

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

**(CORAM: KIMARO, JA., MASSATI, J.A., And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 93 OF 2013**

**GIDAMUDAIGA GIDAYAW..... APPELLANT  
VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania  
At Arusha)**

**(Massengi, J)**

**Dated the 15<sup>th</sup> day of February, 2013  
in**

**High Court Criminal Secession No. 45 of 2012**

.....

**RULING OF THE COURT**

5th & 12<sup>th</sup> December, 2013

**MMILLA, J.A.:**

Gidamudaiga Gidayaw lodged Criminal Appeal No. 93 of 2013 in this Court in which he intended to contest the judgment of the High Court of Tanzania at Arusha handed down on 15.2.2013. That appeal was slated for hearing on 5.12.2013. At the commencement of hearing of the said appeal, Ms Ellen Rwijage, learned State Attorney who represented the respondent /Republic requested the Court to allow her to raise a point of law of which she had not filed a notice of preliminary objection. She pleaded that she

pleaded that she discovered the defect in the appellant's notice of appeal while in court. We granted her the permission sought.

In her brief submission, Ms Rwijage informed the Court that the appellant's notice of appeal was defective for failure to substantially comply with Form B as mandated by Rule 68(7) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In her view, it was improper for the said notice to have said generally that he was appealing against the whole of the decision of the High Court. She urged the Court to declare the notice of appeal fatally defective, thus rendering the appeal itself incompetent entitling the Court to strike it out.

On the other hand, Ms Neema Mtayangulwa, learned advocate who represented the appellant conceded that the notice of appeal filed by her client did not substantially comply with Form B as asserted by her learned sister, and that constitutes a fundamental defect. However, while she agreed with Ms Rwijage that the appeal should be struck out for incompetency, she prayed the Court to grant them an order extending time in which to file a fresh notice of appeal. Unfortunately, she did not point

out any provision under which the Court could grant the order sought. Most probably, she had in mind the provisions of Rule 47 of the Rules.

There is no gainsaying that a competent notice of appeal must comply with the dictates of Rule 68(2) and must substantially comply with Form B of the First Schedule to the said Rules as contemplated by sub rule (7) thereof. While sub rule (2) prescribes the components which must be indicated in the notice of appeal, to wit, the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal, sub rule (7) thereof prescribes for the format which it says must be substantially complied with.

We have closely examined the notice of appeal under consideration. It is positive that it did not comply with Form B of the First Schedule to the said Rules as contemplated by sub rule (7) thereof. We wish to point out that since the appellant is in prison, Rule 75 of the Rules also comes into play. Rule 75 provides that if the appellant is in prison, he shall be deemed to have complied with the requirements of Rule 68 governing notice by filling **Form B/1** and handing it over to the officer-in-charge of the prison in which he is serving sentence.

The appellant's notice of appeal under attack by Ms Rwijage says:-

**"NOTICE OF APPEAL**

Take notice that Gidamudaiga Didayaw (sic: Gidayaw) being dissatisfied with the decision of the honourable Mr. Justice Hon. Massengi (sic) given at Babati on 15.02.2013 intends to appeal to the Court of Appeal of Tanzania against the whole of the said decision as decides that having been sentenced to suffer death by hanging.

The address for service of the appellant is ...."

We also venture to reproduce Form B/1 which he was required to substantially comply with for purposes of comparison. That form is as hereunder below:-

**FORM B/1  
(Rule 75)**

In the Court of Appeal of Tanzania at..... Criminal/Civil or Application No  
..... of .....20.....

In the matter of an intended appeal/Criminal/Civil. Appeal No..... of  
.....20.....

Between

..... Appellant

And

..... Respondent

(Appeal from the ..... of the High Court of .....

at..... (Mr. Justice .....)

Dated.....20.....in .....

Criminal/Civil or Application/Appeal No ..... of .....20.....)

NOTICE OF APPEAL

TAKE NOTICE that ..... appeals to the Court of Appeal of Tanzania against the decision of the Honourable Mr. Justice ..... given at ..... on the ..... day of ..... 20..... whereby the appellant was convicted of ..... and sentenced to .....

The appeal is against conviction only/conviction and sentence/sentence only.

The appellant intends/does not intend to be present at the hearing of the appeal. The address of service of the appellant is .....

Dated this ..... day of ....., 20.....

Signed..... Appellant/Advocate for the Appellant

(Retained only to prepare this notice/

Retained to appear at the hearing of the

appeal/Assigned to appear at the hearing of the appeal.

To: The Registrar of the High Court at..... Lodged in the High Court of Tanzania at ..... on the .....day of ....., 20.....

.....

*Registrar*

For Appellant who is in prison:

Date of Judgment and Conviction: .....

Date of entering the prison: .....

Date of lodging an intention to appeal: .....

Name of certifying officer - in - charge of the prison: .....

Signature: .....

Date: .....

Date of transmission: .....

It is ***ipso facto*** clear that the appellant's notice of appeal did not at all comply with Form B/1 as is glaringly clear when the two extracts are compared. In view of that, we agree with Ms Rwijage that the appellant's notice of appeal appearing on page 57 of the appeal record is fundamentally defective. Since in terms of Rule 68(1) of the Rules the

notice of appeal institutes the appeal, a fatally defective notice of appeal renders the appeal incompetent liable to be struck out as we accordingly do.

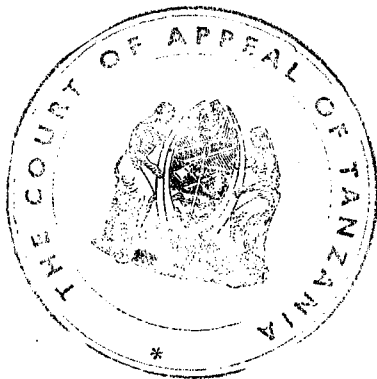
We also considered the issue whether or not we could entertain the request pressed by Ms Mtayangulwa for extension of time to allow them file a fresh notice of appeal.

As already stated her request is, we think, premised under Rule 47 of the Rules. Although it is provided under that Rule that an application for extension of time may be entertained by both the High Court and this court, but that it has first to be filed in the High Court or tribunal, it is expressly stated in that same Rule that in any criminal matter the Court may in its discretion, on application or on its own motion give leave to appeal or extend the time for the doing of any act, notwithstanding the fact that no application has been made to the High Court. Nevertheless, this is a judicial discretion, and has to be applied on sound reasons. In our firm view, the Court can only do so on the assumption that there is a competent appeal or application before it.

As regards the present case, we do not think there are sound reasons to exercise our discretion in this case to grant the request for extension of time in which to file a fresh notice of appeal because having reached the conclusion that the notice of appeal is incompetent and we have struck it out, there is no longer any matter pending before us on which to base the grant of the order sought. Given such a situation, we decline to grant the prayer sought.

We accordingly order.

**DATED at ARUSHA** this 10<sup>th</sup> day of December, 2013.




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

S.A. MASSATI  
**JUSTICE OF APPEAL**

B.M. MMILLA  
**JUSTICE OF APPEAL**

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

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