it could have waited for the determination of Civil Reference No. 12 of 2019 because its outcome has a direct bearing not only to the present application, but also to the fate of the intended appeal. In the circumstances, we agree with Mr. Mgongolwa that the

applicant ought to have waited for the outcome of Reference No. 12 of 2019 before filing the current application.

For the reasons stated above, we find that this application was prematurely filed and therefore we refrain from dealing with the other grounds raised by the applicant. Consequently, we strike out the application with no order as to costs since this is a labour matter.

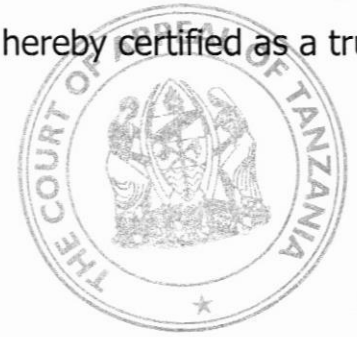
DATED at **DAR ES SALAAM** this 10th day of November, 2020.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 13th day of November, 2020 in the presence of Mr. Sabas Kiwango, learned Counsel for the Applicant and Mr. Kennedy Alex Mgongolwa, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL