IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CIVIL APPLICATION NO. 342/01 OF 2018

TANZANIA COMMUNICATIONS REGULATORY AUTHORITY ..... APPLICANT

VERSUS

CATS-NET LIMITED .....RESPONDENT

(Application for striking out a notice of appeal from the ruling and order of the High Court of Tanzania, at Dar es Salaam)

(Munisi, J.)

dated the 9th day of March, 2017

Civil Case No. 107 of 2014

RULING OF THE COURT

21st October & 13th November, 2020

MWANDAMBO, J.A.:

Cats-Net Limited, the respondent herein, lost to the Tanzania Communications Regulatory Authority, the applicant, in a suit before the High Court of Tanzania sitting at Dar es Salaam in Civil Case No. 107 of 2014. Aggrieved, the respondent lodged a notice of appeal against the decision of the High Court striking out the suit for lack of jurisdiction made on 9th March, 2017. Apart from lodging the notice of appeal, the respondent did not institute the appeal and that triggered the applicant instituting the instant application for striking out that notice.

The applicant has preferred the application under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules) through M/s C&M Advocates in which the Court is asked to strike out the notice of appeal on the ground that some essential steps in the furtherance of the intended appeal have not been taken. Essentially, the founding affidavit deponed to by one Joannes Karungura, Principal Officer of the applicant avers in para 8 and 9 that the notice of appeal has been rendered inoperative because the respondent has not instituted the intended appeal within the period prescribed by the Rules.

Not amused, the respondent has filed an affidavit in reply deponed to by Matojo Mushumba Cosatta, Director of Legal Services. The respondent denies that it has failed to take essential steps in the furtherance of the intended appeal because the Registrar of the High Court has not yet supplied to her copies of the necessary documents she had applied for appeal purpose.

The appeal was called on for hearing on 21st October 2020 in the presence of Mr. Henry Chaula, learned advocate fending for the applicant. The respondent who was duly served defaulted appearance for unexplained reasons. At the instance of Mr. Chaula, the Court

proceeded with the hearing in the respondent's absence in terms of rule 63 (2) of the Rules.

Having adopted the contents of the notice of motion as well as the affidavit, Mr. Chaula took the floor to make elaborations in support of order sought. He argued that the respondent has failed to institute her appeal within 60 days from the lodging of the notice of appeal contrary to rule 90 (1) of the Rules. Taking the argument further, the learned advocate submitted that the respondent cannot benefit from the provisions of rule 90 (3) of the Rules because she did not serve on the applicant, her letter to the Registrar of the High Court requesting for requisite copies for the purpose of the intended appeal within the prescribed period. However, he was unable to specify which period was necessary for serving the said copy on the applicant.

On the other hand, the learned advocate pointed out yet another aspect constituting failure to take one of the essential steps in the intended appeal that is to say; delayed service of the copy of the notice of appeal contrary to rule 84 (1) of the Rules.

Upon hearing arguments from the learned advocate and after our examination of the notice of motion and the affidavit annexed to it as well as the affidavit in reply, central to our determination is whether the

applicant has discharged her burden of proof in support of the order sought. Curiously, the notice of motion has not gone beyond contending that the respondent has failed to take some essential steps in the intended appeal. The affidavit has only averred that the respondent has failed to institute the appeal within the prescribed time. We think, in all fairness to both the respondent and the Court, the applicant ought to have particularised the steps which the respondent is claimed to have failed to take. General assertions deny the respondent opportunity to appreciate the nature of the case and make an appropriate reply.

Be it as it may, in the course of his submissions, Mr. Chaula argued that the respondent ought to have instituted her appeal within 60 days from the date of lodging the notice of appeal as required by rule 90 (1) of the Rules. The respondent would have us hold that since she had applied for the supply of requisite copies for the purpose of the appeal, which have not yet been availed to her, she cannot be blamed for not instituting the appeal within 60 days (see para 4 and 6 of the affidavit in reply). We agree with the learned advocate for the applicant and it is not in dispute that the respondent made a written request to the Registrar of the High Court for the supply of copies of the necessary documents for appeal purposes but a copy of that letter was not served

on the applicant until 17th August, 2018. That was a period of one year and above five months from the date the said letter was delivered to the High Court as evidenced by annexure **CNL2** to the affidavit in reply. Mr. Chaula argued and we are in agreement with that that was an inordinate delay although he was unsure whether there was any specific time limit within which to do so.

Admittedly, rule 90 (1) does not prescribe anytime limit within which a copy of the letter can be delivered on the respondent. However, in **Principal Secretary, Ministry of Defence and National Service vs. Devram Vallambia** [1992] T.L.R 387 this Court discussing rule 83 (1) of the revoked Rules the replica of the current rule 90 (1) of the Rules, the Court held that the period for serving a copy of the letter must be coextensive with the period for delivering the letter to the Registrar, that is to say; 30 days from the date of the impugned decision. That decision was applied recently in **Elizabeth Jerome Mmassy v. Edward Jerome Mmassy & 6 others**, Civil Application No. 390 of 2019 (unreported). It will thus be clear that a copy of the respondent's letter (annex CNL-2) was served on the applicant's advocates on 17th August, 2018 out of the prescribed time.

As rightly submitted by Mr. Chaula, the respondent cannot benefit from the exemption in the computation of time to institute an appeal under rule 90 (3) of the Rules. In other words, she ought to have instituted her appeal within 60 days from the date of lodging the notice of appeal. Since this was not done, the notice of appeal became inoperative and liable be struck out.

The above aside, there is yet another ailment rendering the notice of appeal inoperative. In terms of rule 84 (1) of the Rules, the respondent was bound to serve a copy of the notice of appeal on the applicant before or within fourteen days after the lodging of it. Yet again, we endorse Mr. Chaula's submission that whilst a copy of the notice of appeal annexed to the affidavit as well as that affidavit in reply was lodged on 13th March, 2017, a copy thereof was served on the applicant's advocates on 3rd April, 2017. That was period beyond fourteen days required by rule 84 (1) of the Rules.

There is no gainsaying and we need not cite any authority to state that the delayed service of the copy of the notice of appeal was, but another failure to take an essential step in the furtherance of the intended appeal warranting an order striking out the notice of appeal under rule 89 (2) of the Rules as prayed by the applicant.

In the event, the application is granted, with the net effect that the notice of appeal from the decision of the High Court in Civil Case No. 107 of 2014 is hereby struck out with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 27th day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Ruling delivered on 13th day of November, 2020 in the presence of Mr. Joseph Mbogela holding brief for Mr. Henry Chaula, learned counsel for the Applicant, and Mr. Matojo Cosatta, Principal Officer of the respondent's Company, is hereby certified as a true copy of the original.

H.P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL