

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

**(CORAM: MUNUO, J.A., KIMARO, J.A. And MJASIRI, J.A)**

**CIVIL APPEAL NO. 26 OF 2011**

**ALLY M. TARIMO ..... APPELLANT**

**VERSUS**

**JULIUS GOGADI.....RESPONDENT**

**(Appeal from the Ruling of the High Court of Tanzania  
at Tabora)**

**(Mujulizi, J)**

**dated 23<sup>rd</sup> day of February, 2010 and 7<sup>th</sup> October, 2010**

**in**

**Civil Case No. 7 of 2009**

**and**

**Misc. Civil Appl. No.9 of 2010**

**.....**

**RULING OF THE COURT**

**23 & 28 May, 2012**

**MJASIRI, J.A:**

In this appeal, the appellant Ally Tarimo is appealing against the decision of the High Court sitting at Tabora (Mujulizi, J) dated February 23, 2010 and October 7, 2010 in Civil Case No 7 of 2009.

When the appeal was called on for hearing, Mr Constantine Mutalemwa learned advocate for the respondent, Julius Gogadi, raised a preliminary objection, notice of which had been lodged earlier in terms of Rule 107 (i) of the Tanzania Court of Appeal Rules 2009.

The preliminary objection reads as follows:-

- *That both the High Court's dismissal order and refusal order to restore the dismissed suit under Order IX Rule 4 of the Civil Procedure Act Cap 33 R.E. 2002 are non appealable in terms of section 5(1) of the Appellate Jurisdiction Act Cap 141 R.E.202 as expounded in **Abbas Patrick Robert Mwakitwangwe Versus Power Roads (T) Limited and Peregrine International Limited**, Civil Application No 32 of 2009 CAT DSM Registry unreported.*
- *Alternatively, the appeal is incompetent for lack of leave to appeal to this Honourable Court against both the High Court's decisions dated 23.02.2010 and 7.10.2010.*

- *Further that the appeal against the High Court's decision dated 23.02.2010 is incompetent for lack of notice of appeal.*
- *Alternatively, that the appeal against High Court's decision dated 23.02.2010 is time barred.*

At the hearing of the appeal the appellant was represented by Mr. Kamaliza Kayaga and the respondent was represented by Mr. Constantine Mutalemwa learned Advocates.

The parties were heard by the Court on the preliminary points of law and the Court reserved its ruling.

However upon perusal of the record we made the following observations:-

When the suit was dismissed by the High Court on February 23, 2010 the matter was fixed for hearing on a preliminary point of law which was filed by the respondent. When the matter was called on for hearing neither the appellant/plaintiff nor the respondent/defendant was present in court.

There was also no proof of service to the parties. The order dismissing the suit did not indicate that the parties were served.

As the matter was set up for hearing on a preliminary point of law, was the High Court Justified in dismissing the suit on that date? We do not think so. We are of the considered view that given the prevailing circumstances the matter should be heard on merit. By the powers vested in us under Section 4(2) of the Appellate Jurisdiction Act Cap 141, R.E. 2002 as amended, we hereby quash and set aside the decision of the High Court dated February 23,2010 dismissing the suit and all other subsequent orders thereto. We direct that the record be remitted to the High Court so that the matter can be determined on merits.

It is so ordered.

**DATED** at **TABORA** this 24<sup>th</sup> day of May, 2012.


E. N. MUNUO  
**JUSTICE OF APPEAL**

N. P. KIMARO  
**JUSTICE OF APPEAL**

S. MJASIRI  
**JUSTICE OF APPEAL**

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



  
(Z. A. Maruma)  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**