

TANZANIA / JUDGMENT

20140923 TZCA Arusha

COURT
TZCADECIDED
23 September 2014

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA {CORAM: KILEO, J.A., ORIVO, J.A., And
MMILLA, J.A.) CIVIL APPLICATION NO. 27 OF 2013 AWAKI SHAU RI

..... APPLICANT VERSUS

1. CHRISTOPHER GWAMBAY}
2. BARNABA DAFFI SLARHHI RESPONDENTS {Appeal from the decision of the High Court of Tanzania at Arusha) {Mussa, J.) Dated the 30th day of November, 2007 in Civil Appeal No. 9 of 2003 RULING OF THE COURT 1th & 24th September, 2014 ORIYO, J.A.: Before the court is an application by the applicant, in the form of a Notice of Motion lodged under Rule 89 (2) of the Court Rules, 2009, for an order to strike out the Notice of Appeal lodged on 30th January, 2008 by the respondents. The grounds forming the basis of the application are stated in the Notice of Motion and amplified in the supporting affidavit of Awaki Shauri. The applicant complains that the respondents have failed to take some essential steps in the proceedings within the prescribed 1 I period of time. Awaki shauri's further complaint is that the Notice of Appeal is defective for want of the signature of the second respondent. Briefly, the background to this application is as follows. The respondents who were the defendants in Civil Case No. 45 of 1997 in the Resident Magistrate's Court of Arusha, were the losers, both in the trial and the first appellate courts. Dissatisfied, they lodged a Notice of Appeal to this Court timely on 30th January, 2008 and leave to appeal was duly granted on 13th January, 2012. However, after a lapse of over one and a half years, the intended appeal had yet to be lodged, hence the application for striking out the notice of appeal. Opposition to the allegations made in the supporting affidavit of · Awaki shauri, was done through the Affidavit in Reply of Ms. Neema Mtayangulwa, learned counsel for the respondents. Basically she denied failure on the part of the respondents to take essential steps, thus she forcefully opposed the application to strike out the Notice of Appeal. She listed the essential steps taken so far to include applying for leave to appeal which was granted on 13/1/2012 and an application made to the District Registrar to be supplied with essential documents for appeal 2 purposes, on 30/1/2008. She further stated that on 27th January, 2012, a reminder letter was sent to the District Registrar asking to be supplied with the documents for appeal purposes. The letter was followed by several reminders to no avail including the letter dated 27th March, 2013 and 2ih June, 2013 whose copies are found on record. Ms. Mtayangulwa stated that notwithstanding all these efforts

exhibited on their part, they had until then bore no positive response from the District Registrar. There is evidence on record that the letters were received by the District Registrar but we find no evidence of service of copies on the applicant save for the 'letter dated 27/1/2012; a copy of which was served and acknowledged by him on 13/2/2012. When the application was called on for hearing, the applicant appeared in person, without legal representation, while Ms. Neema Mtayangulwa, learned counsel represented the respondents. The parties had, each, earlier on filed their respective written submissions in compliance with Rule 106 (1) and (8) of the Court Rules. 3 In brief, the respondents, through their counsel, do not deny that it has taken an unduly long time to file the intended appeal but they throw the blame to the court for not availing them with the essential court documents for the purpose. Regarding the absence of the signature of the second respondent, Barnabas Daffi Slarhhi, on the Notice of Appeal, Ms. Mtayangulwa, learned counsel readily conceded. She explained the error to have been committed by his clients before she was engaged to proceed with the matter on their behalf. Rule 89 (2) of the Court of Appeal Rules, 2009 states: "(2) subject to the provision 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 proceeding has not been taken within the prescribed time." 4 In terms of Rule 89 (2), the Court has powers to strike out the Notice of Appeal on the ground that some essential step in the proceedings has not been taken. In this case, as we have already pointed out; out of the several letters written by the respondents to the District Registrar asking for essential documents as listed in Ms. Mtayangulwa's Affidavit in Reply, a copy of only one such letter appears to have been served on Awaki Shauri and receipt thereof acknowledged by him on 03/02/2012. In terms of Rule 90(1) of the Court Rules, it is apparent that the respondents are not entitled to a Certificate of Delay, in view of the state of affairs portrayed, which was also conceded to by the respondents. On the basis of the concessions made by the respondents that upon the demise of Daffi Slarhhi, formerly the second defendant in the suit, the applicant (then plaintiffs), filed an amended plaint by substituting the name of the deceased with that of Barnabas Daffi as the legal representative of the late Daffi Slarhhi. The copy of the Notice of Appeal appearing in the Record, however, shows it was lodged on 30/1/2008 and bears the signature of the first appellant only. The signature of the second appellant is glaringly missing at the space provided for the signature, which is blank. 5 Interestingly, a copy of the same Notice of Appeal attached to the learned counsel's Written Submissions lodged in Court on 18/10/2013, bears a signature purportedly, by the deceased, 2nd appellant. Rule 83 (1) of the Court Rules states: 'Any person who desires to appeal to the Court shall lodge written notice with the Registrar of the High Court "(Emphasis ours). It is mandatory, from the clear language in sub-rule 1, that a notice of appeal in a civil appeal is a vital document in that it institutes an appeal in Court. Further, Rule 83 (6) thereof states: '~ notice of appeal shall be substantially in the Form D in the First Schedule to these Rules and shall be signed by or on behalf of the appellant. "(Emphasis ours). 6 It is not disputed that the second respondent/second defendant died way back when civil case No. 45/97 was still

pending in the trial court. The death of the second defendant prompted the applicant/plaintiff to file an Amended Plaintiff in the trial court on 31/05/2000. The amended Plaintiff replaced the name of Daffi Slarhhi, as second defendant with that of Barnabas Slarhhi as the Legal Personal Representative of the deceased. Therefore when the suit was finalized and judgment delivered, Daffi Slarhhi was deceased and whatever proceeded thereafter ought to have replaced his name with that of Barnabas Slarhhi. The Notice of Appeal lodged in Court on 30/1/2008 shows the name of the second appellant as Daffi Slarhhi and at the bottom it is signed by the first appellant, Christopher Gwambay only. It is Barnabas Daffi, the personal legal representative of the late Daffi Starhhi, who ought to have signed as second appellant; he did not. This omission renders the Notice of Appeal lodged in Court on 30/1/2008 deficient in that it does not bear the name and signature of the second appellant's legal representative. The Notice of Appeal is incurably defective as it contravenes the dictates of 7 Rule 83(1) and (6) and the format in the Form D in the First Schedule to the Rules. In the event, we are constrained to strike out the notice of appeal with costs to the applicant. It is so ordered. DATED at ARUSHA this 23 rd day of September, 2014. E. A. KILEO JUSTICE OF APPEAL K. K. ORIYO JUSTICE OF APPEAL B. M. K. MMILLA JUSTICE OF APPEAL I certify that this is a true copy of the original. ~ COURT OF APPEAL 8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/333919/source_file/a8cc9837b9e471d4/20140923_TZCA_Arusha.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/awaki-shauri-v-christopher-gwambay-noticeofappeal-tzca-2014>

Prepared on 13 October 2026 · Esheria