

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

**(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And LEVIRA, J.A.)**

**CIVIL APPLICATION NO. 85/08 OF 2017**

**JOHN NYAKIMWI ..... APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF**

**CATHOLIC DIOCESE OF MUSOMA ..... RESPONDENT**

**(Application from the decision of the High Court of Tanzania  
at Mwanza)**

**(Mruma, J.)**

**dated the 7<sup>th</sup> day of January, 2014**

**in**

**Land Case Appeal No. 53 of 2010**

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**RULING OF THE COURT**

27<sup>th</sup> November & 3<sup>rd</sup> December, 2019

**MWANDAMBO, J.A.:**

John Nyakimwi, the applicant has by way of notice of motion moved the Court under rule 89(2) and 91(a) of the Court of Appeal Rules, 2009 (the Rules). It is sought to strike out a notice of appeal from the decision of the High Court sitting at Mwanza in Land Appeal No. 53 of 2010 made on 7<sup>th</sup> February, 2014. The application is supported by the applicant's own affidavit. The applicant who acts through Mr. Anthony Nasimire, learned

Advocate resists the application in the affidavit in reply as well as the written and oral submission in reply.

Briefly, the respondent lost to the applicant in Land Appeal No.... of 2014 over a land dispute which had originating in the District Land and Housing Tribunal of Tarime. The decision dismissing the applicant's appeal before the High Court was delivered on 7<sup>th</sup> February 2014. Aggrieved, on the same date, the respondent lodged a notice of appeal to this Court and had a copy thereof served on the applicant on 28<sup>th</sup> February 2014 a period of twenty one (21) days from the date of lodging the notice. As the impugned decision was appealable with the leave of the High Court, the respondent successfully applied for leave to appeal the High Court's decision granting leave to appeal was delivered on 17<sup>th</sup> August 2015. Earlier on, the respondent had applied for copies of judgment and decree for the purpose of the appeal. Despite the High Court granting the respondent's application for leave to appeal, it did not institute the appeal and that prompted the applicant to apply for the striking out the notice of appeal under the aforementioned provisions. Essentially, the applicant contends that the respondent has not taken some essential steps towards

institution of the appeal and prays for the striking out of the notice of appeal.

The respondent has filed an affidavit in reply deponed to by its advocate disputing the applicant's averment that it has failed to take essential steps towards the institution of its appeal. In particular, the respondent contends that it has not instituted its appeal because the Registrar of the High Court has not yet availed to it certified copies of judgment, decree and proceedings for the purpose of the intended appeal. The respondent further avers that it has not lost interest in processing the intended appeal but for the failure by the High Court to supply the requisite papers. Otherwise, it contends that the applicant has not disclosed grounds upon which his application can be sustained.

At the hearing of the application, the applicant appeared in person fending for himself. Mr. Anthony Nasimire, learned Advocate appeared for the respondent. We heard both the applicant and the learned Advocate orally in addition to their written submissions for and against filed earlier on in pursuance of rule 106(1) and (7) of the Rules.

As seen above, notice of applicant has predicated his application under rule 89(2) and 91(a) of the Rules. The notice of motion raises a number of grounds. However, it became apparent during the hearing that the determination of the application turns on the alleged failure to take essential steps in the proceedings within the prescribed time. We directed the applicant to address us on that sole ground followed by a reply from the learned advocate.

The gravamen of the applicant's submission is that whereas the respondent lodged a notice of appeal on 7<sup>th</sup> February 2014, it served a copy of it to him on 28<sup>th</sup> February 2014, a period of 21 days contrary the dictates of rule 84 (1) of the Rules. That rule mandates the appellant to serve a copy of notice of appeal to a respondent(s) within 14 days from the date of filing. It was thus the applicant's contention that failure to serve a copy of the notice of appeal to him within the prescribed time constituted failure to take an essential step which entitles him to apply for the striking out the said notice of appeal under rule 89(2) of the Rules. He accordingly urged us to hold that since the respondent has admitted that the copy of the notice of appeal was served to him belatedly, the application should be granted as prayed in the notice of motion.

The learned Advocate's written submissions focused on the failure by the High Court to supply to the respondent requisite copies of proceedings, judgment and decree after obtaining leave to appeal. It is on that basis the learned advocate was insistent that in essence the applicant has not disclosed grounds for the striking out of the notice of appeal. Responding to the submission predicated on the delayed service of the copy of the copy of the notice of appeal, Mr. Nasimire had two points. One, whilst admitting that that the copy of the notice of appeal has served belatedly, he contended that did not amount to a failure to take an essential step warranting the striking out of a notice of appeal. Two, the learned Advocate contended that the application has been brought prematurely. According to him, such an application ought to leave awaited the institution of the appeal and not before notwithstanding the language used in rule 89(2) of the Rules. Convinced that the application was baseless, he urged us to dismiss it.

The applicant could not sit back. He submitted in rejoinder that service of a copy of a notice of appeal within the prescribed time is an essential step, for otherwise, rule 84(1) of the rules will be rendered impotent, he urged.

Having examined the written submissions as well as the oral arguments for and against the application, it is plain that its determination turns on a very narrow compass that is, whether failure to serve a copy of a notice of appeal is fatal. As seen above, there is no dispute that the respondent served the applicant with a copy of the notice of appeal on 28<sup>th</sup> February 2014, a period of 21 days from the date the same was lodged in court. Mr. Nasimire would have us hold that the delayed service was not fatal notwithstanding the dictates of rule 84(1) of the Rules. That rule stipulates:-

*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.*

Luckily, this is not the first time the issue involving failure to serve a copy of notice of appeal is coming before this Court. It is noteworthy that rule 84(1) of the Rules is identical to rule 77(1) of the Tanzania Court of Appeal Rules, 1979 (revoked and replaced by the current Rules). This Court considered the effect of non-compliance with rule 77(1) of the

revoked Rules in **D.P. Valambhia vs. Transport Equipment Ltd** [1992] TLR 246 and held that failure to serve a copy of the notice of appeal is a failure to take an essential step in the proceedings as required by rule 77(1) of the said Rules. The court became more in current in **Salim Sundeiji and Capital Development Authority v. Sadrudin Sharif Jamal** [1993] TLR 224 when is held that non-compliance with rule 77 (1) and 83(2) of the 1979 rules nullifies a notice of appeal of an appeal. The Court stated:

*"There is a long and unbroken chain of authorities by this Court that non-compliance with the provisions of r 77(1) and r 83(2) of the Court of Appeal Rules nullifies a Notice of Appeal or an appeal. See the decisions of this Court in D P Valambhia v Transport Equipment Ltd (1), Mohamed Raza Azizi and Another v Akberal Habib Hassanal (2) and C Grace Frank Ngowi v Dr Fank Israel Ngowi (3) to mention but only a few of the decisions.*

*In the event the Notice of Appeal is clearly incompetent as some essential step has not been taken and/or has not been taken within the prescribed time. The Notice of Appeal is accordingly struck out.*  
[at page 227]

See also: **Francis Itengeja vs. Kampuni ya Kusindika Mbegu za Mafuta Ltd** [1997] TLR 148

From the above, it became a surprise to us for Mr. Nasimire arguing as he did, that non-compliance with rule 84(1) of the Rules does not amount to failure to take an essential step in the proceedings in the furtherance of an appeal.

The position being so settled as expressed in the cases cited above, we endorse the applicant's argument that the respondent's delayed service of the copy of the notice of appeal amounted to failure to take an essential step in the proceedings which must be visited by the consequences prescribed under rule 89(2) of the Rules to which we now turn.

Mr. Nasirime's argument regarding the timing of striking of a notice of appeal is, with respect attractive but legally untenable. This is because law is settled that service of a copy of a notice of appeal is an essential step in the proceedings non-compliance with it entitles the other party (in this case the applicant) to apply for striking out a notice of appeal under rule 89(2) of the Rules. That rule permits the filing of an application for striking out a notice of appeal either before or after the institution of the appeal. That Rule stipulates:

*89.-(1) An application to withdraw a Notice of*



*Intention to appeal may be made any time before instituting the appeal and a copy of the Notice shall be served upon all parties on whom the Notice was served.*

*(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 or the 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 or has not been taken within the prescribed time.*

Indeed, in all the cases cited above, the applicants had moved the Court for striking out notices of appeal under rule 82(1) of the old rule the equivalent of rule 89(1) of the Rules before the institution of the appeals. Unlike Mr. Nasimire we are unable to agree with him that the applicant should have awaited the institution of the appeal notwithstanding the patent failure to take the essential step in the proceedings.

In the event, we find merit in the application and grant it by striking out the notice of appeal lodged on 7<sup>th</sup> February 2014 as we hereby do. The applicant shall have his costs of the application.

Order accordingly.

**DATED at MWANZA** this 2<sup>nd</sup> day of December, 2019.

S.E.A. MUGASHA  
**JUSTICE OF APPEAL**

L.J.S. MWANDAMBO  
**JUSTICE OF APPEAL**

M. C LEVIRA  
**JUSTICE OF APPEAL**

This Ruling delivered on this 3<sup>rd</sup> day of December, 2019 in the presence of the applicant in person and Mr. Anthony Nasimire, learned, counsel for the respondent, is hereby certified as a true copy of the original.



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