

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

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

CIVIL APPLICATION NO. 131/02/ OF 2018

**1. ALLIANCE INSURANCE CORPORATION LTD. } APPLICANTS
2. ALEXANDER FORBES (T) LIMITED }**

VERSUS

**RICHARD NESTORY SHAYO RESPONDENT
(Appeal from the judgment and decree of the High Court of Tanzania
at Arusha)**

(Dr. Apiyo, J.)

**dated 11th day of July, 2017
in
Civil Appeal No. 52 of 2016**

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RULING OF THE COURT

12th & 19th August, 2020

MMILLA, J.A.:

The applicants, Alliance Insurance Corporation Limited and Alexander Forbes (T) Limited, are requesting us to strike out the notice of appeal which was lodged in this Court by the respondent, Richard Nestory Shayo, on account of the latter's failure to take essential steps in the proceedings within the prescribed period. The application is by way of Notice of Motion, and is founded on the provisions of Rule 89 (2) of the

Tanzania Court of Appeal Rules, 2009 (the Rules) as amended. It is supported by an affidavit affirmed by Mr. Adam Jabir, the applicant's learned advocate from Excellex Attorneys.

On the other hand the respondent has, through the affidavit in reply he filed on 29.11.2017, opposed the application. He has stated in paragraph 7 thereto that he delayed to file the appeal because he is waiting for the determination of his application still pending in the High Court at Arusha for extension of time within which to apply for leave to appeal to the Court.

When this application was called on for hearing on 12.8.2020, none of the parties and/or their advocates appeared in Court. Fortunately however, the applicants' advocate filed written submissions in support of the application, but the respondent did not file any. In view of that fact, we decided to proceed in terms of Rule 106 (12) (a) and (b) of the Rules for which determination of this matter will be based on the applicants' written submissions.

Before we may proceed, we find it proper to briefly give the background facts leading to the present application. The record shows that way back in 2014, the respondent sued the applicants in the Resident

Magistrate's Court of Arusha at Arusha in Civil Case No. 49 of 2014 for recovery of Tzs. 65,848,500/= being the sum insured and specific damages incurred, interest of the claimed amount at the commercial banking rate of 20% per annum from the date of filing the suit till the date of judgment, a further interest at the court's rate of 12% from the date of judgment till payment in full, and costs of the suit. The respondent won the suit. He was awarded Tzs. 48,000,000/= as indemnity for his motor vehicle, and interest of that sum at the rate of 7% from the date of judgment till payment in full. That decision aggrieved the applicants who successfully appealed to the High Court of Tanzania, Arusha Registry. In turn, the reversal of the trial court's decision by the High Court aggrieved the respondent who, on 10.8.2017, filed a Notice of Appeal in an endeavour to challenge the judgment of the first appellate court. In compliance with the law, he served a copy of the said Notice of Appeal on the applicant on 17.8.2017. However, he did not serve a copy of the letter through which he applied to be supplied with the proceedings, judgment and decree to enable him to appeal as envisaged by Rule 90 (1) of the Rules, which is why the applicants have filed the present application.

In his submission in support of the application, Mr. Jabir has essentially repeated the same points reflected in the affidavit accompanying the application. He has contended that, contrary to the dictates of Rule 90 (1) of the Rules, the respondent did not serve on the applicants copies of the letter through which he applied to be supplied with the proceedings, judgment and decree. In view of that omission, Mr. Jabir went on to submit, the respondent ought to have filed his appeal within a period of 60 days from the date of delivery of the judgment which is the subject of the appeal (11.7.2017), because even if the certificate of delay may later on be granted to him, he will be disentitled to rely on it on the basis of Rule 90 (3) of the Rules. Since his appeal is yet to be filed and 60 days have elapsed, Mr. Jabir added, it is certain that the respondent has failed to take essential steps in instituting his appeal, therefore that the application is meriting. He requested us to grant it.

We have keenly perused the respondent's affidavit in reply. It is unfortunate that he has not addressed the query that he did not serve a copy of the said letter to the applicants through which he applied to be supplied the proceedings, judgment and decree to enable him prepare his appeal. As earlier on pointed out, he merely said that he delayed to file

the appeal because he is waiting for the determination of his application for extension of time within which to apply for leave to appeal to the Court still pending in the High Court at Arusha.

Also, we have carefully considered Mr. Jabir's written submissions in support of the application. His contention that his clients were not served with copies of the letter through which the respondent applied to be supplied with the necessary documents to enable him prepare his appeal is a matter falling squarely under Rule 90 (1) and (3) of the Rules. While Rule 90 (1) directs an aggrieved party craving to appeal to do so within a period of 60 days, also that it instructs the party appealing to serve a copy of the letter vide which he applied for the necessary documents to the adverse party, Rule 90 (3) thereof dictates that where a copy of such letter may not have been served to the adverse party, the potential appellant will have no right to rely on the certificate of delay which might have been given to him by the Registrar. Rule 90 (1) and (3) of the Rules provides 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 follows that, where the intended appellant in the shoes of the respondent herein may have not served his adverse party with a letter through which he applied for the necessary documents, such omission renders the appeal out of time, and translates into failure to take essential

steps to institute his appeal in terms of Rule 89 (2) of the Rules. Rule 89 (2) of the Rules provides that:-

"R. 89 (2) Subject to the provisions of sub rule 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."

See also the case of **Asmin Rashid v. Boko Omari** [1997] T.L.R. 146 in which we said that essential steps entail steps which advance the hearing of the appeals, including timely collection of the necessary documents which are supposed to be relied upon by the potential appellant in preparing his/her appeal, obtaining leave to appeal in those circumstances where the appeal is not of right etc.

Since the respondent in the present matter did not file his appeal within a period of 60 days from the date of judgment, and has not even thought of applying for extension of time within which **to serve the said letter to the applicants**, and because the sole ground he has advanced that his application for extension of time within which **to apply for**

leave to appeal to the Court pending before the High Court **is irrelevant to the question at hand**, no doubt, this amounts to failure to take essential steps. In the circumstances, we are constrained to, and we hereby strike out the notice of appeal which was lodged on 10.8.2017. Each party to bear own costs

Order accordingly.

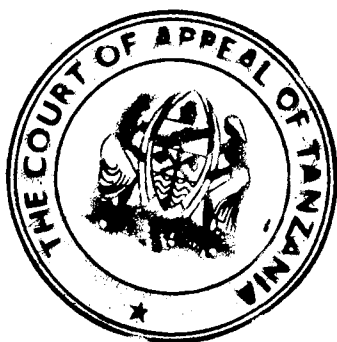
DATED at ARUSHA this 18th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The ruling delivered this 19th day of August, 2020 in the absence of both parties duly served to appear is hereby certified as a true copy of the original.




E. F. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL