

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**  
**CIVIL APPEAL NO. 145 OF 2002**

**MATHEW MBATA.....APPLICANT**

**VERSUS**

**DENIS CATHELESS.....RESPONDENT**

*Date of last order - 29/2/2008*

*Date of Ruling - 31/03/2008*

**RULING**

**Shangwa, J.**

This is an application for leave to appeal to the Court of Appeal of Tanzania against the ruling of this court Ihema, J. (Rtd) delivered on 27/2/2006 in Civil Appeal No. 145 of 2002. In his ruling, Ihema, J. struck out the petition of appeal with costs. The application was filed by Messrs Mkatte and Company Advocates on behalf of the Applicant and it is supported by the affidavit of Mr. Hilary Jacob Mkatte.

Mr. Rutabingwa for the Respondent resisted this application. He said that it has no merit and that it should be dismissed with costs. He submitted that there is nothing in the

ruling of Ihema, J. which is worthy of consideration by the Court of Appeal of Tanzania. He said that the Applicant's petition of appeal was struck out on grounds of incompetency for having been filed improperly before this Court and out of time. He said also that if the Applicant so wishes he may re-start the appeal process.

The reason for striking out the Applicant's petition of appeal is clearly indicated in the Ruling of Ihema, 1 (Rtd). It is that the petition which was filed in this Court offended the provisions of S. 25 (3) of the Magistrates' Courts Act, 1984 which provides as follows:-

*"S. 25 Every appeal to the High Court shall be by way of petition and shall be filed in the District Court from the decision or order of which the appeal is brought."*

Mr. Mkatte for the Applicant submitted that this court erred by striking out his client's petition of appeal without first hearing his Application for extension of time to appeal.

He contended that the High Court could not consider the purported appeal because no order for extension of time had

been given yet, and that the High Court ought to have heard the Application for extension of time and treat the appeal as not properly before it.

Counsel for the Respondent contended that the Applicant ought to have applied for extension of time first before filing an appeal. He said that the Application for extension of time to appeal did crumble upon the striking out the appeal, and that after striking out the appeal, the Application for extension of time to appeal was left with no legs to stand.

In rejoinder, Mr. Mkatte submitted that in this case there is a point of law for consideration by the Court of Appeal as the Application for extension of time has not yet been heard to date and that he wants to ask the Court of Appeal to give a direction that a competent jurisdiction hears it.

First of all, let me go to the back ground to this application. On 123/12/2002 the Applicant's Counsel Mr. Mkatte filed an application for extension of time to appeal against the decision of the District Court of Kinondoni in Civil Appeal No. 78 of 2001 that was delivered on 22/8/2002. The said appeal originated from the decision of the Primary Court of Kimara in Civil Land

Case No. 25 of 2000.

On the date when the Applicant's Counsel filed an application for extension of time to appeal against the decision of the District Court of Kinondoni, that is on 23/12/2002, he also filed the petition of appeal.

On 2/9/2004, Counsel for the Respondent filed a notice of preliminary objection both against the Application for extension of time to appeal and against the petition of appeal itself. In his notice of preliminary objection, he raised three points of objection. First, that the Application for extension of time is incompetent as it was presented after the appeal was filed and or simultaneously with the petition of appeal and that it cannot serve any purpose. Second, that the petition of appeal is incompetent as it was filed out of time. Third, that even if the appeal was in time, the petition was not properly filed and was erroneously presented under the wrong registry as a Civil Appeal instead of PC. Civil Appeal.

The record of this court shows that whereas in his ruling, Ihema, J. (Rtd) addressed himself to the point of objection with regard to the competency of the petition of appeal and struck

out the appeal with costs after finding that the appeal was incompetent, he did not address himself to the Application for extension of time to appeal out of time which was also said to be incompetent for having been presented after the appeal was filed.

In my opinion, I think that in this case, there is a point of law which is involved in the Ruling of this Court given by Ihema, J. (Rtd) in Civil Appeal No. 145 of 2002 and delivered by the District Registrar, Dar es Salaam High Court District Registry. This point is worthy of consideration by the Court of Appeal of Tanzania. The point itself is whether the striking out of the Applicant's petition of appeal had the effect of rendering the Applicant's Application for extension of time to appeal nugatory. In other words, the point is whether or not the Application for extension of time to appeal disappeared with the striking out of the petition of appeal. For this reason, I hereby grant this application for leave to appeal to the Court of Appeal of Tanzania against the aforesaid Ruling of this court.

**JUDGE**

31/3/2008

Delivered in open court this 31<sup>st</sup> March, 2008 in the presence of Mr. Brash for the Respondent holding brief of Mr. Mkatte for the Appellant.

A. Shangwa

**JUDGE**

31/3/2008