

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

CIVIL APPLICATION NO. 45 OF 2008

**PATRICE P. MWAIGOMOLE.....APPLICANT
VERSUS
ROBERT EDWARD HAWKINS
AND ANOTHER.....RESPONDENT**

**(Application for Striking out Civil Appeal No. 46 of 2006 from
the Decision of the High Court of Tanzania at Dar es Salaam)**

(Ihema, J.)

**dated the 25th day of February, 2005
in
Civil Case No. 56 of 2000**

RULING

9 & 17 June, 2008

MUNUO, J.A.:

The applicant, Patrice Mwaigomole, through the services of Mr. Hyera, learned advocate, brought a Notice of Motion under the provisions of Rule 82 of the Court Rules, 1979, Cap 141 (Subsidiary Legislation) R.E. 2002, seeking an order to strike out Civil Appeal No. 46 of 2006 on the ground that it is incompetent in that the decree in the said pending appeal is defective. The Notice of Motion reflects

four grounds for seeking an order to strike out the pending appeal namely that –

1. *"the High Court Civil Case No. 56/2000, the subject of this appeal, has been dragging on for 8 years now, since 2000.*
2. *That legally there is no pending appeal before the Court as the decree in the purported appeal is defective as it bears a different date from the date of the judgment which renders the appeal incompetent.*
3. *The applicant, the respondent in the pending appeal is an old sick man who is diabetic and would like to enjoy the fruits of the judgment; and*
4. *That the applicant is a believer in a prominent legal maxim:*

"Justice delayed is justice denied".

During the hearing, Mr. Hyera submitted that the pending appeal is incompetent for lack of a properly dated decree in that the decree, an essential document in the appeal, bears a date different

from the date of the judgment appealed against. He observed that the judgment was delivered on the 25th day of February, 2005 whereas the decree is dated the 27th July, 2005. Hence the decree is incurably defective thus rendering the appeal incompetent, counsel for the applicant pointed out.

Counsel for the applicant cited the case of ***Hamisi Shabani versus NBC Holding Corporation Civil Application No. 105 of 2000***, Court of Appeal of Tanzania (unreported) in which the Court struck out an appeal because the decree was defective and no essential step had been taken to rectify the record of appeal. Counsel for the applicant contended that it is too late for the respondent to correct the defective decree now so the application to strike out the appeal for failure to take an essential step should be granted with costs. Mr. Hyera was of the view that the respondent's attempt to seek extension of time to rectify the record of appeal is a futile attempt to correct the record of appeal so the application should be allowed with costs.

Mr. Mwandambo, learned advocate for the respondent, conceded that the decree in Civil Appeal No. 46 of 2006 is wrongly dated. He, nonetheless, contended that he has filed an application seeking extension of time to amend the record of appeal, which application is still pending. The pending application, in the opinion of counsel for the respondent, distinguishes this application from the case of ***Hamisi Shabani versus NBC Holding Corporation***, cited *supra*. Furthermore, and adopting paragraphs 4,5 and 6 of the counter-affidavit to resist the application, counsel for the respondent argued that the pending application for extension of time to amend the record of appeal demonstrates that the respondent has taken essential steps to regularize the defective record of appeal so the present application should be disallowed with costs. At paragraph 6 of the counter-affidavit, Mr. Mwandambo referred to the case of ***Kapinga & Co. Advocates versus NBC Ltd. Civil Appeal No. 42 of 2007*** in which the Court made the following order:

"ORDER"

The appellants to correct the irregularity in the extracted order with respect to the date and they are given 14

days to do so from today. Reasons for the order to be given later.....

DATED at DAR ES SALAAM this 24th day of April, 2008".

The above order, Mr. Mwandambo argued, shows that his application for extension of time is on the right track because the chances of the Court extending time to enable him to rectify the record of appeal are plausible so the application lacks merit.

Let me say here that since the Court has not yet given reasons for the above Order it cannot be of much assistance in this application.

The issue is whether there is ground for striking out Civil Appeal No. 46 of 2006 for failure to take an essential step under the provisions of Rule 82 of the Court Rules, Cap 141 (Subsidiary Legislation) R.E. 2002.

Rule 82 of the Court Rules states, *inter-alia*:

"82. A 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".

It is the contention of counsel for the applicant that the appeal is incompetent because the decree in the record of appeal is wrongly dated. Counsel for the respondent conceded that the decree is defective but urged that there is now a pending application for extension of time to rectify the record as directed by the Court in Civil Application No. 109 of 2007 between the same parties. At Page 19 of the typed Ruling a single judge, Rutakangwa, J.A. observed:

"It is, therefore incorrect,to assert or propose that the defect in the applicants' record of appeal would be cured by filing a supplementary record of appeal under rule 92 (3) of the Rules containing a valid

decree. The copy of the decree ought to have been filed together with the primary record of appeal within the time prescribed in rule 83 (1) of the Rules. If such time has expired, then the applicants have to resort to rule 8 of the rules”.

Apparently Mr. Mwandambo’s pending application is anchored on the above holding. Under the circumstances it would be imprudent to strike out the appeal when the application for extension of time to rectify the record has not yet been determined. For that reason I disallow the application. Either party to bear their costs for this application.

DATED at DAR ES SALAAM this 17th day of June, 2008.

(E. N. MUNUO)
JUSTICE OF APPEAL

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

(F. L. K. WAMBALI)
REGISTRAR