

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

CIVIL APPEAL NO. 123 OF 2014

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

**M/S BRAZAFRIC ENTERPRISES LTD APPELLANT
VERSUS
KADERES PEASANTS DEVELOPMENT (PLC) RESPONDENT**

**(Appeal arising from the Ruling of the High Court of Tanzania
Commercial Division at Mwanza)**

(Nchimbi, J.)

**Dated 5th day of September, 2014
in**

Misc. Commercial Application No. 8 of 2014

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RULING OF THE COURT

4th & 11th December, 2015

MJASIRI, J.A.:

This is an appeal from the decision of the High Court of Tanzania, Commercial Division (Nchimbi, J). The appellant is represented by Mr. Alex Banturaki, learned advocate, while the respondent is represented by Mr. Aron Kabunga, learned advocate.

When the appeal was called on for hearing, Mr. Kabunga learned advocate for the respondent rose to argue a preliminary point of law a notice of which was filed under Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 (the Court Rules). The objective is to move the Court to strike out the

appeal with costs on the ground that the notice of appeal dated October 1, 2014, does not conform with the basic requirements of Rule 83 (6) of the Court Rules.

The grounds of objection are reproduced as under:-

"1. The appeal before the court is incurably irredeemably incompetent for being lodged without a notice of appeal known at law.

2. The appeal before the court is incurably irredeemably incompetent for being lodged with a notice of appeal which was not served to the respondent as required by law."

In arguing the preliminary objection, Mr. Kabunga submitted that the appellant has filed two **notices of appeal** bearing the same date. The first one appears on page 4 of the record of appeal and the second one on page 154 of the same record. According to him the notice of appeal on page 4 does not conform to Form D, the acceptable format under the Court Rules. The notice makes reference to the Court of Appeal of Mwanza. He contended that there is no such court making reference to Article 117 of the Constitution of the United Republic of Tanzania and section 3 of the Appellate Jurisdiction Act. Cap 141 (the Act).

Mr. Kabunga submitted that the second notice of appeal on page 154 must have been filed after the advocate for the appellant realized the anomaly. However this second notice was not served on the other party.

Mr. Kabunga emphasised that only one notice of appeal is required to institute an appeal. He submitted that Rule 96 (1) of the Court Rules provides a list of documents which should be contained in the record of appeal. The notice of appeal is one of the required document. Mr. Kabunga submitted further that under Rule 96 (1) (b) of the Court Rules, the respondent's last known address is to be provided as well as proof of service on him on the notice of appeal. This was not done.

He submitted that the respondent has only been served with the defective notice of appeal appearing on page 4 of the record. He stated that an appeal with a defective notice is incompetent. He made reference to the case of **Maneno Mengi Limited and Three Others V. Farida Said Nyama Chumbe and Another**, (2004) TLR 391.

Mr. Banturaki on his part, argued that the notice of appeal was properly filed and the necessary filing fees paid. In making reference to the notice of appeal on page 4, he readily conceded that the notice of appeal contained a

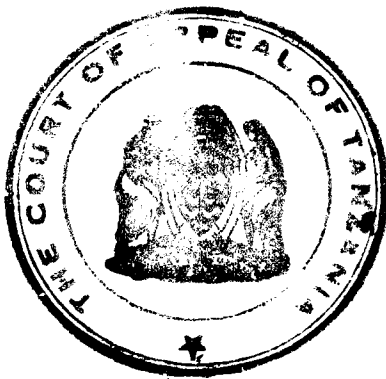
typing error and requested to withdraw it from the record since there is another notice of appeal that is the one on page 154 of the record. He insisted that the respondent was duly served with the notice of appeal appearing on page 4. He submitted further that as the appellant has complied with Rule 90 of the Court Rules, the appeal has been properly instituted. He asked the Court to dismiss the preliminary objection and to proceed with the appeal on merit.

We, on our part, having clearly examined the notices of appeal, would like to make the following observations. We found it rather strange that the appellant has filed two notices of appeal. However the crucial question for determination is whether or not the appellant has filed a proper notice of appeal in accordance with the law. It is rather obvious that the notice of appeal on page 4 of the record is defective hence we are not at all surprised that Mr. Banturaki desired to withdraw it from the record. Form D, as provided under Rule 83 (6) requires the notice of appeal to be addressed to the Court of Appeal of Tanzania and not otherwise. The notice of appeal is making reference to the Court of Appeal of Mwanza. Such a court does not exist. It is evident that it does not conform to the format provided in Form D. See- **Edson Mbogoro V. OC-CID Songea District and Another**, Civil

Appeal No. 44 of 2004. Given the shortcomings, the notice of appeal, is not valid. This means Rule 96 (1) (b) and (j) has not been complied with. Mr. Banturaki is not in any position to rely on his so called second notice of appeal on page 154 for obvious reasons. The notice of appeal has not been served to the respondent as provided under Rule 84 (1) of the Court Rules. There is no evidence of proof of service.

In the result we sustain the respondent's preliminary objection. We hereby strike out this incompetent appeal with costs. Order accordingly.

DATED at MWANZA this 7th day of December, 2015.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL