

IN THE COURT OF APEPAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., LILA, J.A. And MKUYE, J.A.)

CIVIL APPLICATION NO. 76 OF 2015

1. MUFUNGO LEONARD MAJURA
2. ELIKIRA FANUEL KWEKA
3. KAMBWIRI OMARI SHAIBU
4. NOYA JOHN CONRAD
5. SALIMA RAJAB KIZIGO
6. MRS. ABNELI SALATIERI MBALLA
7. IRENE BARAZA SALEHE
8. OMARI SALUM NGALOMBA
9. NAHUMU ANAEL PALLANGYO
10. NGIMA MARY PAUL
11. MAJOR MUSSA SELEMANI KINGAI
12. OMARI RAJABU REMMY
13. MASEGEDO JUMA MGWENO

.....APPLICANTS

VERSUS

TANESCO LIMITED..... RESPONDENT

**(Application for striking out the notice of appeal from the decision of the
High Court of Tanzania at Dar es Salaam)**

(De-Mello, J.)

dated the 5th day of February, 2015

in

Land Case No. 55 of 2008

RULING OF THE COURT

4th & 13th August, 2018

MKUYE, J.A.:

By a Notice of Motion made under Rules 48(1) and (2), 49 (1) and 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants Mufungo Leonard Majura and 14 Others apply for an order of the Court to

strike out the Notice of Appeal lodged with the Registrar of the High Court of Tanzania (Land Division) on 23rd February, 2015 by the respondent, TANESCO Limited. The main grounds for the application are that:

- a) An essential step has not been taken, namely that up to today the 8th day of April, 2015 that is over 2 months from when the decision intended to be appealed against, was delivered, the respondent has not lodged an application for leave to appeal against that decision.
- b) An essential step has not been taken within the prescribed time, namely that the notice of appeal was lodged out of time.
- c) No appeal lies as the Notice of Appeal intends to challenge a non-existing judgment and decree of the High Court of Tanzania (Land Division) before De-Mello Judge dated 05th February, 2015 in Land Case No. 55 of 2008.

The applicants also prayed for an order that the costs of and incidental to this application abide by the result of the said appeal.

The application is supported by an affidavit deposed by Mr. Audax Vedasto, learned advocate for the applicants which was filed 15/4/2015 and

the written submission filed on 21/5/2015. The respondent neither filed an affidavit nor a written submission in reply.

When the application was called on for hearing on 4/7/2018 the applicants entered appearance through Mr. Audax Vedasto, learned counsel; whereas the respondent had the services of Mr. Howa Hiro Msefya, learned advocate, who initially claimed he was not in conduct of the case because the same was assigned and handled by Crax Law Chambers. After a short dialogue and having discovered that he was the one who acknowledged receipt of the notice of hearing on 1/6/2018, we ruled out to proceed with the hearing since the respondent was duly represented.

Mr. Vedasto, who had earlier on filed a written submission sought to adopt the same to form part of his submission and argued further that though the respondent lodged a notice of appeal on 23/2/2015 and the copies of proceedings and judgment were ready for collection and collected by him on 6/2/2015, up to 8/4/2015 when he conducted a perusal in the Court file, which was after two months from when the decision sought to be challenged was delivered and the time he filed this application on 15/4/2015, the respondent had not lodged any application for leave to appeal to the

Court as required by section 47 (1) of the Land Disputes Courts' Act, Cap 216 R.E. 2002 (the LDC Act). On that account, he said, the respondent has failed to take an essential step for prosecuting the appeal in terms of Rule 89(2) of the Rules. Mr. Vedasto also argued as regards the competence of the Notice of Appeal that by mentioning only Mufungo Leonard Majura without mentioning the names of the 14 other respondents, the Notice of Appeal was rendered incompetent and liable to be struck out. He also assailed the Notice of Appeal as incompetent for indicating the intention to appeal against the decision of De-Mello, J. who did not preside over the matter instead of Mansoor, J. who handed down the decision sought to be impugned.

On his part, Mr. Msefya, with much hesitation, conceded that though they had lodged the Notice of Appeal within time, they did not file any application for leave to appeal to this Court. Upon being probed by the Court on the effect of such anomaly, he declined to comment. He left the matter in the hands of the Court to decide.

The issue for this Court's determination is whether the respondent has failed to take essential step in prosecuting the purported appeal.

Rule 89(2) of the Rules which is among the provisions invoked by the applicant to move the Court provides as follows:-

*"Subject to the provisions of sub rule (1), a respondent or other person 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.**"*

[Emphasis added]

Our understanding of the above cited provision is that the application for striking out the notice can be made by the respondent or any person who has been served with a notice of appeal; and that the same can be struck out on account that no appeal lies or *no essential step in the proceedings has been taken* or has not been taken within the prescribed time.

This stance has been also amplified in the case of **International Commercial Bank (T) Ltd Vs Agil Islam and Two Others**, Civil Application No. 175 of 2008 wherein the Notice of Appeal was struck out by

the Court for failure by the respondent to take essential steps. The Court stated thus:-

"By failing to apply for leave from the High Court, the respondent has not taken an essential step in the appellate process. He is therefore in breach of Rule 82 of the Court of Appeal Rules (now Rule 89 of the Rules). The application is therefore granted. The notice of appeal filed by the respondent on 3^d July 2007 is struck out."

Among the steps earmarked to be taken by a person who has lodged a Notice of Appeal is to file an application for leave, if required, or a memorandum of appeal within the prescribed time. Mr. Vedasto has contended that the respondent failed to lodge an application for leave to appeal though the documents of the decision sought to be challenged were ready for collection quite early after the decision was delivered as he collected it on 6/2/2015.

The requirement of leave to appeal on land matters is governed by section 47(1) of the LDC Act. It sets out a condition of obtaining leave to appeal to the Court in land matters from the High Court in its original, revisional or appellate jurisdiction. The said provision states as follows:

"(1) Any person who is aggrieved by the decision of

the High Court (Land Division) in the exercise of its original, revisional or appellate jurisdiction, may with the leave from the High Court (Land Division) appeal to the Court in accordance with the Appellate Jurisdiction Act, 1979."

(2)

(3) The procedure for appeal to the Court of Appeal under this section shall be governed by the Court of Appeal Rules."

Incidentally, though the above cited provision sets out the requirement of leave to appeal from the High Court, it does not provide or prescribe the time within which an application for leave can be lodged. But going by the provisions of subsection (3) of the same section which allows the procedure under the Court of Appeal Rules to be applied, we borrow a leaf from Rule 45(a) of the Rules which sets out the time within which an application for leave can be lodged. Rule 45 of the Rules as it stood at the material time, provides as follows:-

"In Civil matters:-

(a) where an appeal lie with the leave of the High Court, application for leave may be made

*informally, when the decision against which it is desired to appeal is given or by **chamber summons... within fourteen days of the decision.***

(b)"

We, therefore, take that the applicant ought to have lodged the application for leave within 14 days after the decision sought to be challenged was delivered on 5/2/2015.

In this case, that was not done. Though the decision was delivered on 5/2/2015 and the notice of appeal lodged on 23/2/2015, up to 8/4/2015 when the applicants perused the court file and on 15/4/2015 when this application was filed, no application for leave to appeal was lodged by the respondent. This fact was, incidentally, readily conceded by Mr. Msefya.

This Court when faced with similar situation in the case of **Tahera Somji Vs National Housing Corporation**, Civil Application No. 18 of 2014 stated that:-

"The Court has held, times without number, that filing an application for leave to the Court constitutes

an essential step towards prosecution of the intended appeal.”

Likewise, in the case of **Ezekiel Fanuel Mushi Vs NBC Ltd**, Civil Application No. 4 of 2015 (unreported) while citing with approval the case of **Peta Kempap Ltd Vs Mohamed I. A. Abdulhussein**, Civil Application No. 140 of 2004 (unreported) the Court held that the requirement of filing an application for leave was an essential step in the proceedings. We subscribe to the above cited cases.

Even in this case, since no application for leave to appeal was lodged by the applicant after the decision sought to be challenged was delivered or after the Notice of Appeal had been lodged, we agree with Mr Vedasto that, indeed, the respondent failed to take an essential step to prosecute the appeal.

That said and done, we find and hold that the application is meritorious and grant it. In the event, the Notice of Appeal filed by the respondent on 23/2/2015 against the decision of the High Court of Tanzania (Land Division) in Land Case No. 55 of 2008 is hereby accordingly struck out with costs to the applicant. It should, however, be noted that since this ground has the

effect of disposing of the whole matter we did not belabour to deal with other grounds of appeal.

Order accordingly.

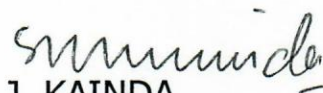
DATED at DAR ES SALAAM this 3rd day of August, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL