IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 121 OF 2008

1. SALAMA HAMISI
2. HUSSEIN MGAYA } **.....APPLICANTS**

VERSUS

1. AKIDA HAMISI AKIDA
2. MLELA MRISHO
3. SIAJABU IDDI } **.....RESPONDENTS**

(Application from the decision of the High Court of Tanzania at Dar es Salaam)

(Oriyo, J)

Dated 14th day of February , 2008
in
PC Civil Appeal No. 57 of 2003

RULING

4th & 24TH December, 2008

LUANDA, J. A:

This application has been taken out under rule 82 of the Court of Appeal Rules, Cap 141 (subsidiary legislation and hereinafter referred to as the Rules).

The applicants through Mr.Rutabingwa, learned advocate are praying to strike out the notice of appeal on three grounds. One, the applicants were not served with the notice of appeal. Two, the respondents have not applied for leave to appeal to this Court. Three, the respondents have not appealed against the High Court decision within the prescribed time.

The evidence of Salama Hamisi Akida in her affidavit which was not challenged is to this effect:- The respondents were dissatisfied with the decision of the High Count (Oriyo,J) dated 14/2/2008 and wish to appeal to this Court. They thus lodged a notice of appeal. However, they knew about the intention of the respondents to appeal at the High Court (Dar es salaam Registry) when they were requesting the files be remitted to the lower courts for execution.

On getting that information they contacted Rutabingwa & Advocates a law firm for a legal advice. The above mentioned law firm wrote a letter to the Registrar and inquired about the status of the case. Indeed, it was discovered that the respondents had filed the notice of appeal and applied to be supplied with proceedings, judgment and decree with the view to appealing to this Court. The Registrar also informed them that the above aforementioned papers were ready for collection through a letter of 16/4/2008.

As the respondents did not take any step to institute the appeal, hence the filing of this application on 26/8/2008.

When the application was called on for hearing, neither the respondents nor their counsel who were duly served appeared. Mr. Rutabingwa learned counsel for the applicant prayed to proceed in absence of the respondent. He cited Rule 105 (2) of the Rules. But Rule 105(2) of the Rules deals with appeals and not with applications. The rule reads:-

> (2) If the appellant appears and the respondent fails to appeal, the **appeal shall proceed** in absence of the respondent and any cross-appeal may be dismissed, unless the court sees fit to adjourn the hearing; but where an appeal has been allowed or cross-appeal dismissed in the absence of the respondent, he may apply to the court to re-hear the appeal or to restore the cross-appeal for hearing, if he can show that he was presented by any sufficient cause from appearing when the appeal was called on for hearing.

The Rule applicable is Rule 58(2) of the Rules. The Rule reads:-

> 58(2). If the applicant appears and the respondent fails to appears, the application shall proceed in the absence of the respondent, unless the court sees fit to adjourn the hearing.

In view of the absence of the respondents without any reason assigned thereto, I decided to proceed to hearing of the application.

Mr. Rutabingwa more or less repeated the same story as that contained in the affidavit of Salama Hamisa Akida.

It is the evidence of Salama Hamisa Akida that they knew about the notice of appeal when they were making a follow up in the High Court for remittance of the files so that they proceed with

execution. They denied to have been served with the notice. That evidence was not challenged in any way. Up todate, which is a period of more than nine months the applicants are yet to be served. It is common knowledge that under Rule 77(1) of the Rules it is mandatory for the intended appellant to serve a copy of the notice of appeal within seven days after lodging the said notice of on all person directly affected by the appeal. Failure to do so violates the mandatory requirement of the above cited Rule which renders the intended appeal incompetent. **(see Festo Kabakama v Joseph Tigusaine Civil Appeal No.66 of 1999 CAT (unreported)).**

It is my settled view that once it is shown that the people directly affected by the appeal were not served with a notice of appeal, than Rule 82 of Rules will not come to play. The Rule is only applicable when it is shown the notice of appeal was served upon all those directly affected by an appeal. Rule 82 reads:-

> 82. A person on whom a notice of appeal has been served may at any time, either before or after institution of the appeal, apply to the court to strike out the notice of appeal, as the case my 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.

Since Rule 82 of the Rules is not applicable the question now is what appropriate action should the Court take.

We have seen that failure to serve those directly affected by the appeal with the notice of appeal renders the intended appeal incompetent. And we have also seen that the applicants were not served with the notice of appeal. So, the intended appeal is incompetent. Under the above circumstance therefore I think the Court is entitled to invoke Rule 3(2) (b) of the Rules and make an order for better meeting the end of justice, not withstanding failure on the part of the applicant to cite the relevant rule.

In meeting the end of justice, I struck out the notice of appeal with costs.

DATED at DAR ES SALAAM this 22nd day of December, 2008.

B.M. LUANDA
JUSTICE OF APPEAL

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

P.B. KHADAY
DEPUTY REGISTRAR