

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A. MJASIRI, J.A., And KAIJAGE, J.A.)

CIVIL APPLICATION NO 187 OF 2015

CHINA RAILWAY JIANCHANG ENGINEERING APPLICANT

VERSUS

CONTINENTAL SERVICES LIMITED..... RESPONDENT

(Application to strike out the Notice of Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Nyangarika, J.)

Dated 8th day of April, 2014

In

Civil Case No. 172 of 2013

RULING OF THE COURT

13th & 27th April, 2016

KAIJAGE, J.A.:

CONTINENTAL SERVICES LTD, the respondent herein, was a losing party in Dar es Salaam High Court (Commercial Division) Misc. Commercial Cause No. 172 of 2013. CHINA RAILWAY JIANCHANG ENGINEERING LTD, the applicant herein, emerged a successful party. After lodging the necessary notice of appeal and, apparently, obtaining the requisite certificate issued by

the Registrar of the High Court in terms of Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the respondent instituted in this Court the now pending Civil Appeal No. 10 of 2015.

By Notice of Motion made under Rule 89 (2) of the Rules, the applicant is moving this Court to strike out the said pending Civil Appeal No. 10 of 2015 on grounds that:-

- "1. No appeal lies.*
- 2. The purported appeal was lodged in Court to purposely delay the hearing and determination of High Court Commercial Case No. 153 of 2013, pending in the High Court, Commercial Division."*

When the application was called on for hearing, Mr. Beatus Malima, learned advocate for the applicant sought, and we accordingly granted him leave in terms of Rule 63 (2) of the Rules, to proceed in the absence of the respondent who was duly served with the Notice of Motion, the applicant's written submission and the Notice of the date of hearing. Noteworthy, is also the fact that the respondent did not file an affidavit in reply.

Addressing the merits of the present uncontested application, Mr. Malima at the outset invited us to adopt the contents of the affidavit and the written submission filed in support thereof. Of more significance are the averments contained in paragraphs 7, 8, 9, 10 and 11 of the supporting affidavit deponed to by Mr. Thomas Lee, a principal officer of the applicant's establishment, which reads:-

" 7. I have read the Notice of Appeal and found that the same is made under Rule 68 (1) and (7) of the Tanzania Court of Appeal Rules, 2009.

8. Mr. Beatus Malima, counsel for the Applicant, has informed me, the information I believe to be true and correct by virtue of his position as advocate that Rule 68 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 is applicable to criminal appeals only. He has further informed me that the applicable rule for notices of appeal for civil appeals is Rule 83 of the Tanzania Court of Appeal Rules, 2009.

9. *I state that the Ruling and Order (Exhibit 1) appealed against emanate from High Court Commercial Division, in Miscellaneous Commercial Cause No. 172/2013 arising from Commercial case No. 153/2013, which is a civil matter not a criminal matter.*
10. *I state further that Mr. Beatus Malima has informed me the information I believe to be true and correct by virtue of his position as advocate that according to the law in this jurisdiction an appeal lies only from a valid notice of appeal.*
11. *I state further that Mr. Beatus Malima has informed me, the information which I believe to be true and correct by virtue of his position as advocate that according to the law in this jurisdiction a notice of appeal which indicates a date which is not the date when the ruling and order appealed against was made, is invalid not*

capable of grounding and/or instituting an appeal."

Focusing on what is stated in the foregoing paragraphs of the applicant's supporting affidavit, Mr. Malima unearthed two defects attending the respondent's Notice of Appeal lodged on 5/5/2014. **Firstly**, he pointed out that the High Court decision desired to be appealed against is dated **8/4/2014**, but the Notice of Appeal as lodged indicates **7/4/2014**. **Secondly**, he maintained that the Notice of Appeal as lodged was incorrectly made under Rule 68 (1) (7) which governs Criminal Appeals instead of Rule 83 (1) of the Rules which governs Civil Appeals. Upon these two patent undisputed infractions which makes the Notice of Appeal unarguably defective and/or invalid, Mr. Malima came out strongly to contend that a valid appeal cannot lie upon an invalid Notice of Appeal such as the one lodged by the respondent on 5/5/2014. Upon this brief submission, we were invited to strike out Civil Appeal No. 10 of 2015 now pending before this Court, under Rule 89 (2) of the Rules.

After we had scanned the impugned Notice of Appeal and the decision of the High Court (Nyangarika, J.) in Misc. Commercial Cause No. 172 of 2013, it became clear to us that in the absence of any application for appropriate amendments made under Rule 111 of the Rules, the impugned Notice of Appeal which purportedly instituted Civil Appeal No. 10 of 2015 was incurably defective on account of the undisputed defects pointed out by Mr. Malima. Again, on account of the same defects there is no valid Notice of Appeal against the decision of the High Court (Nyangarika, J.) **dated 8/4/2014** in Misc. Commercial Cause No. 172 of 2013.

There can be no doubt that the impugned Notice of Appeal offends Rule 83 (6) of the Rules which specifically requires that such Notices should be substantially in conformity with Form 'D' of the first schedule to the Rules. One of the essential components that must be in the body of any notice of appeal lodged in terms of Rule 83 (2) and (6) of the Rules is the **correct date** on which the decision desired to be appealed against was rendered and an indication that it is made under Rule 83 of the Rules.

From the foregoing brief discussion, we accept Mr. Malima's argument that a defective and/or invalid notice of appeal cannot institute a valid appeal. In the circumstances, it is prayed in the notice of motion that the purported Civil Appeal No. 10 of 2015 be struck out under Rule 89 (2) of the Rules which provides:-

*"R. 89 (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."*

[Emphasis is ours.].

Under the foregoing provision of the law, we are settled in our minds that this Court, in a proper application, has powers to strike out either the **appeal or the notice of appeal**. However, since in the present matter we

are not seized with the appeal sought to be struck out, we shall, as we hereby do, strike out the notice of appeal lodged on 5/5/2014 which we have seen and found to be incurably defective.

The application succeeds to this extent with costs.

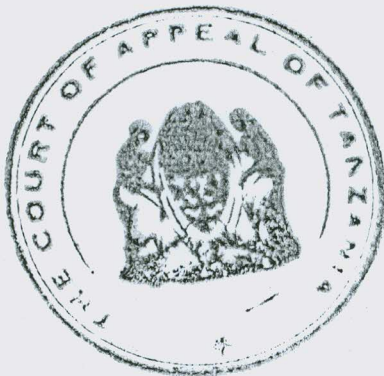
DATED at **DAR ES SALAAM** this 21st day of April, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL