

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

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CIVIL APPLICATION NO. 25 OF 2012

JOAN CONSTANTINE APPLICANT

VERSUS

MOHAMED SLEYM RESPONDENT

**(In the matter on an intended Appeal from the decision of the High
Court of Tanzania
at Mwanza)**

(Sumari, J.)

dated the 16th day of October, 2012

in

H/C Land Case No. 9 of 2006

.....

RULING OF THE COURT

4th & 6th December , 2013

MUSSA, JA.:

The applicant seeks to move the Court towards striking out a Notice of Appeal, allegedly, filed by the respondent on the 23rd October, 2012. The application is by Notice of Motion taken out under the provisions of Rule 89(2) of the Tanzania Court of Appeal Rules ("the Rules"). The same is accompanied by an affidavit, duly affirmed by Mr. Salum Amani Magongo, learned Advocate for the applicant.

The reason assigned for the applicant's quest, in both the Notice of Motion and the affidavit, is an alleged failure by the respondent to take an

essential step in the prosecution of the desired appeal. More specifically, the applicant faults the respondent for failure to institute and obtain, from the High court, the requisite leave to appeal within the prescribed time. As it turns out, the application is countered by an affidavit in reply, duly affirmed by the respondent.

When the application was called on for hearing, the learned Counsel for the applicant defaulted appearance, as it were, despite being duly served. On the adversary side, the respondent had the services of Mr. Kassim Gilla, learned Advocate. In the light of his friend's unexplained absence, Mr. Gilla initially impressed upon us to dismiss the application with costs under the provisions of Rule 63(1). However, after we engaged him in a dialogue as to the absence of the Notice of Appeal sought to be impugned, the learned counsel, on a reflection, became seized of the reality that the application is, in the first place, incompetent. As to what fate befalls on an incompetent matter, is a subject that was meticulously addressed in the old case of **Ngoni Matengo Co-operative Marketing Union Ltd. V. Alimohamed Osman**, [1959] EA 577:-

...This Court, accordingly, had no jurisdiction to entertain what was before the court being abortive, and not a properly constituted appeal at all. What this court ought to strictly have done, in each case, was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it, for the latter phrase implies that competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of.

The defunct Eastern African Court of Appeal was addressing an improperly constituted appeal but, we should suppose, the broad statement of principle equally applies, as here, to an incompetent application. To this end, in as much as the application is not properly before us we cannot entertain Mr. Gilla's dismissal prayer and, accordingly, the application is, instead, struck out for incompetence. As this detail on the incompetence of the application was raised by the Court in the course of a dialogue with Mr. Gilla, we give no order as to costs.

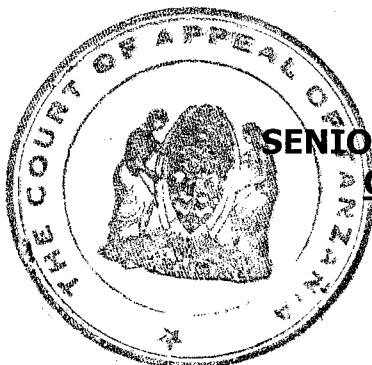
DATED at MWANZA this 4th day of December, 2013.


E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

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




P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL