

CIVIL APPEAL NO.51 OF 2005 COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: LUBUVA, J.A, NSEKELA, J.A AND KAJI, J.A)	TANGANYIKA CHEAP STORE. APPELLANT VERSUS NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED.. RESPONDENT (Appeal from the judgment and order of the High Court of Tanzania at Dar es Salaam) Kileo, J. Civil Case No 272 of 1996.	When Civil Appeal was struck out, the notice of appeal was struck out as well it had no validity to support the fresh. See William Shija V. Fortunatus Masha (1997) TLR 213.
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**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: LUBUVA, J.A., NSEKELA, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 51 OF 2005

**TANGANYIKA CHEAP STORE APPELLANT
VERSUS
NATIONAL INSURANCE CORPORATION
OF TANZANIA LIMITED RESPONDENT**

**(Appeal from the judgment and order of the High
Court of Tanzania at Dar es Salaam)**

(Kileo, J.)

**dated the 9th day of February, 2000
in**

Civil Case No. 272 of 1996

RULING OF THE COURT

KAJI, J.A.:

In this appeal, the appellant, Tanganyika Cheap Store, is appealing against the decision of the High Court sitting at Dar es Salaam (Kileo, J.) dated 9th February, 2000 in Civil Case No. 272 of 1996.

When the appeal was called on for hearing, Mr. Kilindu, learned counsel for the respondent, the National Insurance Corporation of Tanzania Limited, raised a preliminary objection, notice of which had been lodged earlier in terms of Rule 100 of the Court of Appeal Rules, 1979. The preliminary objection reads as follows:–

“Civil Appeal No. 37 of 2001 involving the parties herein having been struck out by this Court on 27th January, 2005, rendered the Notice of Appeal contained therein ineffectual, thus incapable of supporting the present appeal which is therefore incompetent.”

In elaborating this point Mr. Kilindu pointed out that, Civil Appeal No. 37 of 2001 involved the same parties and the same matter.

On 27th January, 2005, that appeal was struck out for want of a proper decree. It was directed that the appellant was at liberty to re-institute it if he so wished, within fourteen days from the date of obtaining a valid decree from the High Court.

On 24.5.2005 the appellant re-instituted the appeal, but based on the notice of appeal which was filed in Civil Appeal No. 37 of 2001. Mr. Kilindu contended that, when Civil Appeal No. 37 of 2001 was struck out, the whole record was struck out, including the notice of appeal, and that, if the appellant desired to re-institute it, he was required to apply for extension of time in which to file a notice of appeal, regard being had to the judgment date which was 9.2.2000. Mr. Kilindu further contended that, since this appeal is based on an ineffectual notice of appeal, it is not properly before the Court. It is incompetent and should be struck out.

On his part, Mr. Mnye, learned counsel for the respondent, conceded that Civil Appeal No. 37 of 2001 was struck out for want of a proper decree. At first he was of the view that the notice of appeal was not struck out, otherwise the Court would not have directed re-institution of the appeal within fourteen days from the date of

obtaining a proper decree from the High Court. Later however, upon reflection he conceded that, by striking out Civil Appeal No. 37 of 2001, the notice of appeal was also struck out. However, he was of the view that, by being directed to re-institute the appeal within fourteen days from the date of obtaining a proper decree from the High Court, the Court had exempted him from the ordinary requirement of applying for extension of time in which to appeal out of time. In his view, the words "we direct that the appellant be put in a position whereby he can easily re-institute his appeal in this Court if he so desires within fourteen days from the date of obtaining the decree from the High Court" meant that he was allowed to re-institute the appeal provided he did so within fourteen days from the date of obtaining the decree.

In his rejoinder, Mr. Kilindu contended that, the Court's direction did not override the requirements of the Court Rules, and that Rule 3 (1) is irrelevant in the instant case because there is a specific provision (Rule 89) prescribing the necessary documents for a record of appeal.

It is common ground that Civil Appeal No. 37 of 2001 involving the same parties was struck out on 27.1.2005 for being incompetent due to lack of a properly signed decree. It is also common ground that, after the appeal had been struck out, the Court also ordered that the appellant should be put in a position whereby he could easily re-institute his appeal in this Court if he so desired within fourteen days from the date of obtaining the decree from the High Court.

At this juncture we wish to deal with two crucial issues namely, the status of a notice of appeal in an appeal which has been struck out and the implication of the Court order that the appeal could be re-instituted within 14 days if it was so desired.

In **Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) v. Adam Mollel** – Civil Appeal No. 2 of 1990 (unreported) the appeal was struck out on a preliminary objection for want of a properly signed decree, with a direction that the appellant was at liberty to re-institute the appeal if he so wished within fourteen days from the date of obtaining a properly signed decree. The appellant obtained a properly signed decree and filed Civil Appeal No. 15 of 1991 within the prescribed period of fourteen

days, but based on the notice of appeal which had previously been lodged in Civil Appeal No. 2 of 1990. The respondent's advocate raised a preliminary objection that, when Civil Appeal No. 2 of 1990 was struck out, the notice of appeal was also struck out, and therefore the appeal was incompetent. The Court sustained the preliminary objection, and further stated that, the appellant was expected to comply with the Court of Appeal Rules in pursuing the appeal afresh. The Court also stated that the directions which were given in the decision in Civil Appeal No. 2 of 1990, were subject to the rules of the Court and not otherwise. This view was reiterated by the Court in the case of **William Shija v. Fortunatus Masha** (1997) TLR 213.

In the instant case, we re-affirm the same view. When Civil Appeal No. 37 of 2001 was struck out on 27.1.2005, the notice of appeal, it was struck out as well. It had no validity to support the fresh appeal it was ineffectual.

As far as the direction given is concerned, it did not override the requirements of the Court Rules. All that the direction meant was that, the appellant was at liberty to re-institute the appeal if he

so wished within fourteen days from the date of obtaining the decree from the High Court, subject to the requirements of the Court Rules, 1979. One of the requirements of the Court Rules, 1979, is to lodge a notice of appeal within fourteen days from the date of the decision against which it is desired to appeal (Rule 76 (2) of the Court Rules, 1979). Where the prescribed period has expired, leave must be sought and be granted for extension of time under Rule 8 of the Court Rules, 1979. In the instant case, the decision which is intended to be appealed against, was delivered on 9.2.2000. In that respect, the appellant ought to have applied for and be granted leave to lodge the notice of appeal out of time before re-instituting the appeal. The direction was not meant to exempt the appellant from the requirements of the Court Rules, nor a departure from the usual practice under Rule 3 (1) of the Court Rules. Rather it was meant to facilitate the process of complying with the requirements of the Court Rules.

Since the purported appeal was based on an ineffectual notice of appeal, it is incompetent.

In the event, and for the reasons stated, we sustain the respondent's preliminary objection, and strike out the purported appeal with costs.

DATED at DAR ES SALAAM this 17th day of November, 2005.

D.Z. LUBUVA
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR