IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J. A. KILEO, J.A. AND KIMARO, J.A.)
CIVIL APPEAL NO 89 OF 1998

BETWEEN

TANZANIA SPRING INDUSTRIES AND AUTOPARTS LTD……APPELLANT

AND

1. THE HONORABLE ATTORNEY GENERAL }
2. COMMISSIONER FOR LANDS }
3. ESSEN INVESTMENT LTD. }…… RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Msumi, J.K.)

Dated 12th day of March, 1998

In

Misc. Civil Case No. 150/98

RULING OF THE COURT:

5 June & 20 July, 2007:

KILEO, J.A.:

On 12 March, 1998 Msumi, J. K. as he then was, made the following decision on a preliminary objection that was raised in the application filed by Essen Investments Ltd before him.

"Since my finding on the preliminary issues raised by all the respondents are not sustainable, rather than give a reasoned ruling and thereby creating an opportunity for further delay caused by yet another possible appeal against the said ruling, it is hereby ordered that the preliminary objections are overruled but reasons for this finding will be incorporated in the judgment on the main application"

The respondents in that application were the present appellant and the first and second respondents.

Being aggrieved by the Hon. J. K.'s ruling, the appellant came to this Court complaining of, among other grounds, that the learned J.K. erred in not giving reasons for dismissing the preliminary objections on the ground that to do so would enable the appellant to file an appeal before the Court of Appeal.

The lodging of the appeal was met with notices of preliminary objections raised by both the Attorney General and counsel for the 3rd respondent.

The Attorney General subsequently withdrew his notice of preliminary objection. The third respondent withdrew his initial notice of preliminary objection but filed a supplementary notice of preliminary objection on 18th November 2005, which is the subject of this ruling. The objection raised is to the effect that the memorandum of appeal relied upon by the appellant is invalid and incurable as it is contrary to the mandatory requirements of rule 86(1) and 86(3) of the Court of Appeal Rules, 1979.

At the hearing, the appellant was represented by Dr. Ringo Tenga learned counsel, the first and second respondents by Mr. Chidowu and Ms Mrema, learned Senior State Attorney and State Attorney respectively. The third respondent was

represented by two learned counsel - Professor Issa Shivji and Mr. George Kilindu.

When the matter was called on for hearing, Dr. Tenga made an application under rule 3 (2) (a) of the Court Rules to withdraw the application with leave to re-file. The learned counsel submitted that upon a closer study of the memorandum of appeal he realized that it did not show what the appellant was seeking from the Court and for this reason he found it wise to ask for withdrawal of the appeal in order to save the Court's time. He went on further to submit that he found the preliminary objection that was raised to have merit.

The application by Dr. Tenga was not objected to by Mr. Chidowu. Prof. Shivji however, objected to the application for withdrawal of the appeal under rule 3 (2) (a) of the Court Rules on the following reasons:

One, that there was no prior indication from the appellant that such an application would be made.

Two, that counsel for the appellant had ample time (from February 2005 when the supplementary notice of preliminary abjection was filed) to study the record and make an application under rule 95 of the Court Rules.

Three, that there is no automatic right to withdraw an appeal unless parties consent and that the application is only a clever move to circumvent an otherwise bad appeal.

Four, that an utter surprise which is nowhere provided for in the rules has been sprung upon them.

Five, that an oral application to withdraw the appeal is untenable where a preliminary objection has been raised as the proponents of the preliminary objection are denied the last word, and that in any case rule 3 (2) (a) is not applicable.

Six, that what counsel for the appellant ought to have done was simply to concede to the preliminary objection raised and ask for the striking out of the appeal.

Prof. Shivji wound up his submission with a prayer that the appeal be struck out with costs. He also asked the Court to certify costs for two counsels.

By way of rejoinder Dr. Tenga submitted that when he said that the preliminary objection had merit he was in effect conceding to the same. He also indicated that he would be ready for the consequences.

Before we had arisen for the day, Prof. Shivji brought to the attention of the Court that there was, in the record of appeal, a notice of appeal filed by the Attorney General on 25.03. 1998. He argued that the notice of appeal should be struck out with costs by operation of the law. He cited the case of **TAZAMA PIPELINES LTD and OTTU on behalf of 71 OTHERS (Misc. Civil Notice No 25 of 1999-**Unreported) in support of his argument.

Mr. Chidowu in response pointed out that the issue raised by Prof. Shivji ought to be raised in another forum and that in any case, in this appeal both Prof. Shivji's client and the Attorney General are respondents.

Now, Prof. Shivji has asked that the appeal be struck out with costs as withdrawal under rule 3 (2) (a) is not tenable. We agree with Prof. Shivji that as long as counsel for the appellant has realized that there is merit in the preliminary objection and

as long as he has conceded to the same the result is that the incompetent appeal has to be struck out. A withdrawal of the appeal under Rule 3 (2) (a) of the Court Rules is not applicable in the present circumstances.

Prof. Shivji asked us to certify costs for two counsel. He did not however address us on why we should certify costs for two counsel. Generally, in taxation of costs only the costs of one advocate are allowed unless the Court has directed otherwise. (Paragraph 15-(1) of Third Schedule to the Court of Appeal Rules, 1979 refers). In other words where there is more than one advocate appearing for a party in a case it is not automatic that every such advocate shall be entitled to costs. We think that before the Court can direct that costs for more than one advocate be allowed the Court has first to be satisfied that there is good ground to do so. The complexity or difficulty of a case may be one of the grounds for certifying costs for more than one advocate. There may be other reasons. We do not think however, that there was any complexity in the present

case to warrant us to certify costs for two counsel and as indicated above, Prof. Shivji did not tell us why we should so certify. Admittedly, sometimes, because other people are affluent, they may wish to have the legal services of several advocates, not necessarily because the case is difficult but simply because they have money to afford more than one advocate. Such luxury in our view should not be at the expense of the losing party. A party should be entitled to such costs of counsel as is necessary for his representation in a particular case. In the circumstances, we strike out the appeal with costs to the 3rd respondent and we certify costs for one counsel only.

Before we are done with this case, we wish to comment very briefly, on the argument advanced by Prof. Shivji concerning the notice of appeal that was lodged by the Attorney General on 23. 03. 1998. The learned counsel, making reference to rule 84 (a) of the Court rules submitted that the notice of appeal should be deemed to have been withdrawn and that the

Attorney General should be condemned to pay costs to his client as he was served with the notice of appeal.

It is to be noted that the appeal before us is not an appeal by the Attorney General. No one knows how the notice of appeal by the Attorney General found its way into the record of appeal which was lodged by Tanzania Spring Industries and Auto parts Ltd. The notice of appeal by the Attorney General was not even an essential document (for purposes of this case) in terms of rule 89 of the Court Rules and has nothing to do with the record of appeal before us. For all we know, there could be an appeal lying some where by the Attorney General as suggested by Mr. Chidowu. The presence of the notice of appeal by the Attorney General in this case is irrelevant and is actually misplaced. The case of **TAZAMA PIPELINES** referred to by Prof. Shivji is distinguishable from the present case in that the striking out of the notice of appeal in that case was not done in the course of hearing another appeal. Moreover, in that case a letter was written to the Registrar drawing his attention to the

fact that TAZAMA PIPELINES had failed to institute its appeal within the prescribed period.

In the light of the above considerations we cannot accede to the suggestion by Professor Shivji that the Notice of Appeal by the Attorney General be deemed to have been withdrawn as this is not the proper forum for that purpose. Consequently, the prayer that his client be awarded costs as against the Attorney General cannot be granted.

DATED at **DAR ES SALAAM** this 16th day of July, 2007.

J. H. MSOFFE
JUSTICE OF APEAL

E. A. KILEO
JUSTICE OF APPEAL

N.P.KIMARO
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR