

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MBAROUK, J.A., MUSSA, J.A., And JUMA, J.A.)**

**CIVIL APPLICATION NO. 172 OF 2012**

- 1. 7 OTHERSTED**
- 2. ALLI MAGWA**
- 3. RICHARD NDUGAI**
- 4. ESHI KWEKA**
- 5. JUMANNE ABDALLAH**
- 6. VERYNICE TESHA**
- 7. FATUMA MAKUKA**
- 8. ABDALLAH MOHAMED**

.....**APPLICANTS**

**VERSUS**

**PETER SINIGA ..... RESPONDENT**

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

**(Makaramba, J.)**

**Dated the 15<sup>th</sup> day of July, 2011**

**in**

**Commercial Case No. 69 of 2008**

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**RULING OF THE COURT**

18<sup>th</sup> & 21<sup>st</sup> July, 2016

**MBAROUK, J.A.:**

When the application was called on for hearing, the respondent failed to enter appearance though duly served on 5<sup>th</sup> July, 2016. That prompted Mr. Seni Malimi, learned advocate for the applicant to request

us to invoke Rule 63 (2) of the Court of Appeal Rules, 2009 (the Rules) to proceed in the absence of the respondent. Without any hesitation, we granted the prayer to proceed with the hearing of the application in the absence of the respondent by invoking Rule 63 (2) of the Rules.

In this application filed by way of notice of motion the applicant is seeking the orders of this Court to strike out the notice of appeal from the decision of the High Court of Tanzania in Commercial Case No. 69 of 2008 dated 15<sup>th</sup> July, 2011 lodged by the Respondent. The notice of motion is supported by the affidavit affirmed by Abdallah Mohamed who is the Director of the 1<sup>st</sup> applicant and duly authorized to depose on behalf of the other applicants.

At the hearing Mr. Malimi prayed to adopt as part of his submission what have been stated in the affidavit in support of the application together with his written submissions he filed earlier on 18/2/2013 in terms of Rule 106 (1) of the Rules.

Mr. Malimi started by submitting that, as stated in the affidavit in support of the application that, after the respondent was aggrieved by the decision of the High Court, he lodged a notice of appeal on 18<sup>th</sup> July, 2011 intending to appeal against the whole of the said decision. He

added that, as shown in the affidavit that, on 29<sup>th</sup> June, 2012 the Registrar High Court of Tanzania Commercial Division wrote a letter to F.E. Mkongwa and Company Advocate informing them that the certified copies of proceedings, judgment, decree and exhibits were ready for collection. He further submitted that, it was until 12<sup>th</sup> September, 2012 when the respondent through his advocate collected those copies after being informed on 6<sup>th</sup> July, 2012 that they were ready for collection.

Mr. Malimi further stated that, the respondent was supposed to file the record of appeal within sixty (60) days, but to date that requirement which is provided for under Rule (90) (1) of the Rules, has not been complied with. For that reason, Mr. Malimi urged us to invoke Rule 89(2) of the Rules and strike out the notice of appeal on the ground that some essential step in the proceedings has not been taken. He then prayed for costs.

Rule 89 (2) of the Rules states as follows:-

*"(2) subject to the provisions of sub rule (1), a respondent or other person on whom a notice of appeal has been served by at any time either before or after the institution of the appeal apply*

*to the Court to strike out the notice or the appeal, as the case may be on the ground that no appeal lie or **that some essential step in the proceedings has not been taken** or has not been taken within the prescribed time”.*

(Emphasis added).

As pointed out by Mr. Malimi that, the decision of the High Court sought to be appealed against was given on 15<sup>th</sup> July, 2011. Thereafter, the respondent filed his notice of appeal on 18<sup>th</sup> July, 2011 well within time. The record also shows that copies of proceedings, judgment, decree and exhibits were supplied to the respondents on 12<sup>th</sup> September, 2012. As per Malimi’s submissions, to date the respondent has failed to take essential step to file his appeal as required under Rule 90(1) of the Rules. For that reason, we are constrained to join hands with the learned advocate for the applicants that the notice of appeal filed by the respondent out to be struck out for failure to take essential step. In the event, we invoke the powers conferred upon us under Rule 89(2) of the Rules and strike out the application with costs.

**DATED at DAR ES SALAAM** this 19<sup>th</sup> day of July, 2016.

M.S. MBAROUK  
**JUSTICE OF APPEAL**

K.M. MUSSA  
**JUSTICE OF APEPAL**

I.H. JUMA  
**JUSTICE OF APPEAL**

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

T.K. Simba  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**