

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NSEKELA, J.A. KALEGEYA, J.A., And ORIYO, J.A.)

CIVIL APPLICATION NO. 72 OF 2010

HILDA MSUMARI APPLICANT

VERSUS

TANZANIA PORTLAND CEMENT CO. LTD RESPONDENT

**(Application for Striking out Notice of Appeal from the
Finding/ Decision of the High Court of
Tanzania at Dar es Salaam)**

(Sheikh, J)

Dated 26th day of June, 2009

In

Misc. Civil Application No. 38 of 2004

RULING OF THE COURT

8th & 26th October, 2010

ORIYO, J.A.:

Before the Court was an application by way of Notice of Motion made under Rules 89(2) and 91(a) of the Tanzania Court of Appeal Rules, 2009, hereinafter to be referred to as the Court Rules, seeking the following orders:-

"that the Notice of Appeal lodged by the Respondent on 15th July, 2009 be STRUCK OUT on the ground that an essential step has not been adhered to within the stipulated period, as the Respondent has failed to institute his intended appeal within 60 days".

ALTERNATIVELY

that the intended appeal be deemed to have been withdrawn.

In conformity with the provisions of Rule 48 (1) and 49(1) of the Tanzania Court of Appeal Rules, the Notice of Motion is supported by the affidavit of the applicant, Hilda Msumari.

When the application was called on for hearing, the applicant appeared in person. The respondent, Tanzania Portland Cement Company Limited, though duly served on 27 September, 2010 through its counsel who filed the Notice of Appeal, M/S Law Associates (Advocates), defaulted appearance without notice. In the circumstances, the applicant urged the Court to allow the application to proceed to hearing as scheduled. There being nothing on record to the contrary, we allowed her to proceed.

The applicant made very brief submissions by adopting the contents of the supporting affidavit. According to the applicant's affidavit, the respondent had initially filed in Court Civil Appeal No. 111 of 2001. At the instance of the said respondent, the appeal was withdrawn on 22 February 2008. Thereafter the respondent lodged Civil Application No. 140 of 2007 which was dismissed with costs on 23 April 2008 for failure to prosecute. Still unrelenting, the respondent applied for and was granted extension of time to file a fresh Notice of Appeal which was duly filed on 15 July 2009, the subject matter of this application.

Following the foregoing background of the matter, the issue before us is whether or not to grant the application.

Rule 89(2) of the Court 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”

Further, Rule 91 of the Court Rules states:-

"91. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time

(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court orders otherwise, be liable to pay the costs of any persons on whom the notice of appeal was served arising from that failure to institute the appeal;"

Going by the Court record, the Notice of Appeal by the respondent against the applicant and 2 others was lodged in Court on 15 July, 2009. Rule 90(1) of the Court Rules prescribes limitation period of sixty days from the date when the notice of appeal was lodged, to institute the intended appeal. By simple calculations, sixty days counted from 15 July, 2009, the date the notice of appeal was lodged, the appeal ought to have been instituted latest by 15 September, 2009. As of now, the period of instituting the intended appeal is late by a period of over one year.

We are firmly of the view that the application has merit. In terms of Rule 91(a) of the Court Rules, the respondent is deemed to have

withdrawn the notice of appeal which was lodged on 15 July, 2009. The applicant is granted the costs of the withdrawal.

It is accordingly ordered.

DATED at DAR ES SALAAM this 12th day of October, 2010.

H.R. NSEKELA
JUSTICE OF APPEAL

L.B. KALEGEYA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL