

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: LILA, J.A., WAMBALI, J.A. And KOROSSO, J.A)**

**CIVIL APPLICATION NO. 76 OF 2015**

**MAFUNGO LEONARD MAJURA .....1<sup>ST</sup> APPLICANT**  
**ELIKIRA FANUEL KWEKA .....2<sup>ND</sup> APPLICANT**  
**KAMWIRI OMARI SHAIBU .....3<sup>RD</sup> APPLICANT**  
**NOYA JOHN CONRAD .....4<sup>TH</sup> APPLICANT**  
**SALIMA RAJAB KIZIGO .....5<sup>TH</sup> APPLICANT**  
**MRS. ABNELI SALATIERI MBALLA .....6<sup>TH</sup> APPLICANT**  
**IRENE BARAZA SALEHE .....7<sup>TH</sup> APPLICANT**  
**GALIO BANGO KISESA .....8<sup>TH</sup> APPLICANT**  
**ALLY MWALIMU SHOMVI .....9<sup>TH</sup> APPLICANT**  
**OMARY SALUM NGALOMBA .....10<sup>TH</sup> APPLICANT**  
**NAHUMU ANAEL PALLANGYO .....11<sup>TH</sup> APPLICANT**  
**NGIMBA MARY PAUL .....12<sup>TH</sup> APPLICANT**  
**MAJOR MUSSA SELEMAN KINGAI .....13<sup>TH</sup> APPLICANT**  
**OMARY RAJABU REMMY .....14<sup>TH</sup> APPLICANT**  
**MASEGEDO JUMA NGWENO .....15<sup>TH</sup> APPLICANT**

**VERSUS**

**TANESCO LIMITED ..... RESPONDENT**

**(Application to strike out the Notice of Appeal from the Decision  
of the High Court of Tanzania at Dar es Salaam)**

**(De-Melo, J.)**

**in**

**Land Case No.55 of 2008**

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**RULING OF THE COURT**

18<sup>th</sup> Nov & 1<sup>st</sup> December, 2020

**WAMBALI, J.A.:**

The fifteen applicants listed above sued Tanzania Electric Supply Company Limited (TANESCO) in Land Case No.55 of 2008 before the High

Court of Tanzania (Land Division) at Dar es Salaam. In that suit the applicants claimed compensation for part of their land which had been identified to be acquired by the respondent for expansion of electricity project known as "*Mradi wa Ukarabati wa Mifumo ya Umeme na Njia za Usambazaji na Upitishaji Umeme, Dar es Salaam, Kilimanjaro na Arusha.*" In its decision delivered on 5<sup>th</sup> February, 2015, the High Court decided in favour of the applicants.

The respondent was not satisfied with that decision and as a result she lodged a notice of appeal on 23<sup>rd</sup> February, 2015 for purpose of challenging the same before the Court.

On the other hand, as the said notice of appeal was served on the applicants as required by the law, through their counsel, the present application was lodged in terms of Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) praying the Court to strike out the said notice of appeal. The application is pegged on the following grounds: -

- 1. An essential step has not been taken, namely that up to today the 8<sup>th</sup> day of April, 2015 that is, over 2 months from when the decision intended to be appealed against was delivered, the Respondent has not lodged an application for leave to appeal against the decision;*
- 2. An essential step has not been taken within the prescribed time, namely that the Notice of Appeal was lodged out of time;*

3. *No appeal lies as the Notice of Appeal uses generic reference of the Respondent;*
4. *No appeal lies as the notice of appeal intends to challenge a non-existing judgment and decree of the High Court of Tanzania Land Division before DIMELO Judge dated 05<sup>th</sup> February, 2015 in Land Case No.55 of 2008."*

The Notice of Motion is supported by the affidavit deposed by Mr. Audax Vedasto, advocate for the applicants. The learned advocate also lodged written submission to support the application.

At the hearing of the application, Mr. Audax Vedasto entered appearance for the applicants. More importantly, as he did not wish to exemplify further orally in support of the application, he entirely adopted the contents of the notice of motion, the affidavit and the written submission and urged us to grant the application with costs.

On the other side, the respondent did not enter appearance. According to the record of the application, in Civil Application No.434/17 of 2018 the Court ordered that the hearing of the application should proceed in the absence of the respondent. That cause of action was taken as the respondent had previously failed to enter appearance on 4<sup>th</sup> July, 2018 when this application was called on for hearing despite being duly served with the notice of hearing by the Court to appear.

At this juncture, the issue for our determination is whether the application has merit.

Having examined the notice of motion, the affidavit and the written submission in support of the application, we deem it appropriate to start our deliberation by considering the first ground which is to the effect that the respondent has failed to apply for leave to appeal. It is the applicants' contention that in terms of section 47 (1) of the Land Disputes Courts Act, Cap 216 R.E 2002 (the Act), any person who is aggrieved by the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court. Moreover, it is submitted for the applicants that according to Rule 45(a) of the Rules, the intending appellant must lodge an application for leave before the High Court in terms of section 11 of the Appellate Jurisdiction Act, Cap 141 R.E.2019 within fourteen days from the date of the decision sought to be challenged.

On the contrary, Mr. Vedasto specifically states in the written submission that, until the current application was lodged on 8<sup>th</sup> April, 2015 the respondent had not applied for leave to appeal as required by the law despite the fact that the decision of the High Court was delivered on 5<sup>th</sup> February, 2015. He thus strongly prayed that the notice of appeal which was lodged by the respondent on 23<sup>rd</sup> February, 2015 be struck out with costs in

terms of Rule 89 (2) of the Rules. The thrust of the applicants' prayer, Mr. Vedasto submitted, is in view of the failure of the respondent to take one of the essential step, that is, to apply for leave to appeal before lodging the intended appeal.

At this juncture, we have to state that in the absence of any explanation from the respondent concerning her failure to apply for leave to appeal within the prescribed time, we have no other option, but to rely on the applicants' existing materials in the record of the application. Besides, it is unfortunate that despite the fact that the respondent previously failed to appear to defend the application as alluded to above, it is noteworthy that until the application was called on for hearing on 4<sup>th</sup> July, 2018, she had not lodged an affidavit in reply as required in terms of Rule 56 (1) of the Rules. This is notwithstanding the fact that she was duly served with the Notice of Motion and the affidavit in terms of Rule 55 (1) of the Rules.

Thus, on our part, in absence of any indication that the respondent lodged an application for leave to appeal within the prescribed time, we have no hesitation to state that in the circumstances of this case, the respondent has failed to take one of the important essential steps to lodge the appeal against the decision which is intended to be challenged. Besides, we are settled that if the respondent would have applied for leave to appeal

before the High Court within the prescribed time or later, the same could have been served on the applicants. However, this is not the case as per record of the application.

We do not need to over emphasize that where leave is a necessary step before an appeal is lodged, failure of the intending appellant to apply for the same after lodging a notice of appeal to challenge the decision of the High Court or subordinate court exercising extended jurisdiction, places him in the risk of his notice of appeal being struck out in terms of Rule 89(2) of the Rules. In **Asmin Rashid v. Boko Omari** (1997) TLR 146 the Court stated among others that: -

*"One of the essential steps...was to apply for leave to appeal... for there was no automatic right of appeal against that ruling".*

Similarly, in the present case, the respondent had no automatic right of appeal unless leave was granted. It is not doubted that in terms of section 47 (1) of the Act, as one of the essential step after lodging the notice of appeal, the respondent was duly bound to apply for leave to appeal within fourteen days as required under Rule 45 (a) of the Rules.

However, we wish to emphasize that we are mindful of the fact that the position we have stated with regard to the provisions of section 47 (1) of the Act is consistent with the position of the law as it existed before the

amendments was introduced to the said provision by the Written Laws (Miscellaneous Amendment) (No. 3) Act No. 8 of 2018. It is thus not out of place to state that currently, in view of the amendment made to section 47 (1) of the Act, leave to appeal to the Court is no longer applicable in decision made by the High Court in exercise of its original jurisdiction.

Nonetheless in the present application, since the decision of the High Court was delivered on 5<sup>th</sup> February, 2015, the respondent was still bound to apply for leave to appeal in accordance with the provision of section 47 (1) of the Act as prescribed before the amendment was introduced by Act No. 8 of 2018.

Having, taken that position, we do not think it is necessary, in the circumstances of this application, to deal with other grounds in the notice of motion in support of the application. We are settled that our deliberation on the ground on failure of the respondent to apply for leave to appeal suffices to dispose of the application.

In the event, since after the notice of appeal was lodged the respondent has failed to take one of the essential and important steps, that is, to apply for leave to appeal within the prescribed time, the application has merit.

In the result, we grant the application. Consequently, in terms of Rule 89 (2) of the Rules, we strike out the respondent's notice of appeal lodged on 23<sup>rd</sup> February, 2015 with costs. We so order.

**DATED at DAR ES SALAAM this 27<sup>th</sup> day of November, 2020**

S. A. LILA  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

The Ruling delivered this 1<sup>st</sup> day of December, 2020 in the Presence of Mr. Paschal Mshanga, counsel for the applicants, is hereby certified as a true copy of the original.



  
E. G. MRANGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**