

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

CIVIL APPLICATION NO. 54 OF 2007

PAUL JUMA..... APPLICANT

VERSUS

- | | | |
|--|----------------------------------|--------------------|
| <p>1. DIESEL & AUTO ELECTRIC SERVICES (DAS)
LTD.....</p> <p>2. WERNER ALFRED WOLF.....</p> <p>3. LINUS DAMAS NYONI.....</p> | <p style="font-size: 3em;">}</p> | RESPONDENTS |
|--|----------------------------------|--------------------|

**(Application for Extension of time from the
Decision of the High Court of Tanzania
Commercial Division at Dar es Salaam)**

(Massati J.)

Dated the 22nd day of May, 2006

in

Commercial Case No. 34 of 2005

RULING

MSOFFE, J. A.:

On 22/5/2006 Massati, J. dismissed Commercial Case No. 34 of 2005 of the High Court of Tanzania (Commercial Division) on the ground that it was *res judicata* Commercial case No. 34 of 2002 of the same court. On 16/11/2006 the said Court (Luanda,J.) dismissed the applicant's application for leave to appeal against Massati, J's decision. The applicant sought to have "a second bite" and accordingly filed Civil Application No. 170 of

2006. On 23/3/2007 a single judge of this Court (Ramadhani, J. A; as he then was) struck out the application on the ground that it was erroneous for seeking leave to appeal against the decision of Luanda, J. instead of that of Massati, J. On 17/4/2007 the applicant filed this application seeking extension of time to file a notice of motion for leave to appeal against the decision of Massati, J.

When the application was called on for hearing the Court had to deal with a preliminary objection notice of which was given earlier under Rule 3(1) and (2) (a) of the Court Rules, 1979. The notice of preliminary objection has two grounds which read as follows:-

1. That the Application is defective and incompetent because a copy of the decision of the lower court intended to be appealed against has not been attached to the Application, and
2. That the Application is defective and incompetent because a copy of the Notice of Appeal has not been attached to the Application.

In arguing the first ground Mr. Dilip Kesaria for the respondents was of the view that in the absence of a copy of the decision intended to be

appealed against the application is incompetent and should be struck out. In support of this view he cited this Court's decision in **Citibank Tanzania Limited and Another V Peter Claver Bakilana**, Civil Application No. 102 of 2005 (unreported). With respect, this point need not detain me for two reasons. **One**, a close look at **Bakilana's** case (supra) will show that it was decided in the context or basis of its own peculiar circumstances. **Two**, it is not true that a copy of the decision sought to be appealed against has not been annexed to the application. The copy was indeed annexed to this application. If the respondents' record does not contain the copy that would be a different matter for which blame could probably be attributed to the applicant for serving the respondents with an incomplete notice of motion.

As for the second ground Mr. Kesaria was of the strong view that it was necessary that a notice of appeal be annexed to the application. In his view, it is a notice of appeal which clothes the court with jurisdiction. He cited this Court's decisions in **CRDB Bank Limited V George Mr. Kilindu**, Civil Application No. 33 of 2004 (unreported) and **CRDB Bank Limited V George Mr. Kilindu**, Civil Application No. 148 of 2006 (unreported) in support of this view.

On the other hand Mr. Ringia for the applicant contended that in an application for leave under Rule 46 (3) a notice of appeal is not a necessary prerequisite. Furthermore, he went on to say, the authorities cited by Mr. Kesaria are relevant in an application for stay of execution and not in an application of this nature where the court is being asked to enlarge time to file an application for leave to appeal.

It occurs to me that under Rule 8 the Court has power to extend time for the doing of any act authorized or required by the Court Rules if there is sufficient reason. I do not read anything in the rule to suggest that in an application for enlargement of time, such as this one, a notice of appeal is a necessary prerequisite.

At this juncture I wish to make the following observation in passing. If the framers of the Court Rules had intended that a notice of appeal should be a necessary document in an application for extension of time they could have easily provided so in the Rules as is the case under Rule 9 (2) (b) in an application for a stay of execution. In the absence of such clear provision there is no basis for saying that in an application for extension of time a notice of appeal is a necessary document.

As already observed, Mr. Ringia contended that under Rule 46 (3) a notice of appeal is not necessary in an application for leave to appeal. I agree with Mr. Ringia that under the **sub-rule** a notice of appeal is not a necessary prerequisite. However, in my view that submission is premature because at this stage what is at stake is an application for enlargement of time and not an application for leave to appeal.

Yet again, as already demonstrated, Mr. Kesaria cited **Kilindu's** cases (supra) in support of the proposition that a notice of appeal clothes the court with jurisdiction, and that failure to annex a copy of the notice renders the application incompetent. With respect, I do not agree for two reasons. **One**, as shown above, a notice of appeal is not necessary in an application of this nature. **Two**, as submitted by Mr. Ringia, **Kilindu's** cases are distinguishable in that they were dealing with applications for stay of execution where under Rule 9 (2) (b) a notice of appeal is a necessary document.

All in all, I am satisfied that the preliminary objection has no merit. It is accordingly dismissed with costs.

DATED at DAR ES SALAAM this 26 day of September, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

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

S.M. RUMANYIKA
DEPUTY REGISTRAR