

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

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CIVIL APPLICATION NO. 23 OF 2014

**SIRI NASSIR HUSSEIN SIRI.....APPLICANT
VERSUS
RASHID MUSA MCHOMBA (Acting as
administrator of the estate of the
deceased MUSA MCHOMBA MASSAWE).....RESPONDENT**

**(Application for striking out Notices of Appeal arising from the
decisions of the High Court of Tanzania
at Arusha)**

(Sambo, J.)

**Dated 18th day of May, 2010, and
Dated 15th April, 2013**

in

**Civil Appeal No. 15 of 2009, and
Misc. Civil Application No. 52 of 2010**

RULING OF THE COURT

29th February & 1st March, 2016.

MBAROUK, J.A.:

The applicant has filed a notice of motion made under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking an order of this Court to strike out the two Notices of Appeal lodged on 21st May, 2010 in respect of the decision of the High Court of Tanzania in Civil Appeal No. 15 of 2009 and another one lodged

on 25th April, 2013 in respect of the ruling of the High Court of Tanzania in Misc. Civil Application No. 52 of 2010. The notice of motion was supported by the affidavit of Siri Nassir Hussein, the applicant.

When the application was called on for hearing, we noted that there was a notice of preliminary objection made under Rule 4 (2) (a) of the Rules lodged by the advocate for the respondent on 20th February, 2016 to the effect that the applicant's application which seeks to strike out two notices of appeal filed in respect of two different decisions is misconceived and thus incompetent.

To appreciate what is contained in the affidavit in support of the application, we have seen it prudent to cite the relevant paragraphs in that affidavit as follows:-

*"2. That the decision/judgment of the High Court of Tanzania in the said Civil Appeal No. 15 of 2009 was delivered on 18th May, 2010. A copy of the decision is annexed hereto marked **E₁** forming part of this Affidavit.*

3. *That on 21st May, 2010 the said MUSA MCHOMBA MASSAWE through the services of F. S. Kinabo Advocate lodged in the Court of Appeal of Tanzania a Notice of Appeal against the decision of the High Court of Tanzania in Civil Appeal No. 15 of 2009. A copy of the Notice of Appeal is annexed hereto marked E₂ forming part of this Affidavit.*
4. *That on 14th July, 2010, that is almost after 57 days, the said MUSA MCHOMBA MASSAWE through the services of F. S. Kinabo Advocate, lodged in the High of Tanzania at Arusha, Misc. Civil Application No. 52 of 2010 for leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court in Civil Appeal No. 15 of 2009. A copy of the application is annexed hereto marked E₃ forming part of this Affidavit.*
5. *That on 13th September, 2010 through the services of Mwaluko and Company Advocates, the applicant herein who was the Respondent in Misc. Civil Application No. 52 of 2010 filed a Counter-Affidavit and also a Notice of*

Preliminary Objection on a point of law on the ground that the application was hopelessly time barred. Copies of the Counter-Affidavit and the Notice of the Preliminary Objections are annexed hereto and collectively marked as annexures E_{4(a)} and E_{4(b)} forming part of this Affidavit.

6. *That on 23rd May, 2011 the High Court of Tanzania at Arusha (K.M. M. Sambo, J.) granted leave for the parties to argue the preliminary objection in Misc. Civil Application No. 52 of 2010 by way of written submission within time, but the Applicant's side never filed their written submissions even after several extensions to do so which were granted by the High Court.*
7. *That after several adjournments, on 27 August, 2012 Advocate F. S. Kinabo prayed to withdraw from representing the said MUSA MCHOMBA MASSAWE who by then was deceased in Misc. Civil Application No. 52 of 2009 and one RASHID MUSA MCHOMBA that is the*

Applicant herein prayed to be joined as an Administrator of the estate of MUSA MCHOMBA MASSAWE.

8. *That on 15th day of April, 2013 the High Court of Tanzania (K.M.M. Sambo, J.) delivered the ruling on the Preliminary Objection, whereby the High Court upheld the Respondent's preliminary objection by dismissing Misc. Civil Application No. 52 of 2010 for the reason of being time barred. A copy of the ruling by the High Court of Tanzania is annexed hereto marked E5 forming part of this Affidavit."*

In this application, Mr. Ezra Mwaluko, learned advocate represented the applicant, whereas Mr. Omar Iddi Omar, learned advocate represented the respondent.

At the hearing, the learned advocate for the respondent in support of his preliminary objection submitted that as the application has combined two applications and seeks to move the Court to strike out two notices of appeal arising from two different decisions of the High Court i.e. **one**, from Civil Appeal No. 15 of

2009 (main suit) dated 18th May, 2010 and **two**, from Misc. Civil Application No. 52 of 2010 dated 15th April, 2013, the application is omnibus. For being omnibus, the learned advocate for the respondent urged us to strike out the application and each party to bear his costs. In support of his preliminary objection, Mr. Omar cited the decision of this Court in the case of **Rutagatina C. L. vs. The Advocates Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010 (unreported).

On his part, the learned advocate for the applicant after resisting the objection for some time, he later conceded to it and prayed for each party to bear his costs.

On our part, after having looked at the record, we agree with the learned advocate for the respondent that the application is omnibus as it seeks to strike out two notices of appeals arising from two different decisions of the High Court. One, notice of appeal is against the main suit from the High Court in Civil Appeal No. 15 of 2009 dated 18th May, 2009 and another notice of appeal is against the decision of the High Court from an application for leave to

appeal to this Court in Misc. Civil Application No. 52 of 2010 dated 15th April, 2013.

We are of the opinion that the applicant ought to have filed two different applications. In the case of **Rutagatina C. L.** (*supra*), this Court observed as follows:-

*"A close look at the general scheme of the Court Rules, particularly Rules 44-66 appearing under PARTS III, IIIA and IIIB, will show that all of them have one common feature. Each one of those rules, as and where is relevant, refers to **an application**. None of them talks of **applications**. It follows that under the Rules it was never envisaged that an intended applicant would file **applications**. It is no wonder that Rule 49 prescribes the manner in which a formal **application** can be presented to the Court. Thus, it occurs to us that there is*

*no room in the Rules for a party to file **two** applications in one, as happened here."*

All said and done, we are increasing of the view that the Court of Appeal Rules, 2009 does not provide for the filing of omnibus application. For that reason, we are constrained to uphold the preliminary objection and strike out this omnibus Application as we hereby do. Each party to bear his costs.

DATED at **ARUSHA** this 29th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL