

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

**(CORAM: MASSATI, J. A., MUSSA, J. A. And MWARIJA, J. A.)**

**TBR. CIVIL APPLICATION NO. 15 OF 2015**

**WILLIAMSON DIAMONDS LIMITED ..... APPLICANT**

**VERSUS**

**1. SALVATORY SYRIDION }  
2. STEPHENE MBWANA } ..... RESPONDENTS**

**(Application from the Ruling of the High Court of Tanzania, at Tabora)**

**(Songoro, J.)**

**dated the 25<sup>th</sup> day of November, 2014**

**in**

**Civil Case No. 2 of 2013**

.....

**RULING OF THE COURT**

11<sup>th</sup> & 13<sup>th</sup> April, 2016

**MASSATI, J.A.:**

By Notice of Motion filed under Rules 4 (2) (a) and 91 (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) the Applicant has sought to move this Court for an order that the notice of appeal be deemed to have been withdrawn on the ground that the Respondents have failed to institute an appeal within sixty days from the date of lodging their Notice of Appeal.

When the application was called on for hearing, we were first faced with a notice of preliminary objections. After some consultations with the learned counsel, we decided to handle both the preliminary objections and the main application. So, this Ruling consists of two parts. The **first** relates to the preliminary objections. The **second** part is in respect of the main application.

At the hearing, the Applicant was represented by Mr. Faustine Malongo, learned counsel, and the respondent was represented by Mr. Mackanjero Ishengoma, learned counsel.

In his notice of preliminary objection Mr. Ishengoma raised two points; namely:-

- (1) That the Notice of Motion filled (sic) by the Applicant is incompetent before this hon. Court for Non-citation of the provisions that support/allowing the lodging of the said application contrary to the law.*
- (2) That the said notice was improperly brought/lodged before this Hon. Court.*

In his submission, Mr. Ishengoma said that it was wrong for the Applicant to have cited Rule 91 (a) of the Court of Appeal Rules, 2009 (the Rules) because that Rule anticipates service upon such person of a notice of appeal, which is not the case here. So Rule 91 (a) was not applicable.

On reflection, however, the leaned counsel conceded that it was proper for the Applicant to cite Rule 4 (2) (a) of the Rules to support the application but it was not proper to cite both Rules 4 (2) (a) and 91 (a). He also added that Rule 48 (1) of the Rules should also have been cited as an enabling provision.

On further reflection, the learned counsel abandoned his second preliminary objection.

On his part, Mr. Malongo submitted that the preliminary objection was misconceived. It was his view that for Rule 91 (a) of the Rules to come into play it does not have to be preceded by service of a notice of appeal, which was an express prerequisite under Rule 89 (2) of the Rules. The purpose of the application under Rule 91 (a) of the Rules was to bring to the attention of the court the pendency of a Notice of Appeal which was useless, so that

the Court could make the necessary orders and strike out the Notice of Appeal from the register. For this, he cited the decision of this Court in **EXPORT TRADING COMPANY AND LIMITED vs MZARTC TRADING COMPANY LIMITED** (Civil Application No. 10 of 2014 (unreported)).

With regard to the non-citation of Rule 48 of the Rules, Mr. Malongo submitted that this Rule only prescribes the manner of drawing applications. It was not an enabling provision. So its non-citation was not fatal. He therefore prayed for the dismissal of the preliminary objections.

The main issue is whether the provisions cited were proper.

The application is based on Rules 91 (a) and 4 (2) (a) of the Rules.

The said Rules provide as follows:-

*4 (1) .....but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interests of justice.*

*(2) (a) Where it is necessary to make an order for the purposes of dealing with any matter for which no*

*provision is made by these Rules or any other written law.*

Rule 91 provides:-

*If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time*

*(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court orders otherwise, be liable to pay the costs of any persons on whom the notice of appeal was served arising from that failure to institute the appeal.*

It seems to us that the purpose of Rule 91 (a) is to flush out such notices of appeal as have outlived their usefulness. That power is vested in the Court. We are further of the view that in exercising such powers, the Court may do so *suo motu* (after giving notice to the parties) or it may be moved by any party who may or ought to have been served with a copy of the notice of appeal under Rule 84 (1) of the Rules. To that extent Rule 91 (a) is broader than Rule 89 (2) where only a party who has been served with a notice can apply to strike out the notice of appeal. From the wording of the Rule, it is also clear that even a party who has been served with a copy

of the notice may opt to move the Court under Rule 91 (a) instead of Rule 89 (2).

That a party who has not been served with a copy of a notice of appeal could also move the Court under this provision has been tested before. In **EXPORT TRADING COMPANY LIMITED vs MZARTC COMPANY LIMITED** (*supra*) and the cases cited therein, it was held that this was possible. So, from the above reasons, we hold that Rule 91 (a) was properly cited as an enabling provision for the application.

As for the non-citation of Rule 48 (1) of the Rules, we agree with Mr. Malongo that the Rule is not an enabling provision. It only prescribes, the manner in which applications to the Court are to be made. It does not clothe the Court with jurisdiction to determine any matter. Although it is desirable to cite it, its non-citation is not fatal.

In fine, we find that the preliminary objection are devoid of substance and we accordingly dismiss them. This marks the end of Part one of this Ruling.

As for part two of this Ruling, Mr. Malongo, adopted his written submission, and went on to submit orally that the application was essentially based on the fact that notwithstanding the fact that the Applicant was not served with the Notice of Appeal, it (the Applicant) was also not served with a copy of the letter from the Respondent requesting for copies of the proceedings and judgment which would have entitled the Respondent to a certificate of delay in terms of Rule 90 (1) of the Rules. So it was obvious that the pending Notice of Appeal was purposeless.

On his part, Mr. Ishengoma came so close to conceding that indeed the pending Notice of Appeal was useless and indeed invalid in terms of Rule 84 (1) of the Rules, having served the Applicant with a copy of it and a copy of letter of request, on 25/2/2015, after lodging the Notice of Appeal on 28/11/2014, well beyond the prescribed time. He also conceded that it was a mistake on his part to not have annexed the said copies in his affidavit in reply.

Finally, Mr. Ishengoma submitted that if the application was allowed, there should be no order as to costs; because in terms of Rule 91 (a), the Applicant was not served with a notice of appeal.

In rejoinder, Mr. Malongo, submitted that it was appropriate to bring the prayer for costs under Rule 4 (2) (a) of the Rules, in which the Court also had power to grant costs as it deemed fit.

This matter should not detain us. At the end of the hearing of the main Application, Mr. Ishengoma conceded that the Applicant was not served with a copy of the Notice of Appeal within 14 days of the Notice being lodged. This is clear from the contents of paragraphs 6 and 7 of the counter-affidavit. In paragraph 6, it is alleged that the notice was lodged on 28<sup>th</sup> November, 2014. But in paragraph 7, it is further alleged that the Applicant was served with a copy of the Notice of Appeal on 25<sup>th</sup> February, 2015 which is a period of nearly 90 days contrary to Rule 84 (1) which requires such copies to be served within 14 days after lodging the notice. It is therefore clear that the Notice of Appeal now pending in Court is invalid, and of no effect.

In the light of all the circumstances of this case, we allow the application. In exercise of our inherent powers under Rule 91 (a) and Rule 4 (2) (a) we declare that the Notice of Appeal is deemed to have been



withdrawn in terms of Rule 91 (a) of the Rules and it is so marked. The applicant shall have his costs.

Order accordingly.


**DATED** at **TABORA** this 12<sup>th</sup> day of April, 2016.

S. A. MASSATI  
**JUSTICE OF APPEAL**

K. M. MUSSA  
**JUSTICE OF APPEAL**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

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

  
P. W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**