**IN THE COURT OF APPEAL OF TANZANIA**
**AT ARUSHA**

**(CORAM: MUSSA, J.A., MKUYE, J.A., And KITUSI, J.A.)**

**CIVIL APPLICATION NO. 571/02 OF 2017**

1. **ERICK RAYMOND ROWBERG**
2. **HARTLEY DAVID KING**
3. **EMOKLOLOSEKI SPSIRING FARM LTD**

..... **APPLICANTS**

**VERSUS**

1. **ELISA MARCOS**
2. **DAVID ELISA MARCOS** (Suing under Power of Attorney of LOTASARUAKI MOLLEL)

..... **RESPONDENTS**

**(Application from the Ruling of the High Court of Tanzania at Arusha)**

**(Sambo, J)**

**Dated 30th day of March, 2010**
**in**
**(Civil Case No. 35 of 1998)**

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## RULING OF THE COURT

29th November & 6th December, 2019

**KITUSI, J.A.:**

The applicants seek to invoke the jurisdiction of this Court under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), praying that we be pleased to strike out the Notice of Appeal lodged by the respondents on 9th April, 2015. The application rests on the following grounds, appearing in the Notice of Motion:

*1. That the respondents (intended appellants) have failed to file a copy of a letter requesting to be supplied*

*with the copies of proceedings on the Applicants within the prescribed time.*

2. *That the Notice of Appeal dated 9th April, 2015 is defective.*
3. *That the respondents (intended appellants) have not exercised diligence in pursuing their appeal.*

The application is supported by an affidavit of Adam Jabir, an advocate, containing 14 paragraphs, seven of which (para 1 – 7) only refer to the background. We take the contents of paragraphs 8, 9 and 10 to be relevant to the first ground. The gist of the averments in those paragraphs is that the respondents did not write to request for copies of proceedings and judgment within time and served a copy of the said letter to the applicants much later, five years from the date of the decision sought to be appealed against. And further that the respondents did that without applying for and obtaining extension of time.

As regards the second ground, it is averred that the Notice of Appeal is defective for bearing a wrong name of one of the parties. We are going to avoid details of this ground by design, because we have resolved that we are not going to pronounce ourselves on this point. We shall rationalize our course later.

The respondents did not file any affidavit in reply, and they were candid enough to file written submissions in reply to written submission in support of the application. The applicants also filed written submissions in support of the application. Up to that point we were made to believe that the application was uncontested, until the parties turned up to address us orally.

At the hearing Mr. Sheick Mfinanga, learned advocate, appeared for the applicants as Mr. Loomu Eliufoo Ojare, learned advocate, assisted by Mr. Duncan Joel Oola, also learned advocate, acted for the respondents. After adopting the contents of the supporting affidavit and those of the written submissions, Mr. Mfinanga shed some light on the merits of the application, invariably the same as what appears in the supporting affidavit. Since Mr. Ojare for the respondents conceded in his oral submission, that the letter complained of was indeed written out of time without there being an extension of time, as argued by Mr. Mfinanga, and as there was no affidavit in reply, we need not repeat what Mr. Mfinanga stated in his oral address. Ordinarily therefore, the matter would not have called for any serious deliberations on our part because rule 90 (1) of the Rules requires an intending appellant to write the letter requesting for copies of documents, within 30 days of the decision, which the present respondents did not do.

However, Mr. Ojare still had an ace with which he wanted to win the legal fight. The first, which he did not argue very enthusiastically, was that there is a decision by this Court that the letter should be written within 30 days of the date of lodging the Notice of Appeal. The learned counsel cited the case of **District Executive Director, Kilwa District Council v. Bogeta Engineering Limited,** Civil Appeal No. 37 of 2017 (unreported). When counsel's attention was drawn to the clear provisions of rule 90 (1) of the Rules, he did not pursue the point further.

The second, is the prayer that we should ignore the violation by using the overriding objective principle which has been introduced in our laws through the recent amendments of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (AJA). Mr. Ojare prayed for our indulgence so that instead of striking out the Notice of Appeal, we should provide the respondents with time to go apply for extension of time within which to present the letter and serve it on the applicants. The learned counsel submitted that, although he is aware that the overriding objective principle does not apply to defeat statutory time limits, we should consider that it was a bona fide mistake for him not to apply for extension of time.

Responding to this argument, Mr. Mfinanga submitted that the overriding objective principle is not to be applied blindly, and that the

same case of **District Executive Director Kilwa** (Supra) cited by Mr. Ojare, emphasizes that caution.

As we begin our deliberations, we have deemed it necessary to first give our reasons for not considering the second ground of the application. The Notice of Motion which has instituted this application has been drawn under Rule 89 (2) of the Rules. Under that rule, an application to strike out a Notice of Appeal may be premised on either of the following two grounds; if no appeal lies or where some essential step has not been taken or has not been taken within the prescribed time. Obviously, the present application is predicated on the latter scenario. It is for that reason that we think the ground alleging defects in the Notice of Appeal should not have been raised under rule 89 (2) of the Rules, even though it may be valid and uncontested. Therefore, we shall consider Mr. Ojare's submission only in relation to ground No. 1 and 3, which are essentially the same, in our view.

The point which Mr. Ojare has raised is a fragile one, and it calls upon us to decide whether the respondents who, admittedly, have not taken some steps within the prescribed time, should not have their Notice of Appeal struck out because theirs was a bona fide mistake.

The provisions which Mr. Ojare is relying on, introduced by the Written Laws (Miscellaneous Amendments) (No.3) Act, No. 8 of 2018 are sections 3A and 3B of the AJA which provide as follows:

> *3A. (1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of all matters governed by this Act.*
>
> *(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*
>
> *3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it with a view to attaining the following-*
>
> *(a) Just determination of the proceedings;*
>
> *(b) Efficient use of the available judicial and administrative resources including the use of suitable technology; and*

*(c) Timely disposal of the proceedings in the Court at a cost affordable by the respective parties.*

Since the coming into force of the above provisions, their applicability has been tested in Court in numerous occasions, such as in the case of **Njake Enterprises Ltd v. Blue Rock Ltd,** Civil Application No. 69 of 2017 (unreported). In yet another case of **Martin D. Kumalija & 117 Others v. Iron and Steel Ltd,** Civil Application No. 70/18 of 2018 (unreported), we emphasized the need to apply the overriding objective principle with reason and without offending clear provisions of the law. The following paragraph from that case will suffice to drive our point home;

*"Finally, we wish to comment on Mr. Seka's plea that the overriding objective principle be applied to save the notice of appeal. We are aware that the Court is enjoined by the provisions of sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 introduced recently vide the Written Laws (Miscellaneous Amendments) (No.3) Act No. 8 of 2018 to give effect to the overriding objective of facilitating the just, expeditious proportionate and affordable resolution of disputes.*

*While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court. We are loath to accept Mr. Seka's prayer because doing so would bless the respondent's inaction and render superfluous the rules of the Court that the respondent thrashed so brazenly".*

We fully associate ourselves with that statement as we think it tells it all, so we need not say more. While the period of inaction in the case of **Martin D. Kumalija** (supra) was two years, it is five years in the case under our consideration, thus a worse scenario.

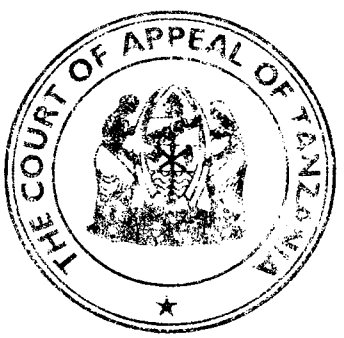
It may be useful to add, that the new provisions of Section 3B of the AJA imposes a duty on the parties and/or their advocates. This is under sub section (2) of section 3B of AJA which provides

*(2) A party to proceedings before the court or an advocate for such a party shall have the duty to assist the Court to further the overriding objective and to that effect, participate in the processes of the Court and comply with directions and orders of the Court.*

It is therefore not expected of a party to sit back and simply wait at the receiving end to ride on the principle of overriding objectives. That will be offending sub section (2) of section 3B of AJA. With respect, we also think Mr. Ojare's submission that his was a of bona fide mistake, as being a bit obscure and he did not elaborate that statement. Whatever the learned counsel may have had in mind however, five years of inaction cannot be wished away by taking refuge to the overriding objective principle.

In the end, we grant the application and strike out the notice of appeal because the respondent did not take essential steps within time. Order with costs.

**DATED** at **ARUSHA** this 4th day of December, 2019.




K. M. MUSSA
**JUSTICE OF APPEAL**

R. K. MKUYE
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

The Ruling delivered this 6th day of December, 2019 in the presence of Mr. Mnyiwala Mapembe, learned Counsel for the Appellants and Ms. Neema Oscar holding brief of Mr. Loomu Ojare, learned counsel for the Respondents is hereby certified as a true copy of the original.

G. HERBERT
**DEPUTY REGISTRAR**
**COURT OF APPEAL**