

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

(CORAM: MWARIJA, J.A., SEHEL, J.A. And MASHAKA, J.A.)

CIVIL APPLICATION NO. 249/16 OF 2021

MUSSA SHAIBU MSANGI APPLICANT

VERSUS

SUMRY HIGH CLASS LIMITED1ST RESPONDENT

SUMRY BUS SERVICE LIMITED 2ND RESPONDENT

**(Application for striking out the Notice of Appeal arising from the
Ruling of the High Court of Tanzania, Commercial Division at Dar es
Salaam)**

(Nangela, J.)

dated the 30th day of March, 2021

in

Misc. Commercial Application No. 124 of 2020

.....

RULING OF THE COURT

21st Sept., 2022 & 26th Jan., 2023

MWARIJA, J.A.:

In this application, the applicant, Mussa Shaibu Msangi has moved the Court to strike out the notice of appeal filed by the respondents, Sumry High Class Limited and Sumry Bus Service Limited (the 1st and 2nd respondents respectively). By the said notice of appeal, which was filed on 29/4/2021, the respondents expressed their intention to appeal to this Court against the ruling of the High Court (Commercial Division) in Misc. Civil Application No. 124 of 2020 handed down by Nangela, J on 30/3/2021.

In the application, which gave rise to the ruling intended to be appealed against, the respondents unsuccessfully applied for extension of time to institute a notice of appeal against the decision of the same court (Nyangarika, J) dated 13/8/2014 in Commercial Case No. 20 of 2012.

The application for extension of time was countered by the applicant through a notice of preliminary objection consisting of three grounds; including the ground that the same was untenable. The objection was upheld and as a result, the application was dismissed. Aggrieved, the respondents intended to appeal and therefore, instituted the notice of appeal, the subject matter of this application.

This application, which was brought under Rule 89 (2) and (3) of the Tanzania Court of Appeal Rules (the Rules), is supported by an affidavit affirmed by the applicant, Mussa Shaibu Msangi. According to the notice of appeal, the ground upon which an order striking out the notice of appeal is sought is that:

"....no appeal lies against the ruling and order of the High Court of Tanzania, Commercial Division, Dar es Salaam in Misc. Commercial Application No. 124 of 2020 (Hon. Nangela, J) dated 30th March, 2021 and that, some essential step in the

proceedings has not been taken or has not been taken within the prescribed time."

At the hearing of the application, the applicant was represented by Mr. Deogratius Ogunde Ogunde, learned counsel. The respondents, who were duly served through their advocates, Tema Law Chambers, did not enter appearance. They did not also file an affidavit in reply. As a result of their failure to appear, the Court granted Mr. Ogunde's prayer to proceed in their absence in terms of Rule 63 (2) of the Rules.

Submitting in support of the application, the learned counsel argued **first**, that an appeal does not lie from the decision which is intended to be appealed against. According to the learned counsel, when an applicant is aggrieved by a decision of the High Court in an application for extension of time to institute a notice of appeal, the available avenue for him is not to appeal but to file a fresh application in this Court in terms of Rule 45A of the Rules. Mr. Ogunde submitted thus that the notice of appeal was filed against a decision which is not appealable.

Secondly, it was the learned counsel's submission that the notice of appeal should be struck out because, as from the date of its lodgement on 29/4/2021, the respondents have not taken any essential steps in the process of instituting the intended appeal.

The provisions of Rule 89 (2) of the Rules upon which the application has been predicated states as follows:

"89 – (1) N/A

(2) subject to the provisions of 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]

Under the sub-rule which has been reproduced above, a respondent may apply to the Court to strike out a notice of appeal on any or the two grounds stated therein; that no appeal lies against the impugned decision or that the intended appellant has failed to take essential steps in the proceedings with a view of instituting the intended appeal.

To start with, the reliance by the learned counsel for the applicant on the ground that an appeal does not lie from the impugned decision, is with respect, a misconception of the law. As shown above, the

application for extension of time to file a notice of appeal was not heard on merit. It was dismissed because of the defects which were found to be incurable. Under Rule 45A of the Rules, an application for extension of time to lodge a notice of appeal may only be filed in the Court after an application to that effect had been refused by the High Court. The provision states as follows:

"45A – (1) where an application for extension of time to:-

(a) Lodge a notice of appeal

(b) N/A

(c) N/A

is refused by the High Court, the applicant may within fourteen days of such decision apply to the Court for extension of time."

Unless therefore, the application filed in the High Court was heard on merit and refused, the applicant cannot come to this Court by way of a second bite.

As for the ground that the respondents have not taken any essential steps to institute the intended appeal, it is clear from the record that they have not done so. As submitted by Mr. Ogunde, after instituting their notice of appeal on 29/4/2021, the respondents have

not taken any essential steps in the process of filing the intended appeal. Furthermore, despite having been duly served with a notice of hearing of this application, they could not enter appearance hence rendering the application unopposed. In the circumstances, we agree with the learned counsel for the applicant that the notice of appeal deserves to be struck out.

In the event, we hereby strike out the notice of appeal under Rule 89 (2) of the Rules with costs.

DATED at DAR ES SALAAM this 25th day of January, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 26th day of January, 2023 in the presence of Mr. Deogratus Ogunde, learned counsel for the applicant and in the absence of the respondents, is hereby certified as a true copy of the original.




G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL