



IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA

**(Coram: Nestor Kayobera, President; Sauda Mjasiri, Vice President;
Anita Mugeni; Kathurima M'Inoti; Geoffrey Kiryabwire JJA)**

APPLICATION NO. 04 OF 2021

(Arising from Appeal No. 10 of 2020)

BETWEEN

THE ATTORNEY GENERAL OF RWANDA-----APPLICANT

VERSUS

UNION TRADE CENTRE-----RESPONDENT

AND

- 1. SUCCESSION MAKUZA DESIRE**
- 2. SUCCESSION NKURUNZIZA GERARD**
- 3. NGO FERRO THARCISSE**

INTERVENERS

RULING OF THE COURT

A. Introduction.

1. This Ruling arises from Application No. 04 of 2021 filed by the Applicant under Rules 4, 94 (1) and 95 (1) of the East African Court of Justice (EACJ) Rules of Procedure, 2019 (hereinafter referred to as “the Rules of this Court”). The Application, further arises from Appeal No. 10 of 2020 (herein after referred to as “the main Appeal) now pending before this Court, which Appeal also arises from the Decision of the First Instance Division (hereinafter referred to as the “the Trial Court”) in Reference No. 10 of 2013. In that Reference, the Respondent Company challenged the takeover and sale of its Mall known as Union Trade Centre (hereinafter referred to as “the UTC Mall”) by the Applicant as being in violation of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”).
2. In the main, the Applicant herein challenges the presence and the authority of Counsel for the Respondent to Represent the Respondent Company in the main Appeal.
3. At the Hearing of the Application, the Applicant was represented by Mr. Ntwali Emile, Principal State Attorney and Mr. Nicholas Ntarugera Senior State Attorney. The Respondent was represented by Mr. Francis Gimara (Senior Counsel) Advocate, and Mr. Hannington Amol, Advocate. Ms. Molly Rwigamba, Advocate, represented the Interveners.
4. The Applicant filed its Application by way of Notice of Motion on the 5th November, 2021. The Application is supported by the affidavit of Ntwali Emile, Principal State Attorney and Head of Legal Services in the Ministry of Justice of the Republic of Rwanda/Office of the Attorney General.
5. The Application Challenges the capacity of Mr. Francis Gimara (SC) and Mr. Hannington Amol both Advocates (hereinafter referred to as the “contested lawyers”) to be the duly appointed counsel representing the

Respondent and UTC in this Court in accordance with Rule 19(1) of the Rules of this Court.

6. The grounds of the Application as stated in the Notice of Motion are as follows: -

“1. After the Commercial Court’s appointment of the liquidator as Mr RUTABINGWA Athanase, on 24th May 2021 he filed an affidavit and the Commercial Court’s decision appointing him, notifying this Court about the liquidation process for UTC and served the parties to the case.

2. The Affidavit signed and served by the liquidator caused doubt and confusion to the Applicant as far as the appearance and representation of UTC before the EACJ as envisaged under Rule 19(1).

3. The Applicant sought to clear the doubt on who is the legal representative of UTC by writing a letter to the liquidator seeking clarification for the representation and appearance before the EACJ for UTC.

4. On this 4th day of November 2021, Mr. RUTABINGWA Athanase the liquidator wrote a letter to the Solicitor General of Rwanda denying that UTC in liquidation had appointed GIMARA Francis or any other advocate to represent it before the EACJ, thus challenging the capacity of Mr. GIMARA Francis and Mr. HANNINGTON Amol as duly appointed advocates to represent UTC before EACJ.

5 The Applicant, therefore, in interest of justice and for the purpose of clarity on the issue of who is presently the duly appointed advocate to represent UTC before the EACJ in Appeal No 10 of 2020. Since the advocates on record have been denied by the UTC legal representative, it is therefore very important to get the Court’s guidance on this issue before the final hearing and determination of the instant appeal.

6. That it is just and equitable in the circumstances that this Court considers this Application and schedules its hearing for clarity before the pending Appeal No. 10 of 2020 is determined.

7. The Applicant stands higher risks and to be prejudiced unless this Honourable Court considers the importance of this Application and sets it down for hearing in order to determine on the real controversy about the legally recognised representative of UTC or the duly appointed advocate to represent it before EACJ...”

7. The Applicant then made the following prayers: -

“ ...

- i. For an order that the challenged advocates be put to strict proof for them to produce to the Court the power of attorney giving them the mandate to represent UTC as duly appointed advocates in Appeal No. 10 of 2020.*
- ii. For an order that the hearing of Appeal No. 10 of 2020 be stayed pending the determination of this Application for clarity.*
- iii. For an order that UTC in Liquidation is legally represented by the liquidator Mr. RUTABINGWA Athanase and that he is the only one capable of appointing any advocate to represent UTC before any Court of law...”*

C. Proceedings before this Court.

8. When the Application was first called for hearing on the 8th November 2021, at the Court’s regular sitting held at Bujumbura, Burundi the Respondent notified the Court that it intended to raise a preliminary objection to the Application. At that hearing the Applicant was absent. At that hearing our Court Clerks and the Interveners represented by Ms. Molly Rwigamba Advocate (appearing online) suggested that Counsel for the Applicant could have been experiencing internet problems at their chambers in Kigali Rwanda as Counsel for the Applicant had opted to participate in the proceedings online.
9. The Court noted the long history of this dispute in the Court and then gave Directions for the parties to file written submissions before the next

hearing Session in February 2021 and be prepared on the date so allocated to argue the Application directly.

10. When the Application came up for hearing on the 9th February, 2022, both counsel for the Applicant and Respondent were in Court and the written submissions for and against the preliminary objection were also on Court Record. The parties prayed in the interest of time and justice that the objection be determined on the basis of the written submissions and highlights already on Court record which prayer the Court granted.
11. We shall now proceed to address the submissions of the parties on record and determine the preliminary objection.

D. Submissions of the Parties.

Objection by the Respondent.

12. Counsel for the Respondent submitted that the Application was an abuse of Court process and a waste of the Court's time. He urged us to take note of the Appeal of **Hon. Dr. Margret Zziwa V The Secretary General of the East African Community**, Appeal No. 02 of 2017 where this Court found in respect of an argument by the Respondent in that Appeal that: -

"... It was much ado about nothing. It nonetheless resulted in waste of precious judicial time in both this Court and the Trial Court. The Court expresses the hope that in the future, red herrings will be spotted early, promptly ignored, and all guns aimed at the real targets... (At Para. 61 at Page 30 to 31)"

Counsel further relied on the reasons hereinafter as to why the Application as filed was an abuse of Court process.

13. Counsel argued that the proceedings in the main Appeal had reached an advanced stage and that the main Appeal had been fixed for hearing under Rule 110 (4) of the Rules of this Court after Scheduling. He submitted that at the Scheduling Conference on the 27th May, 2021 the record showed clearly that the issue of representation had been canvassed and that the

Court directed that representation of the parties as had been the case at the Trial Court would be maintained for purposes of the main Appeal.

14. Counsel further recalled that the issue of representation had also been addressed at the Trial Court in (**The Attorney General of The Republic of Rwanda & others [The Interveners]**) Application No. 24 of 2020 in which the Applicant was unsuccessful but after which the Applicant did not appeal, instead choosing to circumvent the process by filing the present Application.

15. Counsel also argued that following the Ruling at the Trial Court in Application No. 24 of 2020, the Applicant was duty bound not to take any action that may be detrimental and or aggravate the resolution of the dispute before this Court as provided for under Article 38 (2) of the Treaty; which the Applicants did not adhere to. Article 38 (2) provides: -

“...where a dispute has been referred to ...the Court, the Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute...”

16. Counsel submitted that the appointment of a Liquidator by the Courts of the Applicant Partner State during the pendency of this dispute before this Court is tainted with bad faith. Counsel pointed out that in the resolution of this dispute, this Court shall have precedence. In this regard counsel referred us to the Article 33 (2) of the Treaty which provides: -

“...Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter...”

17. Counsel argued that this Application seeks to irregularly import matters of domestic law to override proceedings in this Court which involve the interpretation and violation of the Treaty, which is a preserve of this Court. He pointed out that at the appellate level, this Court is dealing with the Appeal presented in the Memorandum of Appeal based on the status of the matter as it was at the Trial Court.

18. Counsel thus prayed that this Court finds that the present Application is without merit and dismisses it.

E. Reply to the Objection by the Applicant.

19. Counsel for the Applicant objected to the preliminary objection. Counsel argued that since the filing of the Reference at the Trial Court, the Applicant had objected to the appearances and representation of counsel for the Respondent Company.

20. Counsel argued that from the filing of the Reference in 2013 at the Trial Court and subsequently after the Appeal to this Court leading to its remittal in 2016 from this Court back to the Trial Court for hearing *de novo*, the Reference: -

“...was filed by Mr. Rujugiro Ayabatwa Tribert in the names of UTC... (see para 5 of the written submissions) ...” (addition ours).

However, on admission of the Interveners on behalf of the minority shareholders, the Interveners objected to Mr. Rujugiro Ayabatwa Tribert as the legal representative of the Respondent Company.

21. Counsel argued that during the examination and cross-examination of Mr. Rujugiro Tribert at the Trial Court, there was no evidence that the Respondent Company had itself filed a Reference at this Court or hired the contested lawyers. However, the Trial Court Ruled differently.

22. Counsel for the Applicant submitted that soon thereafter, the minority shareholders filed for liquidation of the Respondent Company at the Commercial Court in Rwanda which application was upheld and Mr. Rutabingwa Athanase was appointed as the Liquidator of the Respondent Company. This was also notified to all the Parties concerned. This state of affairs is what led to the doubt and confusion as to whether the representation of the Respondent Company complied with Rule 19 (1) of the Rules of this Court.

23. Counsel for the Applicant further submitted that it was against this background that the Applicant wrote to the Liquidator to confirm whether the challenged lawyers were representing the Respondent Company at the EACJ. The Liquidator then in reply to the said letter on the 4th November, 2021 wrote a letter to the Attorney General of Rwanda: -

“... denying that UTC in Liquidation has not (sic) appointed GIMARA Francis or any other advocate to represent it before the EACJ, thus challenging the capacity of Mr. Gimara Francis and Mr. Hannington Amol as duly appointed advocates to represent UTC before EACJ... (see para 24 of the written submissions) ...”

Counsel argued that this is why this Application was filed and if not addressed, it may affect the Court’s decision and the process of executing it.

24. Counsel also referred us to Article 103 of Law No. 23/2018 of 29/04 of The Republic of Rwanda on Insolvency and Bankruptcy which provides: -

“...

- a) The liquidator takes custody and control of the company property;*
- b) The company’s officers remain in office but cease to have any powers, functions or duties other than those required or permitted to be exercised by this Law;*
- c) No Proceedings, execution or other legal process may be commenced or continued against the company or its Property except with the liquidator’s written consent or with the order of the court. However, the provisions of the preceding Paragraph do not affect the right of a secured creditor to take possession of and realize any property in the bankrupt’s estate over which that creditor has a charge.*
- d) No share of the company may be transferred or other alteration made in the rights or liabilities of any shareholder and no shareholder may exercise any power under the company’s incorporation document or law governing companies;*

e) *The incorporation document of the company may not be altered, except that the liquidator may change the company's registered office or full address...*"

Counsel argued that by reason of the above law, the liquidation process affects the Respondent's legal representation and the case pending before this Court.

25. Counsel further argued that if the case proceeded without the Liquidator's written consent then this may in the future "*...affect the case especially during the execution process...*" (see para 34 of the written submissions).

Counsel submitted that if this Court declines to recognize that the Respondent company's status has changed then it would in effect be opposing the decision of the Rwanda Commercial Court to appoint a liquidator. In this regard he referred us to the head note of the Appeal of **Mary Ariviza & Anor. V Attorney General of Kenya and the Secretary General of the East African Community**, Appeal No. 03 of 2012 where it was held that: -

"...Discretion is to be exercised judiciously- Court cannot review the decisions of national Courts – No concurrent jurisdiction between the two EACJ Divisions-points of fact cannot be appealed-whether the first Instance Division considering all facts arriving at its decision..."

26. Finally, counsel submitted that this Application was not filed intending to delay the hearing of Appeal No. 10 of 2020. Counsel also prayed that the Court find that the status of the Company had changed and that the contested lawyers did not have the authority to represent the Respondent Company.

D. Rejoinder by the Respondent.

27. Counsel for the Respondent, in rejoinder, largely reiterated their submissions in chief and where they did so we see no reason to replicate them.

28. Counsel submitted that the Applicant has misread the conclusion and decision in the **Mary Ariviza case** (supra) which fortified the Respondent's objection in that whereas this Court does not review Judgments of national Courts, it does, under Article 35A of the Treaty handle matters of law from the Trial Court. Furthermore, in this matter there is no review being undertaken of a decision of a national court.

Analysis and Determination by the Court.

29. We have considered, the submissions of the opposing Counsel and the authorities supplied to us for which we are grateful. This is an Application to contest the representation of Mr. Francis Gimara and Mr. Hannington Amol as legal Counsel of the Respondent Company following its being put under Liquidation by an Order of the Commercial Court of Rwanda and the appointment of a Liquidator, Mr. Rutabingwa Athanase. Whereas this Ruling relates to a preliminary objection raised by the Respondent Company against the entire Motion by the Applicant, it appears to us that the Motion itself in the process has been substantially argued.

30. The Objection revolves around Rule 19 (5) of the Rules of this Court in relation to representation of a company at this Court which provides: -

“...A corporation or company may appear by its director, manager or Company Secretary, who is appointed by a resolution under the seal of the corporation or the company or may be represented by an advocate...”

31. It is the case for the Applicant that the contested lawyers do not have the right to represent the Respondent Company following its liquidation by the minority shareholders through a Court Order of the Commercial Court of Rwanda and that there is now the Liquidator Mr. Rutabingwa Athanase who is in charge of the Respondent Company and who does not recognise the contested lawyers. The Respondent Company on the other hand objects that the issue of representation after Liquidation was resolved by the Trial

Court in their favour and that decision was not appealed and therefore this Application is an abuse of Court process.

32. It has been argued by the Respondent Company in the preliminary objection that the Trial Court had an opportunity to address this issue. We shall recall what the Trial Court found in Application No. 24 of 2020. The Trial Court held therein: -

“....

21. *It is common ground herein that domestic proceedings in the Applicant State were lodged well after this Court had issued directions on filing of closing submissions in the Reference, and after the filing of UTC's written submissions. The interveners that initiated the domestic proceedings in question are indeed represented in the Reference. It therefore smirks of bad faith that the same interveners could apply for the liquidation of a company that is a party to proceedings in which they emphatically sought to be joined.*

22. *The central question in the Reference is UTC's alleged deprivation of the management, use and ownership of its mall by the Applicant State. For interveners, minority shareholders in the company, to seek to circumvent the legal status of the Applicant therein is a clear aversion of due process and is disrespectful of the rule of law. As if that were not distasteful enough, they initiated the liquidation proceedings at the tail end of a protracted litigation process in the Reference and after the filing (and presumed receipt) of UTC's written submissions. It is astounding then that they purport to support the present Application in the interests of justice.*

23. *To compound matters, the present Applicant, well aware of the dictates of the rule of law that it is obligated to under the Treaty, would appear to perpetuate the malafides of this situation ... With utmost respect, we ponder, what greater injustice or disregard for due process could there be?*

25. Secondly, drawing from the doctrine of equity, 's/he who comes into equity must come with clean hands' The maxim bars relief for anyone guilty of improper conduct. Equity further dictates that: 's/he who seeks equity must do equity'. Whereby courts will decline to assist any person whose cause of action is grounded in his or her own misconduct towards the other party...

26. Consequently, we take the view that it would not promote the ends of justice, which do include procedural justice, to grant the present Application in the terms sought. It is so held..."

33. Weighing the arguments in this Application against the findings in Application No. 24 of 2020, we are hard pressed to understand the purpose of this Application before us. In response to the Objection raised by the Respondent Company, the Applicant argued that there is confusion as regards the representation of the Respondent Company and therefore this Court should provide the necessary clarity. We on the other hand wonder, if that was the case, then why was the Ruling in Application No 24 of 2020 not appealed within the meaning of Article 35A of the Treaty? The Applicants not having appealed that Ruling are estopped by record to contest it by way of Motion as they seek to do now. The Ruling in Application No. 24 of 2020 is nothing short of an indictment on the conduct of the Applicant and the Interveners on the subject of liquidation, clearly demonstrating that it was an action done in bad faith and it remains on record. To compound that finding through this application is most unwise and an abuse of court process.

34. We are further surprised by the argument by Counsel for the Applicant that by this Court failing to recognise the liquidation process as Ordered by the domestic Court, we shall be reviewing the said decision and that this may cause execution problems in the future. With the greatest of respect to that line of argument, it is totally misconceived. First, this Court is not reviewing the decision of the Commercial Court of Rwanda. It is addressing

the complaint in Reference No. 10 of 2013. Secondly, as to execution, we recall Article 38 of the Treaty which provides: -

"...A Partner State shall take, without delay, the measures required to implement the Judgment of the Court..." (emphasis ours).

So there can be no question of failure to implement the judgment of this Court without further violation of the Treaty. Fortunately, Partner States have complied with this provision without need for further enforcement.

35. We also need to point out that the import and legal questions of this Motion in substance reflect the grounds in the main Appeal, especially Grounds 4 and 5 which state: -

"...

- 4. That the learned Justices of the First Instance Division erred in law by declaring that the Appellant's objection to UTC's locus standi is inadmissible with reference to Article 30(1) of the Treaty ignoring the fact that there is no board or shareholders' resolution allowing UTC to file a case at EACJ. In this respect the Court also ignored the fact that only one shareholder took the initiative to file the Reference on behalf of UTC without the informed approval and consent of the other shareholders. The lawyers who purportedly indicated that they represented UTC only represented an individual shareholder who unilaterally instructed the lawyers. UTC was not a litigant in the Reference.*
- 5. That the Hon. Justices of the First Instance Division erred in law by declaring that UTC was properly represented before it by an advocate who was not duly appointed by UTC..."*

This Motion clearly is also indicative of a fishing exercise by raising the same argument clothed differently multiple times, which is further evidence of abuse of court process.

36. Furthermore, if the Applicant seeks to fault the challenged lawyers, then the onus falls entirely on them to prove the allegation and not on the Respondent company to affirm a negative proposition. Counsel for the Applicant insisted that the contested lawyers had to provide a power of attorney from the Respondent Company to prove that they had been instructed by the said Company. It is not clear on what legal authority and or basis counsel made this submission. He did not in any event provide any. For purposes of the Reference, Rule 25 (4) of the Rules of this Court provides that: -

*“...Where the reference is made by a body corporate the statement of reference shall be accompanied by **documentary evidence of the existence in law of that body corporate...**” (emphasis ours)*

In this matter from the record there is evidence of the Respondent company being a body corporate in Rwanda and which position is not contested by the Applicant so this provision was complied with.

37. Before we take leave of this matter even though this is not the main thrust of the Application, we need to debunk the argument that the Order of liquidation by the Commercial Court of Rwanda would mean that the Liquidator would somehow take over control of the proceedings already commenced in this Court. With the greatest of respect, that cannot be the correct legal position with regard to the law relating to insolvency. Insolvency is a process that is directed at protecting a company from its creditors but not its debtors. In this matter, attached to the affidavit of Mr. Ntwali Emile (Principal State Attorney) is attached the Judgment of Commercial Court of Rwanda No. RCOM 01304/2020/TC both in the English and Rwandan languages. Unfortunately, Mr. Ntwali Emile for purposes of Article 46 of the Treaty and Rule 11(7) of the Rules of this

Court neither indicated which of the two versions of the Judgment is the original nor stated which of them is the certified translation; so we shall not make reference to the said Judgment. What we shall do, is make a comment on the insolvency law.

38. In paragraph 6 of the affidavit in support of the Motion, Mr. Ntwali Emile makes mention of clause (3) of Article 103 of Law No. 23/2018 of 29/04/2018 on insolvency and bankruptcy and avers that by reason of the appointment of Mr. Rutabingwa Athanase as Liquidator of the Respondent Company, he alone can be the legal representative of UTC. Counsel for the Applicant also argued that the main Appeal cannot proceed without the liquidator's written consent. The said clause of the Law provides as follows:

-

*"...No proceedings, execution or other legal process may be commenced or continued **against the company** or its property except with the liquidator's written consent..."* (Emphasis ours).

The key words here are "*against the company*". This is very much in line with the universally known principles of the law of insolvency where the insolvency process protects the company **against** a rush in by its creditors. It must be recalled that Reference No. 10 of 2013 was not instituted **against** UTC by the current Applicant as a creditor but rather by the UTC **against** the Applicant because at the end of the day if the claim by UTC is vindicated at law for the alleged unlawful sale of the UTC Mall, then the Applicant would become the **debtor** and not the creditor of UTC. On the contrary therefore, it is the actions by the Applicant and its agencies like the Rwanda Revenue Authority (RRA) as creditors **against** UTC which would be caught by the cited law; and no legal process by them could be **commenced or continued** against UTC without the consent of the liquidator. So whether at international or domestic law, these provisions would not be applicable to the main Appeal. In this regard we find that the decision of **Mary Ariviza case** (Supra) is not applicable here and in any event the Applicant only cited the headnote and not the judgment itself, which is irregular.

39. This Application among other provisions is premised on Rule 4 of the Rules of this Court which provides: -

"...Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court..."

This Rule is a double edged sword in the sense that on the one hand it allows for the ends of justice to be met which is what the Applicant seeks to achieve while on the other hand it also seeks to prevent the abuse of court process which is what the Respondent Company wants this Court to invoke.

All in All, from our findings above, it is clear that this Application for the reasons given above is an abuse of court process and is therefore not sustainable. We therefore, uphold the preliminary objection.

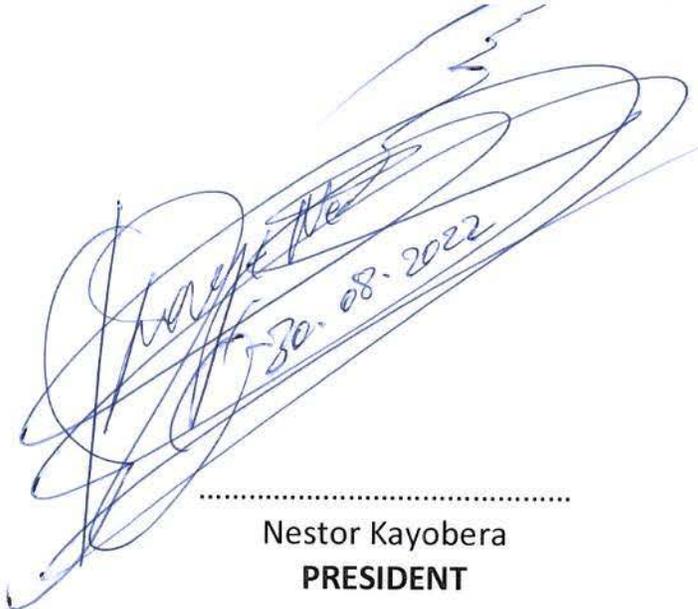
As to costs, Rule 127 of the Rules of this Court provide that costs follow the event unless the Court for good reason otherwise orders. In this matter we award costs to the successful party.

Final Result.

40. The Notice of Motion dated and lodged in this Court on the 5th November, 2021 is struck out with costs awarded to the Respondent.

IT IS SO ORDERED

DATED AND DELIVERED at Arusha this 30th day of August, 2022



30. 08. 2022

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Nestor Kayobera
PRESIDENT



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Suda Mjasiri
VICE PRESIDENT



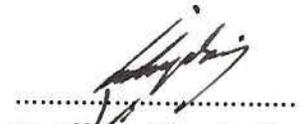
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Anita Mugeni
JUSTICE OF APPEAL



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Kathurima M'Inoti
JUSTICE OF APPEAL



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Geoffrey Kiryabwire
JUSTICE OF APPEAL