IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 464/01 OF 2018

1. GEORGIO ANAGNOSTOU
2. OURANIA ANAGNOSTOU .....APPLICANTS

VERSUS

1. EMMANUEL MARANGAKIS
2. JOSEPH ANTHONY GONSALVES .....RESPONDENTS

(Application for striking out a notice of appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kitusi, J.)

dated the 1st day of February, 2018

in

Civil Case No. 225 of 2013

RULING OF THE COURT

14th May & 18th June, 2019

MWANDAMBO, J.A.:

The applicants are, by way of Notice of Motion, moving the Court under rules 48 (1) (a) and 89 (2) of the Tanzania Court of Appeal Rules, 2009, GN No 368 of 2009 as amended by The Tanzania Court of Appeal Rules(Amendments) Rules, GN. No. 362 of 2017 (henceforth to be referred to as the Rules) for an order striking out the respondents' notice of appeal from the decision of the High Court, Dar es Salaam District Registry made

on 1st February, 2018 in Civil Case No. 225 of 2013 for alleged failure to take essential steps in the intended appeal. The application is supported by the affidavit of Mr. Emmanuel Safari, learned Advocate who represents the applicants in this Court. The respondents resist the application against which they filed an affidavit in reply deponed to by Mr. James Kabakama, learned Advocate who had represented them in the High Court.

The applicants' application has been prompted by facts and circumstances which are more or less straightforward as will become apparent shortly. The applicants successfully sued four defendants in the High Court in Civil Case No. 225 of 2013 for several reliefs all of which surrounding over a bequeath of a disputed property on Plot No. 648 Upanga area in Dar es Salaam. The High Court delivered its judgment on 1st February 2018 in favour of the applicants and on 27th February 2018, the respondents who were the 1st and 4th defendants respectively, lodged a notice of appeal against the High Court judgment. Having lodged the notice of appeal, the respondents had sixty days within which to lodge their appeal unless they had applied for copies of proceedings, judgment and decree from the Registrar of the Court and had a copy of the letter applying for the said copies served on the applicants. Failure to do so

would amount to failure to take essential steps in the appeal entitling the other respondents in the intended appeal served with copies of the notice of appeal to apply for an order striking out the notice of appeal under rule 89(2) of the Rules. This is what the applicants have done in the instant application. The Notice of Motion cites two grounds prompting the filing of the application. One, the respondents have not taken essential steps in the appeal and two, the intended appeal has been overtaken by the events.

The applicants' grounds in the Notice of Motion are amplified in their affidavit in which they contend that the respondents have not taken essential steps in the intended appeal by their failure to institute their appeal for a period of eight months from the date of the decree to the date the application was filed. It is their contention that failure to institute the appeal within the prescribed time amounted to loss of interest in pursuing the intended appeal attracting the invocation of rule 89(2) of the Rules for an order striking out the notice of appeal. Regarding the second ground, the applicants contend that the intended appeal has been overtaken by the events because the decree has been fully executed since

the property forming the basis of the intended appeal has been transmitted to the Administrator General who was the 2nd defendant in the High Court.

Resisting the application, the respondents dispute that they have failed to take essential steps in the appeal. According to para 4 of the affidavit in reply, the respondents aver that their Advocate wrote a letter to the Deputy Registrar of the High Court applying for copies of proceedings, judgment and decree on 8th February, 2018 and a copy served on the applicants' erstwhile Advocates annexed to the affidavit marked **EM2**. As to the contention that the decree has been fully executed, it is the respondents' averment that the same is not correct by reason of the existence of proceedings in the High Court as evidenced by copies of the chamber summons and affidavit in Miscellaneous Civil Application No. 251 of 2018 annexed to the affidavit in reply marked **EM3**. On account of the foregoing, the respondents have prayed for the dismissal of the application.

In terms of rule 106 (1) and (2) of the Rules, Messrs. Emmanuel Safari and James Kabakama, learned Advocates filed their written submissions for the applicants and respondents respectively. However, Mr. Kabakama could not stay on to the end for, he prayed and was allowed to

withdraw from the conduct of the application for the respondents on the date the application was called for hearing. We acceded to a prayer for an adjournment at the instance of the 1st respondent to allow for time to the respondents to engage another advocate to proceed with hearing on a subsequent date. Nevertheless, at the resumed hearing, the respondents had not yet managed to engage another advocate to represent them. As the respondents had no legal representation, they prayed through the 1st respondent to adopt the written submissions already filed by their former Advocate without any oral arguments, to which Mr. Safari had no objection, and so the determination of this application will be made on the basis of the Notice of Motion, affidavit in support, affidavit in reply and the written submissions. We were minded to take that course of action on the authority of rule 106(18) of the Rules.

Before we consider the submissions on record, we wish to dispose one issue at this stage. As indicated earlier, the Notice of Motion is predicated on two grounds which were amplified in the supporting affidavit as well as the written submissions. To our surprise, the submissions by the learned Advocate for the applicants incorporate a third ground to the effect that the respondents have not applied for leave to appeal. That ground

does not feature in the Notice of Motion neither is it reflected in the affidavit in support of the application. We have anxiously considered this aspect and in the end, we are of the firm position that the additional ground raised in the submission without the Court's leave was, but irregular and at best a surprise on the respondents. Accordingly, we are constrained to decline to consider that ground because it was not part of the grounds the applicants intended to pursue in the application. In doing so, we find solace in the passage extracted from **Haystead vs. Commissioner of Taxation** [1920] A.C 155 at page 166 whereby Lord Shaw observed:

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present so as to what should be a proper apprehension, by the Court of the legal result... **If this were permitted, litigation would have no end except when legal ingenuity is exhausted"** (emphasis added).*

We quoted with approval the above passage in **Blue Line Enterprises Limited vs. East African Development Bank,** Civil Application No. 21 of 2012 (unreported). Although the instant application

does not involve bringing a fresh litigation based on discovery of new views, we think the principle is relevant to underscore the point that litigants should not be allowed to change their goal posts as new views are discovered in the course of the litigation. We may go further and add that permitting the applicants' Advocates ingenuity to prevail over the rules regulating the procedure before this Court does not accord with the smooth conduct of litigation depriving the other party from pursuing his case free from surprises. Otherwise, we wonder why the applicants did not see it necessary to seek leave to amend the Notice of Motion had they considered the additional ground to be necessary in the application. With the above, we will now turn our attention to the grounds stated in the notice of motion.

The gravamen of the submissions by Mr. Safari is that in so far as the respondents did not request for copies of proceedings, judgment and decree from the Deputy Registrar of the High Court as required of them under rule 91 (1) of the Rules, they ought to have lodged their appeal within 60 days from the date of the decision of the High Court. The learned Advocate submitted that in the absence of the said letter, the respondents cannot rely on rule 90 (2) of the Rules which empowers the Registrar of

the High Court to exclude the days necessary for the purpose of preparing the said documents. Whilst acknowledging that following the judgment of the High Court the respondents wrote a letter to the Deputy Registrar, High Court and a copy served on the applicants' Advocates, Mr. Safari argued that the said letter was not in connection with Civil Case No. 225 of 2013 from which the decree sought to be appealed arose rather Civil Case No. 225 of 2014. That being the case, the learned Advocate argues, the respondents must be taken to have failed to take an essential step in the appeal with the attendant consequences namely; striking out their notice of appeal under rule 89(2) of the Rules. To bolster his argument, the learned Advocate referred us to one of our decisions in **Murtazir Mohamed Raza Dharani vs Devendra Babubhai Patel**, Civil Application No. 21/02 of 2016 (unreported) in which a notice of appeal was struck out upon the Court being satisfied that a copy of the letter to the Registrar of the High Court applying for copies of proceedings, judgment and decree had not been served on the respondent in the intended appeal.

The learned Advocate did not end there. He submitted in the alternative that if there was any letter to the Registrar in terms of rule 91 (1) of the Rules, still, that would not be of any avail to the respondents

because writing of the letter and copying it to the other party did not absolve the respondents from following up the said copies thirteen days from the expiry of 90 days from the date they made a request to the Registrar as required by rule 90 (4) of the Rules. To this end, the learned Advocate invited us to find the respondent were not diligent in pursuing the intended appeal attracting an order striking out the notice of appeal as prayed in the Notice of Motion.

The respondents' reply is anchored on para 3 of the affidavit in reply in which the deponent avers that the essential steps were taken in the appeal by lodging a notice of appeal and requesting the requisite copies for the purposes of the intended appeal. It is the learned Advocate's submission that in so far as the respondents complied with rule 90 (2) of the Rules by applying for copies of proceedings, judgment and decree vide letter marked annex **EM2** to the affidavit in reply followed by follow-ups with the Registrar, High Court in making sure that the appeal is lodged they cannot be taken to have failed to take essential steps in the intended appeal for, the said Registrar has not supplied to them the requisite documents requested for the purpose of the intended appeal. The

learned Advocate did not address the Court on the alternative argument canvassed by the applicant's Advocate hinged on rule 90 (4) of the Rules.

From the submissions by the learned Advocates there is no dispute regarding the consequences befalling on a party who fails to take essential steps in an intended appeal in pursuance of rule 89 (2) of the Rules. The said rule stipulates:-

> *"(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".*

According to that rule, a party who wishes to benefit from exemption from lodging his appeal within sixty days from the date of the decision sought to be appealed must have complied with rule 90 (2) of the Rules. That rule imposes several obligations on the intended appellant that is to say; application by way of a letter to the Registrar of the High Court for copies of proceedings, judgment and decree within thirty days from the

date of the decision and such letter must have been copied and delivered to the respondent within 30 days.

The crux of the application is that the respondent did not make any application to the Registrar, High Court within thirty days from the date of the decision sought to be appealed and a copy served on the applicants and so they are not entitled to the exemption from lodging their appeal within sixty days from the date of the impugned decision.

As seen earlier, the affidavit in reply and the respondents' written submissions are emphatic that the letter was indeed written and a copy served on the applicants' former Advocates. Be it as it may, the burden on the respondents' contention lies in the variance between the case number shown in the said letter as Civil Case No. 225 of 2014 and the number of the case whose judgment is sought to be challenged in the intended appeal which is Civil Case No. 225 of 2013. Mr. Safari has taken a strong stance arguing that the said letter had no connection with the decision sought to be appealed against and so the respondents must be taken to have failed to take essential steps in the intended appeal.

On our part, upon an objective examination of the facts in the application we are inclined to take a different view. This is so because, apart from the variance in the year shown in annex EM2, the other particulars relate to Civil Case No. 225 of 2013 whose decision was delivered on 1st February 2018 and which is sought to be challenged vide notice of appeal (annex PA4 to the affidavit) lodged on 27th February 2018. In our respectful view, reference to Civil Case No. 225 of 2014 instead of Civil Case No. 225 of 2013 appears to us to be a mere slip of the pen because as observed earlier, the particulars in the said letter all relate to Civil Case No. 225 of 2013. It has not been suggested that the parties were engaged in any other suit than Civil Case No. 225 of 2013 before the same Court and the same judge delivering his decision on the same date. A different suggestion appears to us to be farfetched and so, we are constrained to disagree with the applicants' contention that the respondents failed to take essential steps in the intended appeal by the alleged failure to apply for copies of judgment, decree and proceedings within the prescribed time warranting us making an order striking out the notice of appeal under rule 89 (2) of the Rules. Having so said, it follows that the decision cited to us by Mr. Safari has no relevance to the facts of this application and so we are, with respect, entitled to decline following it.

Our determination of the issue as shown above would ordinarily have been sufficient. However, the applicant would have us find and hold that the respondents did not comply with rule 90(4) of the Rules and so the notice of appeal should be struck out in any event. According to the learned Advocate, the respondents ought to have followed up the requested documents from the Registrar thirteen days after the expiry of 90 days and since they did not do so, they should face the consequences prescribed under rule 89(2) of the Rules. To appreciate the essence of the learned Advocate's submissions, we take the liberty to reproduce rule 90(4) of the Rules quoted at page 7 of the learned Advocate's submissions as under:

> *"subject to sub-rule* ***(I), the Registrar shall ensure a copy of the proceedings*** *is 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* ***within thirteen days*** *after the expiry of 90 days". (emphasis added).*

Our reading of rule 90 (4) of the Rules added by GN No. 362 of 2017 appearing in supplement No.37 Vol. 98 dated 22nd September 2017 reveals the following:

> *"subject to sub-rule (1), the Registrar shall strive to serve (sic!) a copy of proceedings is 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".*** *(emphasis added).*

It will be clear from the foregoing that there is a variance between the two versions on material respects. The first is that the word *ensure* appearing in the version by the learned Advocate does not feature in GN No. 362 of 2017. Secondly, and perhaps the most serious one is that the phrase ***within thirteen days*** does not feature in GN No. 362 of 2017 and yet that is the backbone of the applicants' invitation for the striking out of the respondents' notice of appeal. We are surprised and indeed deeply disappointed by the learned Advocate's audacity in misleading the Court by quoting a legal provision with additional words and phrases which do not exist in the official version of the law. We would stop here on this hoping that our message has been understood well by the learned Advocate.

Reverting to the issue on the basis of sub- rule 4 of rule 90 reproduced above, we note that on its face, it introduces a certain level of

accountability to both the Registrar to whom an application for the supply of proceedings, judgment and decree was made, and the appellant as well. According to that rule, where a request for the necessary documents is made in pursuance of rule 90(2) of the Rules, the Registrar has an obligation to strive to supply the copies requested within 90 days and where this cannot be achieved, the intended appellant has to do a follow up with the Registrar after the expiry of ninety days. The applicants' contention here is that the respondents did not do any follow up with the Registrar of the High Court within thirteen days upon expiry of ninety days from the date a letter of application was written and sent to the Registrar that is to say; 8th February 2018. However, the applicants have not suggested that the Registrar had at any time within 90 days from the date of the respondents' letter informed the respondents that the requested copies were ready for collection. That means the issue for our determination turns on a narrow compass namely; whether the respondents made any steps to collect such copies after the expiry of 90 days. The respondents' Advocates has simply contended that he made follow- ups but was too economic with particulars of such follow-ups.

We are alive to the fact that sub-rule 90(4) was introduced with a good purpose, that is to say; ensuring that there is some accountability on

the Registrar on the one hand to strive to see to it that the copies requested are ready within 90 days and inform the appellant accordingly. On the other hand, that sub-rule introduces an accountability on the appellant to collect the copies after the expiry of 90 days where the Registrar fails to inform him that the same are ready for collection. To our understanding, that seems to suggest that the appellant has to approach the Registrar for collection of the copies regardless whether the same are ready or not after the expiry of 90 days. However, the sub-rule does not fix any time limit within which the appellant will be required to collect the copies after the expiry of 90 days. Despite the absence of specific time limit, it is expected that it must be within reasonable time but again, the sub-rule does not prescribe any consequences flowing from the failure to approach the Registrar for collection of the copies after the expiry of 90 days where the Registrar does not inform the appellant to that effect.

In our respectful view, much as the respondents have simply stated that they made follow-ups with the Registrar for supply of the copies, in the absence of any proof that the copies were indeed ready for collection after the expiry of 90 days, we are unable to uphold Mr. Safari's argument that the respondents have failed to take essential steps in the appeal

within the meaning of rule 89(2) of the Rules. We say so being alive to the fact that apart from the sub-rule requiring the appellant to collect the copies after the expiry of 90 days, no consequences have been prescribed where, as in the instant application the Registrar fails to supply such copies for the reason that the same are not ready. In the upshot we see no merit in this ground and we reject it and that takes us to the determination of the second ground in the Notice of Motion.

It is contended by the applicants that the intended appeal has been overtaken by the events and so the notice of appeal should be struck out under rule 89(2) of the Rules. In support of that contention the applicants stated in the affidavit that the decree sought to be appealed against has been fully executed and so the appeal will not be of any avail to the respondents. The learned Advocate burnt a considerable amount of calories in his bid to move the Court to uphold the second ground.

We think we should not be detained on this ground simply because we are not dealing with an application for stay of execution in which case the execution of the decree would have been a relevant factor. We are dealing with an application for striking out a notice of appeal under rule 89(2) of the Rules in which the only ground the applicant is required to

establish is none other than that the respondents have not taken essential steps in the intended appeal. It has not been suggested that a complete execution of the decree sought to be appealed against before the appeal is determined constitutes failure to take essential steps in the appeal warranting the filing of an application for striking out a notice of appeal. Indeed the learned Advocate did not cite to us any authority in that regard and so, without further ado, that ground is patently misconceived and is hereby rejected.

In the event and for the foregoing reasons, the application is found to be devoid of merit and the same stands dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 23rd day of May 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL