

Civil reference No.12 of 2004 Court of Appeal of Tanzania at Dar es Salaam. Munuo, J.A, Kaji, J.A and Kimaro.	David Mwakikunga Vs Mzumbe University (incessor of the title of IDM Mzumbe) (Reference from the decision of the single Judge of Court of Appeal of Tanzania at Dar es Salaam)	- When applicant had filled the notice of appeal and had applied for necessary document for appeal purpose in time but fail to consider procedure under rules 83(2) of court of Appeal rules of 1979 that will be sufficient ground to struck the notice of appeal as it in mandatory to serve respondent with copy of notice of appeal and other necessary documents.
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**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL REFERENCE NO.12 OF 2004

(CORUM: MUNUO, J, A., KAJI, J, A., KIMARO, J, A.)

DAVID MWAKIKUNGA.....APPELANT

VERSUS

MZUMBE UNIVERSITY (*SUCCESSOR IN TITLE OF IDM-MZUMBE*).....RESPONDENT

**Reference from the decision of a single Judge of the Court of
Appeal of Tanzania at Dar es Salaam**

Hon. Mroso J.A

Dated 22nd day of September, 2004

in

Civil Application No. 66 of 2003

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RULING OF THE COURT

4th & 21st December, 2006

KAJI J, A:

This is an application for reference against the ruling of a single Judge of the Court (Mroso J.A.), refusing the applicant's application for extension of time within which to file a notice of appeal. It has been brought under Rule 57 of the Court of appeal Rules, 1979.

The facts leading to this application are rather pathetic. The applicant, David Mwakikunga, was the plaintiff in Morogoro District Court Civil case No. 75 of 1996 in which he was claiming for terminal benefits. According to paragraph 4 of the applicant's affidavit, it would appear the suit was on 6/2/1997 either struck out or dismissed for having been instituted prematurely. The applicant was aggrieved. He appealed to the High Court at Dar es Salaam in Civil appeal No. 26 of 1997 which was later transferred to Kisutu Resident Magistrate's Court with Extended Jurisdiction and was registered as Civil Appeal No. 22 of 1997. Manento, Principal Resident Magistrate with Extended Jurisdiction (as he then was) dismissed the appeal.

Still undaunted the applicant lodged notice of appeal in time and applied for the necessary documents for appeal purpose within the prescribed period. However he neither copied the letter applying for those documents to the respondent, Mzumbe University (successor in title of Institute of Development Management), nor served the respondent with the same. After expiry of sixty days from the date when the notice of appeal was filed on 1/12/1997, the respondent applied for the notice of appeal to be struck out under Rule 82 of the Court Rules, 1979, on the ground that the applicant had failed to institute the appeal within the prescribed period of sixty days.

On 9/6/1998, a Single Judge of the Court, Kisanga J. A, granted the application (Civil Application No.6 of 1998) and struck out the notice of appeal.

Desperately, the applicant applied in the High Court for extension of time within which to file a notice of appeal (Miscellaneous Civil cause No. 77 of 1998). On 9/5/2003, Bubeshi J, (as she then was), dismissed the application for want of merit.

The applicant tried a second bite in this Court before a Single Judge in Civil Application No. 66 of 2003. On 22/9/2004, a Single Judge of the Court, Mroso J. A, dismissed the application on the ground that the applicant did not give sufficient ground why he neither copied nor served the letter to the respondent as required by Rule 83 (2) of the Court Rules, 1979. It is against this ruling that the applicant has referred the matter to the full Court for reference. His main complaint is that, the learned Single Judge did not consider properly the grounds why he neither copied nor served the respondent as deponed in paragraphs 9,10,11,12, of his affidavit. It is his contention that, had the learned Single Judge properly considered them he would have found them to be sufficient to grant the extension prayed for.

On the other hand, Mr. Mpaya Kamara, learned counsel for the respondent, recapitulated what he had submitted before the Single Judge, that the grounds submitted by the applicant were mere assertions which were not substantiated in material particular, and

that the application was properly refused by the learned Single Judge.

In order to appreciate the applicant's argument, we think, it will be worthwhile if we reproduce the relevant paragraphs of his affidavit containing the grounds in support of his application. They are paragraphs 9, 10, 11, and 12. They read as follows:-

9. That the High Court Civil Registry misdirected me by instead of endorsing on the letter and return the copies to me, filed them all in the Court Case file for further processing likewise the chamber summons which required the hand signature of the Registrar. A copy of the said letter is attached and marked DM – 2.
10. That, thereafter the Court case file Extended Jurisdiction Civil Appeal No. 22 of 1997 could not be traced, and when it was subsequently found the High Court Registry

erroneously opened a new file with registration number Misc. Civil cause No. 77 of 1998 on 5/5/1998.

11. That, that all these errors were caused by the High Court Civil Registry for which I should not be punished.

12. That, having found out all the above mentioned errors, I applied for extension of time within which to properly file the notice of appeal in the Court out of time.

From these, together with the applicant's oral submission, it is clear to us that the applicant is blaming the Civil Registry staff of the High Court for misleading him that the copy had first to be endorsed by the Registrar before it was served on the respondent, and that the Registry never returned to him the copy which he would otherwise have served the respondent. But as properly countered by Mr. Kamara, learned counsel for the respondent, these are mere assertions. There is neither affidavit nor evidence of any kind from

the Registry office confirming the same. Before us when we enquired from the applicant why he handed over all the copies to the Registry, he said he was directed so by a clerk. He could not produce any affidavit from the said clerk to confirm the same. Later he said he did so because he thought that was the correct procedure. His further reply was that he probably misunderstood the import of Rule 83(2) of the Court Rules. Whatever the case, in our view, none of these amounts to sufficient ground for his failure to serve the respondent with the copy of the letter. It was observed that the applicant had not even copied the letter to the respondent, suggesting that, right from the beginning he had not intended to serve the respondent with the same. On this, at first the applicant gave an impression that he thought the court would probably serve it. Later he appeared to be saying that the Registry would probably return it to him whereby he would serve it himself. In our view, all these are not sufficient grounds for failing to serve the respondent with the said copy. The applicant also is blaming the Registry for misplacing Civil Appeal No. 22 of 1997 (Extended Jurisdiction) thereby necessitating a new file-Misc.Civil cause No 77 of 1998 to be opened. In our view, this is not

sufficient ground for failure to serve the said copy because Misc. Civil cause No. 77 of 1998 was filed after the notice of appeal had been struck out by a single Judge of the Court- Kisanga J.A, in Civil Application No. 6 of 1998. In Misc. Civil cause No. 77 of 1998 the applicant was applying for extension of time in which to file a notice of appeal in lieu of the one which was struck out by the single Judge.

As demonstrated earlier, the applicant had filed the notice of appeal and had applied for the necessary documents for appeal purpose in time. The notice of appeal was struck out because he had not served the respondent with a copy of the letter applying for those documents. It was imperative that he should give sufficient grounds why he failed to serve the same in time. He has failed to do so for the reasons already stated supra. There is nothing to fault the decision of the learned single Judge.

In the event, and for the reasons stated, we dismiss the application with cost.

DATED at DAR ES SALAAM this 18th day of December, 2006.

E.N MUNUO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

N.P KIMARO
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR