IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 462/18 OF 2018

DAUDI ROBERT MAPUGA & 417 OTHERS ..... APPLICANTS

VERSUS

1. **TANZANIA HOTELS INVESTMENT LTD.**
2. **CONSOLIDATED HOLDING CORPORATION (SUCCEEDED BY TREASURY REGISTRAR)**
3. **SERENGETI SAFARI LODGES LTD.**
4. **MAFIA ISLAND LODGE**
5. **MOUNT MERU HOTEL LTD.**

..... RESPONDENTS

(Application for striking out notice of appeal from the Judgment of the High Court of Tanzania, Labour Division at Arusha)

(Nyerere, J.)

dated the 11th day of November, 2015

in

Trade Dispute Enquiry No. 2 of 2008

.....

RULING OF THE COURT

7th December, 2020 & 11th February, 2021

NDIKA, J.A.:

By a notice of motion dated 8th June, 2018 made under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), the applicants seek an order of this Court striking out the respondents' notice of appeal lodged on 10th December, 2015. The said notice manifested the respondents' intention to appeal to this Court against the judgment and decree of the High

Court of Tanzania, Labour Division at Arusha (Nyerere, J.) dated 10th November, 2015 in Trade Dispute Enquiry No. 2 of 2008. The ground upon which the relief prayed for is predicated is that the respondents have failed to take essential steps in pursuing their intended appeal.

By way of background, it is instructive to look at the factual matrix of this matter. The applicants were employees of the first respondent, which owned and operated government-owned hotels countrywide, which included the third, fourth and fifth respondents. In the course of privatization of the hotels in 2003 and 2004 conducted on behalf of the government by the Parastatal Sector Reform Commission (PSRC), the applicants had their employment terminated. Aggrieved that the termination did not comply with the first respondent's Service Regulations and Schemes of Service, the applicants lodged a complaint with the now defunct Industrial Court of Tanzania. The Consolidated Holding Corporation (CHC), being the successor to the PSRC, was cited the second respondent. As it turned out, the complaint was not finalized by the time the new labour dispute resolution regime became effective. Hence, the matter was inherited by the High Court, Labour Division at Arusha and docketed as Trade Dispute Enquiry No. 2 of 2008.

Central to the present dispute are claims for terminal benefits, to wit, gratuity, twelve months' remuneration, and forty months' remuneration as a golden handshake. In its decision, the High Court partly sustained the claims, ordering the second respondent, which had taken over the liabilities of the first respondent as the applicants' employer, to compensate each complainant "twelve months wages at the rate of wages which the employees were earning before the termination of their employment."

As hinted earlier, the respondents were aggrieved by the aforesaid decision of the High Court and hence, on 10th December, 2015 they lodged their notice of appeal and applied for a copy of the proceedings.

The applicants' counsel, Mr. Qamara A. Peter, swore an affidavit in support of the application. In essence, he avers that the respondents took no action in furtherance of their intended appeal for over twenty-seven months after they had lodged their notice of appeal and applied to the High Court for a copy of the proceedings. He further avers that the requested documents were ready for collection on the same day the judgment was pronounced by the High Court.

For the respondents was filed on 1st December, 2020 an affidavit in reply by Ms. Grace Lupondo, a State Attorney from the Office of the Solicitor

General assigned to handle the matter. It is the respondents' position that their intended appeal is yet to be filed because they have not been supplied with the requested documents and that they are still waiting for a notification from the Registrar of the High Court to collect the documents once ready for collection. In particular, the deponent denies that the requested documents were ready for collection on the day the High Court rendered its judgment.

Before us, Mr. Qamara A. Peter, learned counsel, prosecuted the application on behalf of the applicants while Mr. Peter J. Musetti and Ms. Grace Lupondo, learned State Attorneys, represented the respondents.

In both his written brief and oral argument, Mr. Peter stressed that the respondents took no further action after they lodged their notice of appeal and applied for a copy of proceedings on 10th December, 2015. According to him, the requested copy was ready for collection on the same day the High Court rendered its judgment and that the applicants collected their copy on the following day as shown at the foot of the attached extracted decree (Annexure PA.1 to the supporting affidavit). He charged that the respondents were indolent for twenty-seven months by the time this matter was lodged; that is, 8th June, 2018. He added that the respondents should have, instead, followed up on their request; that their inaction was unjustified and

deliberate so as to delay and deny the applicants enjoyment of the fruits of the decree in their favour. Reliance was placed on our decision in **The Registered Trustees of Agricultural Inputs Trust Fund v. Alhaji Ali Utoto**, Civil Application No. 63 of 2007 (unreported) in which we struck out a notice of appeal on account of failure to take essential steps in the furtherance of the intended appeal. In the premises, he urged us to grant the application and strike out the notice of appeal.

Opposing the motion on the strength of the affidavit in reply, Ms. Lupondo argued that after the respondents had duly lodged the notice of appeal and applied for a copy of the proceedings on 10th December, 2015, they had no further step to take until they had received a copy of the proceedings from the Registrar. She insisted that they had not yet received any notification from the Registrar of the High Court that the requested documents were ready for collection. The learned State Attorney disputed the claim that the documents were ready for collection on the same day the impugned judgment was delivered, contending that there was no proof to that effect on record. If anything, the applicants ought to have obtained a letter or affidavit to that effect from the Registrar.

In support of her position, the learned State Attorney relied upon **Transcontinental Forwarders Ltd. v. Tanganyika Motors Ltd.** [1997] TLR 328; and **Thobias Andrew and Another v. Jacob Bushiri**, Civil Application No. 442/08/2017 (unreported) for the proposition that an intending appellant has no further legal obligation after he had requested for a copy of the proceedings until being notified by the Registrar that the requested copy was ready for collection. Further reliance was placed on **The Registered Trustees of the Marian Faith Healing Centre @ Wanamaombi v. The Registered Trustees of the Catholic Church of Sumbawanga Diocese**, Civil Appeal No. 64 of 2006 (unreported), which cited with approval a holding in the Indian case of **Krishnappa Ramasa Walvekar v. Ramchandrasa Ramasa Walvekar and Others**, AIR 1973 Mys 234 on exclusion of the time requisite for obtaining a copy of proceedings once an application for such copy is duly made.

Ms. Lupondo went on to acknowledge that recent amendments on Rule 90 of the Rules made in 2017 and 2019 on the institution of appeals have created an obligation on the part of the intending appellant to take steps to collect the requested copy of proceedings within fourteen days after the expiry of ninety days of submission of the request within which the Registrar

is required to ensure that the copy is ready for collection. However, Ms. Lupondo put up a rider that the said position as encapsulated in Rule 90 (5) of the Rules, as amended, would be inapplicable to the instant matter primarily because the impugned notice of appeal, lodged on 10th December, 2015, predated the aforesaid amendments. She maintained that it would be most unjust and improper that the new position as aforesaid be applied retrospectively. To bolster her submission, she referred to our recent decision in **Christopher Ole Memantoki v. Jun Trade and Sellers (T) Ltd.**, Civil Application No. 319/02/2017 (unreported) in which we declined to apply the new position retroactively. The relevant part of that decision is at pages 11 and 12 of the typed ruling thus:

> *"... since at the time of lodging this application the respondent had already taken essential steps to institute an appeal but as earlier pointed out, was impeded by the inaction of the Registrar to supply the requested proceedings, it will be absurd to invoke the retrospectivity principle; to invoke Rule 90 (5) of the Rules to penalize the respondent. In a nutshell, for now the said Rule is inapplicable given the circumstances of this case."*

Finally, Ms. Lupondo refuted the application of **The Registered Trustees of Agricultural Inputs Trust Fund** (*supra*), relied upon by the applicants, to the instant matter. She contended that the said case was decided on the undisputed finding that the respondent, as the intending appellant, failed to institute the appeal eight months after he had been notified in writing by the Registrar that the requested documents were ready for collection. She maintained that the respondents are not to blame; they have not been notified by the Registrar of the readiness of the requested documents for collection. On being probed by the Court, Ms. Lupondo repeated that the respondents had no legal obligation to follow on their request even though it was logical for them to take a positive action instead of waiting indeterminately.

Rejoining, Mr. Peter conceded that the case of **The Registered Trustees of Agricultural Inputs Trust Fund** (*supra*) was distinguishable. However, he contended, rather tersely, that the authorities relied upon by his learned friend were all inapplicable. He maintained that the respondents' inaction was so unjustified that the principle in **Transcontinental Forwarders Ltd.** (*supra*) should not be applied to the instant matter.

We have keenly considered the notice of motion, the supporting affidavit and the affidavit in reply in the light of the contending positions of the learned counsel for the parties. It is common ground that the respondents duly lodged their notice of appeal on 10th December, 2015, signifying their intention to challenge the High Court's ruling dated 11th November, 2015. On the same day, they duly applied for a copy of the proceedings in terms of Rule 90 (1) and (2) of the Rules as they were at the material time, a step which availed them with the exclusion of such time as would be certified by the Registrar of the High Court required for preparation and delivery of the requested copy of proceedings from the computation of the prescribed sixty days limitation for institution of the appeal after the notice of appeal was lodged. As of the date this matter was lodged; that is, 8th June, 2018, the intended appeal was yet to be filed. Until then, thirty-one months (not twenty-seven months as claimed by the applicants) had passed following the filing of the notice of appeal.

The parties have taken sharply contrasting positions on why the intended appeal is yet to be filed: while the applicants blamed the respondents for taking no further action after lodging the notice of appeal and requesting for a copy of proceedings, which were ready for collection on

the day when the impugned judgment was rendered, the respondents' contention is that they neither have been supplied with the requested copy nor have they been notified by the Registrar that the requested copy was ready for collection.

We think, in view of the contending positions of the parties, we must resolve, as an initial question, whether there is proof that the requested documents were ready for collection as alleged by the applicants.

Indeed, as stated earlier, it is averred in Paragraph 4 of the supporting affidavit that the aforesaid documents were ready for collection on 10th November, 2015; the day when the judgment was delivered. Mr. Peter also stated in his written submissions that the applicants collected a copy of the said documents on the next day following the delivery of the impugned judgment as evidenced by the dated endorsement at the bottom of the extracted decree attached to the supporting affidavit. On the other hand, Ms. Lupondo denied that claim and stressed that the Registrar of the High Court had not yet notified them of the readiness of the documents. Having examined the record and weighed these divergent contentions, we are unpersuaded that there is any preponderant proof that the documents were ready for collection on the day the judgment was delivered. Given that the

averment for the applicants on the readiness of the documents is disputed by the respondents, the applicants should have presented definitive proof to that effect from the Registrar. Certainly, we cannot act on Mr. Peter's submission that they collected the documents on the following day after the delivery of the judgment; for it is a mere statement from the bar. In addition, we have examined the endorsement at the bottom of the extracted decree as proof of the alleged collection of the documents but we have found it inconclusive and unreliable on the issue. For, while the attached decree ineptly indicates both "10/11/2015" and "11/11/2015" as the "date" on which the decree was extracted, the rest of the documents (copies of the judgment and proceedings) indicate no date on which they were issued.

At this point we advert to the sticking issue whether the notice of appeal should be struck out pursuant to Rule 89 (2) of the Rules on the ground that some essential step in the proceedings has not been taken. As alluded to earlier, while Mr. Peter blamed the respondents for inaction, Ms. Lupondo absolved the respondents from the blame, contending that the intended appeal could not be filed because they have neither been supplied with the requested documents nor notified by the Registrar of the readiness of the requested documents. Citing **Transcontinental Forwarders Ltd.**

(*supra*), she was emphatic that the respondents, having complied with the requirement under Rule 90 of the Rules, had no further legal obligation to discharge. The relevant part of that case, decided by Makame, J.A. as a single Justice of the Court, reads thus:

> *"I wish to say only that reminding the Registry after applying for a copy of the proceedings, etc and copying the request to the other party may indeed be the practical and realistic thing to do, but it is not a requirement of the law. Once Rule 83 [now Rule 90] is complied with the intending appellant is home and dry."*

In **Mohsin Mohamed Taki Abdallah v. Tariq Mirza & Four Others**, Civil Application No. 100 of 1999 (unreported), Lugakingira, J.A., also sitting as a single Justice of the Court, considered the above holding in **Transcontinental Forwarders Ltd.** (*supra*). His Lordship took the view that an intending appellant, having lodged his notice of appeal and requested for a copy of the proceedings, must all along exercise diligence in the pursuit of the intended appeal. We find it apt to extract from that decision the following passage:

> *"There was no problem with the first sentence; there is indeed no provision which requires the applicant to*

keep reminding the Registry of his application for copies of the proceedings. I do not think, though, that the second proposition is intended to be general, otherwise it would defeat the principle of diligence which parties are required to show in the conduct of their cases. Moreover, the delay in ***Transcontinental*** *was merely six months as opposed to three years in the instant case and the respondents' refusal to go for a copy of the ruling although they know it is ready. I would say that while the High Court is duty bound to supply documents applied for and to supply them without unreasonable delay,* ***it behooves the parties concerned to exercise diligence in the conduct of their cases, otherwise they cannot escape blame.***" [Emphasis added]

Lugakingira, J.A. went on in that case and held that:

> *"I am satisfied that the respondents in this case have by their inaction virtually abandoned any intention to appeal and should be deemed to have withdrawn the notice of appeal in terms of Rule 84 (a) [now Rule 91 (a)]."*

As we observed in **Arthur Kirimi Rimberia & Another v. Kagera Tea Company Ltd. & 3 Others**, Civil Application No. 364/01/2018

(unreported), there is no apparent conflict between **Transcontinental Forwarders Ltd.** (*supra*) and **Mohsin Mohamed Taki Abdallah** (*supra*) because:

> *"... the single Justice in the latter case informed himself of the principle in the former case and concluded that it had no general application. He did so having considered and compared the short delay of six months in the former case as against the manifestly inordinate delay of three years in the latter. In the instant case, we ask ourselves: Does the principle in* ***Transcontinental Forwarders Ltd.*** *(supra) hold even where an intended appellant sits back for five years and four months as in this case? An affirmative answer to this question would be inconsistent with public policy that litigation should come to an end."*

As we held in **Arthur Kirimi Rimberia** (*supra*), we are of the firm view that the stance in **Mohsin Mohamed Taki Abdallah** (*supra*) would be fully applicable where, as in this matter, the respondents, having lodged their notice of appeal and applied for a copy of the proceedings, took no further action thereafter for an inordinate period of time. In the instant matter, the respondents simply sat back believing that they were "home and

dry." Both in the affidavit in reply and oral argument before the Court, the respondents stated fearlessly and unblushingly that they had no obligation to follow up on their outstanding request for a record of proceedings. As a matter of fact, Ms. Lupondo had no difficulty confirming to the Court at the time of the hearing, which was roughly sixty-one months (more than five years) after the request was made, that no follow up had been made on their request to the Registrar. Should we allow them to keep waiting infinitely without any action on their part? We think the law should not be interpreted and applied in a manner that protects parties whose diligence is seriously in question. Their enduring inaction only implies an inexcusable lack of diligence in pursuing the intended appeal warranting the Court to strike out the notice of appeal under Rule 89 (2) of the Rules.

We wish to remark that we are alert that in both **Transcontinental Forwarders Ltd.** (*supra*) and **Mohsin Mohamed Taki Abdallah** (*supra*), it was acknowledged that there was then no specific provision of the law requiring the respondents to take steps to collect the requested copy of the proceedings. That position changed following the amendment of Rule 90 by the Tanzania Court of Appeal (Amendment) Rules, 2017, Government Notice No. 362 of 2017 ("G.N. No. 362 of 2017") by adding a new sub-rule (4) to

require the intending appellant to take such steps either on being informed by the Registrar that the copy is ready for delivery or upon expiry of ninety days after the request for such copy is made. The said new sub-rule stipulated as follows:

> *"(4) Subject to sub-rule (1), the Registrar shall strive to serve a copy of the proceedings is (sic) ready for delivery within 90 days from the date the appellant requested for such copy, and the appellant shall take steps to collect a copy on being informed by the registrar to do so, or after the expiry of 90 days."*

As the intended meaning of the above provision was somewhat lost in the obviously obscure and inelegant manner it was drafted, that sub-rule was once again amended by the Tanzania Court of Appeal (Amendment) Rules, 2019, G.N. No. 344 of 2019 and renumbered as sub-rule (5) of Rule 90. In its current form, it stipulates that:

> *"(5) Subject to the provisions of sub-rule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such copy and the appellant shall take steps to collect a copy upon being informed by the Registrar to do so, or within*

fourteen (14) days after the expiry of the ninety (90) days."

As we stated in **Arthur Kirimi Rimberia** (*supra*), the above provision imposes two obligations: first, it enjoins the Registrar to ensure that a copy of the proceedings is ready for delivery within ninety days after the request is made. Secondly, it requires the intending appellant to collect a copy of the proceedings upon being informed by the Registrar to do so and that if he is not so informed, then he must take such steps within fourteen days following the expiry of the ninety days after the request was made.

We recall that Ms. Lupondo, on the authority of our decision in **Christopher Ole Memantoki** (*supra*), valiantly agitated against the application of the new position retrospectively to knock down the respondents' notice of appeal lodged on 10th December, 2015. In the circumstances of this matter as already demonstrated, the same result would be arrived at on the strength of the principle in **Mohsin Mohamed Taki Abdallah** (*supra*) as the respondents' diligence in the pursuit of their intended appeal is seriously in question.

As we conclude, we wish to borrow the expression by the Court of Appeal of Kenya in **Martin Kabaya v. David Mungania Kiambi** [2015]

eKLR when it confronted an application of a similar nature. The Court observed that:

> *"The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the judiciary bears as backlog."*

While we acknowledge that the Registrar is plainly blameworthy for his inaction in supplying the requested documents, we think the respondents' diligence is seriously in question. We are unprepared to let the respondents claim that they were home and dry. It would be most illogical and injudicious, we think, to accept the respondents' wait infinitely for a copy of the proceedings while they take no action on their part to follow up on their

request to the Registrar. To say the least, this infinite inaction, in our respectful view, offends the ends of justice.

That said and done, we find that the respondents as the intending appellants failed to take essential steps towards instituting their intended appeal. For their default, we grant the application with costs and, in consequence, order, in terms of Rule 89 (2) of the Rules, that their notice of appeal lodged on 10th November, 2015 be and is hereby struck out.

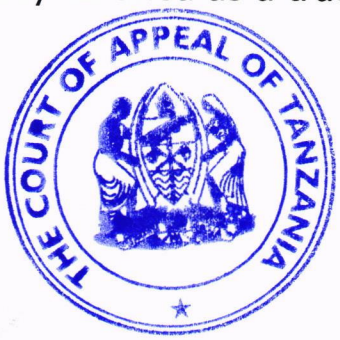
DATED at **DAR ES SALAAM** this 4th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The ruling delivered on this 11th day February, 2021, in the presence of Mr. Aloyce Peter Qamara, learned counsel for the applicants linked - via video conference at Arusha and Ms. Mary Lucas, State Attorney for the respondents, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL