

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CIVIL APPLICATION NO. 11 OF 2012

ELIAS MARWA APPLICANT

VERSUS

1. INSPECTOR GENERAL OF POLICE

2. ATTORNEY GENERAL RESPONDENTS

(Application to strike out a notice of appeal from the decision of the High Court of Tanzania at Mwanza)

(Nyangarika, J.)

dated the 24th day of March, 2011

in

Civil Case No. 2 of 2000

RULING OF THE COURT

28th Nov. & 5th Dec. 2013

KAIJAGE, J.A.:

Elias Marwa, the applicant herein, was a successful party in Mwanza High Court Civil Case No. 2 of 2002. The Inspector General of Police and the Attorney General, the respondents herein, were the losing parties. Dissatisfied with the decision of the High Court handed down on 24/3/2011, the respondents lodged a notice of appeal with the Registrar of the High Court on 4/4/2011. Since then to date, the respondents' intended appeal has never been instituted.

By the Notice of Motion brought under Rules 89(2) and 91(a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) the applicant is moving this Court for orders that "*the notice of appeal lodged by the respondents on 4/4/2011 be struck out and consequently the same be deemed as withdrawn.*" The application is supported by the applicant's sworn affidavit and it is predicated upon one major ground, namely:-

That, the respondents having lodged the notice of appeal, the appeal was not instituted within 60 days next following.

At the hearing of the application, the applicant appeared in person, unrepresented. Mr. Obadia Kajungu assisted by M/s Bibiana Kileo, both learned State Attorneys, appeared for the respondents.

When the application was called on for hearing, the parties invited us to adopt the arguments presented and the positions maintained in their respective written submissions filed in support and in opposition to the application, without more.

Going by the written submissions, it is common ground that the respondents having been dissatisfied with the decision of the High Court dated 24/3/2011, a notice of appeal against that decision was lodged on 4/4/2011. The parties are also at one as regards the fact that the

respondents, through the services of the Principal State Attorney stationed at Mwanza, wrote a letter with reference No. J/MZA/C.30/3/05/40/150 dated 1/4/2011 to the Registrar of the High Court at Mwanza, applying to be supplied with copies of proceedings, judgment and the decree of the trial High court.

Not disputed, is also the fact that the Registrar of the High Court supplied to the respondents copies of the said documents together with a certificate of delay dated 13/10/2011. For purposes of instituting the intended appeal, the Registrar issued a certificate excluding days which were required for the preparation and delivery of the documents. Going by the certificate, the respondents were supposed to institute their intended appeal sixty (60) days from 19/8/2011 and not from the date of lodgement of the notice of appeal.

On the merits of the application, we propose to begin by examining Rule 89(2) of the Rules which provides:-

"R. 89 (2) Subject to the provisions of sub rule (1), a respondent or other person on whom a notice of appeal has 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** as the case may be, on the ground that no appeal lies or that some assential step in the proceedings has not been taken within the prescribed time.”*[Emphasis is ours.]

A relief under Rule 89 (2) of the Rules is only available to a person on whom the notice of appeal has been served. In this case, it is evident that the applicant was not served with a notice of appeal in terms of Rule 84(1) of the Rules which provides:-

*"R. 84(1) **An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal;** but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court.”* [Emphasis is ours.]

On the strength of the immediate foregoing, we are settled in our minds that applicant's application brought under Rule 89 (2) of the Rules is highly misconceived.

We have, however, found merit in the other limb of the applicant's application pegged on Rule 91 (a) of the Rules which provides:-

"R.91 If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time,

*(a) **He shall be deemed to have withdrawn his notice of appeal** and shall unless the court orders otherwise, be liable to pay the costs of any person on whom the notice of appeal was served arising from the failure to institute the appeal."* [Empasis is ours.]

The rationale behind Rule 91 (a) (then Rule 84 (a), of the 1979 Rules) was lucidly stated thus **in EMIR WILSON DAUD AND ANOTHER VS. TANZANIA POSTAL BANK**, Civil Application No. 163 of 2008:-

"it has long been recognized that it is in the public interest that there should be an end to litigation, so that a decree holder may enjoy the fruits of the decree in his favour as soon as possible... Otherwise a mischievous judgement debtor bent on frustrating the decree holder, in the absence of Rule 84 (a) , would simply lodge a notice of

appeal, successfully apply for a stay of execution order and take no further action in the matter. This would, indeed, be against public interest and the interest of justice.”

In this case, we are of the firm view that the respondents were required to institute their intended appeal within 60 days of the date of lodgement of the notice of appeal. This brings us face to face with Rule 90 (1) of the Rules which provides:-

*"R. 90 (1) Subject to the provisions of Rule 128, an **appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged** with-*

- (a) A memorandum of appeal in quantuplicate;*
- (b) The record of appeal in quantuplicate;*
- (c) Security for the costs of the appeal,*

*Save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there **shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the registrar of the High Court as having been required***

for the preparation and delivery of that copy to the appellant.

(2) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent.” [Emphasis is ours.]

We have hereinbefore alluded to a certificate issued to the respondents by the Registrar of the High Court in terms of Rule 90 (1) of the Rules. Considering the facts which we have been able to glean from the original record of the trial High Court, and on the basis of the provisions under Rule 90(2) of the Rules, we are satisfied that the respondents were not even entitled to take advantage of an exception to sub-rule (1) of Rule 90. This is because the Principal State Attorney’s letter to the Registrar of the trial High Court requesting for copies of proceedings, judgment and decree, was not copied and served on the applicant. This being the position, the respondents were undoubtedly required to institute their intended appeal within sixty days of the date of lodgment of their notice of appeal. In similar vein, a certificate dated 13/10/2011 made by the Registrar of the High Court pursuant to the

proviso under Rule 90(1) of the Rules, has no practical significance in view of the mandatory provisions of Rule 90(2) of the Rules.

We have gathered from the respondents' written submission that one of the untenable reasons explaining the failure to institute the intended appeal in compliance with the Rules, is the applicant's failure to furnish the respondents with the address of service in terms of Rule 86 (1) (a) of the Rules which provides:-

"R. 86 (1) Every person on whom a notice of appeal is served shall

(a) Within fourteen days after service on him of the notice of appeal lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address for service; [Emphasis is ours.]

In this case, having been satisfied that the respondents did not serve on the applicant with a copy of the notice of appeal as lodged, the provisions of Rule 86 (1)(a) of the Rules could not be invoked in aid of the former. As such, no blame should be thrown against the applicant for his inaction under that Rule.

Furthermore, and in the light of what we have discovered in the original record of the trial High Court, it appears that the applicant, since April, 2001, until March, 2011 when the judgment of the High Court Civil Case No. 2 of 2000 was delivered, the latter had consistently appeared and prosecuted his case, in person. It is also clear that throughout the same period, the court processes were served on him personally. The record of the trial High Court further reveals the fact that the proposed issues drawn on behalf of the respondents and filed in court on 7/8/2009 by the learned State Attorney were served on the applicant, in person. It is curious that the respondents took no notice of these facts which were within their personal knowledge and, ultimately, decided to transmit, for the purposes of service on the applicant, the notice of appeal through the address of a certain learned counsel who had never appeared before the trial High Court to prosecute the case on the applicant's behalf.

Be that as it may, and as matters stand, we are settled in our minds that the respondents are in breach of Rule 90(1) of the Rules. Since the effect of default in instituting the appeal is provided under Rule 91 (a), we find that the respondent's notice of appeal should be, and it is hereby deemed to have been withdrawn sixty days after its lodgement.

Considering the fact that the applicant was not timeously served with the notice of appeal, his application succeeds only to the extent indicated above with no order as to costs.

DATED at MWANZA the 3rd day of December, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL