

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

CIVIL APPLICATION NO. 67 OF 2003

In the Matter of an Intended Appeal

BETWEEN

**COLGATE PALMOLIVE COMPANY LTD.
APPLICANT**

AND

**ZAKARIA PROVISION STORE & 3 OTHERS.....
RESPONDENTS**

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

(Msumi, J.K.)

dated the 9th day of May, 2002

in

Civil Case No. 1 of 1997

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R U L I N G**

MROSO, J.A.:

The applicants - Colgate Palmolive Company Ltd. - through their advocates, F.K. Law Chambers, have filed a Notice of Motion under Rules 82 and 83 of the Court Rules, 1979 applying for an order of the Court to strike out the respondents' Notice of intention to appeal. At the hearing of the application the respondents were absent and unrepresented. Mr. Kesaria, learned advocate, who was representing them in the High Court, had earlier applied for leave, which was granted, to withdraw from representing them in this Court because he had lost contact with them

and, consequently, could not get proper instructions to continue representing them.

Following the withdrawal of Mr. Kesaria from representing the respondents there was no known address to serve notice to them directly. So, Dr. Mapunda, learned advocate of F.K. Law Chambers, who appeared for the applicants, applied for and was granted leave to serve the respondents by substituted service. Notice of the hearing date and time was duly published twice in the Daily News and the Guardian Newspapers respectively as ordered by the Court. The Court, therefore, allowed Dr. Mapunda to address it on the Notice of Motion in the absence of the respondents.

The respondents, who were defendants in a suit in the High Court, were the losing side. Dissatisfied by the High Court decision they sought to appeal to this Court and duly lodged a Notice of Appeal in time. They also wrote in time to the Registrar of the High Court to be supplied with copy of proceedings and that letter was duly copied to the applicants. The Registrar of the High Court wrote to Mr. Kesaria, then advocate for the respondents, on 25/11/2002 informing him that copies of proceedings were ready for collection on payment of requisite fees. According to Dr. Mapunda, Mr. Kesaria received the Registrar's letter on

2/12/2002. Therefore, sixty days within which to institute the appeal expired on or about the 2nd of February, 2003.

By 29th July, 2003 when this application was lodged in this Court no memorandum of appeal had been lodged and no record of appeal had been filed in this Court. Dr. Mapunda submits that the respondents had failed to take those necessary steps in the prosecution of their intended appeal and the consequences are that the Notice of Appeal should be struck out.

Three cases were cited by Dr. Mapunda in support of the submission that the notice of appeal should be struck out. These are **Atlantic Electric Ltd. v. Morogoro Region Cooperative Union** [1993] TLR 12; **Stanbic Bank (T) Ltd. v. Jayant Patel and Another**, Civil Application No. 78 of 2001 (unreported) and **Blueline Enterprises Ltd. v. East African Development Bank**, Civil Application No. 103 of 2003 (unreported).

Rule 83 (1) of the Court Rules reads, as relevant –

83 (1) Subject to the provisions of Rule 122, an appeal shall be instituted by lodging in the appropriate registry,

within sixty days of the date when the notice of appeal was lodged -

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- a) a memorandum of appeal in quantuplicate;
- b) the record of appeal, in quantuplicate;
- c) ---

The effect of default in instituting the appeal in compliance with Rule 83 (1) is provided for in Rule 84 which reads, as relevant -

84.If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time -

- a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court orders otherwise, be liable to pay the costs of any persons or whom the notice of appeal was served arising from the failure to institute the appeal.

It is apparent, therefore, that the respondents who have not to date instituted their intended appeal are liable, on application by a party on whom the notice of appeal was served, to have the notice of appeal deemed to have been withdrawn, with costs to the applicant.

The applicant did not take this course and, instead, invoked Rule 82. The Rule authorizes a person on whom a notice of appeal has been served to apply to the Court, as the applicants have done, to have the notice of appeal struck out, in this case, for failure to institute the appeal by lodging the memorandum of appeal and filing the record of appeal.

In the **Atlantic Electric Ltd.** case cited by Dr. Mapunda, the applicant applied to the Court to strike out a notice of appeal because the respondent had failed to take the necessary steps to prosecute the appeal. The steps which were to be taken were first, to apply for copies of proceedings, which the respondents had not done; second, the respondent had not applied for leave to appeal. Ramadhani, J.A. struck out the notice of appeal with costs.

In **Stanbic Bank (T)** an application to strike out a notice of appeal on the ground that an essential step had not been taken was dismissed because the applicant had not established that the respondents had failed to take an

essential step to institute the intended appeal.

The third case cited by Dr. Mapunda, **Blueline Enterprises Ltd.**, also related to a failure by an intending appellant to seek leave to appeal. That failure came under Rule 82, that is to say, a failure to take an essential step within prescribed time to prosecute an intended appeal. The notice of appeal was consequently struck out.

It will be observed that neither **Atlantic Electric Ltd.** nor **Blueline Enterprises Ltd.** related directly to failure to institute an appeal or to file a record of appeal. But there can be no doubt that although failure to institute an appeal has a specific provision - Rule 84 (a) - indicating the consequences, it also amounts to a failure to take an essential step in the appeal process under Rule 82. The respondent, as already mentioned, has not lodged a memorandum of appeal within sixty days after being notified that the copy of proceedings was ready for collection. As rightly pointed out by Dr. Mapunda, the applicant who obtained a favourable decree in the High Court must not be kept in suspense indefinitely because of an intended appeal which never became an appeal. The notice of appeal is struck out with costs under Rule 82 although it could also be deemed to have been withdrawn under Rule 84 (a) of the Court Rules.

DATED at DAR ES SALAAM this 14th day of
December, 2004.

J.A. MROSO
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR