

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

CORAM: BWANA , J.A, MASSATI,, J.A And JUMA, J.A.

CIVIL APPEAL NO. 54 OF 2009

NYAKATO SOAP INDUSTRIES LTD.....APPELLANT

VERSUS

CONSOLIDATED HOLDING CORPORATIONRESPONDENT

**(Appeal from the Judgment and Decree of the High
Court of Tanzania at Dar es salaam)**

(Bubeshi, J.)

Date 5th October, 2000

In

Civil Case No. 203 of 1999

RULING OF THE COURT

16th & 30th April, 2013

MASSATI, J.A.

The appellant was dissatisfied with the decision of the High Court (Bubeshi J) in Civil Case No. 205 of 1999 dated 5th October 2000, and filed an appeal in this Court on the 3rd July 2009. Similarly, the respondent was aggrieved by part of the decision and filed a notice of cross appeal on 19th July, 2009 to have it varied or reversed.

When the appeal came up for hearing, the Court was first invited to determine a preliminary objection, raised by the appellant, notice of which was earlier on filed under Rule 107 of the Court of Appeal Rules, 2009, (the Rules). The objection was against the notice of cross appeal and couched in the following terms:-

" TAKE NOTICE that on the first day of hearing of this appeal or any other date the appeal shall stand adjourned the appellant shall raise a preliminary objection on point of law and shall move the Honourable Court to strike out the cross appeal on the ground that the same is time barred following decision of the High court (Makaramba, J) dated 11th June, 2008 in Civil Case No. 205 of 1999 refusing to grant extension of time to the respondent to file notice of appeal"

For the Appellant, Mr Wilson Ogunde, learned counsel, submitted that since the Respondent's application for extension of time to file a notice of appeal was refused by the High Court on 11.6.2008, and since the Respondent had filed a notice of appeal against that ruling and an application for leave to appeal having been granted on 27/2/2009, the Respondent cannot now abandon that process and use a back door to

appeal to this Court, by way of a cross appeal. It was further his view, that for all purposes and intents a cross appeal was as good as an appeal. So, he invited the Court to read into Rule 87 of the Court of Appeal Rules, 1979 (the old Rules) (now Rule 94(1) of the Rules) that in the circumstances, the Respondent could not be allowed to have filed the cross appeal. He thus asked us to strike it out as it was incompetent. The learned counsel did not refer to us any authority on that stance.

But Mr. Lugano Mwandambo, learned counsel for the respondent, had a different view. He submitted that a notice of cross appeal is distinct from a Notice of Appeal. If extension of time to file a Notice of Appeal is refused the respondent would not be barred from filing a notice of cross appeal because the rights under Rules 77 and 87 of the old rules and 83 and 94 of the Rules are mutually exclusive and none depends on the other. He went on to point out that under Rules 87 of the old rules (and Rule 94 of the Rules) a notice of cross appeal has to be filed within 30 days from the date of service upon respondent, of a record and memorandum of appeal. In the present case, the respondent was served with the documents on 6/7/2009 and the cross appeal was filed a 17/7/2009. So it was filed in time, he argued. He therefore urged us to dismiss the

preliminary objection with costs. Like Mr. Ogunde, Mr. Mwandambo himself did not refer to us any authority to support his own version.

The notice of cross appeal in this case was filed under Rule 87 of the old Rules. That Rule reads as follows:

87 (1) A respondent who desires to contend at the hearing of the appeal that the decision of the High Court or any of it should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part shall give notice to that effect, specifying the grounds of contention and the nature of the order which he proposes to ask the Court to make, or to make in that event, as the case may be.

(2) A notice given by a respondent under this Rule shall state the names and addresses of any person intended to be served with copies of the notice and shall be lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal. (Emphasis supplied)

(3) A notice of cross appeal shall be substantially in the Form G in the First Schedule to these Rules and shall be signed by or on behalf of the respondent.

This provision is in *pari materia* with Rule 94 of the current Rules. Unlike a cross appeal, a notice of appeal under the old Rules, was instituted under Rule 77 (now Rule 83) "*in duplicate, within fourteen days*). It is only after lodging the notice of appeal that an appeal could have been instituted within sixty days from the date when the notice of appeal has been lodged. So while an appeal comes into existence when a notice of appeal is lodged, a cross appeal can only come into existence, and co exist in and after lodging an appeal. It does not depend on the existence of a notice of appeal. To that extent, we partly agree with Mr. Mwandambo that an appeal and a cross appeal are distinct proceedings, but we do not agree with him that they do not depend on each other. A notice of cross appeal is dependant upon the coming into existence of an appeal. So under Rule 87 (2) of the old rules time begins to run after the respondent has been served with a record of, and memorandum of appeal.

In the present case, there is no dispute that the record and memorandum of appeal was served on the respondent on 6/7/2009, and that the notice of cross appeal was filed on 17/7/2009, well within the prescribed 30 days. In our view, it is not relevant for the purposes of Rule 87(2) of the old Rules (or Rule 94(2) of the current Rules) whether or not

the respondent had attempted and failed to lodge a separate notice of appeal in the same proceedings; because as seen above a notice of cross appeal is a distinct creature brought about by the existence of an appeal.

For the above reasons, we find no merit in the preliminary objection and dismiss it with costs.


DATED at DAR ES SALAAM this 19th day of April, 2013.

S. J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL