IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CIVIL APPEAL NO. 39 OF 2017

GEITA GOLD MINE LIMITED .....APPELLANT

VERSUS

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY .....RESPONDENT

(Appeal from the judgment and decree of the Tax Revenue Appeals Tribunal of Tanzania at Mwanza)

(Shangwa, J.)

dated the 09th day of October, 2006

in

Tax Appeal No. 14 of 2006

RULING OF THE COURT

31st October & 7th November, 2017

MWANGESI, J.A.:

The appellant herein was dissatisfied by the decision of the Tax Revenue Appeals Tribunal, which was handed down on the 09th October, 2006 wherein, it did uphold the decision of the Tax Revenue Appeals Board. Armed with four grounds of appeal, it seeks to fault the said decision of the Tribunal on the reason that, it was erroneously arrived at. In its own words, the memorandum of appeal reads:

1. *The Tax Revenue Appeals Tribunal erred in law, when it held that, Value Added Tax (VAT) is payable on the excess fuel utilized by M/s Golden Construction Company to run the Geita Gold Mine power station.*
2. *The Tax Revenue Appeals Tribunal erred in law and fact, when it held that, there was a vatable (sic) supply of fuel between Geita Gold Mine Limited and Golden Construction Company operating the Geita Mine power station.*
3. *The Tax Revenue Appeals Tribunal erred in law in relying on the un-issued invoice to hold that VAT is payable by reason only of the existence of the invoices without giving due regard to section 4 and 5 of the VAT Act, 1997.*
4. *The Tax Revenue Appeals Tribunal erred in law in dismissing the appeal and ordering the appellant to pay costs.*

On the other hand, the appeal was strenuously resisted by the respondent.

When the appeal was called on for hearing on the 31st October, 2017, the appellant enjoyed the services of Messrs Dr. Ong'hwamuhana Kibuta, allan Kileo, Wilson Mukebezi and Norbert Mwaifani learned counsel, whereas, the respondent was being advocated for by Mr. Salvatory Switi, learned counsel. At the outset and before the learned counsel could commence to unleash their rival arguments on the appeal, we prompted them to address us on the propriety of the appeal, which seemingly,

appeared to be time barred in view of the wording under the provision of Rule 90 (1) and the proviso thereto, of the Court of Appeal Rules, 2009 (the Rules).

In his submission before us, Dr. Kibuta learned counsel, did start by giving a brief account of the timeline of the appeal that, it was initially instituted as Civil Appeal No. 81 of 2012, which was however, withdrawn as per the order of this Court dated the 26th day of May, 2015. There-afterwards, the appellant did lodge an application at the Tax Revenue Appeals Tribunal that is, Tax Application No. 10 of 2015, for extension of time within which to file a notice of appeal, which was granted on the 10th March, 2016. On the 14th March, 2016, the appellant did lodge a notice of appeal and subsequently, this appeal, which was lodged on the 21st January, 2017. Meanwhile, on the 11th March, 2016, the appellant did write a letter to the Registrar of the Tax Revenue Appeals Tribunal, requesting for a rectified decree of the Tribunal, while on the 21st September, 2016, he did request for rectified copies of the proceedings of the Tax Revenue Appeals Tribunal. It was after he had been supplied with the requested documents that, the appellant became able to lodge the appeal at hand.

With regard to the stipulation under the provisions of Rule 90 (1) of the Rules that, an appeal has to be lodged within sixty days from the date of lodging the notice of appeal, except where an application for copies of the proceedings has been made within thirty days from the delivery of the decision, the view of the learned counsel for the appellant has been that, the provision is only applicable where a fresh appeal is being lodged. In a situation where an appeal is being re-lodged as it was the case for the current appeal, the provision does not apply, as it has to be read *mutatis mutandis* with the previously withdrawn appeal. In that regard, Dr. Kibuta did strongly implore us to find that, the failure by the appellant to apply for copies of the proceedings within a period of thirty days after delivery of the impugned decision in compliance with Rule 90 (1) of the Rules, to have had no any effect to the appeal at hand. He was thus of the firm view that, the appeal was properly before the Court.

In response to the submission of his learned friend, Mr. Switi learned counsel, opined that, in terms of Rule 90 (1) of the Rules, the appellant was obligated to apply for copies of the proceedings within the period stipulated therein failure of which, could only be remedied by way of an application for extension of time. In the circumstances, the letter that was

written by the applicant on the 11th March, 2016, which was done without leave being sought and granted, was ineffectual. He has vehemently resisted the contention by Dr. Kibuta learned counsel that, where the appeal is to be re-lodged, the provision does not apply. To that end, he did urge us to find the appeal at hand to be time barred and as such, it be struck out. He has however, not pressed for costs.

In rejoinder, Dr. Kibuta did maintain his previous stance that, a distinction has to be drawn between an appeal being lodged afresh, and the one which is being re-lodged. Since in re-lodging an appeal, some of the processes had already been performed in the previous appeal, redoing them in the fresh appeal was unnecessary if not boring. And, in case we would be convinced that, such practice had indeed to be complied with, he did invite us to do away with it, for purposes of hastening dispensation of justice under the spirit fostered under Article 107 A (2) of the Constitution of the United Republic of Tanzania, 1977, as well as Rule 4 (1) and (2) of the Court of Appeal Rules.

What stands for our deliberation and determination in the light of what has been submitted above is whether, the appeal at hand is properly before the Court. To appreciate the gist of the arguments advanced by the

learned counsel for both sides, we hereby reproduce the provisions of Rule 90 (1) of the Rules verbatim thus:

> *"90 - (1) Subject to the provisions of Rule 128, an appeal **shall** be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with-*
>
> *(a) a memorandum of appeal in quintuplicate;*
>
> *(b) the record of appeal in quintuplicate;*
>
> *(c)security for costs of the appeal,*
>
> *save that where an application for a copy of proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.*
>
> *[Emphasis supplied]*

According to his submission, Dr. Kibuta learned counsel, reserves no doubt to the mandatory requirement that has been imposed by the above quoted provision of law to an appellant, who is lodging a fresh appeal. His dispute is on an appeal, which is being re-lodged. He did argue that, the fact that, in the previous appeal, the appellant had already applied for the copies within time, the provision cannot apply to the subsequent appeal.

The question which does crop from such averment, is, what is the effect of an appeal being struck out or withdrawn? The answer to this question has been answered by the Court in the previous matters of the like. It is the position of the Court that, once an appeal is struck out or withdrawn, it goes away with everything that accompanied it. See: **Pamela P. Bikatumba Vs The Director ABB Tanalec Limited**, Civil Appeal No. 4 of 2015, **National Micro finance PLC Vs Oddo Odilo Mbunda,** Civil Appeal No. 91 of 2016, **Azaram Mohamed Dadi Vs Abilah Mfaume,** Civil Appeal No. 74 of 2016 (all unreported).

In **Azaram Mohmaed Vs Abilah Mfaume** (supra) for instance, it was the holding of the Court that:

> *"Unfortunately, the appellant did not similarly seek any extension of time within which to file an application for leave to appeal to the Court, nor could he properly have sought any leave to appeal under section 47 (1) of the Land Disputes Courts Act without the former. The leave to appeal that was once upon a time granted by the High Court, on 3/4/2011, no longer survived the striking out of his two incompetent appeals to the Court, respectively on 5/6/2013 and 3/12/2014. He was required to re-seek leave to appeal thereafter for proper institution of this appeal, which inadvertently he did not. He missed a mandatory step in the land appeal process to the Court. It is fatal to the appeal."*

In the same breath, the withdrawal of appeal No. 81 of 2012 that was made by the appellant in the previous appeal on the 26th May 2015, left nothing in Court and as such, the argument by Dr. Kibuta learned counsel that, the provision of Rule 90 (1) of the Rule had to be read *mutatis mutandis* in the two appeals, meaning with all the necessary changes, could not arise, as there was no any traces left in Court of the previously withdrawn appeal. It is not surprising therefore, to find that, in the record of appeal by the appellant, there has never been any mention of Civil Appeal No. 81 of 2012 which got withdrawn, other than by mere passing, in the order for its withdrawal.

In the circumstances, the purported certificate of delay found at page 208 of the record of appeal dated the 18th January, 2017, which unfortunately was issued by the Registrar of the Tax Appeals Tribunal under non-existing law that is, the repealed Court of Appeal Rules, 1979 of which, nonetheless, is not the issue under discussion for the moment, was of no avail to the appellant.

To that end, we are constrained to join hands with Mr. Switi learned counsel for the respondent to hold that, the appeal by the appellant is time barred and therefore, improperly before the Court. We hereby strike it out.

And regard being to the fact that, the learned counsel for the respondent did not press for costs we make no order as to costs.

Order accordingly.

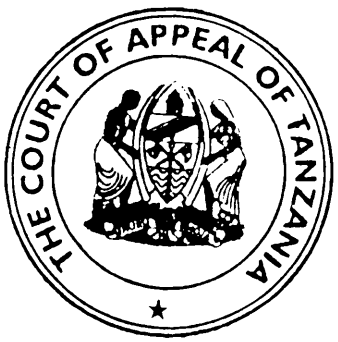
DATED at **DAR ES SALAAM** this 3rd day of November, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL