IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J. A., KILEO, J.A. AND KALEGEYA, J.A.)

CIVIL APPEAL NO 111 OF 2004

THE HONOURABLE ATTORNEY GENERAL.....APPELLANT

VERSUS

MOROGORO AUTO SPARES.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tanga)

(Mkwawa, J.)

Dated 21st September 2000
in
Civil Case No 22 of 1994

RULING OF THE COURT

3 & 10 July 2007

KILEO, J.A.

On 10th May, 2004 the High Court sitting at Tanga, (Mkwawa, J.) passed a decree in favour of the respondent in the sum of Tshs. 2,700,000/=. The Government (through the Attorney General) who was the defendant in the case was ordered, in addition to the principal sum, to pay interest at commercial rate from 1983 to the time of filing of the suit as well as paying interest at 10% from the date of judgment till the date of full payment.

The Attorney General was aggrieved by that decision and preferred an appeal to this Court. Following the lodging of the notice of appeal and memorandum of appeal by the Attorney General, the respondent, Morogoro Auto Spares Limited filed a notice of cross - appeal. Subsequent to the filing of the cross-appeal, the notice of appeal, which was lodged by the Attorney General, was found to be time barred by Ramadhani, J.A. who struck it out on 5th May 2005.

When this matter was called on for hearing, the Court *suo motu* asked Mr. Ndunguru, learned Principal State Attorney for the appellant, the Attorney General, to address the Court on the status of the matter in view of the fact that the notice of appeal by the Attorney General had been struck out by Ramadhani, J.A.

Addressing the Court, Mr. Ndunguru submitted that since the notice of appeal was struck out, it means that there is no appeal before the Court and therefore, the cross - appeal has no leg to stand on, implying that the prosecution and determination of the

cross - appeal by Morogoro Auto Spares Ltd was dependent upon the appeal by the Attorney General being competent.

Mr. Ndunguru also argued that the cross - appeal was incompetent as there was no valid decree in the record, the one filed having been signed by the District Registrar instead of the trial judge or her/his successor as required by law.

When asked to comment, Mr. Anil C. Amin, Director of the respondent company, who was unrepresented told the Court that he was leaving the matter entirely in the hands of the Court.

We shall begin with Mr. Ndunguru's contention that in view of the fact that the appeal by the Attorney General was struck out, then the cross - appeal by Morogoro Auto Spares Ltd did not have a leg to stand on. The obvious question to ask ourselves is whether a cross - appeal automatically collapses where an appeal against which a cross - appeal has been preferred has collapsed. In other words, does a cross - appeal survive a struck out notice of appeal or appeal?

We have been unable to find a specific rule in the Court Rules catering for the above situation. We have noted however, that Rule 96 (1) of the Rules allows cross - appeals to proceed where an appeal has been withdrawn. The rule provides as follows:

> **"96 (1) If an appeal is withdrawn under Rule 95 after notice of cross-appeal has been given, the respondent who gave the notice may withdraw it within fourteen days of the service upon him of the notice of withdrawal: if it is not so withdrawn, the cross – appeal shall proceed to hearing and the provision of these Rules shall apply as if the cross appeal were an appellant and the appellant a respondent"**

By correlation it should mean that a cross - appeal in a struck out appeal stands on its own like a cross - appeal in a withdrawn appeal and can proceed by virtue of Rule 3 (2) (a) of the Court Rules. A cross - appeal is like a counterclaim at an appellate level. The collapse of the claim by the original plaintiff in a suit where there is a counterclaim does not automatically result in the collapse of the counterclaim. The counterclaim, in terms of Order VIII rule 9 (2) is treated as a cross - suit. The provision stipulates as follows:

"(9) (2) Where a counterclaim is set-up in a written statement of defence, the counterclaim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall apply *mutatis mutandis* to such written statement as if it were a plaint."

The cross-appeal is an appeal of its own kind just like a counterclaim is a suit of its own kind. Reading through Rule 87 of the Court Rules one gathers that the ingredients of a cross-appeal are more or less the same ingredients as those to be found in an appeal. Rule 87 of the Court Rules provides as follows:

"87- (1) A respondent who desires to contend at the hearing of the appeal that the decision of the High Court or any part of it should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make, or to make in that event, as the case may be.

(2) A notice given by a respondent under this rule shall state the names and addresses of any persons intended to be served with copies of the notice and shall be lodged in quadruplicate in the appropriate

registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal."

This Court, in the case between **Stanbic Bank Tanzania Limited and Abercrombe &Kent (T) Limited- Civil Appeal No.21 of 2001 (**unreported), proceeded with the determination of a cross- appeal after the appellant's appeal was dismissed.

In the light of the above considerations we are unable to accede to Mr. Ndunguru's contention that the cross - appeal has no leg to stand on merely because of the collapse of the Attorney General's appeal. In short, we are of the settled view that the collapse of an appeal against which a cross - appeal has been preferred does not automatically result in the collapse of the cross- appeal. A cross-appeal, if properly before the Court can survive a collapsed appeal.

We now come to the question of the decree, which is in the record. We note that rule 87 of the Court Rules does not expressly require a cross appellant to file essential documents as stipulated under rule 89 of the Rules of which a decree appealed against is one of them. This may probably be due to the fact that the appellant is expected to have filed the documents upon lodging his

appeal. We think however, that a cross- appellant has a duty to ensure that all the essential documents, including a valid decree are in the record.

It is true, as pointed out by Mr. Ndunguru, that the District Registrar signed the decree in the present case. This Court has stated, on a number of times, that a decree under Order XX rule 7 of the Civil Procedure Code is required by law to be signed by the judge who tried the case or her/his successor in office. (See for example **Murtaza Mohamed Raza Virani versus Mehboob Hassani Versi – Civil Appeal No.31** of 2004, {unreported} and **NBC Holding Corporation versus Mazige Mauya & Mwanahamisi Bilali – Civil Appeal No 36 of 2004** {unreported}).

In view of the fact that there is no valid decree in the record to accompany the cross- appeal we find that the cross – appeal is not competently before the Court and for this reason we strike it out. Bearing in mind the circumstances of the case we shall make no order for costs.

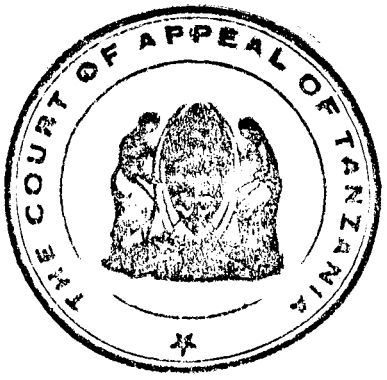
DATED at TANGA this 5th day of July, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

L.B.KALEGEYA
JUSTICE OF APPEAL

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



(I. P. KITUSI)
DEPUTY REGISTRAR