

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MJASIRI, J.A., KAIJAGE, J.A., And MMILLA, J.A.)

CIVIL APPLICATION NO. 4 OF 2013

ASGARALI HABIB KASSAM MANJI..... APPLICANT

VERSUS

NATIONAL HOUSING CORPORATION RESPONDENT

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

(Mkwawa, J.)

Dated 19th day of December, 2006

In

Civil Appeal No. 22 of 2004

RULING OF THE COURT

21st& 27th June, 2016

KAIJAGE, J.A.

The applicant was a successful party in Tanga High Court Civil Appeal No. 22 of 2004. Dissatisfied by the decision of that Court which was pronounced on 19/12/2006, the respondent, a losing party, lodged a Notice of Appeal with the Registrar of the same court on 22/12/2006. In terms of Rule 83(1) of the revoked 1979 Tanzania Court of Appeal Rules

(the old Rules) which is similar to the current Rule 90(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the respondent was supposed to institute the intended appeal within sixty (60) days of the date when the Notice of Appeal was lodged, which she did not.

By Notice of motion taken under Rule 89(2) of the Rules, the applicant is moving this Court for orders that:-

- (i) *This Court be pleased to strike out the notice of appeal by the respondent for reason that some necessary steps towards instituting the appeal have not been taken and for reasons contained in the affidavit of the applicant.*
- (ii) *The applicant be awarded costs of and incidental to this application.*

The present application is supported by the affidavit affirmed by the applicant, ASGARALI HABIB KASSAM MANJI. The respondent did not file the affidavit in reply. Indeed, the said application is predicated upon two main grounds namely:-

- (i) That the respondent has lost track of the intended appeal and all his applications inclusive application for leave to appeal failed and are not easily repairable.*
- (ii) The applicant is now engaged in a side appeal bearing thereof on the intended appeal being so remote and uncertain hence delay of justice on the part of the applicant.*

When the application was called on for hearing before us, the applicant and the respondent were, respectively, represented by Mr. Godfrey Ukongwa and Mr. Aloyce Sekule, learned advocates.

While submitting on the merits of the application, Mr. Ukongwa took the position that his client, the applicant, was not served with the Notice of Appeal lodged by the respondent with the Registrar of the High Court on 22/12/2006. He maintained that court processes were usually served on the applicant through the address of his Chambers, but a copy of the Notice of Appeal appearing as annexure "B" to the record of application was received, endorsed and signed by one Musa Makanga, a person unknown to the applicant. He thus contended that the non-service on the applicant of the Notice of Appeal within 7 days as was then required under Rule 77(1) of the old Rules amounts to the failure attributable to the respondent for not taking one of the essential steps in instituting the

letter's intended appeal. On this account, he urged us to strike out the Notice of Appeal.

In response, Mr. Sekule submitted that the Notice of Appeal in question was served on the applicant through the address indicated thereon. However, he did not provide any proof of such service.

We, on our part, have also no material basis upon which to fault Mr. Ukongwa's non-service submission. We however take his submission to be a self inflicted injury which could easily dispose of this application in view of Rule 89 (2) of the Rules which reads:-

*"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** 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 within the prescribed time".*

Admittedly, the present application has been taken under Rule 89 (2) of the Rules, cited hereinabove. By its terms, a relief under this Rule is only available to a person on whom the notice of appeal has been served. Since Mr. Ukongwa has stated categorically in his submission that his client, the applicant, was not served with the notice of appeal lodged by the respondent with the Registry of the High Court on 22/12/2016, we have found ourselves left with no option but to find, as we hereby do, that the present application is highly misconceived.

Accordingly, we strike it out with costs to the respondent.

DATED at **TANGA** this 25th day of June, 2016.

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL