

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: JUMA, C. J., MMILLA, J.A. And NDIKA, J.A.)

CIVIL APPLICATION NO. 365/16 OF 2017

TIMOTHY DANIEL KILUMILE CO. LTD APPLICANT

VERSUS

**HILLARY PATRICE OTAIGO t/a
NYAKANGA FILLING STATIONRESPONDENT**

**(Appeal from the Ruling and Order of the High Court of Tanzania
(Commercial Division) at Mwanza)**

(Songoro, J.)

Dated the 2nd day of May, 2017

in

Miscellaneous Commercial Case No. 22 of 2015

.....

RULING OF THE COURT

23rd & 25th March, 2020

MMILLA, J.A.:

This application has been brought by Timothy Kilumile Company Limited (the applicant), who enjoys the services of Mr. Daniel Bernard Welwel, learned advocate. It is based on the provisions of Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), and is supported by an affidavit sworn the said Mr. Welwel. The applicant is seeking the Court's

indulgence to strike out the notice of appeal for failure by the respondent, Hillary Patrice Otaigo t/a Nyakanga Filling Station, to take essential steps in the proceedings in terms of Rule 90 (1) (a), (b), (c) and 90 (2) (sic: (3)) of the Rules, on the ground that the latter did not file the intended appeal within a period of 60 days, nor did he serve the applicant with a copy of the letter vide which he applied to be supplied with the essential documents for purposes of appeal.

The brief background facts of this matter are that, in 2014 the applicant instituted Civil Case No. 22 of 2014 against the respondent. He sought to recover an outstanding sum of Tzs. 86,160,360/= being the value of 39,000 litres of petrol supplied to the latter plus interest at a monthly rate of 31 per cent, among other reliefs. Upon service on him, the respondent filed a written statement of defence. When the matter came up for the first pre-trial conference on 16.4.2015, for no apparent reasons, the respondent did not attend. In consequence, the trial High Court made a ruling in terms of which it struck out the respondent's

written statement of defence and entered judgment in favour of the applicant.

The respondent was aggrieved by the ruling of 16.4.2015. He filed Misc. Commercial Application No. 17 of 2015 in which he sought to convince the trial court to set aside that *ex parte* judgment. On 14.8.2015, that application was struck out for being time barred. Undaunted, on 27.10.2015 the respondent filed Misc. Commercial Application No. 22 of 2015 requesting the trial court to extend time within which to file an application to set aside the *ex parte* judgment. Once again, on 2.5.2017 that application was dismissed for want of merit. It was then that on 19.5.2017 he filed a Notice of Appeal intending to contest that decision.

On the date of hearing of this application, Mr. Daniel Welwel, represented the applicant; but the respondent did not appear. Upon production of a summons which showed that the respondent was duly served to appear to contest the application but had deliberately not appeared, Mr. Welwel successfully requested for the matter to be heard *ex parte* in terms of Rule 63 (2) of the Rules. We accommodated his prayer.

In his brief submission, Mr. Welwel stated that after lodging the Notice of Appeal on 19.5.2017, the respondent ought to have filed the appeal within a period of 60 days, save where he could have filed in the High Court and served the applicant, a letter applying to be supplied with the necessary record for appeal purposes. Since he did not serve a copy of that letter on the applicant, he explained, it means he is not entitled to the exclusion of the time which was necessary for lodging the appeal as contemplated by Rule 90 (3) of the Rules. In view of this situation, he went on to submit, the respondent failed to take an essential step in the proceedings, therefore that the applicant is justified to press the Court to strike out the Notice of Appeal in terms of Rule 89 (2) of the Rules.

We have soberly considered Mr. Welwel's submission in this matter. The crucial issue is whether or not the respondent has failed to take essential steps to institute his appeal as is being alleged.

There is no gainsaying that the competence of any civil appeal before the Court depends on the appellant's compliance with the provisions of Rule 90 (1) the Rules. Where the said appeal may be

lodged beyond the period of 60 days expressed under sub-rule (1) of this Rule, the appellant's appeal may still be salvaged where he could have complied with the dictates of sub-rule (3) of that same Rule. Rule 90 (1) and (3) of the Rules provide that:-

"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 quintuplicate;*
- (b) The record of appeal in quintuplicate;*
- (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) N.A.

(3) 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."

It is essential to state that where the appellant fails to take essential steps to institute his appeal, then in terms of Rule 89 (2) of the Rules the Court has power to strike out the Notice of Appeal.

Rule 89 (2) of the Rules provides that:-

"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 essential step in the proceedings has not been taken within the prescribed time."

In the circumstances of the present case, it is plain and certain that after lodging the Notice of Appeal on 19.5.2017, the respondent ought to have filed the appeal within a period of 60

days, but he did not. Similarly, the fact that the respondent did not serve the applicant with a copy of the letter applying to be supplied with the necessary record for appeal purposes, cements the argument of Mr. Welwel that the respondent is not entitled to seek shelter provided under Rule 90 (3) of the Rules.

The Court encountered a situation like this facing us here in the case of **Francis Itengeja v. Kampuni ya Kusindika Mbegu za Mafuta Ltd. [1997]** T.L.R. 148. In that case, the respondent did not serve on the applicant both, a copy of the notice of appeal and also a copy of the letter to the Registrar vide which he applied for necessary documents. After considering such a situation, the Court stated that:-

"The net result, therefore, is that the respondent has failed to prove the allegation that the two documents i.e. a copy of the notice of appeal and a copy of the letter to the Registrar applying for the proceedings of the case, were duly served on the applicant or his counsel. Since there has been no application for extension of time to serve these documents on the applicant, the

present application must succeed. As Mr. Kambamwene rightly pointed out, the respondent company cannot in terms of the exception under Rule 83 (1) of the Rules (now Rule 90 (1) of the Rules) claim protection against the time running against it because the applicant was not duly served with a copy of the letter to the Registrar applying for court proceedings in the case. That is to say, the time for lodging the appeal has long elapsed, and there is nothing to salvage that situation. . .”

After being satisfied that the respondent did not serve copies of the Notice of Appeal and a letter applying for necessary documents on the applicant, the Court struck out the notice of appeal - See also the cases of **Director, Mukheshi Global Estate Ltd. v. Hamisi Njama**, Civil Application No. 172 of 2000 and **Nderingo Elisante Ngowi v. Josephine Joseph Meshack and 2 Others**, Civil Application No. 35 of 2014 (both unreported).

In the circumstances of the present case, we agree with Mr. Welwel that since he did not file his appeal within 60 days, and because he did not serve a copy of the letter applying for records,

the respondent failed to take essential steps towards lodging an appeal to this Court. Consequently, we are constrained to, and we hereby strike out the Notice of Appeal which the respondent lodged on 19th May, 2017. The applicant is awarded costs in this application.

Order accordingly.

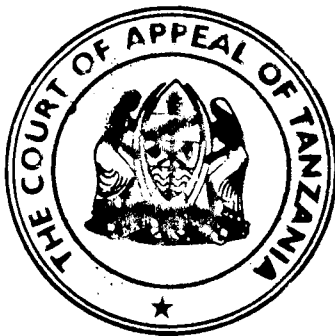
DATED at **MWANZA** this 24th day of March, 2020.

I. H. JUMA
CHIEF JUSTICE

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The ruling delivered this 25th day of March, 2020 in the presence of Mr. Timothy Daniel Kilumile, Director of the Applicant and Mr. Joseph Patrice Otaigo, brother of the Hillary Patrice Otaigo for the respondent is hereby certified as a true copy of the original.



S. J. Kainda
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL