

**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. 53 OF 2005

**EAST AFRICA MINES LIMITED..... APPELLANT
VERSUS
CHRISTOPHER KADEO..... RESPONDENT**

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

(Luanda, J.)

dated the 13th day of June, 2003

in

Civil Appeal No. 23 of 2002

RULING OF THE COURT

LUBUVA, J.A.:

This is an appeal against the decision of the High Court (Luanda, J.) in High Court Miscellaneous Cause No. 220 of 2003. The matter arose from Dispute No. 3 of 2002 which was adjudicated upon by the Commissioner of Minerals under the provisions of the Mining Act, 1998. The dispute was between the appellant, the East Africa Mines Limited, and the respondent, Christopher Kadeo. The Commissioner of Mines resolved the dispute against the respondent, the original complainant before the Commissioner. Against the decision of the Commissioner, the respondent successfully appealed

to the High Court. Against the decision of the High Court, the appellant has preferred this appeal.

At the commencement of hearing the appeal, Mr. Nyange, learned counsel for the respondent, raised a preliminary objection notice of which he had priorly filed in terms of rule 100 of the Court Rules, 1979. The preliminary objection was based on the following grounds.

1. The application for leave to appeal lodged on 15th August, 2003 was way out of time contrary to rule 43 (a) of the Court of Appeal Rules 1979 and no leave of the High Court was sought and granted for its hearing out of time.
2. The appeal lodged on 26 May, 2005 is time barred for non compliance with rule 83 of the Court of Appeal Rules, 1979.

In support of ground two Mr. Nyange submitted to the following effect: The appeal lodged on 26.5.2005 was time barred

because it does not comply with the provisions of rule 83. The reason he said was that as the record does not contain a copy of the letter dated 23.6.2003 addressed to the Registrar, High Court applying for copy of proceedings, the appellant is not entitled to rely on the exception to the provisions of sub-rule (1) of rule 83. In that situation, counsel took the view that the appeal should have been instituted within 60 days of the date of the notice of appeal. In this case as the notice of appeal was lodged on 25.6.2003, the appeal instituted on 26.5.2005 was out of time. At the latest, the appeal should have been instituted by 24.8.2003. As happened in this case, the institution of the appeal on 26.5.2005, was inordinately out of time, Mr. Nyange contended. He referred the Court to its decision in **Mrs. Kamiz Abdullah M.D. Karmal v. The Registrar of Buildings And Miss Hawa Bayona**, (1984) TLR 199 and **Stephen Wasira v. Joseph Warioba** (1997) TLR 205.

Mr. Nyange also made submissions on the other ground of preliminary objection that there was no valid leave to appeal granted. It was his contention that the application for leave to appeal was

made outside the period prescribed under rule 43 (a). In this case the decision of the High Court in respect of which leave to appeal was sought was delivered on 19.6.2003. Under rule 43 (a) the application for leave to appeal shall be made within 14 days of the decision against which it is desired to appeal. As the application for leave to appeal was made on 15.8.2003, it was time barred. In the circumstances, leave to appeal granted was invalid and of no legal effect. As a result, this appeal is incompetent, it was based on invalid leave to appeal, it should be struck out as prayed in the preliminary objection.

Responding to these submissions, Mr. Mujulizi, learned counsel for the appellant, first deal with the ground that the appeal was time barred in terms of rule 83. While conceding that the letter of 23.6.2003 to the Registrar, High Court applying for copy of the proceedings was not contained in the record, he maintained that as borne out from the supplementary record furnished, a copy of the letter was sent and received by counsel for the respondent on 26.6.2003. In that situation, Mr. Mujulizi urged that under sub-rule

(2) of rule 83, the appellant was entitled to rely on the exception to sub-rule (1) of rule 83 in computing the time in which to institute the appeal. It is not a matter for counsel to state from the bar that no service was effected with regard to the copy of the letter, evidence has to be provided. In this case, there was evidence of service, he emphasized.

With regard to the submission that leave to appeal granted in this case was invalid, Mr. Mujulizi vigorously took the opposite view. In determining whether the application for leave to appeal lodged on 15.8.2003 in relation to the High Court decision of 13.8.2003, he submitted that the period of time should be reckoned from the time when copy of the proceedings was received on 12.8.2003 and not 19.6.2003, when the High Court decision, was given. This is so he said if the provisions of rules 43 (a) and 3 are read together. Under the provisions of rule 3, the practice of the Court in computing the time in which to apply for leave is to reckon the period of time from the time the copy of proceedings was received. In this light, if the period of time is computed from 12.8.2003, when copy of the

proceedings was received, the application for leave lodged on 15.8.2005, was within the time, Mr. Mujulizi urged.

We shall first deal with the issue whether the appeal was time barred. On this, the relevant provision is rule 83 which under sub-rule (1) provides in clear terms that an appeal shall be instituted within sixty (60) days of the date of the notice of appeal. However, there is also a proviso in the sub-rule to the effect that if the letter to the Registrar of the High Court applying for copy of the proceedings is in writing and was copied to the respondent, the time taken for the preparation and delivery of the copy of proceeding as may be certified by the Registrar as having been necessary for the preparation of the copy of the proceedings shall be excluded. In this case, Mr. Nyange, learned counsel for the respondent had urged us to hold that the exception to sub-rule (1) of rule 83 does not apply because in the record of appeal, the copy of the letter to the Registrar dated 23.6.2003, is not contained. However, he conceded that there was such a letter as can be gleaned from the supplementary record supplied by the appellant.

With respect, we do not think that this issue should delay us. The issue is whether there was a letter addressed to the Registrar applying for copy of proceedings which was copied to the respondent. The long and short answer to it is that there was. This is the letter dated 23.6.2003 which is shown at page 9 of the supplementary record. From our scrutiny of the letter and as submitted by Mr. Mujulizi, not only was the letter copied to the respondent, it was also duly received by counsel for the respondent on 26.6.2003. In that case, we agree with Mr. Mujulizi that the provisions of sub-rule (2) of rule 83 were complied with. Consequently, it is our view that the appellant was entitled to the exception to the proviso to this sub-rule. That this is the position of the law is reflected in a number of cases decided by the Court. See for instance **Mrs. Kamiz Abdallah M.D. Kermal v. The Registrar of Buildings And Miss Hawa Bayona** (1988) TLR 199, among others.

This takes us to the issue raised by Mr. Mujulizi that the computation of time should be reckoned from the time the decision

of the High Court viz 19.6.2003 and not the date when the copy of the proceedings was received on 12.8.2003. With respect, we think that Mr. Mujulizi is getting mixed up on what the Court practice in the High Court means in terms of rule 3 in this regard. In its plain and ordinary meaning, court practice in terms of rules 43 (a), 3 and 6 in so far as applications of this nature are concerned, relates to the format of the application. While in the High Court the applications are by way of chamber summons, in this Court, the applications are by way of notice of motion.

It seems clear that Mr. Mujulizi's perception on the Court practice with regard to the scope, purview and the application of the exception to rule 83 (1) is highly misconceived. On a proper construction of rule 83 (1) and its proviso, we are satisfied that if the time certified by the registrar until 20.4.2005 is excluded, the institution of the appeal on 26.5.2005 was timeous. The preliminary objection based on this ground is without merit. It is rejected.

We shall next deal with the other ground in support of the preliminary objection. This relates to leave to appeal which was granted by Masati, J. on 31.5.2004. As observed earlier, the point raised in opposition to the preliminary objection on this issue was that the period of time should be reckoned from the time when copy of proceedings was received on 12.8.2003 and not the date of the decision of the High Court of 19.6.2003 as urged by Mr. Nyange. Rule 43 (a) of the Court Rules, 1979 relates to application for leave to appeal where an appeal lies with leave of the High Court. It provides:-

43 (a) – Where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within fourteen days of the decision (emphasis supplied)

From our reading and understanding of this rule, it is plainly clear that the prescribed time of fourteen days in which to make the application for leave is to be reckoned from the date when the decision against which it is desired to appeal was delivered. Reference to the time or date when copy of the proceedings was obtained is not borne out from the provisions of this sub-rule. The submission by Mr. Mujulizi that the date of the receipt of the copy of the proceedings of the High Court as the basis upon which to reckon the period of time has, with due respect, no bearing to the law. To do so, we think would amount to stretching the application of the rule beyond the purview and scope it was intended to serve.

In that situation, we do not accept Mr. Mujulizi's submission on this point. We are therefore in agreement with Mr. Nyange that in computing the time within which the application for leave to appeal was made, the period of time is to be reckoned from the date of the decision. In this case the High Court decision was delivered on 19.6.2003. By Chamber Summons, Miscellaneous Civil Application No. 220 of 2003 was filed in the High Court on 15.8.2003.

Therefore, it goes without saying that the application for leave was out of time by about 1½ months in terms of rule 43 (a). At the latest, the application for leave should have been filed by 3rd July, 2003.

Consequently, the application for leave having been filed and obtained out of time, it follows that leave to appeal granted by the High Court (Masati, J.) on 31.5.2004, was invalid, it was of no legal consequence, it was sought and obtained out of time. Therefore, the purported appeal before us is incompetent.

Accordingly, the preliminary objection raised is sustained resulting in the appeal being struck out with costs. It so ordered.

DATED at DAR-ES-SALAAM this 24th 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