

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

**(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)**

**BK CIVIL APPLICATION NO. 3 OF 2011**

**DAUDA KANAGWA ..... APPLICANT**

**VERSUS**

**1. IZAMU ABDUL ]  
2. BARIKIA AMRAN ] ..... RESPONDENTS**

**(Application to strike out a Notice of Appeal arising  
from decision of the High Court  
of Tanzania at Bukoba)**

**(Lyimo, J.)**

**dated the 28<sup>th</sup> day of January, 2010  
in  
Civil Appeal No. 2 of 2009**

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**RULING OF THE COURT**

29<sup>th</sup> & 29<sup>th</sup> May, 2012

**RUTAKANGWA, J.A.:**

This application is brought under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant, by notice of motion, is moving the Court to strike out the notice of appeal lodged by the 1<sup>st</sup> respondent in respect of the decree of the High Court sitting at Bukoba in Civil Appeal No. 2 of 2009, dated 28<sup>th</sup> January, 2010. The basis of the application is that although the notice of appeal was supposed to be lodged

within 14 days, then, of the impugned decree and a copy of the same served on him within 7 days, he has to date not been served with the same. This failure, he argues, renders the lodged notice of appeal liable to be struck out under Rule 89 (2) of the Rules.

On his part, the 1<sup>st</sup> respondent has vehemently argued that he served the applicant a copy of the notice of appeal on 6<sup>th</sup> February after duly lodging it on 5<sup>th</sup> February, 2010. He did not provide any proof of such alleged service, claiming that it was their accepted practice to serve each other informally.

The credibility of the 1<sup>st</sup> respondent's claim was put to test by the 2<sup>nd</sup> respondent. The latter told the Court that contrary to the allegation of the 1<sup>st</sup> respondent that they were serving each other informally, his own copy of the notice of appeal was served on him by dispatch by a clerk from the 1<sup>st</sup> respondent is firm of advocate.

We have dispassionately considered the rival claims between the applicant and the 1<sup>st</sup> respondent. For two goods reasons, we have reached

a conclusive finding that the 1<sup>st</sup> respondent never served the applicant with a copy of the notice of appeal. **One**, the 1<sup>st</sup> respondent is bare assertions are not supported by any document signed by the applicant acknowledging service on him. Furthermore, we are settled in our minds that the claim that service was made on 6<sup>th</sup> February, 2010 is an afterthought. Had it been true, this would have been reflected in his "counter affidavit" lodged on 24<sup>th</sup> May, 2012.

**Two**, the undisputed assertion of the 2<sup>nd</sup> respondent that service on him was done formally by dispatch as already shown, reduces the defence of the 1<sup>st</sup> respondent to a pack of lies. The 1<sup>st</sup> respondent is trying to become wise after the event.

All said, we find merit in this application. As the 1<sup>st</sup> respondent failed to serve a copy of the notice of appeal at all, he contravened the mandatory provisions of Rule 77 (1) of the then Court Rules, 1979. We are constrained, therefore, to strike out the impugned notice of appeal with costs as urged by the applicant as we hereby do.

Order accordingly.

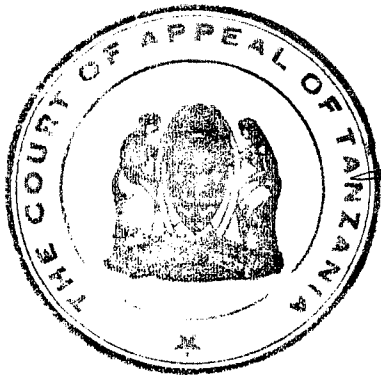
DATED at MWANZA this 29<sup>th</sup> day of May, 2012.

E.M.K. RUTAKANGWA  
**JUSTICE OF APPEAL**

E.A. KILEO  
**JUSTICE OF APPEAL**

K.K. ORIYO  
**JUSTICE OF APPEAL**

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



  
E.Y. MKWIZU  
**DEPUTY REGISTRAR**