

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CIVIL APPLICATION NO. 342/16 OF 2020

POWER ONE AFRICA LIMITED APPLICANT

VERSUS

ZANZIBAR TELECOM LIMITED RESPONDENT

**(Application to strike out the Notice of Appeal against the Judgment and
Decree of the High Court of Tanzania (Commercial Division)
at Dar es salaam)**

(Mruma, J.)

**dated the 21st day of August, 2018
in
Commercial Case No. 108 of 2016**

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RULING OF THE COURT

24th September, & 8th October 2021

MWANDAMBO, J.A.:

Zanzibar Telecom Limited, the respondent, lost to Power One Africa Limited, the applicant, before the High Court (Commercial Division) in a judgment delivered on 13/12/2018 in Commercial Case No. 108 of 2016. Aggrieved, the respondent lodged a notice of appeal on 11/01/2019 through M/s M.A. Ismail & Co. Advocates who also delivered to the Deputy Registrar of that court a letter requesting to be furnished with a certified copy of the proceedings in terms of rule 90(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The letter was copied

and served on the applicant's advocates on which there is no dispute. The delivery of the letter to the Deputy Registrar and service of a copy thereof was meant to serve one purpose; to suspend the running of the prescribed time for the institution of the intended appeal until such time the Deputy Registrar notified the intended appellant of the availability of the requested copy. Otherwise, the respondent was bound to institute her appeal within 60 days reckoned from 11/01/2019 the date on which her advocates lodged the notice of appeal.

The instant application seeks to strike out the respondent's notice of appeal allegedly for failure to institute an appeal within the prescribed period after the notification by the Deputy Registrar of the availability of the certified copy of proceedings the respondent's advocates had requested through the letter dated 8/01/2019. The application is predicated under rule 89 (2) of the Rules supported by an affidavit of Athuman Ally Omari, who identifies himself as a director of the applicant. What prompted the application is explained in paragraphs 5 and 6 of the affidavit to wit; the Deputy Registrar's letter dated 17/04/2020 notifying the respondent that the certified copies she had requested through her advocates were ready for collection. It is averred in those paragraphs that even though the Deputy Registrar notified the

respondent's advocates to collect the certified copies necessary for the institution of the appeal, the respondent has not instituted its appeal within 60 days despite being supplied with those copies.

The respondent who enjoyed the services of Ms. Raya Said Nassir, learned advocate, has affirmed to an affidavit in reply resisting the application. Para 4 of the affidavit in reply avers that the letter from the Deputy Registrar dated 17/04/2020 was never delivered to her firm. Besides, the deponent avers that the said letter could not have been delivered to her firm as it bears a wrong address of the advocates for the respondent. In her further reply, Ms. Nassir avers that on 17/04/2020 she wrote a letter to the Deputy Registrar reminding him to furnish the respondent's advocates with the certified copy of proceedings despite which, no such certified copy had been furnished as of 14/09/2020 when she deposed to the affidavit in reply. In addition, she avers also in para 5 that her firm made concerted follow-ups with the registry officers of the Commercial Court for the supply of the requested documents to no avail. In a nutshell, the respondent contends that the application was prematurely filed because the Deputy Registrar has not supplied her advocates with the necessary documents for the purpose of the intended appeal.

Mr. Mpaya Kamara, learned advocate represented the applicant to prosecute the application during the hearing. He anchored his submissions on the letter by the Deputy Registrar dated 17/04/2020 annexed to the affidavit as annex 'D'. We heard Mr. Kamara arguing zealously that since his firm received a copy of the Deputy Registrar's letter on 08/06/2020, it was obvious that the respondent too was in receipt of that letter but neglected to collect the requisite documents which were ready from 17/04/2020 for the purpose of the appeal.

Responding to the averments in para 5 of the affidavit in reply, Mr. Kamara argued that the said averments fall short of disclosing the names of Registry Officers who were contacted by the respondent's advocate when following up the requisite documents from the High Court. Placing reliance on the Court's decision in **Phares Wambura and 15 Others v. Tanzania Electric Supply Co. Ltd**, Civil Appeal No. 186 of 2016 (unreported), the learned advocate argued that to provide credence to the averments in para 5 of the affidavit in reply, an affidavit of any of the Registry Officers should have been filed.

Next, Mr. Kamara downplayed the application of the home and dry rule in **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [1997] T.L.R. 328 with the coming into force of rule 90 (5)

of the Rules which, according to him obliges an appellant to remind the Registrar of the High Court to furnish him with the certified copy of proceedings. At any rate, Mr. Kamara argued, there is no indication whatsoever in the respondent's affidavit in reply on the effort she did after becoming aware of the letter dated 17/04/2020 indicating that the requested documents were ready for collection as of the date of that letter.

With the foregoing submissions, the learned advocate implored the Court to find and hold that a case has been made for the grant of the application warranting the striking out the notice of appeal with costs.

Ms. Nassir premised her submissions on paras 4, 5 and 6 of her affidavit in reply. She argued that the letter on which the applicant relies in contending that the respondent has failed to institute the appeal never reached her office and so she could not be held to have failed to collect the certified copies and institute the appeal within the prescribed time. In any event, Mr. Nassir argued that much as the respondent was not required to remind the Deputy Registrar to supply her with the documents she had requested through her advocates, she did so vide letter dated 17/04/2020 which stood un-responded to even though she

made fruitless follow-ups with the registry of the High Court. Relying on **Saleh Abdi Mohamed v. Katibu Mkuu Baraza la Mapinduzi & Another**, Civil Application No. 384/15 of 2018 (unreported), the learned advocate contended that the respondent did more than she was required by reminding the Deputy Registrar having made a written request to him under rule 90(1) of the Rules. Her response to the requirement to obtain affidavits of the particular registry officers she contacted in the process of follow-up of the certified copy of the requested documents, was that the cases relied upon by the applicant were irrelevant to the facts in the instant application. According to her, as no particular officer's name was mentioned in the affidavit in reply, the need for obtaining such affidavit did not arise. she wound up her submissions by urging the Court to dismiss the application.

Mr. Kamara had a short rejoinder reiterating the essence of obtaining affidavits of persons named in an affidavit to back up the respondent's assertions. Mr. Kamara, suggested to us that the respondent should have resorted to rule 56(2) of the Rules by filing a supplementary affidavit.

Having heard the submissions for and against the application and upon examination of the notice of motion, the affidavit and the

respondent's affidavit in reply, the determination of the application depends on the answer to the question whether the Registrar notified the respondent of the availability of the requested documents for appeal purposes. This is more so because it is that letter which prompted the applicant in moving the Court to strike out the notice of appeal.

The respondent contends in the affidavit in reply as well as the oral submissions that she never received such letter. Mr. Kamara did not press much argument on that contention and not surprisingly so because, apart from the averments that his firm received a copy of the letter on 08/06/2020, there is no proof of its delivery on the addressee; the respondent. Indeed, upon our examination of the letter; annex 'D' to the founding affidavit, several disquieting aspects are apparent lending credence to the respondent's arguments. One, the letter makes reference to the respondent's advocates letter Ref. No. CC/3164/016/RN dated 23/01/2019 which is different from annex 'C' to the founding affidavit with Ref. No. CC/3164/016/A1 dated 08/01/2019 which requested the requisite copies. In other words, it is doubtful whether annex 'D' was indeed written in response to annex 'C'.

Two, according to annex 'C', the postal address is indicated to be Post Office Box 1553, Dar es Salaam whereas annex 'D' shows that the

address is Post Office Box No. 729, Dar es Salaam. As shown above, in the absence of proof of physical delivery of the letter to the addressee, the error in the address cannot be said to be inconsequential. Three, annex 'C' was copied to two more advocates apart from Crest Attorneys to wit; Daimu Halfani of Misnak Law Chambers and Seni Malimi of K & M Advocates. Annex D was copied to Crest Attorneys only. Again, this omission, coupled with lack of proof of delivery on the respondent's advocate is not too insignificant to elude our attention and consideration contrary to Mr. Kamara's submission. It is our considered view that taken individually and in their totality, the above features are not insignificant; they go to the root of the respondent's argument that annex 'D' has nothing to do with the respondent's letter dated 08/01/2019 requesting to be supplied with certified copies of proceedings for the purpose of an appeal from Commercial Case No. 108 of 2016.

Ms. Nassir's argument is reinforced by the absence of proof that annex 'D' was delivered on the respondent's advocate. The burden of proving delivery of that letter to the respondent's advocates lied in no other person than who alleges that it was so delivered; the applicant. In **George T. Varghese and Another v. Fedha Fund and 2 others,**

Civil Application No. 10 2008 (unreported), the applicants moved the Court for striking out an appeal on the ground that it was lodged out of time on the 16th January, 2008 instead of 4th December, 2007. Like in the instant application, the applicants' advocate had received a copy of letter from the Registrar, High Court notifying the respondent's advocate of the readiness of the documents for appeal purposes. On that basis, the applicants moved the Court to strike out a notice of appeal under rule 82 of the Tanzania Court of Appeal Rules, 1979, the equivalent of rule 89 (2) of the Rules. It was argued for the respondent that such letter had not been delivered to and/or received by her advocates. The Court was confronted with the issue whether the appeal is time barred. Sustaining the respondent's argument, it held:

"Not, in my considered view, principally because the period of limitation started running when the respondent discovered the registrar's letter in the record of the High Court on the 19th November, 2007. There is no proof that the letter had been served on the respondents before the 19th November, 2007. Nor can the respondents be victimized for inefficiency in the office of the District Registrar whose staff failed to serve the letter dated the 3rd October, 2007 on the respondents and instead left it lying in the file until the respondent's counsel incidentally came across the same while checking on the status of

execution. Counting from the 19th November, 2007, the appeal was timeously filed within sixty days, i.e., on the 16th January, 2008. Under the circumstances the application is lacking in merit."

We shall hold likewise here as there is no proof of delivery of the letter, annex 'D' to the respondent's advocates. We are satisfied that from the facts, the application was filed prematurely as no cause of action had accrued to trigger the invocation of rule 89(2) of the Rules as it were. A similar approach was taken by the Court in **Foreign Board of the Southern Baptist Convention v. Alexander Panomaris** [1984] T.L.R 146 in which it was aptly stated at page 147:

"In our view, the application was filed prematurely, as on the 1st February, 1984, no cause of action existed for any delay on the part of the respondent to institute and prosecute his appeal."

With respect, we are not prepared to go along with Mr. Kamara on his suggestion premised on rule 90(5) of the Rules regarding the respondent's obligation to remind the Registrar, a position which is said to be doing away with the home and dry rule expressed in **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** (supra). We say so mindful of the fact that the applicant's application is not premised on the respondent's failure to take steps to collect

documents within 14 days after the expiry of 90 days from the date of the letter to the Deputy Registrar in terms of rule 90(5) of the Rules. We do not think it will be appropriate for the applicant to change her cause of action in the course of hearing having failed to support her case on the respondent's alleged failure to institute her appeal within the prescribed time.

In any event, we think it is not irrelevant to say a word or two regarding the respondent's conduct in pursuing her appeal. There is no dispute that her advocates wrote to the Registrar on 17/04/2020 reminding him of the supply of the very documents said to have been ready for collection vide annex 'D' on that very date. Admittedly, that letter was way beyond 14 days prescribed by rule 90(5) of the Rules but that rule does not prescribe any sanctions against the respondent. According to the respondent's advocate, the Deputy Registrar has neither responded to that letter nor acted on the reminder by supplying the said documents. Under the circumstances, much as the respondent has not obtained an affidavit or affidavits of any registry officer on whom follow-ups for the documents were made on the strength of the cases cited by Mr. Kamara, the fact that the Deputy Registrar has not acted on the respondent's letter of 17/07/2020 the date on which he is

said to have notified her of their availability, appears to lend credence to the respondent's claim that the said documents have not been supplied as claimed by the applicant's learned advocate.

In the event, we are satisfied that the application lacks merit and is hereby dismissed with costs.

It is so ordered.

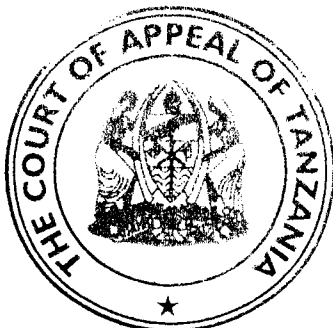
DATED at **DAR ES SALAAM** this 5th day of October, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Ruling delivered on 8th day of October, 2021 in the presence of Mr. Mpaya Kamara, learned counsel for the applicant and Ms. Raya Nassir, learned counsel for the respondent, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL