

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

**(CORAM: KIMARO, J.A., BWANA, J.A. And MANDIA, J.A.)**

**CIVIL APPLICATION NO. 47 OF 2011**

**ENIFA KAJUMBA..... APPELLANT**

**VERSUS**

**KILIMANJARO TRUCK CO. LTD ..... RESPONDENT**

**(Application for Striking out Notice of Appeal from the Judgment of the  
High Court of Tanzania at Dar es Salaam)**

**(Shangwa, J.)**

**dated the 17<sup>th</sup> day of June, 2010**

**in**

**Civil Appeal No. 182 of 2007**

.....  
**RULING OF THE COURT**

8<sup>th</sup> & 21 February, 2013

**BWANA, J.A:**

This application was filed on 12<sup>th</sup> May, 2011. It requests the Court to strike out a Notice of Appeal in respect of the decision of the High Court in Civil Appeal No. 182 of 2007 dated 17<sup>th</sup> June, 2010. The said Notice of Appeal to this Court was filed on 14<sup>th</sup> July, 2010. It is the applicant's averment therefore, by the time he filed this application on 12<sup>th</sup> May, 2011, the respondent had taken no essential step either to prosecute the appeal or to ask and be granted extension of time to do the same. This application was

filed pursuant to Rules 48 (1) and (2) and 89 (2) of the Court of Appeal Rules 2009 (the Rules).

It is on record that when the respondent filed the Notice of Appeal on 14<sup>th</sup> July, 2010, on the same day he wrote to the Registrar of the High Court requesting to be supplied with copies of the proceedings, judgment and decree. A copy of that letter was served upon the applicant on 16<sup>th</sup> July, 2010. According to Mr. Godwin Muganyizi, learned counsel for the applicant, after the filing of the Notice of Appeal by the respondent, no further steps were taken until 12<sup>th</sup> May, 2011 when the applicant filed this application and served the respondent with copies of the same on 20<sup>th</sup> May, 2011. Therefore, according to Mr. Muganyizi, a period of almost one calendar year elapsed without the respondent taking essential step in prosecuting his appeal. That failure led the applicant to invoke Rule 89 of the Rules and file this application. He claims for costs of the application as well.

It is further on record that after service of copy of the applicant's notice of motion to the respondent, Mr. H.H.H. Nyange, learned counsel for the respondent, filed an application for extension of time to apply for leave to appeal out of time. The said application was lodged on 2<sup>nd</sup> August, 2011, some months after the applicant's application. It is therefore, Mr. Muganyizi's averment that such an application is an attempt to pre-empt his client's earlier application. We will revert to this point shortly.

In reply, Mr.Nyange does not dispute the facts as stated above. However, in both his submission and affidavit in reply, Mr. Nyange attributes those sequence of events to several factors including the following:-

- That his client could not process his appeal in time because he was not aware that the judgment of the High Court had been delivered on 17<sup>th</sup> June, 2010. The respondent's earlier counsel had not informed him of that fact. Hence, when Mr. Nyange took over as new counsel, he had to face all the consequences of the delay. We should however note at this juncture that it is on record that Mr. Nyange took over the matter well in time but then he was not mindful of the implications of Rules 89(2) and 90(1) and (2).
- The relevant High Court documents were not availed to him well in time before Mr. Muganyizi's filing this application.
- There is a pending application before the High Court by his client, requesting for extension of time. The said application was filed after accessing the court record in June, 2011 and again in August, 2011 following a discovery of some errors on his part. We should note again that subsequent correspondence or series of activities that took place between the respondent and the High Court were not copied to the applicant as expected under the Rules. We cannot therefore take the said averments on their face value.

Having considered the foregoing analysis of the facts involved in this application, the following observations are important.

First and foremost is whether this application is proper before the Court or is an attempt to pre-empt the respondent's application for extension of time allegedly pending before the High Court. It is not in dispute that the respondent herein lodged a notice of appeal to this Court. The said notice, dated 14<sup>th</sup> July, 2010 reads in part as follows.

**NOTICE OF APPEAL**

TAKE NOTICE that KILIMANJARO TRUCK CO. LTD. being dissatisfied with the decision of the Honourable Mr. Justice Shangwa, given at Dar es Salaam on the 17<sup>th</sup> day of June, 2010, intends to appeal to the Court of Appeal of Tanzania against the whole of the said decision .....

The above notice of appeal is substantially similar to form D of the first Schedule to the Rules. It was properly filed before this Court. It is now settled that a Notice of Appeal filed in Court puts in motion the appeal process (R.83). Therefore, it has to follow the requirements of the Rules of Court, in terms of procedure and timing. Failure to comply with the foregoing, as was the case herein, invites the adverse party to

invoke relevant provisions of said Rules and apply for remedy. In the instant matter, it is evident that after lodging the Notice of Appeal, the respondent took no further essential step in prosecution of his appeal within the prescribed period. That led the applicant to invoke Rule 89(2) of the Rules and apply for the appeal to be struck out. The said Rule 89(2) provides thus:-

“...Subject to the provisions of sub rule (1), a respondent ..... may at any time, either before or after the institution of the appeal, apply to the Court ***to strike out the notice ..... 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***”(Emphasis provided).

In this matter, the respondent took no essential step within the prescribed period. He did not apply for extension of time for leave to proceed with the appeal (R.90). Given those circumstances, we are of the considered view that this application to strike out the Notice of Appeal has merit. Mr. Nyange’s averments, supra, do not disclose sufficient cause for the delay. Likewise, any application pending before the High Court, “***in mitiori sensu***” does not affect this application. The present application had to stand and be considered on its own merits.

In conclusion and all the above considered, the application before us has merit. The Notice of Appeal filed by the respondent on 14<sup>th</sup> July, 2010 is accordingly struck out, with costs in favour of the applicant.

DATED at DAR ES SALAAM this 20<sup>th</sup> day of February, 2013

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

S.J. BWANA  
**JUSTICE OF APPEAL**

W.S. MANDIA  
**JUSTICE OF APPEAL**

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



M.A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**