

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUSSA, J.A., MWARIJA, J.A. And MWANGESI, J.A.)

CIVIL APPLICATION NO. 108/01 OF 2017

DAVID MAJOLA APPLICANT

VERSUS

1. JUMA ABDALLAH CHEMBEA

2. CONSOLIDATED TRANSPORT LTD RESPONDENTS

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

(Mujulizi, J.)

Dated the 6th day of July, 2015

In

Civil Case No. 62 of 2008

RULING OF THE COURT

12th February & 6th April, 2018

MWARIJA, J.A.:

The applicant, Daniel Majola was the successful party in Temeke District Court Civil Case No. 62 of 2008. He had instituted a suit against the respondents, Juma Abdallah Chembea and Consolidated Transport Ltd for breach of the agreement to transport and deliver to the applicant, 270 bags of Irish potatoes. The trial Court ordered the respondents to pay to the applicant, Shs. 13, 210,000/= as the value of undelivered 270 bags

of potatoes, Shs. 100,000,000/= as general damages for loss of business and costs of the suit.

The respondents appealed to the High Court and their appeal was partly allowed. The award on the value of the potatoes was reduced to Shs. 9,000,000/= while the award of general damages was reduced to Shs. 8,000,000/=. Whereas, further, the applicant was awarded interest at the rate of 7% from the date of the trial Court's judgment to full satisfaction of the decree, each party was ordered to bear its own costs.

Aggrieved further, the respondents intended to appeal to this Court and therefore instituted in the High Court, an application for leave to appeal, Misc. Civil Application No. 440 of 2015. That application was dismissed on 9/11/2015 for non-appearance of the respondents. Undaunted, through Misc. Civil Application No. 743 of 2015, the respondents applied to the High Court to set aside the dismissal order. Their application was, however, unsuccessful. It was dismissed on 17/5/2016 for lack of merit.

They were again, dissatisfied with the ruling of the High Court refusing to set aside its dismissal order. According to the applicant, they consequently lodged a notice of appeal. Under paragraph 6 of his affidavit,

the applicant states that the notice of appeal was lodged in June, 2016. It is against the notice of appeal filed by the respondents that the applicant has brought this application seeking an order striking it out for the respondent's failure to take essential steps in instituting the intended appeal.

The application which is shown to have been brought under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) was not opposed. The respondent did neither file an affidavit in reply nor a reply to the written submission filed by the applicant on 3/5/2017.

When the application was called on for hearing on 12/2/2018, the applicant appeared in person, unrepresented by a counsel. On their part, the respondents, who were duly served on 6/2/2018, did not enter appearance. As a result, we invoked Rule 63 (2) of the Rules and permitted the applicant to argue his application in the absence of the respondents.

As indicated above, the applicant had filed his written submission in support of the appeal. At the hearing, he did not have much to state. He adopted his affidavit and written submission in which, apart from stating the background facts giving rise to the application, he complained that

the trend taken by the respondents is intended to delay him from executing the decree. He states as follows:-

*"From the time the aforesaid notice of appeal was lodged, the respondents have failed to take essential steps in pursuing the said appeal. As a result, to date there is no any pending appeal or any application to that respect in any Court of law. However, **due to the aforesaid, the applicant has failed to proceed with execution as the respondent use the same as grounds to object the same...."***

[Emphasis added].

As stated above, the application was brought under Rule 89 (2) of the Rules which provides as follows:-

"89 – (1)

*(2) 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].

In both his affidavit and the written submission, the applicant has complained that, although the respondents had lodged a notice of appeal, they did not serve a copy thereof to him. In the circumstances therefore, since under the above quoted Rule, an application to strike out a notice of appeal may only be brought by "*a respondent or other person on whom a notice of appeal has been served*", this application has obviously been wrongly brought by the applicant – See for example, the case of **Elias Marwa v. Inspector General of Police & Another**, Civil Application No. 11 of 2011 (unreported). In that case, the Court stated as follows:-

"A relief under Rule 89 (2) of the Rules is only available to a person on whom the notice of appeal has been served. In this case, it is evident that the applicant was not served with a notice of appeal in terms of the Rules.... On the strength of the immediate foregoing, we are settled in our minds that the applicant's

application brought under Rule 89 (2) of the Rules is highly misconceived.”

In the light of the above stated position, we would have proceeded to strike out the application for having been misconceived.

Having considered however, the long history of the case and the trend shown by the respondents which, in our view, signifies lack of seriousness on their part, we find it appropriate to invoke Rule 4 (2) (a) and (b) of the Rules and consider the matter with a view of meeting the ends of justice. The respondents did not act with diligence in prosecuting the applications in the High Court. They also exhibited a laxity after having been notified of the present application, all these at the expense of preventing the applicant from executing the decree.

According to a copy of the notice of appeal which was supplied to the Court by the applicant, the same was filed on 15/6/2016. Apart from failing to serve a copy to the applicant, the respondents did not take any essential step in instituting the intended appeal. According to Rule 90 (1) of the Rules, the appeal ought to have been filed within 60 days from the date of lodgement of notice of appeal. The respondents have not done so. Worse still, apart from being duly served to appear at the hearing of this application, they defaulted to do so without notifying the Court of any

sufficient cause to that effect. Under Rule 91 (a) of the Rules, when a person who has lodged a notice of appeal fails to institute the intended appeal in accordance with Rule 90 (1) of the Rules, he shall be deemed to have withdrawn that notice.

In view of the considerations made above, the notice of appeal filed by the respondents on 15/6/2016 is hereby deemed to have been withdrawn under Rule 91 (a) of the Rules.

Order accordingly.


DATED at **DAR ES SALAAM** this 22nd day of March, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL