Citation	Parties	Legal Principles Discussed
AR. CIVIL APPLICATION NO. 5 OF 2006- COURT OF APPEAL OF TANZANIA AT ARUSHA -RUTAKANGWA, J.A.	**TANZANIA REVENUE AUTHORITY Vs. TANGO TRANSPORT COMPANY LTD (Application for leave to file a Notice of appeal from the Judgment of the High Court of Tanzania at Arusha)- Civil Case No. 38 of 2000 -Mushi, J.**	**-** an application by Notice of Motion brought under Rules 3 (2) (a), 8 and 44 of the Court of Appeal Rules, 1979; An Application **to** extend time to file an application for leave to file a Notice of appeal out of time- An Application to file a notice of appeal out of time. The time limits fixed by the Court of Appeal Rules include the time within which to file a notice of appeal, (under rule 76 (2)) and the time within which to apply for leave to appeal (see Rule 43).- There is no specific provision either in the Appellate Jurisdiction Act or in the Court of Appeal Rules directing in no uncertain terms that a party aggrieved by a decision of the High

		Court rejecting or dismissing an application for extension of time either to file a notice of appeal or for leave to appeal has no right of appeal and shall only proceed by way of an application of this nature under rule 8 of the Rules. Both the High Court and Court of Appeal have concurrent jurisdiction but by virtue of the provisions of Rule 44, the applicant had to go to the High Court first: see **WILLIAM SHIJA v. FORTUNATUS MASHA (1997) TLR 213.** - If a party fails in his or her bid to obtain an extension of time, then that party can try a second bite in the Court of Appeal under Rule 8 and thereafter can proceed by way of a reference under rule

		57 (1).

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

AR. CIVIL APPLICATION NO. 5 OF 2006

TANZANIA REVENUE AUTHORITY.....APPLICANT
VERSUS
TANGO TRANSPORT COMPANY LTD.....RESPONDENT

(Application for leave to file a Notice of appeal from the Judgment of the High Court of Tanzania at Arusha)

(Mushi, J.)

dated the 5th December, 2003
in
Civil Case No. 38 of 2000

RULING

18 & 30 October, 2007

RUTAKANGWA, J.A.:

Before me is an application by Notice of Motion brought under Rules 3 (2) (a), 8 and 44 of the Court of Appeal Rules, 1979 (the Rules, in short). The orders being sought herein are: -

(a) that the time be extended for the Applicant to file an application for leave to file a Notice of appeal out of time, and

(b) that leave be granted to the applicant to file a notice of appeal out of time.

The application is being resisted by the respondent, which has also challenged its competence by filing a notice of preliminary objection.

It will be apposite if I were to start with a brief factual background of and legal basis for the application. It is as follows: -

The respondent instituted a suit against the applicant in the High Court at Arusha claiming a number of reliefs. The judgment of the High Court delivered on 5th December, 2003, was in the favour of the respondent. The applicant was aggrieved. It duly filed a notice of appeal and subsequently lodged Civil Appeal No. 83 of 2004. The said appeal was struck out on 15th July, 2005 on the ground of incompetence as the certificate of delay incorporated in the record of appeal was improper and erroneously issued.

Following the striking out of the said appeal, the applicant which was still desirous of challenging the High Court decision started afresh to process a new appeal. It filed Miscellaneous Civil Application No. 39 of 2005 in the High Court at Arusha seeking extension of time within which to file a Notice of Appeal. The said application was filed under Section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 and Rule 44 of the Rules.

Section 11 (1) of the Act grants the High Court powers to extend the time for giving notice of intention to appeal from the judgment of the High Court or for making an application for leave to appeal or for a certificate on a point of law. Rule 44 reads as follows: -

> "*Whenever application may be made either to the Court or to the High Court, it shall in the first instance be made to the High Court, but in any criminal matter the Court may in its discretion, on application or of its own motion, give leave to appeal or extend the time for the doing of any act, notwithstanding the fact*

> *that no application has been made to the High Court".*

Rule 8 on the other hand provides that:

> *"The Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court or of the High Court for the doing of any act authorised or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act, and reference in these Rules to any such time shall be construed as a reference to that time as so extended".*

The time limits fixed by the Rules include the time within which to file a notice of appeal, (under rule 76 (2)) and the time within which to apply for leave to appeal (see Rule 43). So both the High Court and this Court have concurrent jurisdiction but by virtue of the provisions of rule 44, the applicant had to go to the High Court first.

Misc. Civil Application No. 39 of 2005 was dismissed with costs by the High Court on 17th August, 2006. Hence this application which was duly filed on 12th October, 2006.

When the application was called on for hearing on 15th October, 2007, Mr. Sang'ka learned advocate for the respondent, rose to argue two points of preliminary objection, notice of which had earlier been filed. The two points are to the effect that: -

> *(a) the application is wrongly before the Court for the court is not seized with jurisdiction to entertain and grant the orders being sought and*
>
> *(b) the matter is res judicata as the orders being sought were the subject of adjudication in Misc. Civil Application No. 39 of 2005 in the High Court of Tanzania.*

Elaborating on the two points of preliminary objection together, Mr. Sang'ka argued that as the applicant did not challenge the decision of the High Court in Misc. Civil Application No. 39 of 2005,

on an appeal to this Court, it has no right to be heard in these proceedings. Mr. Sang'ka, with much conviction, argued that the only avenue open to a party who is dissatisfied by a decision of the High Court under Section 11 (1) of the Act is an appeal against the decision under Section 5 (1) (c) of the Act and not to come to this Court by way of an application under rules 8 and 44. Convinced that this is the only remedy available under the prevailing law, Mr. Sang'ka strongly argued that mistakes have been done in the past in entertaining similar applications and the error should not be perpetuated. If a party is aggrieved by the decision of the High Court refusing to extend time under Section 11 (1) of the Act, then he has to appeal to this Court after obtaining the necessary leave to appeal, he concluded his short but thought provoking submission. He accordingly urged me to strike out this application with costs.

For the applicant, Mr. Kalolo-Bundala, and Dr. Fauz Twaib appeared together. Relying on case law, Mr. Kalolo pressed me to dismiss the preliminary objections with costs for being misconceived. He referred me to the case of **WILLIAM SHIJA v. FORTUNATUS MASHA (1997) TLR 213**, wherein this Court held that this court

and the High Court have concurrent jurisdiction to grant extension of time to give notice of appeal. He went on to submit that at first they had intended to appeal against the decision of the High Court and had indeed duly lodged a notice of appeal. However, on the authority of the binding decision of this Court in **WILLIAM SHIJA v. FORTUNATUS MASHA** (supra) they abandoned the appeal process in favour of this application, he maintained. Mr. Kalolo referred me also to the case of **UMOJA GARAGE v. N.B.C. (1997) TLR 109** to bolster up his claim that the avenue they are pursuing is the appropriate one under the law. It was his contention, therefore, that the argument of Mr. Sang'ka is misconceived unless he can show that these two decisions of the Court, among others, were entertained contrary to the clear dictates of the law. He accordingly prayed for the dismissal with costs of the two points of preliminary objection.

As I have alluded to earlier in this ruling, Mr. Sang'ka's argument is not outwardly outlandish. There is no specific provision either in the Act or in the Rules directing in no uncertain terms that a party aggrieved by a decision of the High Court rejecting or dismissing an application for extension of time either to file a notice

of appeal or for leave to appeal has no right of appeal and shall only proceed by way of an application of this nature under rule 8 of the Rules. But there is no gainsaying, as was held by this Court in **WILLIAM SHIJA Vs. FORTUNATUS MASHA's** case that: -

> *"…… in terms of the provisions of Section 11 (1) of the Appellate Jurisdiction Act, 1979 and Rule 8 of the Court's Rules, this Court and the High Court have concurrent jurisdiction to grant extension of time to give notice of appeal. However, under Rule 44, the application for extension of time shall in the first instance be made to the High Court……." at page 217.*

If a party fails in his or her bid to obtain an extension of time, then that party can try a second bite in this Court under Rule 8 and thereafter can proceed by way of a reference under rule 57 (1). Since an aggrieved party in a proceeding under Section 11 (1) of the Act for extension of time to file a notice of appeal or for leave to appeal (and not for a certificate on a point law) can still come to this Court under rule 8, that party has no right of appeal at all under

Section 5 (1) as a whole. Rule 8 is so wide in scope that it cannot be seriously contended that this application is misconceived. It falls within the ambit of it and many applications have been successfully brought under it without protest. I am saying so fully aware that two wrongs do not make a right. However, I am convinced that in applications of this nature appeals are barred, albeit impliedly, by rules 8 and 44. What a litigant is interested in, after all, is to get redress from the Court. It matters less if it is by way of appeal or under rule 8. After all, conventional wisdom has it that it does not matter whether the cat is black or grey provided it catches the mice.

All said and done I hold that in spite of Mr. Sang'ka's stimulating arguments, he has failed to convince me that this application is misconceived. It is competently before the Court and it should be heard on merit. I accordingly overrule Mr. Sang'ka and dismiss the preliminary objections. However, since Mr. Sang'ka's arguments **might** act as a catalyst for making the Rules clearer on the issue, I order that the costs be in the cause. It is so ordered.

DATED at ARUSHA this 30th day of October, 2007.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

(I. P. KITUSI)
DEPUTY REGISTRAR