

IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CIVIL APPLICATION NO. 12 OF 2015

1. RAMADHANI MAABADI }  
2. HAMADI MAABADI } ..... APPLICANTS

VERSUS

MAKA SERAFINI.....RESPONDENT

(Application for striking out Notice of Appeal filed on 2<sup>nd</sup> June, 2014  
arising from the decision of the High Court of Tanzania  
at Arusha)

(Masengi, J.)

Dated the 20<sup>th</sup> day of May, 2014  
in  
Misc. Civil Application No. 158 of 2013

.....

**RULING OF THE COURT**

22<sup>nd</sup> & 27<sup>th</sup> July, 2016

**MASSATI, J. A.:**

On 31/3/2013 the applicants, through their counsel J. & J. Shirima Associates & Company, Advocates, lodged a notice of motion in this Court under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for this Court to strike out the Notice of Appeal lodged on the 2<sup>nd</sup> day of June, 2014 to challenge the decision of the High Court of Tanzania at Arusha in Misc. Civil Application No. 158 of 2013. The major ground was that the respondent had failed to take essential steps in the proceedings, such as to apply for leave to appeal, to serve the applicants with the notice of appeal, and to apply for extension of time to do any of

those steps. The Notice of Motion was supported by the joint affidavit of the applicants, paragraph 6 of which reiterates the grounds for the notice of motion.

Upon being served with the said Notice of Motion, on 27/4/2015, the respondent lodged a notice of preliminary objection under Rule 4 (2) (a) of the Rules. The objection was to the effect that since the applicants have not been served with the notice of appeal, they could not take up an application under Rule 89 (2). So, they had no *locus standi* to move the Court under that provision.

At the hearing of the application, the applicants were represented by Mr. John Shirima, learned counsel. The respondent was represented by Mr. Fadhilli Nangawe, learned counsel.

Arguing the preliminary objection, Mr. Nangawe submitted that a party who has not been served with a notice of appeal could not move the Court under Rule 89 (2) of the Rules to strike out the notice of appeal. Service of a notice of appeal was a prerequisite for that rule to come into play. In support he cited to us, an unreported decision of this Court in **ABDULRAZACK OMARI LAIZER (As Administrator of the Estate of the late ABUBAKAR OMARI) and Another vs MATIKU IDD (As Administrator of the Estate of the late MBARAKA OMARI** (Civil Application No. 28 of 2014 (Arusha). So, he argued that

the application was misconceived and should thus be struck out with costs.

At first, Mr. Shirima tried to resist the preliminary objection but after some haggling he conceded that as the applicants had not been served with the notice of appeal, they could not resort to Rule 89 (2). He urged the Court to strike out the application but make no order as to costs. He went further to concede that, indeed the applicants had not taken the essential steps such as serving the respondent with the notice of appeal. He went on to ask the Court to mark the notice of appeal withdrawn, under Rule 91 (a) of the Rules.

In his rejoinder submission, Mr. Nangawe argued that Rule 91 (a) could only be invoked if the Court was moved by way of a substantive application under that provision, not when as in the present case, the originating application has been found wanting. Otherwise he pressed for costs.

Rule 89 (2) of the Rules provides:-

*"89 (1) .....*

*89 (2) Subject to the provision of sub rule (1) a respondent or other provision on whom a notice of appeal has been served may at any time,*

*either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies, or that some essential step in the proceedings has not been taken, or has not been taken within the prescribed time."*

It is clear in our view, that for the Rule to be invoked "**a respondent or that other person**" must have **been served with a notice of appeal** which is sought to be struck out.

In the present case the applicants admit in their Notice of Motion and their joint affidavit that they have not been served with the notice of appeal. That disqualifies them from the application of Rule 89 (2) (See **ABDULRAZACK OMARI LAIZER's** case (*supra*). Fortunately even the applicants concede to this point. So, we unhesitatingly uphold the objection and proceed to strike out the application.

The next question that has exercised our minds considerably is: what is to be done, with the notice of appeal, in view of the applicants' admission that no essential steps have been taken in the proceedings since its lodgment in 2/6/2014?

Fortunately, in the first place, Mr. Shirima has already prayed for an order that the notice of appeal be marked withdrawn. Secondly, even

if he did not do so, the Court would be minded to exercise its powers under Rule 91 (a) of the Rules which provides:-

*"91. 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 the failure to institute the appeal."*

Mr. Nangawe was of the view that this provision could only be invoked by the Court if it is so moved by a formal application. With respect, we do not agree with him.

The purpose of Rule 91 (a) is to flush out those notices of appeal which have outlived their usefulness.

As a general rule, a civil appeal ought to be lodged within sixty days after lodging a notice of appeal (Rule 90 (1)). So a notice of appeal serves as a beacon, from which the time for filing an appeal is to be reckoned. If an appeal is not filed within the sixty days, and is not

excepted under the proviso to Rule 90 (1), and (2), the notice of appeal becomes purposeless and lifeless. Unless its existence is extended, it must be deemed to be withdrawn. It has no business remaining in the registry, and the Court has a duty to flush it out regardless of how its existence comes to its notice. This is because this is a Court of Justice and not of the parties.

In the present case, it has come to the Court's knowledge through the application and the submission of the parties that ever since the respondent has lodged a notice of appeal on 2/6/2014, no essential steps have been taken in the proceedings with a view to instituting the appeal. This is almost two years now. In view of what we have observed above, the said notice has now outlived its usefulness and can no longer be left to remain in the register of civil appeals.

In terms of Rule 91 (a) of the Rules, we order that the said notice of appeal be deemed to have been withdrawn upon the expiry of the prescribed period of sixty days after lodging the notice of appeal. (See **ATHANAS SIMON vs KABANGA NICKEL CO. LTD.**, Civil Application No. 1 of 2014 (unreported) (Bukoba). We order each party to bear their own costs.

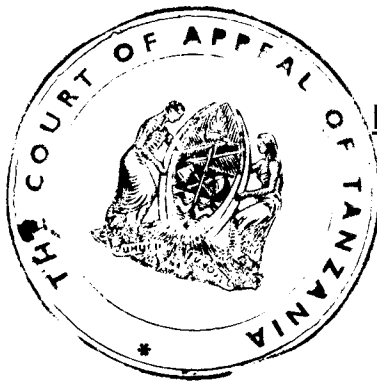
DATED at ARUSHA this 25<sup>th</sup> day of July, 2016.

E. M. K. RUTAKANGWA  
**JUSTICE OF APPEAL**

E. A. KILEO  
**JUSTICE OF APPEAL**

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

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



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