

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: MSOFFE, J.A., MJASIRI, J.A. And MASSATI, J.A.)**

**CIVIL REFERENCE NO. 1 OF 2010**

**GEM AND ROCK VENTURES CO.LTD. .... APPLICANT  
VERSUS  
YONA HAMIS MVUTAH... RESPONDENT**

**(Reference from the Ruling of a Single Judge of the Court  
of Appeal of Tanzania at Arusha)**

**(Mandia, J.A.)**

**dated the 22<sup>nd</sup> day of February, 2010  
in  
Civil Appeal No. 18 of 2008**  
-----

**RULING OF THE COURT**

**27<sup>th</sup> Sept. & 8<sup>th</sup> October, 2011**

**MJASIRI, J.A.:**

This reference arises from the decision of a single judge of this Court striking out a notice of appeal filed by the Respondent on the ground that the respondent has failed to institute the intended appeal within the prescribed time.

The background to this matter may be briefly stated as follows: The High Court of Tanzania at Arusha dismissed an appeal filed by the applicant

Yona Hamis Mvutah on August 17, 2007. The applicant then lodged a notice of appeal against the decision of the High Court. Mr. Loomu Ojare, learned advocate for the respondent, then filed an application to this Court seeking for the orders that the Notice of Appeal filed by the appellant be struck out on the ground that the intended appellant had failed to institute the intended appeal within the prescribed time. The single judge found that the application had merit and the notice of appeal was struck out, hence this reference.

Before us the applicant was represented by Mr. John Lundu, learned advocates while the respondent was advocated for by Mr. Loomu Ojare, learned advocate. The learned advocate for the applicant filed the following grounds of complaint against the decision of the single judge, namely that:-

*" In terms of Rule 60(2) (1) (b) of the Tanzania Court of Appeal Rules, 2009 the orders of striking out a notice of appeal with costs be reversed by the Court for the following reasons:-*

*(a). In terms of Rule 60(2) (c) application to strike out a notice of appeal is supposed to be heard by the Court.*

*(b). The reason for striking out the notice of appeal, i.e. failure to prove service through Allen who was named by a supplementary affidavit of Elizabeth Timothy Laizer, Allen being an employee of the Applicant was improperly taken into consideration by a single Justice.*

At the hearing of the reference, Mr. Lundu argued the first ground of complaint first. He submitted that the second ground of complaint will be argued as an alternative ground. He submitted that the learned single judge did not have jurisdiction to hear the application to strike out notice of appeal in view of the requirements under Rule 60 (2) (c) of the Court of Appeal Rules, 2009 ( hereinafter "the Court Rules"). Under the Court Rules such an application should be heard by the Court.

Mr. Ojare conceded that the single Judge had no jurisdiction to hear the application under Rule 60(2) (c) of the Court Rules. He however stated that it was possible to do so under Rule 130 of the Court Rules.

We would first like to consider the issue of jurisdiction. Rule 60 of the Court Rules provides as follows:

*"60.-(1) Every application other than an application included*

*in sub rule (2), shall be heard by a single Justice save that application may be adjourned by the Justice for determination by the Court.*

***(2) The provision of sub-rule (1) shall not apply to -***

*(a) an application for leave to appeal: or*

*(b) an application for a stay of execution; or*

***(c) an application to strike out a notice of appeal or an appeal: or***

*(d) an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of hearing.*

*(Emphasis supplied.)*

It is very clear from Rule 60 (2) (c) of the Court Rules that the single Judge had no jurisdiction. The Court's jurisdiction is derived from the statute. Mr. Ojare made reference to Rule 130 (a) which contains the transitional provisions. However this provision is not applicable to this matter as the application was heard after the 2009 Court Rules were already in operation.

We on our part entirely agree with Mr. Lundu that the application should have been heard by the Court. This issue was not raised by Mr. Lundu before the single Judge. We are quite sure that had he done so the

Single Judge would have arranged for the matter to be placed before the Court.

The law on references is settled. Only issues which have been raised and considered before the single Judge can be raised in the reference. The learned single Judge cannot be faulted on issues which were not raised before him.

In the case of **TRI-TEL Telecommunication Tz Ltd v Tanzania Telecommunications Co. Limited and Three Others**, Civil Reference No.12 of 2003 (unreported) it was stated as follows:-

*"All matters which were not raised before the single Justice of Appeal are irrelevant to the reference and, therefore cannot provide a ground for objecting to the reference and asking for it to be struck out."*

However it is equally settled that the issue of jurisdiction can be raised at any stage of the proceedings even before this Court.

In **Charles Julius Rukambura v Isaac Ntwa Mwakajila and Tanzania Railways Corporation**, Civil Appeal No.2 of 1998 (unreported) it was stated as follows:

*"The question of jurisdiction is paramount on any court proceedings. It is so fundamental that in any trial even if it is not raised by the parties at the initial stages, it can be raised and entertained at any stage of the proceedings in order to ensure that the Court is properly vested with jurisdiction to adjudicate the matter before it".*

We appreciate that the above authority refers to appeals. However by parity of reasoning we think that the same principle should apply in a reference. Although the above point was not raised before Mandia, J.A. this was a question of jurisdiction and we think it was proper for Mr. Lundu to raise it at this stage.

Since the first ground of complaint is sufficient to dispose of this application we need not delve into the second ground.

In the result, and for the foregoing reasons, we allow the reference with costs. The effect of our decision is that Civil Application No. 18 of 2008 that was before Mandia, J.A. will now be heard by the Court on a date to be fixed.


DATED at ARUSHA this 6<sup>th</sup> day of October, 2011.

J.H. Msoffe  
**JUSTICE OF APPEAL**

S. Mjasiri  
**JUSTICE OF APPEAL**

S.A. Massati  
**JUSTICE OF APPEAL**

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

  
**E.Y. MKWIZU**  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**