

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MASSATI, J.A. And MUGASHA, J.A)

CIVIL APPLICATION NO. 58 OF 2015

THE REGISTERED TRUSTEES OF KAGERA

FARMERS' TRUST FUND APPLICANTS

VERSUS

CRDB BANK LIMITED..... RESPONDENT

(Application to strike out Notice of Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

dated the 28th day of October, 2009

in

Civil Case No. 257 of 2003

.....

RULING OF THE COURT

16th May & 1st September, 2016

MJASIRI, J.A.:

This is an application to strike out a Notice of Appeal brought under Rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Court Rules). It is made on the following grounds:-

- (i) That the respondent has not taken essential steps to prosecute the appeal.*
- (ii) That if the respondent has taken any step(s), the same do not show any seriousness on his part and amount to the abuse of the Court processes.*

(iii) *That costs be provided for.*

The application is supported by the affidavit of Mr. Mutabaazi Lugaziya, learned advocate for the applicant. Rule 89 (2) provides that:-

*"(2) subject to the provisions of sub rule (1), a respondent or other person whom a notice of appeal has been served may at any time, either before or after the institution of appeal, as the case may be, on the ground that **no appeal lies, or that some essential steps in the proceedings has not been taken within the prescribed time.**"*

[Emphasis provided].

According to Rule 89 (2) the application can be brought in Court on two major grounds. **Firstly**, it can be brought on a question of law, that is when no appeal lies. **Secondly**, when there is failure to take essential steps.

At the hearing of the application, the applicant was represented by Mr. Mutabaazi Lugaziya, learned advocate while the respondent had the services of Mr. Deogratus Lyimo, learned advocate.

When the application was called on for hearing, Mr. Lugaziya and Mr. Lyimo reached a consensus that hearing of the application should proceed by way of written submissions. This request was made after the advocate

for the applicant informed the Court that he had been ill and did not have time to prepare for the hearing of the application. Both counsel filed their written submissions accordingly, in compliance with the Court order.

Mr. Lugaziya in his submissions challenged the validity of Mr. John T. Kalinjuna's practicing certificate hence the validity of the affidavit in reply filed by the respondent in respect of this application, which was attested by him.

He also argued in the alternative that no essential steps were taken to prosecute the appeal. Mr. Lugaziya conceded that the respondent on different occasions sent letters to the Registrar reminding him of his request to be supplied with appropriate documents which were necessary for filing an appeal. Mr. Lugaziya complained that there was a lack of seriousness on the part of the counsel for the respondent. The respondent waited for a whole year for the necessary exhibits to be endorsed. He relied on the case of **Tanzania Equipment Limited v Devram P. Valambia** (1993) TLR 91.

According to him the duty is upon the litigant to make a follow up. He made reference to the case of **Mohsin Mohamed Taki Abdallah v Tariq**

Mirza, Civil Application No. 100 of 1999 CAT (unreported). He asked the Court to strike out the notice of appeal.

Mr. Lyimo on his part, submitted that the necessary steps were taken by the respondent to acquire the necessary documents which were needed to file an appeal. He was informed by the Registrar that the documents were ready for collection. After paying the necessary fees and collecting the documents, it was discovered by the respondent that the exhibits supplied were not certified and endorsed by the trial Judge. A copy of a ruling on a preliminary hearing was not supplied and a copy of the certificate of delay also had errors which had to be corrected. On the whole, efforts were made by the respondent to obtain the necessary documents. Letters to the Registrar have been attached to the respondent's affidavit. He made reference to **Transcontinental Forwarders Limited v Tanganyika Motors Limited** (1997) TLR 328 and **Hassan Jambia** by (his legal personal representative) **Shafii Ali Nuru v TANESCO**, Civil Application No. 78 of 2013, CAT (unreported). He contended that the application has no basis and should be dismissed.

On the complaint on the affidavit in reply, that the affidavit was attested by Mr. John T. Kalinjuna, advocate who did not have a practicing

certificate at the time of attesting the respondent's affidavit in reply, Mr. Lyimo contended that Mr. Kalinjuna advocate, has been appearing in court, and he had no reason to suspect that his practicing certificate had expired. He also stated that the publication of names of the advocates whose certificates had expired was not very accurate as it sometimes contained errors.

In his rejoinder, Mr. Lugaziya reiterated his argument that the respondent's affidavit in reply was not properly before the Court.

On the failure to take essential steps, Mr. Lugaziya submitted that it is not enough to lodge an application to be supplied with records, and even if there is a follow-up, it must be seen that the follow up constitutes serious efforts.

We would first address the complaint that the affidavit in reply was not properly filed before the court, as the advocate who attested the said affidavit did not have a valid practicing certificate. This complaint need not detain us. Our short answer to that, is that this allegation against the advocate in question was not made under oath, it is a mere statement/argument from the Bar, the Court is therefore not in a position to act on that.

In relation to the failure to take essential steps, having carefully reviewed the parties' affidavits and the submissions filed by counsel, we are of the considered view that some essential steps were taken by the respondent in pursuing their appeal. Paragraphs 7 to 14 of Mr. Wilbrod Mwakipesile, the legal services manager of the respondent, clearly outlines the steps which were being taken by the respondent in order to file an appeal in Court.

In the instant case it is not disputed that the respondent was furnished with documents which were problematic even though the applicant is of the view that the problems were minor. In **Transcontinental Forwarders Limited** (supra) it was stated thus:-

"... failure to take essential steps to institute the appeal could either be procedural or evidential. An example could include omission to apply for leave to appeal or a certificate on appoint of law, when one was required; or failure to collect copies of proceedings, judgment or order necessary for the institution of an appeal or failure to lodge an appeal within the prescribed time, where the documents are ready."

In the instant case the inordinate delay in furnishing the relevant documents to the respondent could not be blamed entirely on the respondent.

See – for instance **International Commercial Bank (T) Limited v Agil Islam and Two Others**; Civil Application No. 175 of 2008 CAT (unreported) and **Foreign Mission Board of the Southern Baptist Convention v Alexander Panomaritis** (1984) TLR 146 and **Hassan Jambia** (by Legal Personal Representative) **Shafii Ali Nuru**.

As this Court has clearly stated in **Transcontinental Forwarders Limited v Tanganyika Motor Limited**, once the respondent has shown that he had applied to the Registrar for a copy of proceedings sought to be appealed against, and he had not been furnished with any, he had complied with the Rules. It is evident from the correspondences between the respondent and the Registrar of the High Court that not all documents were furnished to the respondent and some of the documents supplied to him were problematic.

For the foregoing reasons, we find no merit in the application.

In **Foreign Mission Board of the Southern Baptist Convention v Alexander Panomaritis** (supra) it was stated thus:-

"Since the inordinate delay in furnishing a certified copy of the proceedings of the High Court cannot be blamed on the respondent no cause of action existed on his part to bar him from instituting and prosecuting his appeal."

In the result the application is hereby dismissed with costs to the respondent. Order accordingly.

DATED at **DAR ES SALAAM** this 26th day of August, 2016.

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL