

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. LAND APPLICATION NO.3 OF 2018

(Arising from Land Appeal No.14 of 2016 of Shinyanga District Land and Housing Tribunal)

MBOJE MAHENDA.....APPLICANT

Versus

MIHAMBO KISEN'HE.....RESPONDENT

Date of Last Order: 28/04/2020

Date of Ruling: 27/05/2020

RULING

C. P. MKEHA, J

The applicant had filed the present application seeking extension of time for filing notice of appeal and an application for a certificate that there is a point of law involved in the intended appeal. Before the present application was scheduled for hearing Mr. Audax learned advocate for the respondent raised and argued a preliminary point of objection regarding maintainability of the application. Mr. Frank Samwel learned advocate represented the applicant.

According to Mr. Audax learned advocate, a close scrutiny to Annexure A1 to the respondent's counter affidavit and paragraph 16 of the affidavit

supporting the present application reveals that, the applicant had already filed notice of appeal since the 18th October, 2016.

The learned advocate for the respondent went on to submit that, there was nothing showing that the same was withdrawn before the filing of the present application. In view of Mr. Audax learned advocate, the application is misconceived and untenable.

Mr. Frank Samwel learned advocate replied by submitting that, Rule 91(a) of the Court of Appeal Rules is clear. That, the applicant's notice of appeal dated the 18th October, 2016 is deemed to have been withdrawn following the applicant's failure to file an appeal within sixty (60) days. The learned advocate for the applicant went on to submit that, whereas the former notice of appeal was filed on 18/10/2016, the present application was filed on 15/01/2018, well, after nearly thirteen (13) months since when the said sixty (60) days expired.

The learned advocate for the applicant does not dispute the fact that his client did file a notice of appeal on 18/10/2016. He however maintains that, following failure of the applicant to file the actual appeal within the prescribed time, the earlier filed notice of appeal is deemed to have been

withdrawn in terms of Rule 91(a) of the Court of Appeal Rules. On the other hand, Mr. Audax learned advocate was of the view that, to avoid presence of parallel proceedings, the applicant ought to have actually withdrawn his earlier filed notice of appeal before filing the present application.


It is true that, in terms of Rule 91(a) of the Court of Appeal Rules, if a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he should be deemed to have withdrawn his notice of appeal. However, in my considered view, the deemed withdrawal of notice of appeal remains to be incomplete withdrawal until when the intending appellant procures a formal court order to that effect or when the said notice is struck out pursuant to Rule 89(2) of the Rules. **See: STIVIN SULUS VS. JELA MAREGELI, CIVIL APPLICATION NO.441/08/2017, CAT AT MWANZA** (Unreported).

I entertain the stand hereinabove because of the wording of Rule 91(a) of the Court of Appeal Rules. Under the said provision the intending appellant should, 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. The said wording presupposes that, a formal court order to mark the Notice of Appeal actually withdrawn, is necessary. In the

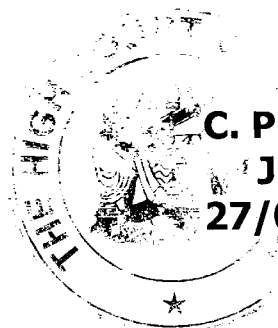

case of **OTTU ON BEHALF OF P.L. ASSENGA & 106 OTHERS AND THREE OTHERS VS. AMI TANZANIA LIMITED, CIVIL APPLICATION NO.35 OF 2011**, the Court of Appeal insisted that even when formal notice of withdrawal is filed pursuant to Rule 89(1) of the Rules, it has to be followed by a formal court order so as to avoid parallel proceedings before the Court of Appeal.

It is because of the foregoing reasons, I hold the objection to be meritorious. The same is sustained. The application stands struck out for reasons of incompetence.

Dated at **SHINYANGA** this **27th day of May, 2020.**


C. P. MKEHA
JUDGE
27/05/2020

Court: Ruling is delivered in the presence of the applicant in person and Mr. Audax learned advocate for the respondent.



C. P. MKEHA
JUDGE
27/05/2020