

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

CIVIL APPLICATION NO. 3 OF 2010

CYPRIAN MAMBOLEO HIZZA APPLICANT

VERSUS

**1. EVA KIOSO
2. MRS. SEMWAIKO } RESPONDENTS**

**(An Application for extension of time to file an application for
leave to appeal to the Court of Appeal of Tanzania
at Tanga)**

(Mkwawa, J.)

**Dated the 20th day of October, 2005
in**

Civil Appeal No. 19 of 2004

.....

RULING

25 & 28 March, 2011

MSOFFE, J.A.:

This application, which is by way of a notice of motion, is for extension of time to file an application for leave to appeal. It is supported by the affidavit of the applicant Cyprian Mamboleo Hizza.

The respondents were duly served with the notice of motion but exercised their discretion under Rule 56(1) of the Tanzania Court of Appeal Rules, 2009 and decided not to file affidavit (s) in reply.

At the hearing of the application Mr. Alfred Akaro, learned advocate for the respondents, at first sought to oppose the application but on reflection he changed his mind and opined that the application has merit.

The applicant lost in DC Civil Appeal No. 19 of 2004 of the High Court at Tanga (Mkwawa, J.). On 1/11/2005 he lodged a notice of appeal against that decision. He did so within time. He then applied for leave to appeal to this Court vide Misc. Civil Application No. 61 of 2005, again within time. On 24/7/2009 Mussa, J. dismissed the application in answer to a preliminary objection taken at the instance of the respondents. It is important to observe here that one would have expected the judge to strike it out rather than dismiss it because he did not determine the application on merit. I am supported in this view of the decision by the Court of Appeal in Eastern Africa for the celebrated case of **Ngoni- Matengo Cooperative Marketing Union Ltd. V Alimahomed Osman** (1959) EA 577 where at page 580 an effort is made at distinguishing the meaning of "striking out" an appeal etc. and "dismissing" etc. thus:-

..... This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of.

Presumably, if the application had not been dismissed the applicant could have gone back to the High Court and start the process afresh. Since the application was dismissed instead of being struck out he came to this Court vide Civil Application No. 4 of 2009 by way of a "second bite", so to speak. On 12/3/2010 Munuo, J.A. struck out the application for being time barred. On 14/4/2010 he filed this application seeking enlargement of time to file an application for leave to appeal.

The main reason for the delay in filing an application for leave to appeal within time is predicated upon the averments made under paragraph 6 of the application affidavit thus:-

6. That the reasons why I could not file the said Application within the prescribed time was due to the fact that by the time the copy of ruling became ready for collection the time allowed to file such Application has already elapse and hence this instant Application for extension of time to file an Application for leave to Appeal to the Court of Appeal of Tanzania.

As already observed, this application is not opposed. On my part I have no reasons not to grant the application. Accordingly, I hereby grant the application. The applicant is hereby ordered to file the application for leave to appeal within a period of fourteen days from the date of delivery of this Ruling. No order is made as to costs.

DATED at DAR ES SALAAM this 26th day of March, 2011.



J. H. MSOFFE
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "E. Y. MKWIZU", is written over a horizontal line.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL