IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MUNUO, J.A., And KAJI, J.A.

CIVIL APPEAL NO. 56 OF 2005

1. **DHOW MERCANTILE (EA) LTD**]
2. **YOHANA HILARIUS NYAKIBARI**] .....**APPELLANTS**
3. **GULAMALI SHAH BOKHARI**]

VERSUS

1. **REGISTRAR OF COMPANIES**]
2. **LUSHOTO TEA COMPANY LTD.**]
3. **ABDIRIZZAKH S. TUKE**] ..... **RESPONDENTS**
4. **NAWAB ABDULRAHIM MULLA**]
5. **YUSUF N. MULLA**]

(Appeal from the decision of the High Court of Tanzania, Commercial Division, at Dar es Salaam)

(Kalevega, J.)

dated the 23rd day of April, 2004
in
Commercial Case No. 62 of 2003

REASONS FOR THE ORDER OF THE COURT

LUBUVA, J.A.:

On 26th October, 2005 when the appeal was called on for hearing, Mr. Kilindu, learned counsel for the 2nd, 3rd, 4th and 5th respondents, raised a preliminary objection. He had priorly filed notice of preliminary objection in terms of the provisions of rule 100. After hearing submissions on the preliminary objection by learned counsel, M/s Kilindu, Ukwong'a and Mr. Shani, learned State Attorney

for the 1st respondent, we upheld the preliminary objection and ordered the appeal to be struck out on the ground that it was incompetent. Reasons were reserved which we are now set to give.

In support of the preliminary objection Mr. Kilindu, learned counsel, made brief submissions to the following effect: In Civil Appeal No. 86 of 2004 between the same parties, on 23.3.2003 the Court struck out the appeal upon the ground that the appeal was incompetent because an invalid decree was attached to the record. It was left open for the appellant to reinstitute the appeal if it was so desired. As a result of the appeal being struck out, no valid document including the notice of appeal remained. In this case the appeal reinstituted on 31.5.2005, was based on the notice of appeal which was struck out together with the rest of the record of appeal. The issuance of the certificate of delay by the Registrar presupposes that there is a valid notice of appeal in place. In reinstituting the appeal, the requirement of a valid notice of appeal is not substituted. What was required of the appellant was to apply to the High Court for extension of time to file notice of appeal out of time. Once the application for extension of time sought is granted, then the appeal so reinstituted would be based on a valid notice of appeal. In this

case, there was no application sought and granted for the extension of time to file notice of appeal out of time, so the appeal is incompetent, it should be struck out. In support of the submission that with the striking out of the appeal, there was no valid notice of appeal left, Mr. Kilindu referred the Court to its decision in **William Loitiame v. Asheri Naftali,** Civil Appeal No. 73 of 2002 (unreported).

Mr. Shani, learned State Attorney for the 1st Respondent fully associated himself with the submissions by Mr. Kilindu on the preliminary objection.

Mr. Ukwong'a, learned counsel for the appellants, vehemently opposed the preliminary objection. He conceded that Civil Appeal No. 86 of 2005 involving the same parties was struck out on 23.3.2005. However, he firmly maintained that the notice of appeal was saved under rule 82 of the Court Rules, 1979. For this reason, Mr. Ukwong'a further submitted that the appeal reinstituted on 31.5.2005 was based on the notice of appeal dated 30.4.2004 . Otherwise, counsel also conceded that an appeal based on an invalid notice of appeal has no leg upon which to stand. In this case, he

insisted that there was a valid notice of appeal saved after the appeal was struck out.

It is common ground that a notice of appeal properly lodged in terms of the provisions of rule 76 is a pre-requisite condition for the institution of an appeal. Otherwise there is no denying the fact that without a valid and proper notice of appeal there would be as it were, no leg upon which the appeal would stand. In this case, after Civil Appeal No. 86 of 2005 was struck out on 23.3.2005, was the notice of appeal saved under rule 82 as urged by Mr. Ukwong'a? With respect, we do not think so. The provisions of rule 82 of the Court Rules, 1979 were not, in our view, meant to cover situations such as in this case. The rule provides:-

> 82 – 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 within the prescribed time.

From our reading of this rule, it is apparent that the rule presupposes the existence of a valid record of appeal together with the notice of appeal which the Court may be moved to strike out if it is shown that an essential step in instituting the appeal has not been taken or has not been taken within the prescribed time under the rules. It seems to us, therefore, that rule 82 covers an entirely different situation from that envisaged in Mr. Ukwong'a's submissions in this case.

Furthermore, it is also to be observed that it is now settled that after an appeal has been struck out upon the ground that it is incompetent, there is nothing as it were, saved with regard to the appeal including the notice of appeal. That is, the order striking out the appeal also had the effect of striking out the notice of appeal as well. Where, as happened in this case, after striking out the notice of appeal, it is left open for the appellant to reinstitute the appeal if it is so desired, it is expected that due compliance with the requirement of the rules would be observed. In this case the appellants were expected to apply for extension of time in which to file the notice of appeal. This was not done.

Failure to apply and obtain extension of time in which to file notice of appeal renders the purported appeal so reinstituted

incompetent because there is no valid notice of appeal to support it. In a number of cases this Court has consistently held this view. See for instance, **Robert John Mugo v. Adam Mollel,** Civil Appeal No. 15 of 1999, and **William Loitiame v. Asheri Naftali,** Civil Appeal No. 73 of 2002, among others (both unreported).

To recapitulate, we agree with Mr. Kilindu, learned counsel, that after the initial record of appeal was struck out on 23.3.2005 in Civil Appeal No. 86 of 2004, no valid notice of appeal remained as urged by Mr. Ukwong'a. It was imperative upon the appellant to apply afresh to the High Court for extension of time in which to file notice of appeal. The fact that in striking out the initial appeal the Court had left it open for the appellant to reinstitute the appeal afresh was no substitute for the requirement on the part of the appellant to comply with the rules in reinstituting the appeal. The appellants' failure to apply for and obtain extension of time to file a fresh notice of appeal was fatal. The appeal could not be reinstituted based on the same notice of appeal which had been struck out together with the record of appeal on 23.3.2005. Mr. Ukwong'a's submission that the notice of appeal was saved under rule 82 was misconceived. We reject it.

For these reasons, the appeal being incompetent, we ordered the appeal to be struck out on 26.10.2005.

DATED at DAR ES SALAAM this 15th day of November, 2005.

D.Z. LUBUVA
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR