

IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

CIVIL APPLICATION NO. 28 OF 1996  
In the Matter of an Intended Appeal

BETWEEN

FRANCIS ITENGEJA ..... APPLICANT

AND

KAMPUNI YA KUSINDIKA MBEGU  
ZA MAFUTA LTD. ....RESPONDENT

(Application for striking out Notice of  
Appeal from the Decision of the High  
Court of Tanzania at Dar-es-Salaam)

(Bubeshi, J.)

dated the 1st day of September, 1994

in

Civil Appeal No. 91 of 1994

R U L I N G

KISANGA, J.A.:

This is an application to strike out a notice of appeal for failure to take two essential steps, namely, (1) to serve a copy of the notice of appeal on the applicant or his counsel and (2) to lodge the appeal within 60 days of the filing of the notice of appeal. The matter originates from the decision by the High Court (Bubeshi, J.) refusing an application to restore Civil Appeal No. 91/1994 which had been dismissed for want of prosecution. Following such refusal the respondent company was aggrieved, duly gave notice of its intention to appeal and obtained leave to appeal to this Court against the refusal. Meantime, however, and as already intimated, the applicant has now brought this notice of motion seeking to have the notice of appeal struck out on the

grounds as indicated above. Before me the applicant was represented by Mr. J.R. Kambamwene, learned advocate while Mr. D.C. Mbezi, learned advocate, appeared for the respondent company.

The notice of motion is duly supported by the affidavit of Mr. Kambamwene and that of the applicant himself. Both affidavits are to the effect that the respondent has failed to serve the applicant or his counsel with a copy of the notice of appeal and has failed to lodge the appeal within 60 days of the notice of appeal. Elaborating on this in his oral submission, Mr. Kambamwene maintained that as regards the failure to lodge the appeal within the prescribed period of 60 days, the respondent could not benefit from the exception under rule 83(1) of the Court of Appeal Rules because the respondent did not serve the applicant or his counsel with any copy of a letter to the Registrar requesting for proceedings of the case in question.

In response to this, two counter-affidavits were filed by Mr. Mbezi and by one Mr. Hyera, a principal officer of the respondent company. The depositions are to the effect that at first, attempt was made to serve on the applicant personally a copy of the letter to the Registrar applying for proceedings, but that the applicant declined service and directed that the service be effected on his advocate, which was accordingly done within the time prescribed by the Court of Appeal Rules.

It is elementary in matters of procedure that he who makes an allegation has the burden of proving it. In the context of this case Mr. Mbezi and his client have the burden of proving their claim that they did serve on Mr. Kambamwene, the applicant's advocate, the two documents in issue i.e. the copy of the notice of appeal

and the copy of the letter to the Registrar applying for proceedings. In an attempt to discharge that burden Mr. Mbezi produced a dispatch book which was allegedly signed to acknowledge receipt of the two documents. According to Mr. Hyera who claims to have effected the service, he went to Mr. Kambamwene's chambers in Dar es Salaam and there handed to someone an envelope containing the two documents. The handing over of the envelope was against signature in the said dispatch book, but Mr. Hyera does not know the name or otherwise the identity of the person so receiving the envelope and signing for it. Mr. Kambamwene completely refuted the allegation.

I have anxiously considered this matter in the course of which I have examined closely the relevant page of the dispatch book produced by Mr. Mbezi. There is one striking feature which appears on this page. The spot corresponding to the alleged signature is rubbed off and completely obliterated such that no signature is identifiable there. In other words it is not possible for anyone to say that the signature which has been rubbed off was or was not of a person working at Mr. Kambamwene's chambers. As such, therefore, the dispatch book is completely worthless as evidence to prove that the two documents in question were received by, or on behalf of, Mr. Kambamwene, the applicant's counsel as alleged. In other words the signature which has been rubbed off from the dispatch book could be of any person quite unconnected with Mr. Kambamwene or his chambers. Indeed Mr. Mbezi conceded this point.

If the dispatch book cannot be relied upon to prove service of the two documents on the applicant's advocate, then what other evidence is there to prove it? I could find none.

Mr. Mbezi in another dimension contended that the two documents should be deemed to have been duly served on the applicant personally when he declined to accept them and directed them to be served on his advocate. With due respect I cannot agree. Where a party to a case has engaged the services of counsel then in my view he is perfectly entitled to direct that that any service relating to that case be effected on his counsel. He may, of course, accept service personally and then pass it on to his lawyer, but to my mind he is not obliged or bound to do so. Nor can such a party properly be said to have refused service in so doing. For, all that he has done is to direct that the service be effected on his agent, and if such agent does exist and is identifiable then the party could not properly be said to have refused service; rather the party is merely saying that the matter should be referred to his agent who is better placed in terms of, say, expertise to deal with the matter. The position would be different if the said agent does not in fact exist; but this was not the position in the present case because the applicant's advocate was known and could be located. I am therefore of the settled view that no service was effected on the applicant personally when he declined and directed that the same be effected on his counsel.

In yet another desperate attempt to resist the application Mr. Mbezi referred to a letter (EMS dated 4.12.95) addressed to Mr. Kambamwene and apparently enclosing copies of the two documents in question. According to the learned counsel, the two documents were thereby duly served on Mr. Kambamwene, the applicant's advocate. However, as rightly pointed out by Mr. Kambamwene, on the date of that letter i.e. 4.12.95 the time for serving the documents on the

applicant had long elapsed, although the documents themselves were apparently written on time.


The net result, therefore, is that the respondent has failed to prove the allegation that the two documents i.e. a copy of the notice of appeal and a copy of the letter to the Registrar applying for the proceedings of the case, were duly served on the applicant or his counsel. Since there has been no application for extension of time to serve these documents on the applicant, the present application must succeed. As Mr. Kambamwene rightly pointed out, the respondent company cannot in terms of the exception under rule 83(1) of the Rules claim protection against the time running against it because the applicant was not duly served with a copy of the letter to the Registrar applying for court proceedings in the case. That is to say, the time for lodging the appeal has long elapsed, and there is nothing to salvage that situation.

Thus, failure to serve the applicant with a copy of the notice of appeal within 7 days of the notice as required by rule 77 (1) of the Rules, and failure to lodge the appeal within 60 days of the notice as required by rule 83 (1) are, in the absence of any evidence of extension of time by the Court to do these things, grounds which warrant the striking out of the notice of appeal, which I hereby do. The applicant is to have his costs.

DATED at DAR ES SALAAM this 20th day of May, 1997.

R. H. KISANGA  
JUSTICE OF APPEAL

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

  
( M.S. SHANGALI )  
DEPUTY REGISTRAR