

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM.**

CIVIL APPLICATION NO. 87 OF 2008

**RICHARD MCHAU APPLICANT
VERSUS
SHABIR F. ABDULHUSSEIN RESPONDENT**

**(Application to strike out the Notice of Appeal from the decision of
the High Court of Tanzania at Dar es Salaam)**

(Mlay, J.)

dated the 8th February, 2006

in

Civil Appeal No. 20 of 2004

.....

RULING

3rd September, & 22nd October, 2008

BWANA, J.A.

By a Notice of Motion purportedly made under Rules 26,36,45,46,55 and 82 of the Tanzania Court of Appeal Rules, 1979, the Applicant, Richard Mchau, is seeking the following orders:-

1. That this Court strike out the notice of appeal served by the Respondent on the Appellant and lodged in this Court on the ground that no appeal lies and some essential steps in the

proceedings have not been taken within the prescribed period by the Respondent.

2. That the Applicant be granted leave to file his application (in the High Court (Land Division) pursuant to the orders of the defunct Housing Appeals Tribunal of Tanzania at Dar es salaam.
3. That costs and incidentals of this application be ordered.

I have used the word "purportedly" hereinabove because, it was not necessary, on the part of the Applicant, to cite Rules, 26,36,46 and 55. Such an application could sufficiently be made under Rules 45, 82 and 84 of the Court of Appeal Rules (The Rules). In the circumstances of this application – as is shown later herein invoking Rule 89(2) would have been equally proper.

The application is supported by an affidavit of the Applicant wherein it is provided inter alia, as follows in paragraphs 4,5,6,7 and 10:-

"Para 4: That on the 21 February 2006, the Respondent herein served me with the Notice of Intention to Appeal to this Honorable Court.

"Para 5 (i); That ever since I received the said notice, there has not been any service of appeal papers whether by any process server or the Respondent or any person being the agent of the Respondent.

(ii);

(iii); That the Respondent had a decree and drawn order to execute against the Applicant issued by the then Regional Housing Tribunal, Ilala, issued on 5 August 2002 but was quashed by the judgment of the then Housing Appeals Tribunal.

"Para 6: That with this acquiescence on the part of the Respondent, it is obvious that there is no appeal pending against me in this Honorable Court.

"Para 7: That I am fully prepared to effect the ruling that I won in the Housing Appeals Tribunal by filing a suit in the High Court (Land Division) but this notice deters me from any further action.

"Para 10: That due to the above tactics of the Respondent, the Applicant has suffered both physically, mentally and financially which together amount to the sum of TShs. 370m/=, without interest."

However, in his Affidavit in Reply, the Respondent raises the following matters:-

"Para 4: I state that the Applicant is aware that I obtained leave to appeal on 8 February 2008 when the ruling on the application for leave to appeal to

the Court of Appeal was delivered by the High Court (Shaidi, J.).

Para 5: I further state that there could not be any appeal filed as I was still awaiting the result of the ruling on an application, for leave to appeal and to be supplied with a copy of judgment and proceedings together with a certificate of delay.

Para 12: That I dispute the contents of para 10 of the affidavit. I state that there are no tactics from my side that had caused any harm to the applicant whatsoever. I state further that reasons for delay to file appeal are not in my power.”

When the parties appeared before me on 3 September 2008, Counsel for both parties agreed to argue this application by way of written submissions. Dr. Ringo, learned counsel for the Applicant, was to present his written submission by 19 September, to be

followed by Mr. Zakis submission on 26 September 2008. The latter Counsel represented the Respondent. A rejoinder, if any was to be filed by 3 October 2005. It is not insignificant to note that the above schedule has not been complied with. When I called the record to prepare this Ruling today, the 6th day of October 2008, none of the two sides had filed its submissions. I am therefore left with no option, other than to rely on the affidavit evidence.

The bottom line of this application is the Ruling of Mlay, J. wherein and pursuant to the provisions of section 54 (1) of the Land Disputes Act, Cap 216 RE 202, he struck out the appeal as being improperly before the Court. Aggrieved by that decision, the instant Respondent filed a notice of appeal to this court. As he states in his Affidavit in Reply, he could not proceed with the appeal to this Court, without first obtaining leave to do so. He is right. It appears that he eventually obtained that leave on the 8th of February 2008, following a Ruling by Shaidi, J. However, it is the Applicant's averment that he has not taken some essential steps within the

prescribed period. It is trite law that such essential steps should have been taken within 60 days. Rule 83 of the Rules states:

"83(1) Subject to the provisions of Rule 122, an appeal shall be instituted by lodging in the appropriate registry, ***within sixty days*** of the date when the notice of appeal was lodged ---

- (a) a memorandum of appeal
- (b) the record of appeal
- (c) the prescribed fee
- (d)

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 preparation and delivery of that copy to the appellant.

- (2) 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 sent to the respondent***(emphasis provided).

Strictly put the provisions of Rule 83(1) and (2) (supra) disposes of this application. This is so, for the following reasons. ***First***, the Respondent seems to suggest that he had applied to the Registrar of the High Court for certified copies of proceedings and drawn order. It is averred that this was done by virtue of a letter dated 20 February 2006, written by Mr. Rweyongeza, then advocating for the Respondent. However, although that letter is said to have been copied to the Applicant, there is no proof of its service, so as to comply with the requirements of the provisions of Rule 77 (1) which provide _____

“ An intended appellant shall before or within seven days after lodging a notice of appeal, ***serve copies of it on all persons who seem to him to be directly affected by the appeal***“(emphasis provided)”.

As stated above, there is no evidence of service and/or receipt of the said copy of that letter by the Applicant. Failure to comply with Rule 77(1) therefore renders the said appeal incompetent.

Second, even if I were to assume that the Respondent did apply for the said documents (as he avers in his affidavit in reply) and that he has not received the same todate, still that averment is self defeating. Leave to appeal to this Court was granted by Shaidi, J, on 8 February 2008. Rule 83(1) (supra) requires that the Respondent should have taken the necessary steps within sixty days from the date thereof. The instant application was filed on 20 June 2008 that is 132 days later. By then, there were no steps taken to

comply with Rule 83(1). The exception to the said sub – rule (1) does not apply in the circumstances of this application. Likewise Rule 122 does not apply. It is my considered view therefore, that the Applicant is justified to come before this court by invoking the provisions of Rule 82 which state:-

“ 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”.

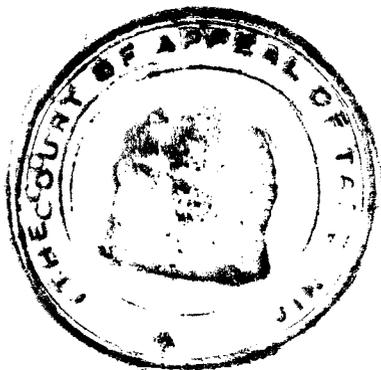
No steps had been taken even after 132 days following the Ruling by Shaidi, J. I am not aware of any application for extension of time lodged by the Respondent so as to enable him comply with the procedural requirements before he could proceed with his appeal.

The above considered therefore, this application succeeds. The intended appeal is struck out for failure to comply with the requirements of Rule 83 of the Rules. Costs of this application awarded to the Applicant, Richard Mchau. It is so ordered.

DATED at DAR ES SALAAM this 9th day of October, 2008.

S.J. Bwana
JUSTICE OF APPEAL

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




P.B. KHADAY
DEPUTY REGISTRAR