

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

**(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)
CIVIL APPLICATION NO. 14 OF 2015**

**ITEX SARL.....APPLICANT
VERSUS**

**1. CHIEF EXECUTIVE TANZANIA
ROAD AGENCY (TANROADS)RESPONDENTS**

**2. ATTORNEY GENERAL
(Application from the decision of the High Court of Tanzania
at Tabora)**

(Songoro, J.)

dated the 3rd day of October, 2013

in

Civil Case No. 6 of 2012

RULING OF THE COURT

8th & 9th December, 2015

MASSATI, J.A.:

This is an application by notice of motion under Rule 89(2) of the Court of Appeal Rules, 2009 (the Rules) in which the Court is moved to strike out the Notice of Appeal, on the ground that the respondents have failed to take essential steps in processing the appeal.

The application is supported by the affidavit of Mr. Kamaliza Kayaga learned Advocate. It is asserted in the affidavit that the applicant obtained a judgment and decree against the respondent on 3/10/2013 in its favour; that it was served with the Notice of Appeal and a letter applying for preparation of the

documents for record of appeal on 16/12/2013; that the Notice of Appeal was, in fact, lodged on 17th October 2013, thus served on the applicant on 16/12/2013 after the prescribed time for service, and that no further action has been taken to prosecute the appeal. There was no affidavit in reply to refute these allegations.

At the hearing of the application, Mr. Kayaga, learned counsel, appeared for the applicant and Mr. Juma Masanja, learned Senior State Attorney appeared for the respondents.

Mr. Kayaga adopted his affidavit and written submission and briefly submitted that as the respondents had failed to serve the application with the Notice of Appeal and a copy of the letter of request for copies of appeal documents in time, the appeal cannot be salvaged. Distinguishing the case from that of **ATHANAS SIMON v KABANGA NICKEL CO. LTD**, Civil Application No. 1 of 2014 (unreported) the learned counsel argued that the present Notice of Appeal could not be deemed to have been withdrawn under Rule 91(a) of the Rules. So, he prayed that the Notice be struck out with costs.

Mr. Masanja, conceded to the application. In addition to the problems cited by Mr. Kayaga, the learned Senior State Attorney also pointed out several defects in the Notice of Appeal itself. So, he agreed that it be struck out. But he resisted the order for costs. His reason is that since no steps had been taken in prosecuting the appeal the proper way was to deal with the Notice under Rule 91(1) of the Rules. According to the said order, costs would be in the discretion of the Court.

But, Mr. Kayaga disagreed. He said that in view of the investment in legal research he had made, he was entitled to his costs.

Since the respondents do not resist the application to strike out the Notice of Appeal, whether it is done under Rule 89(2) or 91(1) is neither here nor there; because the end result would be to terminate the Notice of Appeal. Neither would it be necessary to go into the debate on which of the two Rules is suitable. That discussion was sufficiently, we hope, undertake in **ATHANAS SIMON's** case (supra) and we need not say more. What remains to be decided presently is the question of costs, on which there seems to be a difference of opinion between the learned counsel.

In this Court, the power of the Court to order costs in appeal is provided in Rule 114(1) which reads as follows:

"114(1) The Court may make such order as to the whole or any part of the costs of appeal in the court below as may be just, and may assess them or direct taxation of them, and in the case of a second appeal this Rule shall apply to costs in the trial court as well as in the first appellate court."

We know that by its wording, the Rule appears to be applicable to appeals and it may be argued that it may not apply in an application like the present one. In our view, the rule is equally applicable to applications by inspiration and by

force of Rule 4(2) of the Rules which empowers this Court to give directions as to the procedure to be adopted or make any other order which it considers necessary. So long as there is no specific rule empowering this Court to order costs in applications, and so long as the application of Rule 114(1) does not work injustice to any party, we think it is necessary in the interests of justice to apply that Rule for the time being, in applications as well. The question is how does a Court decide to award or refuse to award costs?

As it is clear from the wording of Rule 114(1) costs are in the discretion of the Court. However the general rule and practice is that costs should normally follow the event unless the Court orders otherwise for good reason, which must be based on facts. (See **CAMPBELL v POLLACK** (1927) AC. 732). One of the accepted good reasons for depriving a successful party of his costs, is when it is shown that his conduct, either prior to, or during the course of the matter, has led to litigation, which, but for his own conduct, might have been averted. (See **DEVRAM MANJI DATTANI v HARIDAS KALIDAS DAWDA** (1949) 16 EACA 35, **PREMCHAND RAICHAND LTD. AND ANOTHER v QUALITY SERVICES OR EAST AFRICA AND OTHERS** (NO. 3) (1972) TEA 162.

Based on the above principles, do we have any reason why the applicant should be deprived of his costs in the present case? Mr. Masanja has suggested none; and we cannot find any, from the record, or from the applicant's conduct, prior or after the institution of the suit in the High Court and the present application. We further agree with Mr. Kayaga, that he has put in some energy in legal research by drafting the notice of motion preparing the written

submissions and arguing it before us. As such the applicant ought to be fairly reimbursed for the costs he has incurred. (**PREMCHAND RAICHMAND LTD. AND ANOTHER**) (supra). In the absence of any inhibitions advanced by the respondent, we do not have any reason for depriving the applicant of his costs.

That said, this application is allowed. The Notice of Appeal is struck out with costs. The costs are to be taxed.

It is so ordered.

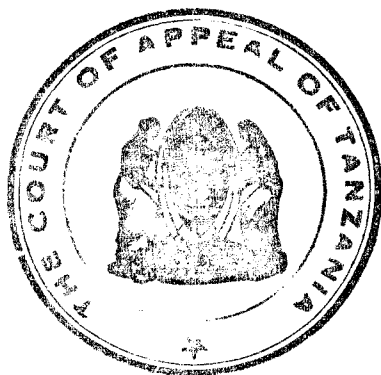
DATED at **TABORA** this 9th day of December, 2015.

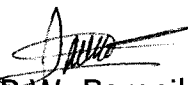
B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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




P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL