

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A. KAIJAGE, J.A. And MUSSA, J.A.)

CIVIL APPLICATION NO. 28 OF 2014

1. **ABDULRAZACK OMARY LAIZER**
(As Administrator of the estate
of the late **ABUBAKAR OMARI**) } **APPLICANTS**
2. **RODRICK HUMPREY JONAS** }

VERSUS

MARIAM IDD
(As Administrator of the estate
of the late **MBARAKA OMARI**) **RESPONDENT**

(Application from the judgment and decree of the High Court of Tanzania

at Arusha)

(Nyerere, J.)

dated the 12th day of July, 2012

in

Civil Case No. 1(B) of 1992

RULING OF THE COURT

13th & 18th February, 2015,

KAIJAGE, J.A.

Before this application came for hearing on 13/2/2015, Mr. Loomu Ojare, learned advocate for the respondent, had given notice on 17/12/2014 under rule 4(2) (a) of the Court of Appeal Rules, 2009 (the Rules) raising a preliminary objection to the hearing of the application on the following main substantive ground namely;

"That the applicants have no Locus Standi to prefer or bring the present application for orders to strike out the notice of appeal and the record of appeal respectively; as they do not satisfy the condition precedent laid down under Rule 89(2) of the Tanzanian Court of Appeal Rules, 2009."

The respondent's notice of preliminary objection was brought subsequent to the filing, on 13/10/2014, of the applicants' application under rules 89(2) and 4(2) (a) and (c) of the Rules seeking for an order that the Notice of Appeal filed by the respondent on 26/5/2014 be struck out with costs. Apparently, the respondent had earlier instituted an appeal in this Court against the judgment and decree dated 12/7/2012 given in favour of the applicants by the High Court sitting at Arusha in Civil Case No. 1(B) of 1992.

When the application was called on for hearing, Mr. Ojare rose to amplify on the said ground upon which the preliminary point of objection is based. In his brief but focused submission, he contended that the relief sought by the applicants under rule 89(2) of the Rules is not available to

them because the condition precedent under that rule had not been satisfied. He argued, in elaboration, that since the Notice of appeal was not served upon the applicants in terms of rule 84(1) of the Rules an application for a relief under rule 89(2) is unmaintainable. In the circumstances, he urged us to strike out the applicants' application with costs.

Responding to Mr. Ojare's submission, Mr. John Materu, learned advocate for the applicants dismissed the respondent's objection as having no basis, contending that a relief under rule 89(2) of the Rules is available to his clients notwithstanding the fact that they were **not** duly served with the Notice of appeal in terms of rule 84(1) of the Rules. However, upon reflection, he abandoned that stance and urged us to overrule the respondent's point of objection and find that the applicants' application for striking out the Notice of appeal is maintainable under rule 4(2) (a) of the Rules.

On our part, we are, with respect, in complete agreement with Mr. Ojare's submission. We are readily accepting that a relief under rule 89(2)

of the Rules is only available to a person on whom the Notice of appeal has been served. That rule which admit no ambiguity provides:-

"R. 89(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 of 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 within the prescribed time."

It is gathered from paragraph 6 of the affidavit filed in support of the application that the respondent herein, who is the appellant in the pending appeal did not serve the respondents, the applicants herein, with a copy of the Notice of appeal in terms of rule 84(1) of the Rules which reads:-

"R. 84(1). An intending appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons

who seem to him to be directly affected by the appeal; but the Court may, on an ex-parte application direct that service need not be effected on any person who took no part in the proceedings in the High Court."

In the light of the provisions under rule 89(2) as read with rule 84(1) of the Rules, we are settled in our minds that a relief envisaged under rule 89(2) of the Rules does not cover the applicants herein who were **not** served with the Notice of appeal in terms of rule 84(1) of the Rules. In the circumstances, the applicants' present application brought under rule 89(2) of the Rules is undoubtedly misconceived.

In view of the existence of a specific rule (rule 89(2) of the Rules) under which any person on whom a notice of appeal has **not** been served could apply to the Court to strike out the notice of appeal, we declined Mr. Materu's invitation to resort to rule 4(2) (a) of the Rules in sustaining the applicants' application and overruling the respondent's preliminary point of objection. It is common knowledge that rule 4(2) (a) of the Rules could

validly be resorted to in situations for which no provision is made under the Rules.

The applicants' application brought under rules 89(2) and 4(2) (a) of the Rules having been adjudged misconceived and, therefore, incompetent, it is accordingly hereby struck out with costs to the respondent.

DATED at ARUSHA this 16th day February, 2015.

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL