



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
APPELLATE DIVISION**

**(Coram: Sauda Mjasiri, VP., Kathurima M'Inoti, Cheborion Barishaki,
JJA.)**

**APPLICATION NO. 14 OF 2022
(ARISING FROM APPEAL NO. 7 OF 2022)**

BETWEEN

RUGO FARM COMPANY.....APPLICANT

AND

**ATTORNEY GENERAL OF THE
REPUBLIC OF BURUNDI.....RESPONDENT**

[Application to strike out the Record of Appeal in Appeal No. 7 of 2020 arising from the Judgment of the First Instance Division at Arusha by Yohane B. Masara, P.J., Dr. Charles Nyawello, Charles Nyachae, Richard Muhumuza, and Richard W. Wejuli, JJ. dated 7th April 2022 in Reference No. 14 of 2018]

RULING OF THE COURT

INTRODUCTION

1. **Rugo Farm Company, (the Applicant)** filed a Notice of Motion on 16th August 2022 seeking an order to strike out **Appeal No. 7 of 2022** filed in this Court by the **Attorney General of the Republic of Burundi (the Respondent)**. The Motion was taken out primarily under *rule 91* of the **East African Court of Justice Rules of Procedure, 2019 (the Rules of the Court)**.
2. The Applicant is a company incorporated in the Republic of Burundi and is represented in this Application by **Mr. Janvier Nsabimana**, Advocate. For the purposes of the **Treaty for the Establishment of the East African Community (the Treaty)**, the Applicant is resident in the Republic of Burundi.
3. **The Respondent** is the **Attorney General of the Republic of Burundi**, a Partner State to the Treaty. The Respondent is represented in this Application by **Mr. Vyizigiro Diomede**, Director, Civil Litigation and **Mr. Barankiste Pacifique**, Principal State Attorney.

BACKGROUND, REFERENCE AND JUDGMENT OF THE TRIAL COURT

4. On 24th August 2018 the Applicant filed **Reference No. 14 of 2018** in the **First Instance Division** of this Court (**the Trial Court**) alleging that the Respondent had violated its own laws as well as **Article 6 (d)** and **7 (2)** of the Treaty by expropriating the Applicant's land and putting the same into public domain. The Applicant pleaded that its land was

unlawfully repossessed by **COGERCO**, a Company owned by the Government of the Respondent and that despite litigation in Burundi before the National Commission for Land and Other Assets, the Special Court and the Constitutional Court, the Applicant did not obtain any relief. The Applicant contended that by failing to protect its property rights, the Respondent had violated both its laws as well as the Treaty. The Applicant therefore prayed for declarations that the Respondent had violated the Treaty, an order for compensation, and costs of the Reference.

5. The Respondent opposed the Reference contending that the sale through which the Applicant acquired the land was invalid and that the person who sold the land to the Applicant had no right to do so. The Respondent also resisted the Reference on the grounds that the Court did not have jurisdiction in the matter and that the Reference was time barred.
6. The Trial Court heard the Reference and by a judgment dated 7th April 2022 held that the Applicant's Reference was not time barred; that the sale of the land to the Applicant was lawful; that the Respondent had violated the Treaty; but that the Applicant had failed to prove the value of the land for purposes of compensation. The Court however, awarded the costs of the Reference to the Applicant.

THE APPEAL TO THE APPELLATE DIVISION

7. The Respondent was aggrieved by the Judgment of the Trial Court and filed a notice of appeal on 6th May 2022. Subsequently on 25th May 2022 the Respondent filed **Appeal No. 7 of 2022** against the Judgment of the Trial Court. On its part, the Applicant was also aggrieved and

filed a **Notice of Cross Appeal** on 29th June 2022 in which it faulted the Trial Court for failing to order restitution of the property or compensation in light of its finding that the Applicant had deprived the Respondent of the property.

8. The Appeal came up for Scheduling Conference on 10th August 2022 but the same could not be scheduled because the Applicant indicated that it intended to apply to strike out Appeal No. 7 of 2022. Ultimately on 16th August 2022 the Applicant filed the application which is now before the Court, seeking to strike out the Respondent's record of appeal.
9. On 7th December 2022 the parties filed Joint Scheduling Conference Notes in which they agreed on two issues for determination. For clarity and focus, and without losing substance and meaning, we would recast those issues as follows:-
 - a. *whether Appeal No. 7 of 2022 is filed in violation of the Rules; and*
 - b. *what remedies are the parties entitled to?*

THE APPLICATION TO STRIKE OUT THE APPEAL

10. As drawn, the application to strike out the Appeal does not even remotely comply with the Rules of the Court regarding how a Notice of Motion should be drawn. **Rule 94** requires all applications to the Court (save where informal applications are permitted) to be made by Notice of Motion which shall also state the grounds upon which the application is based. The format of the Notice of Motion is provided in **Form A** of the **Seventh Schedule**. All that a party is required to do is to follow the provided format. Instead of following that prescribed format, the Applicant devised and presented a novel and complex document

headed "Application" and cluttered with unnecessary headings, and subheadings.

11. As far as we can discern from the Applicant's document and the oral submissions by the Applicant's counsel, the application is made under **rule 91** of the Rules of the Court which allows a party to apply to strike out the notice or record of appeal, as the case may be, where no appeal lies or where some essential step has not been taken at all or within the prescribed time.

ISSUE NO. 1 - WHETHER APPEAL NO. 7 IS FILED IN VIOLATION OF THE RULES.

APPLICANT'S CASE

12. During the oral hearing of the Application, **Mr. Nsabimana**, learned counsel for the Applicant identified a litany of omissions on the part of the Respondent, which he submitted were fatal to the Appeal. Counsel submitted that the Respondent did not file the notice of appeal within the prescribed time or at all; that the Respondent did not serve a copy of the notice of appeal upon the Applicant within the prescribed time; that the Respondent did not serve upon the Applicant a letter bespeaking copies of the proceedings; that the Record of Appeal was filed out of time; and that the Record of Appeal did not contain a copy of the Notice of Appeal.
13. Counsel contended that instead of serving the Applicant with the Notice of Appeal, the Respondent served only the Memorandum of Appeal on 25th May 2022 without any Notice of Appeal. Counsel further doubted whether the Notice of Appeal was filed on 6th May 2022 as claimed by the Respondent. In his opinion, the Respondent's letter

bespeaking the proceedings was dated 5th May, 2022 and in it the Respondent indicated that it had already filed the Notice of Appeal in the Sub-registry in Burundi. It was contended that if the Notice of Appeal was already filed by 5th May 2022, it was not clear how the Notice of Appeal was stamped as filed on 6th May 2022. Counsel further relied on the letter from the Deputy Registrar forwarding copies of the proceedings to the Respondent which indicated that the application for proceedings was received on 6th May 2022.

14. It was further contended that the Respondent was obliged by **rule 88 (1)** of the Rules of the Court to serve a copy of the Notice of Appeal upon the Applicant within 14 days and to file an affidavit of service, which the Respondent failed to do. Counsel further cited **rule 96** of the Rules of the Court and submitted that the Respondent did not serve upon the Applicant a copy of the letter applying for proceedings and, as such, the Respondent was required to file the record of Appeal within 30 days from the date of the impugned Judgment. Lastly, counsel submitted that the Respondent's Record of Appeal was incompetent because it did not contain a copy of the Notice of Appeal.

15. For the foregoing reasons, counsel submitted that the Respondent had failed to take essential steps and/or within the time prescribed by the Rules of the Court and that as filed, the appeal was incompetent. He therefore urged the Court to allow the application and strike out Appeal No. 7 of 2022.

THE RESPONDENT'S CASE

16. The Respondent opposed the Application vide a Replying Affidavit sworn on 22nd August 2022 by **Mr. Hajayandi Gervais**, Permanent Secretary in the Respondent's Ministry of Justice.

17. Mr. Hajayandi deposed that the Respondent's Notice of Appeal was stamped by the Court on 6th May 2022, which was within 30 days from the date of delivery of the Judgment of the Trial Court. He added that the Respondent filed the Appeal on 25th May 2022, which was within 30 days from the date of filing of the Notice of Appeal.
18. Mr. Hajayandi further averred that the Court should not grant the application to strike out the Appeal because the Applicant was aware of the Appeal and had even responded to it by filing a Notice of Cross Appeal. Accordingly, the Respondent urged the Court to find that the Applicant had not suffered any prejudice and to dismiss the Application with costs.
19. At the hearing of the Application, the Respondent's counsel, **Mr. Vyizigiro** and **Mr. Barankiste** expounded on the above response. Counsel submitted that the Applicant was duly served with the Memorandum of Appeal, as a result of which the Applicant filed a Notice of Cross Appeal, which precluded it from alleging that it had not been served with the Notice of Appeal.
20. Counsel further contended that since the Respondent had already filed the Appeal and the Applicant had responded to it by filing a Notice of Cross Appeal, it was late in the day for the Applicant to apply to strike out the Appeal. It was urged that both the Notice of Appeal and the Record of Appeal were filed within the period prescribed by the Rules of the Court.
21. Regarding whether the Notice of Appeal was served upon the Applicant, counsel explained from the Bar that the Applicant had not

provided an email address for service and that the Notice of Appeal was served physically on the Applicant's counsel but the person effecting the service omitted to ask the Applicant's counsel to endorse a copy of the Notice of Appeal as evidence of service.

22. It was counsels' further contention, if we understood them correctly, that the Applicant was supposed to raise a preliminary objection to the competence of the Appeal under rule 109 of the Rules of the Court before the Scheduling Conference and having failed to do so, the Applicant was precluded from challenging the competence of the Appeal. For the above reasons, the Respondent urged the Court to dismiss the Application with costs.

23. In his submissions in rejoinder, counsel for the Applicant reiterated his earlier submissions, which we find unnecessary to rehash.

THE COURT'S ANALYSIS AND DETERMINATION

24. We have carefully considered the application and the submissions by learned counsel for both parties as regards Issue No 1. Rule 91 of the Rules of the Court under which the application is made entitles a party to an appeal to apply to the Court to strike out a notice or record of appeal, as the case may be, if no appeal lies or if some essential steps in the proceedings have not been taken at all or within the time prescribed by the Rules of the Court. The Applicant has listed a host of alleged violations of the Rules of the Court on the basis of which the Applicant urges the Court to strike out the Respondent's Appeal. On its part, the Respondent maintains that the Appeal is filed in compliance with the Rules of the Court and that the Applicant is

precluded from bringing the Application, having failed to raise a preliminary objection before the Scheduling Conference.

25. The first point of disagreement between the parties relates to the filing and service of the Notice of Appeal. Rule 88 (1) and (2) of the Rules of the Court provides as follows:-

“(1) Any Person who desires to appeal from the Judgment or order of the First Instance Division shall lodge a written notice of appeal in duplicate in the registry of the Appellate Division.

(2) Every notice of Appeal shall, subject to the provisions of Rule 92, be so lodged within thirty (30) days of the date of the decision against which it is desired to appeal.” (Emphasis added).

26. The Applicant contends that the Respondent did not file the notice of appeal within the time prescribed by the above rule. Subject to what we shall say shortly about inclusion or failure to include the Notice of Appeal in the Record of Appeal, the Applicant does not deny that the Respondent lodged a Notice of Appeal which was received at the Court and stamped on 6th May 2022. The Applicant relies on the Respondent's letter bespeaking copies of the proceedings to cast doubt on whether the notice of appeal was filed on 5th May 2022, because in that letter of even date, the Respondent stated that it had **already** filed the Notice of Appeal. In our view, nothing turns on whether the notice of Appeal was filed on 5th or 6th May 2022. The decisive question is **whether the Notice of Appeal was filed within 30 days of the date of the Judgment of the Trial Court, namely 7th April 2022.** If the Respondent filed the Notice of Appeal on 6th May 2022, as both parties agree, then the Notice of Appeal was filed within 30 days from the date

of the Judgment and therefore it was filed within the time prescribed by rule 88(2) of the Rules of the Court.

27. The second point is whether the Respondent served the Notice of Appeal upon the Applicant within the prescribed time. As regards service of the Notice of Appeal, rule 89 of the Rules of the Court provides as follows:

“89(1) A party intending to appeal shall, within fourteen (14) days after lodging a Notice of Appeal: -

i. serve copies of it on all persons who seem to him to be directly affected by the appeal...

ii. File in the Registry an affidavit of service.”

(Emphasis added).

28. Whilst the Applicant contends that the Respondent never served upon it the Notice of Appeal, the Respondent states that it effected service of the Notice of Appeal upon the Applicant but its process server failed to seek endorsement from the Applicant’s counsel to confirm service. The problem with the Respondent’s explanation is that it was given from the Bar and did not even indicate the date when the alleged service was effected. One would have expected the Respondent’s explanation to be under oath in the replying affidavit of Mr. Hajayandi. As it is, we cannot accept bare assertions from the Bar that the Applicant was served with the Notice of Appeal.

29. The respondent faces the further challenge of failure to comply with rule 89(2) of the Rules of the Court which required it, after serving the Notice of Appeal upon the Applicant, to file an affidavit of service in

the Registry. The Respondent readily concedes that it did not file such an Affidavit. Indeed, the Respondent did not have to seek endorsement of service from the Applicant. So long as it had served the Notice of Appeal, all that the Respondent needed to do was file an affidavit of service. Such affidavit would have easily resolved the question whether or not the Respondent had served the Applicant with the Notice of Appeal. In the absence of an affidavit of service, we are unable to agree with the Respondent that there is any credible evidence that it served the Applicant with the Notice of Appeal within 14 days of lodgement, as required by the Rules of the Court.

30. The Applicant's next complaint is that the Respondent did not serve upon it a copy of the letter bespeaking copies of the proceedings as required by rule 96(4) of the Rules of the Court. As such, the Applicant argues that the Respondent's appeal was filed out of time because it was not filed within 30 days from the date of the Judgment. The Respondent did not expressly address this complaint, but maintained that its appeal was filed within the prescribed time.

31. Rule 96 of the Rules of the Court is in the following terms:

"96. (1) Subject to the provisions of Rule 131, an appeal shall be instituted by lodging in the appropriate registry, within thirty (30) days of the date when the notice of appeal was lodged:—

(a) a memorandum of appeal, in eight (8) copies;

(b) the record of appeal, in eight (8) copies; and

(c) payment of Five hundred United States Dollars (500 USD) as security for costs of the appeal.

(2) Notwithstanding sub-rule (1) above, where an application for a copy of the proceedings in the First Instance Division has been made within thirty (30) days of the date of the decision against

which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar as having been required for the preparation by the Registrar and collection of that copy by the appellant.

(3) The intended appellant shall collect the proceedings applied for under sub-rule (2) above within seven (7) days after being notified by the Court that they are ready for collection.

(4) An appellant shall not be entitled to rely on sub-rule (2) unless his application for the copy of the proceedings was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service."

32. The import of that rule is that an appeal must be filed within 30 days from the date of lodging the notice of appeal. However, where the appellant has applied for copies of proceedings within 30 days from the date of the decision intended to be appealed, the 30 days for filing the appeal shall exclude the period certified by the Registrar, in a certificate of delay, to have been required to supply the proceedings. To be able to rely on that exception, the intended appellant must satisfy three conditions. Firstly, he or she must apply for the proceedings in writing, secondly the intended Appellant must serve a copy of the letter of application upon the Respondent; and thirdly, the intended Appellant must retain proof of service upon the Respondent of the letter bespeaking proceedings.

33. Upon being notified by the Registrar that the proceedings are ready for collection, the Appellant is required to collect the same within seven days and thereafter to file the Appeal within thirty days from the date of collection of the proceedings.

34. In this case, whether the Respondent complied with Rule 96 of the Rules of the Court is not the decisive factor, although it is plainly clear there was non-compliance with some of the provisions of the rule. The Respondent's letter bespeaking proceedings is in writing and is dated 5th May 2022, which is within 30 days from the date of the judgment. However, there is no evidence that the letter was ever served upon the Applicant. The letter itself is not copied to the Applicant, nor did the Respondent avail any proof of service of the letter.
35. The Registrar advised the Respondent that the proceedings were ready for collection on 13th May 2022. Rule 96(3) required the Respondent to collect the proceedings within 7 days of being notified by the Registrar that they were ready. It was neither alleged nor proved by the Applicant that the Respondent did not collect the proceedings within 7 days of notification.
36. Be that as it may, as we have stated, compliance with rule 96 is not relevant because the impugned appeal was filed on 25th May 2022, which was within 30 days of the date of the filing of the Notice of Appeal, namely, 6th May 2022. Thus, the Respondent complied with rule 96(1) and having so complied it was not required to comply with the other limbs of that rule, because those requirements are only an alternative to the requirements of rule 96(1).
37. We should take this opportunity to correct the Applicant's assertion that under the Rules of the Court, the Respondent was obliged to file its Appeal within 30 days from the date of the judgment. That is a clear misapprehension of the rules. Under rule 91(1) the Respondent was required to file the Appeal within 30 days from the date of filing the Notice of Appeal. The Record shows that

the Respondent's appeal was filed on time within the meaning of rule 91(1) of the Rules of the Court.

38. The biggest hurdle facing the Respondent and which it has failed to surmount is the lack of a copy of a Notice of Appeal in the Record of Appeal. The Respondent readily concedes that the Record in Appeal No. 7 of 2022 does not contain a copy of the Notice of Appeal.

39. An Appeal is initiated by filing a Notice of Appeal. It is the first and foundational step in an Appeal. Rule 88 of the Rules of the Court provides as follows, as regards institution of Appeals:-

"88(1) Any person who desires to appeal from the judgment or order of the First Instance Division shall lodge a written notice of appeal in duplicate in the registry of the Appellate Division."
(Emphasis added)

40. A Notice of Appeal is also a mandatory part of the Record of Appeal. Under Rule 98 (1) (g) of the Rules of the Court, a Record of Appeal must contain a copy of the Notice of Appeal. Where a Record of Appeal does not contain a copy of the Notice of Appeal or any other of the primary documents listed in rule 98, rule 101 (4) allows a party to lodge a Supplementary Record of Appeal to cure the defect before the Scheduling Conference. But the bottom-line remains that a Record of Appeal devoid of a Notice of Appeal is utterly incompetent and cannot form the basis of an appeal over which this Court can exercise jurisdiction. A notice of appeal is a mandatory prerequisite before an Appellate Court can exercise jurisdiction to hear an appeal. (See the decision of the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7**

Others [2014] eKLR where the Court held that a notice of appeal is a jurisdictional prerequisite.)

41. Before we leave this issue, it is apt to address the Respondent's assertion that the Application to strike out the Record of Appeal is incompetent because the Applicant did not utilise rule 109 of the Rules of the Court. We do not think there is any merit in the submission.
42. Rule 109 provides for preliminary objections. It provides as follows:-
- "109(1) Where a respondent intends to raise a preliminary objection to an appeal he shall, before the Scheduling Conference under rule 110 of these Rules, give not less than seven (7) days written notice to the Court and to the other parties to the appeal of the grounds of that objection.*
- (2) Nothing in sub-rule (1) shall prevent the Court for sufficient reason from entertaining a preliminary objection otherwise raised."*
43. The default position under the rules is to require a party who wishes to raise a preliminary objection on the competence of the Appeal to do so by giving not less than seven days written notice of the objection and to do so before the Scheduling Conference. The purpose of this rule is to ensure that all objections to the appeal are raised and heard before the Appeal is certified ready for hearing at the Scheduling Conference. The rationale is clearly that because a preliminary objection raises a pure point of law on the basis of which the appeal may be determined, such issues must be addressed before the appeal is scheduled for hearing.

44. But it must also be noted that even when the preliminary objection is not raised as provided by rule 109(1), under rule 109(2), the Court may still entertain a preliminary objection even after scheduling of the appeal, if sufficient reason is presented as to why there was no compliance with rule 109(1). In other words, failure to raise a preliminary objection as required by rule 109 (1) does not foreclose the possibility of a preliminary objection being raised after the Scheduling Conference.

45. On the other hand rule 91 allows a party to the appeal to apply to strike out the notice or record of appeal for failure to take prescribed steps at all or within the prescribed time. The rule reads as follows:-

"91. A person on whom a notice of appeal has been served may at any time, either before or after the institution of of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time." (Emphasis added).

46. As is eminently clear, an application to strike out a notice or record of appeal can be made at any time. We do not see any stricture in rule 91 that prohibits a party who could otherwise have raised a preliminary objection under rule 109 from applying to strike out the notice or record of appeal under rule 91. The Rules have deliberately left the choice on how to proceed to the parties. That the Applicant who could have moved the Court under rule 109 elected to move the Court under rule 91 does not render the application under the latter rule incompetent.

47. For the reasons we have stated above, we are satisfied that the Respondent's Appeal No. 7 of 2022 is utterly incompetent due to lack of a Notice of Appeal and the Respondent's failure to take remedial measures in the timely manner required by the Rules of the Court. The Court cannot entertain, let alone determine an Appeal where the Record of Appeal is devoid of a Notice of Appeal. Accordingly, we answer Issue No. 1 in the affirmative.

ISSUE NO. 2 : WHAT REMEDIES ARE THE PARTIES ENTITLED TO?

APPLICANT'S CASE

48. In his Notice of Motion the Applicant prayed for, among others, an order that the respondent be liable to pay costs of any person on whom the notice and record of appeal were served. During the highlighting of the submissions in support of the Application, Mr. Nsabimana urged the Court to strike out the appeal with costs because of the Respondent's failure to comply with the Rules.

RESPONDENT'S CASE

49. On his part, Mr Vyizigiro for the Respondent urged the Court to find that the Application to strike out the Appeal has no merit and to dismiss it with costs to the Respondent.

COURT'S ANALYSIS AND DETERMINATION

50. Learned Counsel for both parties were very concise and precise in their submissions on Issue No. 2. While the Applicant urged the Court to allow the Application, strike out the Notice and Record of Appeal and award costs to the Applicant, the Respondent urged the Court to find no merit in the Application and to dismiss it with costs.

51. In Issue No. 1 we have found that the Respondent's Record of Appeal in Appeal No. 7 of 2022 is fatally defective for lack of a Notice of Appeal. The effect is that the Appeal is incompetent, leaving the Court with no other option but to strike out the Appeal.

52. The effect therefore is that the Applicant is entitled to the remedy it had prayed for, namely, striking out of Appeal No. 7 of 2022. We answer Issue No. 2 accordingly.

COSTS

53. By dint of rule 127 of the Rules, costs follow the event unless the Court, for good reason, orders otherwise. The effect of rule 127 is that as a general rule, a party who succeeds in his or her Application, Reference or Appeal, is entitled to award of costs, unless there are good reasons why the Court should depart from the general rule. In **Margaret Zziwa v. The Secretary-General of EAC**, EACJ Appeal No. 2 of 2017, the Court explained the import of rule 127 as follows:-

"costs are in the discretion of the Court (and that) in exercising such discretion, the Court bears in mind that costs follow the event and that a successful party may only exceptionally be deprived of costs depending on the particular circumstances of the case such as the conduct of the parties themselves or their legal representatives, the nature of the litigants, the nature of the proceedings or the nature of the success."

54. Having carefully considered the Application before us, we do not perceive any compelling reason why we should depart from the general rule. Accordingly, we award costs of the Application to the Applicant.

DISPOSITION

55. The upshot of our consideration of the Applicant's application is that:-

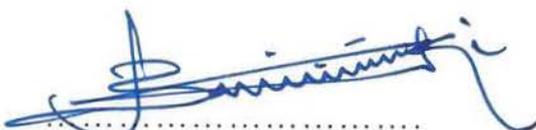
- a. The Appeal No. 7 of 2022 is fatally incompetent for lack of a Notice of Appeal and is hereby struck off; and
- b. The Applicant is awarded costs of the Application.

IT IS SO ORDERED.

DATED, DELIVERED, AND SIGNED in Arusha on this 23rd day of November 2023.


Sauda Mjasiri¹
VICE PRESIDENT


Kathurima M'Inoti
JUSTICE OF APPEAL


Cheborion Barishaki
JUSTICE OF APPEAL

¹ Justice Sauda Mjasiri retired from the East African Court of Justice Appellate Division on 19th June 2023.