

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CIVIL APPLICATION NO. 8 OF 2012

MAZEMBE W. NYERERE APPLICANT

VERSUS

1. SAMWELI KIMAYU

2. WILSON OUKO

3. SAMSON ARRABITO

..... RESPONDENTS

**(Application to strike out the notice of appeal from the decision of the
High Court of Tanzania
at Mwanza)**

(Sumari, J.)

dated the 07th day of December, 2010

in

Civil Appeal No. 4 of 2010

RULING OF THE COURT

22nd & 27th November, 2013

KAIJAGE, J.A.:

By a Notice of Motion brought under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant, Mazembe Nyerere, is moving this Court for an order that the notice of appeal filed jointly by the respondents on 7/1/2011 be struck out on the ground that the essential steps in the institution of the intended appeal have not been taken within the prescribed time.

Going by the record, it is clear that pursuant to the dictates of Rule 106 (1) of the Rules, the applicant filed a written submission in support of the present application. It also appears that on 16/8/2012, a copy of the applicant's written submission was duly served on Mr. Makenena Ngero, learned advocate for the respondents. Since then and for no apparent reason/s, a written submission in reply was not forthcoming from the respondents, to be filed within the period prescribed under Rule 106 (10) of the Rules. That rule requires the respondent to file a reply submission within thirty (30) days from the date of service on him of the applicant's written submission. Indeed, the record depicts no efforts made by the respondents to apply for an extension of time within which to file a reply submission out of time.

When the application was called on for hearing, the parties herein appeared in person, unrepresented. Mr. Makenena Ngero, learned counsel for the respondents was aware of the hearing date, but did not appear. In view of the non filing of a reply submission by the respondents, this Court, in the exercise of its discretion under Rule 106 (10) of the Rules ordered the hearing of the present application to proceed *ex parte*.

The applicant adopted his written submission and the contents of his uncontroverted affidavit filed in support of the application, without more. Apparently, the respondents did not file any affidavit in reply. In regard to the background of the present matter, it is submitted that initially the applicant successfully instituted a civil suit in the Resident Magistrates' Court at Musoma. The respondents who were aggrieved by the said trial court's decision, unsuccessfully appealed to the High Court at Mwanza vide Civil Appeal No. 4 of 2010. Undaunted, on 7/1/2011 a notice of appeal to this Court was lodged with the Registrar of the High Court.

On the merits of the application it is submitted that, in terms of section 5 (1) (c) of the Appellate Jurisdiction Act (the Act) the decision desired to be appealed against is appellable with leave. It is the applicant's contention that since the requisite leave was not sought and obtained, the respondents should be adjudged as having failed to take an essential step within the time prescribed in the Rules. It is basically on the strength of this pertinent submission that the applicant has urged us to strike out the respondents' notice of appeal with costs.

With respect, we are in agreement with the applicant. There can be no doubt that the intended appeal traces its origin from the suit instituted by the respondents in the Resident Magistrates' Court at Musoma. It is supposed to be an appeal against the judgment of the High Court sitting at Mwanza (Sumari, J.) in Civil Appeal No. 4 of 2010. As such, it should be governed by the provisions of section 5 (1) (c) of the Act which imposes a mandatory requirement of obtaining prior leave to appeal.

A mandatory prior leave to appeal against the decision of the High Court is obtainable in a manner prescribed in Rule 45 of the Rules thus:-

"R. 45 (A) Where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within fourteen days of the decision."

It is submitted, and we agree with the applicant, that the respondents in this case did not seek and obtain leave of the High Court in any manner and within the period prescribed in Rule 45 of the Rules. The record has it that the said High Court decision was handed down on 7/12/2011. At all material times, the respondents never bothered to

apply, in the High Court, for an extension of time within which to apply for leave to appeal out of time. We consider such an aberration on the part of the respondents as constituting a failure to take an essential step in prosecuting their intended appeal.

In the upshot, we are satisfied that the present application has force and merit. Accordingly, we strike out respondents' Notice of Appeal lodged on 7/1/2011 with costs.

It is so ordered.

DATED at MWANZA the 25th day of November, 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