

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

**CIVIL APPLICATION NO. 12 OF 2008**

**MEHBOOB HASSANALI VERSI ..... APPLICANT**

**VERSUS**

**MURTAZA MOHAMED RAZA VIRAN.....RESPONDENT**

**(Application for Strick out Notice of Appeal from  
The Judgment of the High Court of Tanzania)**

**(Kimaro, J.)**

**dated the 4<sup>th</sup> day of September, 2008  
in  
Commercial Case No. 281 of 2008**

**RULING**

**11<sup>th</sup> & 20<sup>th</sup> June, 2008**

**KAJI J.A:**

In a notice of motion made under Rule 82 of the Court of Appeal Rules, 1979, the applicant, Mehboob Hassanal Versi, is moving the Court for an order to strike out Civil appeal No. 145 of 2006 filed by the respondent Murtaza Mohamed Raza Viran against the applicant on 28<sup>th</sup> December, 2006 on the grounds that:

- (a) The appeal is based on the notice of appeal which was struck out by the Court together with Civil Appeal No 31 of 2004.
- (b) The memorandum of appeal is not accompanied with the judgment or order appealed against.

At the hearing of the application the applicant, through his advocate Mr. Rwebangira, abandoned the second ground, that is, ground (b) and proceeded with ground (a).

Mr. Rwebangira's brief submission is as follows;-

On 4<sup>th</sup> September, 2003, the High Court of Tanzania, Commercial Division, entered judgment in favour of the applicant against the respondent in Commercial case No. 281 of 2002.

The respondent was dissatisfied with the decision and lodged notice of appeal on 9/9/2003 and later instituted Civil Appeal No. 31 of 2004.

However the said Civil Appeal was struck out on 12/12/2006 on the ground that it was incompetent for want of a valid decree. The door

was left open for the respondent to reinstitute the appeal if he so wished.

On 28<sup>th</sup> December, 2006 the respondent filed Civil Appeal No, 145 of 2006 based on the very notice of appeal lodged on 9/9/2003 in respect of civil appeal No. 31 of 2004 which was struck out on 12/12/2006. It is the learned counsel's submission that, since the notice of appeal lodged on 9/9/2003 was in respect of Civil Appeal No. 31 of 2004 which was struck out on 12/12/ 2006; the notice of appeal died with it and could not support any subsequent appeal. The learned counsel pointed out that if the respondent wished to reinstitute the appeal, he ought to have applied for extension of time within which to file a fresh notice of appeal. In the absence of a fresh valid notice of appeal, Civil Appeal No. 145 of 2006 has no leg on which to stand and should be struck out with costs for being incompetent. The learned counsel cited some decisions of the Court in support of his submission that where an appeal is struck out for being incompetent the notice of appeal thereat dies with it and cannot be the basis for a subsequent appeal, and that, if the

appellant wishes to re-institute it he must start it all over again in the High Court including applying for extension of time to file a notice of appeal.

In reply, Mr. Sylvester Shayo, learned counsel for the respondent, resisted the notice of motion although he conceded that Civil Appeal No. 145 of 2006 is based on the notice of appeal lodged on 9/9/2003 in respect of Civil Appeal No. 31 of 2004 which was struck out by the Court on 12/12/2006 for being incompetent for want of a valid decree. Mr. Shayo asserted that, on 12/12/2006 when the Court struck out Civil appeal No. 31 of 2004 the respondent was left at liberty to re-institute it within 14 days from the date of delivery of the ruling which liberty the respondent availed himself on 28/12/2006. The learned counsel was of the view that, by granting the respondent 14 days within which to re-institute the appeal, the Court directed a departure from other Rules in respect of appeal processes which include abandoning the process of filing a fresh notice of appeal, and that the Court had jurisdiction to do so under Rule 3(1)(2)(b) of the Court Rule,1979. The learned counsel

observed that, in granting 14 days the Court had intended to facilitate the re-institution of the appeal without requiring the respondent to lodge another notice of appeal. The contrary would be absurd as it would not be possible to apply for extension of time to file a notice of appeal and be able to re-institute the appeal within such short period of 14 days, asserted the learned counsel.

Mr. Shayo considered the authorities cited by the applicant's learned counsel and held the view that they are irrelevant in the circumstances surrounding the instant case. He called upon the Court to dismiss the application with costs.

In a short rejoinder, the applicant's learned counsel contended that, Rule 3 applies only where there is no specific provision to cater for the matter and that in the instant case there is a specific provision for extension of time which the respondent ought to have complied with. The learned counsel observed that the authorities he had cited are relevant in the circumstances of the instant case.

It is common ground that Civil Appeal No. 145 of 2006 is based on the notice of appeal which was lodged on 9/9/2003 in respect of Civil Appeal No. 31 of 2004. It is also common ground that Civil Appeal No. 31 of 2004 was struck out on 12/12/2006 for want of a valid decree. The only crucial issue is whether the notice of appeal upon which Civil Appeal No. 145 of 2006 is founded disappeared when Civil Appeal No. 31 of 2004 was struck out. Incidentally this issue is not new in the Court. It has been dealt with and decided in a number of cases. For instance, in the case of **DHOW MERCANTILE (EA) LTD AND OTHERS V THE REGISTRAR OF COMPANIES AND OTHERS**, Civil Appeal No. 56 of 2005 (Unreported) the parties had previously been parties in Civil Appeal 86 of 2004 which was struck out on 23/3/2005 on the ground that it was incompetent for want of a valid decree. It was left open for the appellants to reinstitute the appeal if they so desired. On 31/5/2005 the appellant reinstated Civil Appeal No. 56 of 2005 based on the notice of appeal which was lodged in respect of Civil Appeal No. 86 of 2004 which, as already stated, was struck out on 23/3/2005. At the hearing of the appeal the respondents raised a preliminary objection contending

that after Civil Appeal No. 86 of 2004 was struck out, no valid document, including the notice of appeal, remained and that Civil Appeal No. 56 of 2005 was incompetent for want of a valid notice of appeal. The Court had this to say:-

*It is to be observed that it is now settled that after an appeal has been struck out upon the ground that it is incompetent, there is nothing as it were, saved with regard to the appeal including the notice of appeal. That is, the order striking out the appeal also had the effect of striking out the notice of appeal as well. Where, as happened in this case, it is left open for the appellant to reinstitute the appeal if it is so desired, it is expected that due compliance with the requirement of the rules would be observed. In this case the appellants were expected to apply for extension of time in which to file a notice of appeal. This was not done. Failure to apply and obtain extension of time in which to file notice of appeal renders the purported appeal so reinstated incompetent because there is no notice of appeal to support it. In a number of*

*cases this court has consistently held this view. See for instance, **Robert John Mugo V Adam Mollel**, Civil Appeal No. 15 of 1999, and **William Loitiame V Asheri Naftal**, Civil Appeal No. 73 of 2002, among others (both unreported).*

*...The fact that in striking out the initial appeal the court left it open for the appellant to reinstitute the appeal a fresh was no substitute for the requirement on the part of the appellants to comply with the rules in reinstating the appeal. The appellants' failure to apply for and obtain extension of time to file a fresh notice of appeal was fatal. The appeal could not be reinstated based on the same notice of appeal which had been struck out together with the record of appeal on 23/3/2005.*

The above observation by the Court on the point is so exhaustive that I have found myself with nothing useful to add. In the instant case the notice of appeal lodged on 9/9/2003 in respect of Civil Appeal No. 31 of 2004 died away when Civil Appeal No. 31 of 2004 was struck out on 12/12/2006. If the appellant wished to



reinstitute the appeal he ought to have applied for extension of time in which to file a fresh notice of appeal. The 14 days granted by the Court to reinstitute the appeal was no substitute for the requirement on the part of the appellant to comply with the rules in reinstating the appeal. It was merely a direction by the Court to facilitate the appellate processes if the appellants intended to reinstitute the appeal instead of giving the appellant an indefinite period within which to set in motion the appeal processes. The appeal processes for reinstating an appeal include an application for extension of time in which to file a notice of appeal. The respondent's counsel raised an interesting point. He submitted that, by granting 14 days within which to reinstitute the appeal if the appellant so desired, the Court directed a departure from the general rule as is allowed by Rule 3(1). Indeed on the face of it it would appear the Court may, at anytime, direct a departure from the general rules in any case in which this is required in the interests of justice.

Rule 3(1) reads as follows:-

*The practice and procedure of the Court in connection with appeals and intended appeals*

*from the High Court, and the practice and procedure of the high Court in connection with appeals to the Court shall be as prescribed in these Rules, **but the Court may at anytime, direct a departure from these Rules in any case in which this is required in the interests of justice.***

*(Emphasis supplied)*

What I can say on the learned counsel's submission on this is that, when the above cases were decided by the Court, Rule 3(1) was already there. If he wishes the Court to depart from its current position on the point he may do so through the proper channel.

In conclusion, since Civil appeal No. 145 of 2006 was based on the notice of appeal lodged on 9/9/2003 in respect of Civil Appeal No. 31 of 2004 which notice died away when Civil appeal No.31 of 2004 was struck out on 12/12/2006, the said Civil Appeal No. 145 of 2006 is incompetent for want of a valid notice of appeal. In terms of Rule

82 of the Court of Appeal Rules, 1979, Civil Appeal No. 145 of 2006 is hereby struck out with cost.

DATED at DAR ES SALAAM this 20<sup>th</sup> day of June, 2008.

S. N. KAJI  
**JUSTICE OF APPEAL**

I certify that this is true copy of the original.

(F. L. K. WAMBALI)  
**REGISTRAR**  
**COURT OF APPEAL**