

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

(CORAM: MKUYE, J.A., WAMBALI, J.A. And KOROSSO, J.A.)

CIVIL APPEAL NO. 350 OF 2019

EMANUEL FUNGA.....APPELLANT

VERSUS

HALMASHAURI YA KIJINI CHA MVUMI MISSION.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Kalombola, J.)

Dated the 5th day of September, 2016

in

Land Appeal No. 12 of 2014

RULING OF THE COURT

23rd September, & 7th October, 2020

MKUYE, J.A.:

In this appeal, the appellant EMANUEL FUNGA is appealing from the decision of the High Court of Tanzania at Dodoma in Land Appeal No. 12 of 2014 dated 5/9/2017 (Kalombola, J.). Before the District Land and Housing Tribunal for Dodoma at Dodoma (DLHT), the appellant sued the respondent HALMASHAURI YA KIJINI CHA MVUMI MISSION over a parcel of land measuring four acres situated in Mvumi Mission Village which he

claimed to have acquired since 1957 and had been using it for cultivating various perennial crops. His complaint was that in 2009, the respondent invaded and took away his farm and incorporated it with other farms for purpose of running a farm project without his consent. Upon being heard *ex parte*, the DLHT was satisfied that the appellant was the owner of the suit land and that the respondent invaded it. Eventually, the DLHT entered judgment on his favour but did not award any damages though he had prayed for. The appellant, however, was dissatisfied by that decision particularly, for not having been awarded general damages. Thus, he appealed to the High Court against that aspect only and upon *ex parte* hearing of the said appeal, the first appellate court upheld the DLHT's finding of not awarding damages and dismissed the said appeal for want of merit.

Still aggrieved, the appellant has brought this appeal to this Court on three grounds of appeal which essentially hinge on the first appellate court's failure to award general damages.

Upon being served with the appeal together with the record of appeal, the respondent through the services of the Office of the Solicitor

General lodged preliminary objection, the notice of which was lodged on 14/9/2020. In the notice of preliminary objection, the respondent raised five points of objection but, we think, in the circumstances of this appeal, the most crucial point of objection is No. 2 to the effect that:

"The appeal is incompetent and bad in law for non compliance with Rule 83(1) of the Court of Appeal Rules, 2009 (Cap. 141 R.E 2019)."

When the appeal was called on for hearing, the appellant appeared in person and was unrepresented; whereas the respondent had the services of Mr. Francis Rogers, the learned Senior State Attorney assisted by Ms. Adelaida Masua and Ms. Neema Mwaipyana both learned State Attorneys.

Submitting in support of the point of objection, Mr. Rogers contended that the appeal is out of time for having not complied with Rule 83 (1) of the Rules. In elaboration, he asserted that the judgment sought to be challenged was delivered on 5/9/2016. The appellant filed the notice of appeal on 7/10/2016 which was out of time. Realizing that the notice of appeal was filed beyond 30 days prescribed by law, the appellant filed an

application for extension of time to lodge a fresh notice of appeal. On 2/4/2019 the High Court granted the application and gave him thirty (30) days within which to file the said notice of appeal to the Court of Appeal. However, the appellant did not comply with that order and instead he lodged the memorandum of appeal on 6/9/2019. In this regard, he contended, as the appellant failed to file the notice of appeal within 30 days granted by the High Court, it renders the present appeal to have no legs to stand on. To support his argument, he referred us to the case of **Dhow Mercantile (EA) Ltd v. Registered of Companies and 4 Others**, Civil Appeal No. 56 of 2005 (unreported). In the premise, he implored the Court to find that the appeal is time barred for having no legs to stand on and strike it out with no order as to costs.

In response, the appellant after a short dialogue with the Court conceded to the preliminary objection raised by the respondent. He also urged the Court to strike the appeal without costs.

The issue for determination by this Court is whether there is a valid appeal before the Court.

Our starting point will be revisiting the provisions of the law governing notices of appeal in civil matters. Rule 83 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) provides as follows:

"83 (1) Any person who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court.

*(2) Every notice shall, subject to the provisions of rules 91 and 93, **be so lodged within thirty days of the date of the decision against which it is desired to appeal.**" [Emphasis added]*

Our understanding from the above cited provision is that where a person wishes to appeal to this Court, he has to file a notice in writing in duplicate to the Registrar of the High Court and such notice is to be lodged within 30 days from the date when the decision was given.

The importance of the notice of appeal to any appeal was well articulated in the case of **Dhow Mecantile (EA) Ltd** (supra) when the Court stated as follows:

"It is common ground that a notice of appeal properly lodged in terms of the provisions of Rule 76 [Now rule 83] is a pre-requisite condition for the institution of an appeal. Otherwise there is no denying the fact that without a valid and proper notice of appeal there would be as it were, no leg upon which the appeal would stand." [Emphasis added]

In the matter at hand, as alluded to earlier on, the appellant initially lodged the notice of appeal on 7/10/2016 against the decision which was delivered on 5/9/2016. This was after 32 days from when the decision was delivered. Incidentally, after realizing that the same was out of time, he lodged an application for extension of time vide Misc. Land Application No. 96 of 2018 which was granted by the High Court on 2/4/2019 whereby a time of thirty (30) days was extended for him to file a fresh notice of appeal. By simple computation, such time was to expire on 2/5/2019. That, the appellant did not do. Instead, he lodged the appeal on 6/9/2019 which was 156 days after the granting of extension of time.

We asked ourselves whether the notice of appeal that was lodged on 7/10/2016 remained valid even after extension of time to file a fresh notice of appeal was granted on 2/4/2019. Our answer is definitely no. In the first place, that original notice was invalid for being filed out of time. Secondly, we think, after the grant of extension of time to file a fresh notice of appeal the said original notice ceased to exist. Thus, since the appellant failed to file a fresh notice of appeal as he was so ordered, there was no notice of appeal in this appeal. This implies that, in the absence of a valid notice of appeal filed after extension of time, there cannot be filed an appeal. If we may go a step further, an appeal that was filed without having been proceeded with a valid notice of appeal had no leg upon which to stand on and thus is incompetent before the Court.

Even in this case, we can confidently conclude that, since there was no notice of appeal which was filed after the appellant was given extension of time to file it, then his appeal which he filed on 6/9/2019 is incompetent because it lacked its foundation. (See **Dhow Mercantile (EA) Ltd** (supra). Thus, in effect the appeal is time barred.

In the event, we sustain the second preliminary point of objection and hereby strike out the appeal for being incompetent. However, we do not make any order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 5th day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Ruling delivered this 7th day of October, 2020 in the presence of the Appellant in person and Ms. Neema Mwaipyana, learned State Attorney for the respondent both linked to the court through video conference from Dodoma High Court is hereby certified as a true copy of the original.

