

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**CIVIL APPLICATION NO. 12 OF 2015**

**MZARTC TRADING COMPANY LTD ..... APPLICANT**

**VERSUS**

**EXPORT TRADING COMPANY LTD ..... RESPONDENT**

**(Arising from the decision of the High Court of Tanzania  
Commercial Division at Mwanza)**

**(Makaramba J.)**

**dated the 1<sup>st</sup> day of April, 2014**

**in**

**Commercial Appeal No. 1 of 2014**

**R U L I N G**

2<sup>nd</sup> & 9<sup>th</sup> December, 2015

**MJASIRI, J.A.:**

This is an application for extension of time to file a notice of appeal. The application for extension of time to file a notice of appeal was rejected by the High Court (Songoro, J.) leading to this application.

Mr. Mutalemwa filed a preliminary objection, a notice of which was lodged on July 20, 2015. It is reproduced as under:-

*"That this Honourable Court lacks jurisdiction to extend time for filing the Notice of Appeal under Rule 10 of the Court Rules, 2009 as clearly stated*

*by this Court in both cases of **Mkunazini Shipping Enterprises & Mkunazini General Trader versus Said Khamis Hamed** CAT, Zanzibar, Civil Application No. 5 of 2012 Zanzibar Registry, (unreported) and **Aioyce Mseiie versus Consolidated Holding Corporation**, CAT, and Civil Application No. 1 (B) of 2009, Arusha Registry.”*

Both parties filed written submissions in accordance with the requirements under the Court Rules.

At the hearing of the application the applicant was represented by Mr. Chama Matata, learned advocate and the respondent had the services of Mr. Constantine Mutalemwa, learned advocate.

Mr. Mutalemwa submitted that the Court has no jurisdiction to hear the application in view of the decisions of this Court in the **Mkunazini** and **Mselle** cases (supra). According to Mr. Mutalemwa, this Court cannot exercise its jurisdiction to extend time to file a notice of appeal following the refusal by the High Court. Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Court Rules) does not confer any such powers. The correct procedure is to appeal to the Court against the refusal order.

According to Mr. Mutalemwa, there are conflicting decisions of this Court on the said issue. He made reference to the cases of **Stephen Wasira v. Joseph Warioba**, (1999) TLR 335, and **Tanzania Revenue Authority v. Tango Transport Company Limited**, Civil Application No. 5 of 2006, CAT (unreported). He submitted that no decision has been made in the **Mkunazini** case (supra). The case has been forwarded to the Court for determination. He prayed that the ruling in this matter be adjourned pending the decision of the Court in the **Mkunazini** case. Mr. Mutalemwa did not press for costs.

Mr. Matata on his part strongly opposed the preliminary objection. He argued that the preliminary objection is misconceived. He submitted that the applicant has a right to come to this Court after the High Court has refused extension of time. It is not a requirement under the law that an appeal should be filed against the order of the High Court refusing extension of time. He relied on the case of **Stephen Wasira** (supra). Mr. Matata also cited a Ugandan case, **Bruno and Others v. Republic** (1969) EA 400 where it was held that the Court of Appeal has jurisdiction to extend time to appeal.

Mr. Matata conceded that there are two conflicting positions on this aspect, that is, **One**, the requirement to file an appeal to this Court if extension of time is refused by the High Court and **Two**, this Court and the High Court have concurrent jurisdiction. He however stated that this issue cannot be raised by way of a preliminary objection.

I must admit at the outset that I was astounded by the prayer made by Mr. Mutalemwa for the ruling on the preliminary objection to be adjourned pending the finalisation of the **Mkunazini** case on a future unknown date. This argument was brought forth despite his contention that the Court has no jurisdiction to hear the application for extension of time. Being the issue of jurisdiction one would have thought that the legal issue in question would be unconcealed and apparent without there being a need to hibernate until the **Mkunazini** decision is out. This brings me to the crucial issue for determination. The terms and conditions put across by Mr. Mutalemwa before a decision on the preliminary objection is made raise serious questions as to whether or not what Mr. Mutalemwa has filed in Court qualifies as a preliminary objection. I am of the considered view that it does not, given the requirements under the law.

According to **Black's Law Dictionary** (Eighth Edition), a preliminary objection is defined as follows:-

*"An objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary"*

**In Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) EA 696 Law J.A., stated as follows at page 700:

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, **and which if argued as a preliminary point may dispose of the suit.** Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration."*

*[Emphasis provided].*

AND **NEWBOLD, P** stated thus at page 701

*"A **preliminary objection is in the nature of what used to be a demurrer.** It raises a pure point of law which is argued on assumption that all*

*the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion**".*

*[Emphasis provided].*

In **Selcom Gaming Limited versus Gaming Management (T)**

**Limited and Another** it was stated thus:-

*"A preliminary objection must first raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter."*

It was further stated that:

*"A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but on **stated legal, procedural or technical grounds. Any alleged irregularity, defect or default must be apparent on the face of the application.**"*

*(Emphasis provided)*

See - **COTTWU (T) OTTU Union & Another and Hon. Iddi Simba, Minister of Trade and Others**, Civil Application No. 40 of 2000, CAT (unreported).

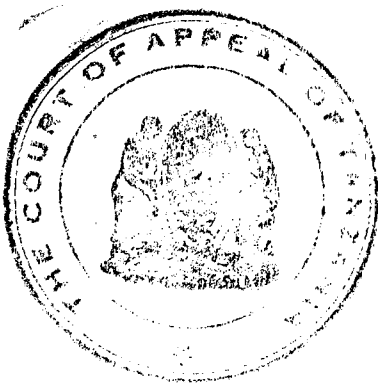
For the foregoing reasons, the preliminary objection fails in its entirety. It is hereby dismissed with costs to the applicant. The application for extension of time should therefore be heard on merit. Order accordingly.

In the circumstances, I would urge Mr. Mutalemwa to use the proper forum laid down under the law in trying to resolve the conflicting decisions of this Court.

DATED at MWANZA this 7<sup>th</sup> day of December, 2015.

S. MJASIRI  
**JUSTICE OF APPEAL**

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



  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**