

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 2 OF 2007

JOVIN MTAGWABA AND 80 OTHERS.....APPLICANTS
VERSUS
GEITA GOLD MINING LIMITED.....RESPONDENT

(Application from the Judgment of the High Court of
Tanzania (Land Division) at Mwanza)

(Rugazia, J.)

dated the 8th day of December, 2004

in

Land Case No. 1 of 2004

RULING

5 March & 16 March 2007

RUTAKANGWA, J. A.:

The respondent successfully sued the applicant before the High Court at Mwanza in Civil Land Case No. 1 of 2004. Being aggrieved by the High Court decision, the applicants lodged Civil Appeal No. 109 of 2005 in this Court. When the appeal was called on for hearing the same was found to be incompetent. The record of appeal did not contain a

*1. One's appeal has been struck if goes with notice.
2. You can not apply for extension of time to file Appeal before applying for ext. of time to file notice of Appeal.
3. An application for filling notice of Appeal must be made in H.C first as per rule 44.*

proper decree. It was accordingly struck out with costs. All the same, the court granted the applicants "leave to file a formal application to this Court for extension of time, if they should consider themselves time barred".

In response to the leave granted, the applicants promptly filed this application. They are "seeking extension of time to appeal from the judgment of the High Court of Tanzania at Mwanza (Land Division) in Land Case No. 01 of 2004..."

When the application was called on for hearing, Mr. Rwechungura, learned advocate, raised a preliminary objection on a point of law, notice of which had been earlier filed. The objection was to the effect that the application is incompetent in as much as it is not accompanied by a notice of appeal.

Submitting in support of the preliminary objection, Mr. Rwechungura argued that when the Court struck out the earlier appeal, it automatically nullified the earlier notice of appeal which had formed

the legal basis of the said appeal. As such, this application has no legal basis since there is no notice of appeal in existence in respect of the High Court decision in Land Case No. 1 of 2004. In this particular case, the proper procedure would have been for the applicants to apply, first, to the High Court for extension of time to file notice of appeal, he further argued. Mr. Rwechungura was not lost on the leave granted to the applicant by the Court when their appeal was struck out. To him that direction did not have the effect of dispensing with the mandatory process for instituting an appeal which has been struck out. In support of his contentions he referred me to two decisions by this Court to that effect. These are:-

One **WILLIAM SHIJA vs. FORTUNATUS**

MASHA, [1997] TLR. 213, and

two, **TANGANYIKA CHEAP STORE vs. N.I.C.**,

Civil Appeal No. 51 of 2005 (*unreported*).

He accordingly urged me to strike out this application with costs.

Responding to these arguments, Mr. Kabonde, learned advocate for the applicants, conceded that as the court held in the two cases relied on by Mr. Rwechungura, the striking out of the applicant's earlier appeal had the effect of striking out their earlier notice of appeal which otherwise had been filed in time. He conceded also that up to the time the application was called on for hearing the applicants were yet to apply to the High Court for extension of time to file a notice of appeal. These facts notwithstanding, Mr. Kabonde was very adamant that the preliminary objection was misconceived because it was raised prematurely. To him, apart from the naked fact that the order of the court giving leave to file this application never gave leave to file notice out of time, an application of this nature and an application to file notice out of time, are two distinct applications. He sought to distinguish this application from the facts of the two cases cited by Mr. Rwechungura on the basis that in those two cases the Court was dealing with appeals and not applications for extension of time to appeal out of time. He concluded his submission contending that once the applicants are given extension of time to file the appeal out of time, then they will rush to the High Court to apply for extension of time to file a notice of appeal.

To him, there is no law barring them from making this application unless and until they have first duly filed a notice of appeal. He accordingly pressed me to dismiss the preliminary objection with costs.

I will start from where Mr. Kabonde ended. Since it is common ground that there is no formal notice of appeal in existence in relation to the decision of the High Court in Land Case No. 1 of 2004, then Mr. Kabonde is wrong in his assertion that the law is on his side. The contrary is the case. The most relevant case is that of **WILLIAM SHIJA vs. FORTUNATUS MASHA** (*supra*). It is indistinguishable from the case at hand.

Contrary to Mr. Kabonde's vehement submission, William Shija had not come to this Court by way of an appeal. It was a reference from a decision of a single judge of the Court. Definitely, a brief background to the said reference will be very-instructive.

In Civil Appeal No. 43 of 1996, Mr. Masha was the appellant, while Mr. Shija was the respondent. The said appeal was held to be

incompetent for not having the extracted order attached. It was struck out. In striking out the appeal, the Court had given Mr. Masha leave to institute the appeal afresh if he so wished by making an appropriate application. He applied to the High court for extension of time within which to appeal to this Court. The High Court held that it could not grant such an extension as the applicant had a right of appeal as a matter of right. He then made the application for extension of time to appeal out of time, before a single judge of the Court, as is the case here. The learned judge granted the application. Mr. Shija was aggrieved by the decision. He attacked the decision by way of a reference.

Counsel for Mr. Shija vehemently submitted **that the application before the learned single judge for extension of time to file the appeal was incompetent because it lacked the pre – requisite notice of intention** to appeal. Upholding this submission, the Court said:-

"... in situations such as this where Rule 76 of the Court's rules explicitly provides for notice of appeal as a necessary condition, compliance with it cannot be attained by implication. It has to be done in fact and nothing short of that. In here, **the application before the learned single judge was filed before an application for extension of time to give notice of appeal had been made to the High Court.** This fact apparently the learned single judge realized when he granted an extension of fourteen days in which to file notice of appeal, a relief which was not sought in the application ... in terms of the provisions of S. 11(1) of the Appellate Jurisdiction Act, 1979 and Rule 8 of the Court's Rules, this Court and the High Court have concurrent jurisdiction to grant extension of time to give notice of appeal. However, under Rule 44, the application for extension of time shall in

the first instance be made to the High Court. **In the instant case, no such application had been made to the High Court. Therefore, the matter before the learned single judge was incompetent for non – compliance with Rule 44. That is, the Court had no jurisdiction to entertain the application which had not satisfied the conditions set out under this rule ...” (emphasis is mine).**

The reference was allowed and the proceedings before the single judge were nullified.

This is the law which tells it all. This application is, therefore, barred by the law which was lucidly stated in the case of **WILLIAM SHIJA vs. FORTUNATUS MASHA**. The applicants have first to make an application for extension of time to give notice of intention to appeal in the High Court. This ought to be common knowledge. The order of this Court while striking out the applicants' appeal was not meant to

dispense with the mandatory requirement of the rules, as correctly argued by Mr. Rwechungura. Indeed **KAJI, J.A.** was of the same view in **TANGANYIKA CHEAP STORE vs. N.I.C. (supra)**.

For the foregoing reasons, I uphold the preliminary objection and hold that this application is incompetent. It is accordingly struck out with costs.

DATED at MWANZA this 16th day of March, 2007.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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




S. M. RUMANYIKA
DEPUTY REGISTRAR