

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

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

CIVIL APPLICATION NO. 17 OF 2012

VITALIS OKAL APPLICANT

VERSUS

PANYAKOO OULA RESPONDENT

**(Application for striking out the Notice Of Appeal from the Decision of the
Court of Resident Magistrate
at Tarime)**

(Mwingwa PRM with EXT.)

dated the 30th day of May, 2012

in

PC Civil Appeal No. 34 of 2006

RULING OF THE COURT

4th & 5th Dec. 2013

RUTAKANGWA, J.A.:

The applicant was the successful party in the Tarime Resident Magistrate Court – Extd. Jur. (P.C.) Civil Appeal No. 36 of 2006, whose judgment was delivered on 30th May, 2012. The respondent was aggrieved by the outcome of his appeal. He accordingly lodged a notice of appeal to this Court on 27th June, 2012, a copy of which was served on the applicant on 1st July, 2012.

The intended appeal to this Court would be a third appeal. Accordingly, the respondent has no automatic right of appeal to this Court. This right is exercisable subject to first obtaining certificate on a point of law from the High Court only. It is the applicant’s claim that up to this day, the respondent has not sought, let alone obtaining, this requisite certificate on a point of law. He is, therefore, moving the Court

under Rules 89 (2) and 91 (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to strike out the notice of appeal lodged on 27th June, 2012.

When the application was called on for hearing, the applicant appeared before us in person. The respondent, on the other hand, was absent. Efforts to serve him in person with the notice of hearing on 19/11/2013 proved abortive. The notice was returned unserved with an accompanying affidavit sworn to by one Jackson Tinako, the process server, to the effect that he refused to accept service on him. We had no alternative but proceed **ex parte** under Rule 63 (2) of the Rules. The applicant had nothing to tell us but invited us to make use of the contents of the notice of motion and its supporting affidavit and allow the application with costs.

As already alluded to in this ruling, this is only an application seeking to have the notice of appeal lodged by the respondent who was not pleased with the lower court's decision. We are not concerned here with the reasons of the respondent's grievances against that decision. We have no mandate to look into the propriety and/or legality or otherwise of the decisions of the two courts below at this stage. Our concern here is whether or not the applicant has made out a good case under Rule 89 (2) of the Rules.

Rule 89 (2) of the Rules provides:-

"(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 or the 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 or has not been taken within the prescribed time.”

There is no dispute here that after lodging the notice of appeal on 27/06/2012, the appellant had to apply in the High Court under the provisions of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, for a certificate on a point of law. He has failed to do so to date. His failure to do so, in our considered opinion, amounts to failure to take an essential step towards prosecuting his intended appeal in terms of Rule 89(2) of the Rules. The applicant deserves the order sought, therefore.

In the light of the above discussion, we find merit in this application. We strike out, with costs, the notice of appeal lodged by the respondent on 27th June, 2012.

DATED at MWANZA this 4th day of December, 2013

E.M.K. RUTAKANGWA
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.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL