



**IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA**

(Coram: Emmanuel Ugirashebuja, P; Geoffrey Kiryabwire and Sauda Mjasiri, JJA)

APPLICATION NO. 05 OF 2019

BETWEEN

MEDIA COUNCIL OF TANZANIA 1st APPLICANT

LEGAL AND HUMAN RIGHTS CENTRE 2ND APPLICANT

TANZANIA HUMAN RIGHTS DEFENDERS COALITION 3rd APPLICANT

AND

**THE ATTORNEY GENERAL OF THE
UNITED REPUBLIC OF TANZANIA RESPONDENT**

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica Mugenyi, Hon. Dr. Faustin Ntezilyayo DPJ, Hon. Justice Fakihi A. Jundu, Hon. Justice Audace Ngiye, and Hon. Charles Nyachae (J) , dated 28th March 2019 in Reference No. 02 of 2017]

9th June, 2020

RULING OF THE COURT

A. Introduction.

1. This Ruling arises from Application No 05 of 2019 filed by the Applicant under Rule 81 of the East African Court of Justice (EACJ) Rules of Procedure, 2013 (hereinafter referred to as “the Rules of this Court”) to strike out the Notice of Appeal filed by the Respondent on the 11th April, 2019. The Application, arises from the Decision of the First Instance Division (hereinafter referred to as “the Trial Court”) in Reference No. 02 of 2017 in which the Applicants challenged the provisions of the Media Services Act as being in violation of Articles 6 (d) and 7 (2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”).
2. Judgment in Reference No 02 of 2017 was entered by the Trial Court in favour of the Applicants. Being dissatisfied with the said Decision, the Respondents filed a Notice of Appeal in this Court dated 11th April, 2019.
3. At the Hearing of the Application, the Applicants were represented by Advocates Mr. Fulgence Massawe and Mr. Jebra Kamole; and the Respondents by Ms. Alesia Mubya Principal State Attorney, Mr. Abubakar Mrisha, Principal State Attorney and Mr. Stanley Kalokola, State Attorney.

B. Background

4. The Applicants on the 11th January, 2017 filed a Reference in the Trial Court (Reference No. 02 of 2017) challenging the provisions of the Media Services Act, 2016 for contravening Articles 6 (d) and 7 (2) of the Treaty.

C. Proceedings and Decision before the Trial Court

5. On the 28th March, 2019 the Trial Court delivered Judgment in favour of the Applicant.

D. Application to the Appellate Division.

6. The Respondents aggrieved by the Decision of the Trial Court on the 11th April, 2019, filed a Notice of Appeal and served it on the Applicants. The Applicants, then filed a Notice of Address for Service on the Respondents on the 25th April, 2019.
7. The Applicants on the 06th December, 2019, filed and served on the Respondents this Application to strike out the Notice of Appeal under Rule 81 of the Rules of this Court.

Scheduling of Application No. 05 of 2019.

8. At the Scheduling Conference held on the 13th February, 2020, the Parties with the approval of the Court agreed to the following agreed issues:-

Issues.

- i. Whether the Notice of Appeal filed on the 11th April, 2019 by the Respondent should be struck out for contravening the East African Court of Justice Rules of Procedure 2013.
- ii. What reliefs if any, are the Applicants entitled to.

E. Proceedings before the Appellate Division.

The Parties filed written submissions, which they adopted as their oral arguments when the case came up for hearing.

Issue No. 1: Whether the Notice of Appeal filed on the 11th April, 2019 by the Respondent should be struck out for contravening the East African Court of Justice Rules of Procedure 2013.

Applicant's Case.

9. Counsel for the Applicants submitted that, the Notice of Appeal served on them by the Respondents should be struck out because up to the time of hearing, the Respondents had failed to institute an appeal within 30 days of lodging the Notice of Appeal, which is an essential step required under Rule 86 of the Rules of this Court.
10. He argued that there is no evidence to show that, following the lodging of the Notice of Appeal on the 11th April 2019, that the Respondent then

- instituted an appeal within 30 days from that date as required by Rule 86 (1) of the Rules of this Court. He submitted that this amounted to the
11. Further submitted that by the Respondent failing to institute an appeal, it also followed that the Respondent had equally failed to prepare a record of appeal.
 12. Counsel for the Appellant, dismissed the reasons advanced by the Respondent failure by the Respondent, to take a necessary step within the meaning of the Rules.
 13. Counsel in their affidavit in reply, which stated that the failure to lodge the appeal in time was occasioned by the restructure of the Office of the Attorney General in the United Republic of Tanzania. This restructuring led to the creation of the Office of the Solicitor General, which was now legally mandated to take over litigation of cases from the Office of the Attorney General; but which Office had not yet been made operational. Counsel also dismissed the argument of the Respondent that, the delay in their lodging the appeal was further occasioned by the loss of their file during the period of restructuring. Counsel argued that, the record shows that the Notice of Appeal was filed at the time when Office of the Solicitor General had already been established. He also argued that, if the file got lost then the Respondent could have looked for the court file and made a duplicate file for their record.
 14. He further argued that if the Respondent had valid reasons for the delay, then the Respondent should have filed an application for extension of time; which the Respondent did not. He also submitted that, there was no evidence to support the reasons preferred by the Respondent for delaying

to instituting the appeal in time and that the arguments put forward were nothing more than submissions from the Bar.

15. Counsel finally prayed that the Notice of Appeal be struck out with costs.

Respondent's Case

16. Counsel for the Respondent conceded that, the Respondent did not file the appeal in time as prescribed by Rule 86 (1) of the Rules of this Court. Counsel however pointed out that, the Respondent had initiated the appeal process by filing a Notice of Appeal within time within the meaning of Rule 78 (2) of the Rules of this Court. Counsel further argued that, the Respondent had provided reasons why the main appeal had not yet been instituted as required by the Rules of this Court. Counsel submitted that, the real question to be interrogated therefore was *"whether the assigned reasons are justifiable to warrant this Honourable Court from declining to strike out the notice of appeal"*.

17. Counsel submitted that, the first reason for the delay was the re-organisation of the Office of the Attorney General. Counsel pointed out that, the function of litigation had been transferred from the Office of the Attorney General to that of the Solicitor General as established by The Office of the Solicitor General (Establishment) Order 2018; a copy of which had been annexed to their affidavit in reply (as Annexure OSG – 2). Counsel argued that, the restructuring entailed the movement of files and personnel from one office to another which negatively affected the timely institution of the appeal.

18. Counsel further argued that, the said transfer affected litigation as their file on this matter went missing, making it impossible for them to prepare the Memorandum and Record of Appeal as required under Rule 86 of the Rules of this Court. Furthermore, whereas the Office of the Solicitor General had been established before the Judgment in Reference No 02 of 2017 had been rendered, that said Office had not been made operational; as it did not have a Solicitor General and other staff.

19. As to the reason why the Respondent did not file an application for extension of time, counsel submitted that under Rule 82A of the Rules of this Court, such an application can only be made after the notice of appeal has been lodged with the court; which in this case had already been done. Rule 82A of the Rules of this Court provides:

“...A party who intends to lodge in the Appellate Division an application for extension of time to appeal shall first lodge a notice of appeal in the same Division, which shall be stamped “lodged out of time”.

20. It is the case for the Respondent that, the reason and facts adduced in the affidavit in reply suffice to warrant this Court to decline to grant the reliefs sought by the Applicants. Furthermore counsel prayed that, the Respondents be accorded time to file the memorandum and record of appeal as required by law out of time.

Analysis and Determination by the Court.

21. We have considered, the submissions of the opposing Counsel and the authorities supplied to us for which we are grateful. This is an Application to strike out the Notice of Appeal. The thrust of the Application is, whether or not the Notice of Appeal on the Court record should be struck out. Rule 86 (1) of the Rules of this Court provide that a party who has lodged a Notice of Appeal, must institute the said appeal within 30 days of filing the Notice of Appeal. The Rule reads:-

“...1) Subject to the provisions of Rule 119, an appeal shall be instituted by lodging in the appropriate registry, within thirty (30) days of the date when the notice of appeal was lodged:

(a) A memorandum of appeal, in quintuplicate;

(b) The record of appeal, in quintuplicate;

(c) The prescribed fee; and

(d) Security for the costs of appeal...”

In this matter, the Respondents having lodged their Notice of Appeal in time, have not instituted the appeal as required under this Rule. We agree with the submissions of Counsel for the Applicants that this lapse in procedure by the Respondent, amounts to a failure to carry out an essential step in the proceedings.

22. Rule 81 of the Rules of this Court provides that where:

“...A 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...”

The Applicants were therefore within their rights under the Rules of this Court, to apply to have the Respondent’s Notice of Appeal struck out for failure to take an essential step in the proceedings.

23. It has been conceded by Counsel for the Respondent that, indeed no appeal was instituted by them within the meaning of Rules 81 of the Rules of this Court. However, the Respondent argued that there were good reasons for this delay which the Court should consider and not strike out the Notice of Appeal. The reasons, centre around the reorganisation of the Office of the Attorney General by virtue of The Office of The Attorney General (Re-structure) Order, 2018 (GN No. 48 of 2018) and The Office of The Solicitor General (Establishment) Order, 2018 (GN No. 50 of 2018) both published on the 13th February 2018. By reason of these instruments, the powers of representation in any court or arbitration of the United Republic of Tanzania were moved from the Office of the Attorney General to the Office

of the Solicitor General; which disrupted the ability of the Respondent to institute its appeal in a timely manner.

24. Counsel for the Respondent argued that, the real question for this Court to answer therefore was *“whether the assigned reasons are justifiable to warrant this Honourable Court from declining to strike out the notice of appeal”*. With respect, we do not agree with counsel for the Respondent as to the question for this Court to consider in this application. This is because, Rule 82 (a) of the Rules of this Court is very clear as to what happens when an Appeal is not instituted in time.

25. Rule 82 (a) of the Rules of this Court provides:-

“...If a party who has lodged a notice of appeal fails to institute an appeal within the prescribed time:

(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court orders otherwise, be liable to pay the costs of any persons on whom the notice of appeal was served arising from that failure to institute the appeal...”

This clearly means that, the Respondent having conceded that she failed to institute the Appeal within the prescribed time, then the notice of appeal lodged in this matter, is deemed to have been withdrawn and the Respondent is liable to suffer costs. To our minds therefore, the Notice of Appeal in this matter being deemed to have been withdrawn (by virtue of Rule 82(a) of the Rules of this Court), the only outstanding question therefore is that of costs.

26. The above finding is sufficient for us to dispose of this Application. However, the Respondent has argued to some length that, it has good reasons why we should not strike out the Notice of Appeal. In this regard, we must agree with Counsel for the Applicant that, if the Respondent had any good reason for the delay in instituting the appeal, then the Respondent cannot raise those reasons in this Application under review. Having conceded that, the Respondent did not institute the appeal in time, the best the Respondent can do to remedy that lapse, is to apply to Court to extend time required for them to institute the appeal. Rule 4 of the Rules of this Court provides:

“...A Division of the Court may, for sufficient reason, extend the time limited by these Rules or by any decision of itself for the doing of any act authorized or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to such time as so extended...”

However the Respondent, has filed no such application for us to consider so the reasons argued before us for the delay in this application are beside the point and are irrelevant.

Final Result

27. The Notice of Appeal dated and lodged in this Court on the 11th April, 2019 is struck out with costs awarded to the Applicant.

IT IS SO ORDERED

DATED AND DELIVERED at Arusha this 09th day of June, 2020

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Emmanuel Ugirashebuja
PRESIDENT

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Geoffrey Kiryabwire
JUSTICE OF APPEAL

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Sauda Mjasiri
JUSTICE OF APPEAL