IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CIVIL APPLICATION NO. 203 OF 2015

MAJURA MAGAFU .... FIRST APPLICANT

PETER SWAI .... SECOND APPLICANT

VERSUS

THE MANAGING EDITOR, MAJIRA NEWSPAPER .... FIRST RESPONDENT
BUSINESS TIMES LIMITED .... SECOND RESPONDENT

(Application to strike out notice of appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Luanda, J., as he then was)

dated the 2nd day of September, 2003

in

Civil Case No. 242 of 2001

....

RULING OF THE COURT

3rd & 13th September, 2018

NDIKA, J.A.:

Aggrieved by the judgment and decree of the High Court of Tanzania sitting at Dar es Salaam (Luanda, J., as he then was) in Civil Case No. 242 of 2001 dated 2nd September, 2003, the respondents lodged a notice of appeal on 11th September, 2003 and then instituted Civil Appeal No. 90 of 2003 before this Court. However, on 14th August 2007 the said appeal was struck out for incompetence. Thereafter, the respondents restarted the

appeal process by lodging a notice of appeal dated 25th July, 2011 upon being granted extension of time by the High Court (Makaramba, J.) on 18th July, 2011 to file the said notice. The said notice was duly received and acknowledged by the applicants' counsel, Ngalo & Company Advocates, on 1st August, 2011. According to the applicants, for more than four years since July 2011 by the time this application was lodged (that is, 12th October, 2015) the respondents took no action to lodge their record and memorandum of appeal and that their inaction and apathy frustrated and completely shut down the applicants' right to pursue execution of the decree entered in their favour. Against this background, this application has been lodged.

In essence, the application moves the Court for striking out the respondents' notice of appeal lodged on 25th July, 2011 principally on the ground that the respondents failed to take essential steps to lodge their record and memorandum of appeal. The application is made by Notice of Motion under Rules 4 (2) (b), 89 (1) and 91 (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit deposed by Mr. Michael Joachim Tumaini Ngalo, the applicants' counsel. Above and beyond, the applicants duly lodged written submissions in support of the

application. It is noteworthy that the respondents filed no affidavit in reply or any reply to the applicants' written submissions.

At the hearing of the application, Mr. Michael J.T. Ngalo, learned counsel appeared for the applicants; whereas the respondents had the services of Mr. Gabriel S. Mnyele, learned counsel.

Before the hearing commenced in earnest, we desired to satisfy ourselves whether the application was competent. To secure expedited conduct of the proceedings and disposal of the matter, we directed the learned counsel to address us simultaneously on the competence of the application as well as its merits. On the basis of this approach, we shall first determine the competence of this matter and then proceed to deal with the merits of the application if we are satisfied that the matter is properly before us.

Arguing on the competence of the application, Mr. Ngalo conceded, at first, that the relief of striking out a notice of appeal for the failure to take essential steps could not be made either under the provisions of Rule 4 (2) (b) or under those of Rule 89 (1) of the Rules cited in the Notice of Motion. Nonetheless, he argued so ardently that the applicants' quest is maintainable under Rule 91 (a) of the Rules, which is, incidentally, cited

along with the aforesaid avowedly inapplicable provisions. Reliance was placed on the decision of the Court in **Williamson Diamonds Limited v. Salvatory Syridion and Another**, TBR Civil Application No. 15 of 2015 (unreported).

On the other hand, Mr. Mnyele submitted that the Court was not properly moved. He elaborated that the relief prayed for in the Notice of Motion that the respondents' notice of appeal be struck out for the alleged failure to take essential steps could only be sought under Rule 89 (2) of the Rules. He added, apart from the fact that Rule 89 (1) was clearly inapplicable, Rule 4 (2) (b), being a general provision applicable in the absence of a pertinent specific enabling provision, is inapplicable in the instant case as Rule 89 (2) specifically exists for the relief prayed for in the matter. On the applicability of Rule 91 (a), the learned counsel disagreed that it could aptly apply in the matter. In his view, the aforesaid provision, as construed in **Williamson Diamonds Limited** (supra), was only applicable to a motion for a notice of appeal being deemed to have been withdrawn upon failure to institute an appeal within the prescribed time. He added that the application could have been maintainable under Rule 91 (a) had the applicant prayed for the respondents' notice of appeal being deemed to have been withdrawn. Concluding, Mr. Mnyele urged us to

strike out the application for non-citation of proper enabling provisions of the law.

Rejoining, Mr. Ngalo restated his concession that Rules 4 (2) (b) and 89 (1) of the Rules were completely inapplicable. However, he added that the Court could act *suo motu* under Rule 91 (a) to flush out notices of appeal that have outlived their usefulness as held in **Williamson Diamonds Limited** (supra). While acknowledging that the relief claimable under Rule 91 (a) was different from what was stated in the Notice of Motion, he underlined that the effect of the reliefs under Rule 91 (a) and Rule 89 (2) was the same.

From the competing learned submissions, it is common cause that the provisions of Rules 4 (2) (b) and 89 (1) of the Rules could not be resorted to for anchoring the applicants' prayer for striking out the respondents' notice of appeal. Indeed, whereas the general or default provisions of Rule 4 (2) (b) could not be resorted to in the instant case as Rule 89 (2) specifically exists for the relief prayed for in the matter, Rule 89 (1) is irrelevant to the present purpose for it only governs an application by an intending appellant for withdrawal of a notice of appeal. The issue of contention in this matter, then, narrows down to whether the application is maintainable under Rule 91 (a) of the Rules.

In confronting the above issue, we find it convenient to reproduce the aforesaid Rule 91 (a) thus:

> *"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."*
> [Emphasis added]

The above provision is quite explicit; it stipulates the effect of default in instituting an appeal timeously. A party who has lodged a notice of appeal but fails to institute an appeal within the prescribed time would be deemed to have withdrawn his notice of appeal.

We recall that Mr. Ngalo referred to a holding at pages 5 and 6 of the typed decision of the Court in **Williamson Diamonds Limited** (supra) to support his stance that the instant matter was properly predicated upon Rule 91 (a). The said holding reads as follows:

> *"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).*** *"*[Emphasis added]

The Court in the above passage considered and determined the breadth of its power concerning **deemed withdrawal of a notice of appeal** on account of the default of the intended appellant to institute an appeal timeously. That holding has absolutely no bearing to a prayer for striking out a notice of appeal for not taking essential steps. We think that while 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), he can only do so if he seeks an order for the notice of appeal to be deemed withdrawn. In other words, the prayer for striking out a notice of appeal cannot be maintained under Rule 91 (a) even if its effect would be the same as that of a deemed withdrawal of the notice of appeal.

We would also add that the decision in **Williamson Diamonds Limited** (supra) is distinguishable from the instant application. In that case, the application was for the notice of appeal to be deemed to have been withdrawn on the ground that the respondents had failed to institute the appeal within sixty days from the date of lodging their notice of appeal. On that basis, the said application was properly predicated upon Rule 91 (a). That is not the case with the instant application, which concerns the relief of striking out the notice of appeal, which can only be sought under Rule 89 (2) of the Rules.

Based on the foregoing, we are of the firm view that this matter is not properly before us on account of non-citation of proper enabling provisions contrary to the mandatory requirement under Rule 48 (1) of the Rules. It is settled that non-citation of enabling provisions of the law renders the application incompetent: see, for example, **National Bank of Commerce v. Sadrudin Meghji** [1998] TLR 503; **Almas Iddie Mwinyi v. National Bank of Commerce and Mrs. Ngeme Mbita** [2001] TLR 83; **Harish Ambaram Jina (By His Attorney Ajar Patel) v. Abdulrazak Jussa Suleiman** [2004] TLR 343 and **China Henan International Cooperation Group v. Salvand K.A. Rwegasira** [2006] TLR 220.

In the final analysis, we strike out this matter for its incompetence. We make no order as to costs as the outcome of this matter has been predicated upon a point of law raised by the Court on its own motion.

Order accordingly.

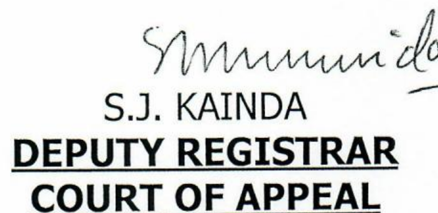
DATED at **DAR ES SALAM** this 11th day of September, 2018

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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



S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL