

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

(CORAM: MKUYE, J. A., SEHEL, J.A, And GALEBA, J. A.)

CIVIL APPLICATION NO. 523 OF 2020

KAEMBA KATUMBUAPPLICANT

VERSUS

SHULE YA SEKONDARI MWILAMVYA.....RESPONDENT

**[Application for striking out the Notice of Appeal dated on 30th August,
2019 filed against the decision and decree of the High Court
(Labour Division) at Kigoma]**

(Matuma, J.)

dated the 27th day of August, 2019

in

Labour Revision No. 4 of 2018

.....

RULING OF THE COURT

14th & 16th July, 2021

SEHEL, J.A.:

By notice of motion, the applicant seeks for an order of the Court that the notice of appeal filed by the respondent on 30th August, 2019 against the judgment and decree in Labour Revision No. 4 of 2018 be struck out. The notice of motion is predicated on Rule 89 (2) and (3) of the Tanzania Court of Appeal Rules of 2009 as amended (henceforth "the Rules") and it was lodged on 21st July, 2020. It is supported by an affidavit of the applicant himself.

The grounds upon which the application is hinged are stated in the notice of motion, thus: -

- "i) That, the respondent has filed to institute an appeal within the appointed time.*
- ii) That, the respondent has not filed any certificate of delay.*
- iii) That, the applicant is a believer in a prominent legal maxim "justice delayed is justice denied".*
- iv) That, this court be pleased to order for striking out the Notice of Appeal filed on 30th August, 2019 with costs."*

The respondent, on the other hand, resisted the application by filing an affidavit in reply.

A brief background leading to this application as could be gathered from the record is that; the applicant successfully sued the respondent before the Commission for Mediation and Arbitration for Kigoma (CMA) in a labour dispute No. CMA/KIG/DISP/31/2018. The dispute was determined *ex-parte* against the respondent. After the respondent became aware of the *ex-parte* award, she filed an application before CMA to set it aside. However, on 1st May, 2019 the application was dismissed for want of merit.

Aggrieved by such dismissal, she unsuccessfully filed an application for revision, Labour Revision No. 4 of 2018 before the High Court of Tanzania at Kigoma. The application was dismissed on 27th August, 2019.

Still aggrieved, the respondent lodged a notice of appeal on 30th August, 2019 and also on the same date she applied to be supplied with the copies of proceedings, judgment and decree for appeal purposes. The said notice of appeal and the letter were served upon the applicant on 4th September, 2019. After the applicant was served with the notice of appeal, he waited for almost a year and having seen that nothing was forthcoming, he lodged the present application.

At the hearing of the application, the applicant appeared in person. He had no legal representation. Whereas, the respondent had the services of Mr. Musa Kassim, learned advocate.

At the very outset, the applicant informed the Court that he abandoned the second ground appearing in his notice of motion. He then adopted the notice of motion and the affidavit. Thereafter, he pointed out that the respondent lodged the notice of appeal on 30th August, 2019. By the time he filed the present application on 21st July, 2020, that is, almost after the lapse of 348 days, the respondent was yet to file any appeal before the Court despite that Rules 90 (1) of the Rules requiring her to lodge it within the prescribed period of sixty (60) days. He added that the respondent has not even taken any action whatsoever in filing the appeal as she did not take any efforts to remind the Registrar of the High Court (henceforth to be referred to as "the High Court") to supply

her with the requested documents. According to his submission, the respondent has lost interest in the appeal that is why she wrote a reminder letter on 10th June, 2021 contrary to Rule 90 (5) of the Rules which requires her to write it within 104 days. He further contended that the act of the respondent to write a reminder letter after she was served with the notice of hearing of the present application is a proof that she is trying very hard to deny the applicant a right to execute a judgment entered in his favour. He added that since the respondent belatedly wrote a reminder on 10th June, 2021 the Court should find that the respondent failed to take essential steps in filing appeal. He therefore prayed under Rules 89 (2), 90 (1), 90 (4), 90 (5) and 91 (a) of the Rules for the notice of appeal to be struck out with costs.

In reply, Mr. Kassim adopted the affidavit in reply and strongly objected to the application. He submitted that the respondent had complied with the legal requirement provided under Rule 90 (1) of the Rules and is still waiting to be notified for collection of the requested documents which are yet to be supplied as deposed under paragraph 4 of the affidavit in reply. He further elaborated the essential steps taken by the respondent that; after the judgment was delivered on 27th August, 2019, within a period of three days, that is, on 30th August, 2019, the respondent lodged a notice of appeal and applied in writing to the High

Court to be supplied with the copies of proceedings, judgment and decree for appeal purposes. Further, on 4th September, 2019, that is, after a lapse of eight (8) days counted from the date of the decision against which it is intended to appeal, the respondent served to the applicant both the notice of appeal and the letter. It was the submission of Mr. Kassim that since the respondent complied with the law and she had not been notified that the requested documents are ready for collection, the Court should find that the respondent had taken all essential steps required by the law. He fortified his submission by referring the Court to its earlier decision in the case of **Georgio Anagnostou and Another v. Emmanuel Marangakis and Another**, Civil Application No. 464/01 of 2018 (unreported). On the whole, Mr. Kassim urged the Court to dismiss the vexatious application with costs.

In rejoinder, the applicant reiterated his earlier submission that in so far as, the respondent did not remind the Registrar in time, the respondent failed to take essential steps hence the notice of appeal ought to be struck out.

We have dispassionately considered the notice of motion, affidavit in support of the motion, affidavit in reply and the oral submissions of the parties. Having done so, we find it apt to set out the undisputed facts. According to paragraphs 5 and 6 of the affidavit and 3 of the affidavit in

reply, it is not disputed that the intended impugned judgment was delivered on 27th August, 2019 and the notice of appeal was lodged on 30th August, 2019. It was further deposed by the respondent in paragraph 4 of the affidavit in reply and orally submitted by Mr. Kassim which submission was not counter-attacked by the applicant that the respondent applied in writing to the High Court to be supplied with the copies of proceedings, judgment and decree. That letter is dated 29th August, 2019 and received by the Court on 30th August, 2019. It was further orally submitted and not counter-attacked by the applicant that the applicant was served with the notice of appeal and the letter on 4th September, 2019. Much as the steps taken by the respondent are not disputed by the applicant, the applicant still insisted that the respondent ought to have reminded the High Court within the stipulated period of 104 days provided under Rule 90 (5) of the Rules about the supply of the requested documents needed for filing appeal. Failure to do so, he argued, the respondent's notice ought to be struck out under Rules 89 (2), (3), 90 (1), (4), (5) and 91 (a) of the Rules. For ease of reference, we take liberty to reproduce Rule 89 (2) of the Rules that: -

"Subject to the provisions of subrule (1), any other person on whom a notice of appeal was served or ought to have 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 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."

The import of the above Rule, is that any person on whom a notice of appeal has been served, may apply to the Court to have such notice struck out on any of the three grounds, that, **one**, no appeal lies, **two**, some essential steps had not been taken and **three**, some essential steps had not been taken within the prescribed time.

Initially, we have shown herein that the applicant pegged his application that the appeal was not instituted within the period of 60 days prescribed under Rule 90 (1) of the Rules. That Rule provides: -

*"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) 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) Not relevant.

(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.

(4) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals in the exercise of its bankruptcy jurisdiction.

(5) Subject to the provisions of subrule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such copy and the appellant shall take steps to collect copy upon being informed by the Registrar to do so, or within fourteen (14) days after the expiry of the ninety (90) days." (Emphasis is added)

We first wish to state from the outset that Rule 90 (4) of the Rules as quoted above is not relevant to the applicant although he strongly relied upon it. The said sub-rule deals with bankruptcy matters whereas the applicant's application arose from a labour dispute.

That said and back to the present application, our interpretation of Rule 90 (1), (3) and (5) of the Rules is that an appeal has to be instituted

in the appropriate registry by lodging a memorandum of appeal in quintuplicate, a record of appeal in quintuplicate, and security for costs of the appeal within sixty (60) days from the date when the notice of appeal was lodged. However, where the intended appellant had applied in writing for the copies of the proceedings, judgment and decree to the High Court and such application was made within thirty (30) days (the days are counted from the date of the intended impugned decision) and the said application had been copied and served on the respondent, the time taken for the preparation and delivery of the requested copies may be excluded by a certificate of the Registrar of the High Court. In other words, in a situation where the intended appellant, like the present respondent, had applied in writing, that is, had written a letter to the High Court requesting to be supplied with the copies of proceedings, judgment and decree and such letter was written within thirty (30) days from the date when the intended impugned decision was delivered, copied and served to the respondent, the sixty (60) days period for lodging an appeal no longer starts to run against him/her from the date of lodging the notice of appeal. The clock will start ticking from the date when the High Court notified the intended appellant that the requested copies are ready for collection. Basically, Rule 90 (5) of the Rules, requires the Registrar to ensure that the copies are ready for collection within ninety (90) days

from the date the intended appellant made his/her application pursuant to Rule 90 (1) of the Rules.

In the instant application, the impugned decision was delivered on 27th August, 2019 and the respondent timely lodged her notice of appeal on 30th August, 2019. We say it was filed in time because Rule 83 (2) of the Rules requires the notice of appeal to be filed within thirty (30) days of the date of the decision against which it is desired to appeal. Having filed the notice of appeal, generally, the respondent was required to lodge her appeal within 60 days as prescribed by Rule 90 (1) of the Rules. However, since she did not have all relevant documents to enable her to lodge the appeal within time, on 30th August, 2019 she wrote a letter to the High Court requesting to be supplied with the same and served that letter and notice of appeal on the respondent on 4th September, 2019. Furthermore, on 10th June, 2021 the respondent reminded the High Court of her request to be furnished with the documents which she needed in instituting an appeal. From the foregoing we are not persuaded by the applicant's submission that the respondent had not taken any essential steps. This is because the steps which the respondent took are the essential steps within the ambit of Rule 89 (3) of the Rules. The steps so far she took are; she lodged a notice of appeal in time, she made an application requesting to be supplied with the copies for proceedings,

judgment and decree to the High Court in writing in time, she copied and served such application to the respondent in time and she wrote a reminder letter dated 10th June, 2021 to the High Court.

The applicant contended that the reminder letter was belatedly written as it was written beyond 104 days prescribed under Rule 90 (5) of the Rule. We respectfully differ with his submission because sub-rule (5) to Rule 90 of the Rules does not provide a time limit within which an intended appellant will be required to write a reminder letter. Similarly, the said sub -rule does not place any obligation upon the intended appellant where the High Court had failed to notify him/her that the requested documents are ready for collection and it is only after the intended appellant had been notified that the copies are ready for collection, then he/she has fourteen (14) days to collect the same. It is from that date of notification when the period for lodging appeal starts to run.

In this application, the applicant did not bring any evidence/proof that the respondent was notified by the High Court that the copies were ready for collection. Neither did he bring any proof that the respondent failed to collect the same within the period of 14 days prescribed under Rule 90 (5) of the Rules. There being no proof, we failed to go along with the applicant's argument that the respondent did not take essential

steps. To the contrary, we find that the respondent has taken all steps which are essential in filing appeal as required by the law.

Consequently, we find that the applicant's application is devoid of merit. We therefore dismiss it without costs because it emanated from a labour dispute.

DATED at **KIGOMA** this 16th day of July, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This Ruling delivered this 16th day of July, 2021 in the presence of the applicant present in person and Mr. Sadiki Aliku, hold brief for Mr. Musa Kassim, learned counsel for the respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL