

THE COURT OF APPEAL RULES 2009 AND THE ADMINISTRATION OF JUSTICE IN TANZANIA

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INTRODUCTION

1 **Enactment:**

The Rules have been made by the Chief Justice of the United Republic of Tanzania pursuant to the powers conferred on him under Section 12 of the Appellate Jurisdiction Act, 1979 [Cap. 141 R.E.]

Section 12 reads:

“ The Chief Justice may, either on his own motion or upon the advice of, and after consultation with , the Chief Justice of Zanzibar, make rules of court regulating appeals to the Court of Appeal and other matters incidental to the making, hearing or determination of those appeals.”

The rules were published on 6/11/2009 through GN 368 of 2009. They came into force on 1/2/2010 vide Government Notice No. 36 of 2010. The notice on commencement date was published on 29/1/2010.

They bear the same chapter number: Cap.141 Subsidiary Legislation.

Having commenced just on 1st February, 2010 as we discuss them today they have been in existence hardly 8 months [76 days].

Prior to making the rules the Chief Justice consulted extensively with the legal community, business people, practicing advocates, lawyers in public and private sector service and members of the judiciary.

The consultation process was steered by the Law Reform Commission and the BEST program. An open invitation was published for a consultant to prepare a position paper on the Review of the Appellate Jurisdiction Act and the Court of Appeal Rules 1979 .

The position paper prepared by the consultant is available on the website of the Law Reform Commission and that of BEST. Seminars and workshops were conducted both on the mainland and Zanzibar to solicit views from stake holders.

The Chief Justice then appointed a Committee of Five Judges of the Court of Appeal to advise him on the drafting of the new rules in the light of the recommendations from the stake holders. The committee of justices of appeal reviewed the draft rules prepared by the Consultant and recommended the current version of the rules.

2 General Scheme of the Rules

2.1 The rules regulate proceedings filed before and after commencement of the Rules. There is a savings provision in Rule 130 which allows proceedings filed before commencement of these Rules to be determined in accordance with the Court of Appeal Rules 1979.

The savings provision also empowers the Chief Justice to issue directions in event of problems in administering the rules.

The rules contain significant emphasis on the need to achieve substantive justice without undue regard to procedural technicalities and avoid delays. This desire to achieve substantive justice is provided in Rules 2 and 4:

Rule 2 states:

“ In administering these Rules, the Court shall have due regard to the need to achieve substantive justice in the particular case ”.

On the other hand Rule 4 empowers the Court to depart from the rules if the interests of the case require so in the particular circumstance. Thus Rules 2 and 4 reflect the spirit of the Constitution of the United Republic of Tanzania 1977 under Article 117(A) that Courts should administer justice without undue regard to technicalities.

2.2 In drafting the rules thinking focused on the role of the Court of Appeal as the apex or citadel of justice/final appellate court. That not only it is the point of last resort and that the Court should suffer no injustice, wrong grievance/injury without a redress but also the Court should provide guidance on what remedies parties are entitled to.

2.3 That procedural rules and technicalities should not stifle/hinder administration of justice Rules 1 & 4; Rule 99(1) if Respondent feels

record is insufficient or defective he may lodge a supplementary record to introduce the missing documents;

2.4 Elimination of Element of surprise and ambush: List of authorities sought to be relied upon must be filed within 48 hours (clear days); Notice of Date of hearing of an appeal must be served not less than 14 days under Rule 108. There is no time fixed for notice of date of hearing of an application.

Under Rule 107 Preliminary Objections must be fully articulated/presented. A party must not raise a vague and general objection but must state the law, principle, decisions that support the objection. The preliminary objection must be served on the opposite party within 3 clear days to enable the other party to decide whether to concede or not.

Under Rule 113(1) Objections to competence of an appeal should not be raised at the hearing of the appeal but must be raised by way of an application under Rule 89

2.5 The rules introduce a much more liberal approach to amendment of documents. Under Rule 111 a party may amend a Notice of Appeal, memorandum or record of appeal anytime before hearing.

Court of appeal may reduce the time limits set for presenting oral arguments if circumstances require under Rule 106(19)

Court must deliver judgment within 90 days from close of the submissions Rule 39(1)

2.6 The period of time for taking particular actions to advance an appeal or application have been enlarged in some respects. Lodging Notice of Appeal has been enlarged to 30 days under Rule 83.

2.7 There is a time limit of 90 days within which Court of Appeal must deliver judgment in Rule 39(1)

2.8 Requirement of Judges to write separate judgments in Civil cases unless they are unanimous. [Rule 39(3)]

2.9 Applications for leave to appeal and extension of time may be made at the Tribunals Rule 47

3.0 General Administrative and Procedural Provisions

3.1 These are spread in various parts of the Rules. The scope of the powers of Registrars are prescribed in Rules 14 -18. Appeals to the Court lie not only from the High Court but also from tribunals. Appeals from Court of Resident Magistrate exercising extended jurisdiction have also been retained. Although there was consensus that in view of the expansion in appointment of High Court judges and in view of the debate whether magistrates can perform functions of a judge when they have not been sworn, no changes could be made in the rules unless the provisions of Article 117 (3) of the Constitution conferring power on magistrates with extended jurisdiction to hear cases which would ordinarily be heard by the High Court is amended. It is expected that the judiciary will use its wisdom to gradually withhold assigning cases to magistrates with extended jurisdiction.

3.2 The definition of Registrar has been expanded to cover Registrars of Tribunals. Deputy Registrar and acting deputy registrars are also covered. Thus a Resident Magistrate acting as an Acting Deputy Registrar can exercise the powers of the Registrar. This is intended to facilitate processing of documents for appeal purposes in two senses. First, all High Court centres serve as registries of the Court of Appeal. Second, there should be no excuse for a document not to be endorsed on time because the judicial function can be performed by the Registrar, deputy registrar or acting deputy registrar. It is inconceivable all of them will not be available at the station at the particular moment. Note that under the High Court Registries Rules 1984 together with Rules 6(1) and 25(1) of the Court of Appeal Rules 2009 each High Court centre may serve as a Registry of the Court.

4.0 NEW PROVISIONS THAT REQUIRE NEW ATTITUDE/MINDSET

RULE 1 & 4: Advocates and judges should never lose sight of the need to achieve justice without too much emphasis on technicality and without delay . The two rules reflect the spirit in the provisions of Rule 107A of the Constitution.

Will the lawyers change their mind and refrain from relying on technicalities?

Will the Judges change their thinking that technical rules may sometimes hinder justice . As between the rule pedantic lawyers s vis-vi the common sense lawyers who should prevail?

RULE 10 : Extension of time: main consideration is “ **good cause**” as opposed to “ **sufficient cause**” **under former Rule 8**. What is the distinction ? Is it just a matter of rhetoric is there substantive change in the concepts? The objective as opposed to the subjective standard.

RULE 11 STAY OF EXECUTION

Rule 11(d)(i) Grounds for grant of stay order specified. Former Rule 9 (b) did not specify grounds “ **substantial loss**” as opposed to “ **irreparable loss**”.

Substantial loss is more objective as it looks to the circumstances of each case. Irreparable loss is a much higher standard and more subjective.

RULE 12 FORMAT OF DOCUMENTS

Rule 12(1) methods of preparing documents are much broader. The rule accommodates modern technology in preparation of documents.

But Rule 12 (5) requires parties to adopt the most economical method for purposes of recouping costs on taxation.

Rule 13(7) Registrar may direct a party to amend the documents if not prepared in the acceptable format. Read together with Rules 99(6) and 111 an appellant is afforded opportunity to amend the record of appeal to remedy any defect.

MODE OF SERVICE OF DOCUMENTS

Rule 22 imports the procedures used under CPC 1966, Cap.33

In Criminal matters under Rule 22(7) service on an appellant in jail is effected on officer in charge of the prison.

Rule 75 provides safeguards to ensure the person in custody is properly served.

ACCESS TO COURT RECORDS BY MEMBERS OF PUBLIC

Rules 14(9) and 20(5) allow Members of the public to get access documents and registers of the Court and obtain copies by paying prescribed fee.

CHANGE OF ADVOCATES

Rules 32(1) and 13(7)(e) It is the party to the proceeding who should inform the Registrar about change of advocate. It is not the advocate who should tell the Court that he has been instructed to represent a party.

Parties who lack means and are assigned advocates are awarded costs or compensation may be compelled to contribute towards expenses of the advocate assigned to such parties, Rule 31(2).

RIGHT OF AUDIENCE BY YOUNG ADVOCATES AND FOREIGN PRACTITIONERS

Attorney General whether appearing by himself or represented by State Attorneys and Law Officers takes precedence over other advocates Rule 33(2).

Newly enrolled members of the bar, as a general rule, must practice in High Court for 5 yrs, but there is exception to this two in the proviso to Rule 33(3).

Foreign practitioners from any Commonwealth jurisdiction may obtain license from CJ for limited appearance Rule 33(4).

Right of counsel representing impecunious clients to recover costs in event they get compensated or paid Rule 31(2).

EASIER RULES ON WITHDRAWAL OF APPEALS AND APPLICATIONS

Application may be withdrawn any time informally, in writing or in course of hearing Rule 58

Notice of Appeal may be withdrawn by intending appellant any time by writing a letter..

Withdrawal of Appeal before it is called to hearing may be by written notice Rule 102 and Registrar may allow the withdrawal

If some parties do not consent to withdrawal, the appeal shall be treated as dismissed under 102(4)

REMOVAL OF ELEMENT OF SURPRISE OR AMBUSH

The rules which curtail elements of ambush include: Rule 34(2) (c) list of authorities must be filed at least 48 hours before hearing.

Rule 107 which requires a Preliminary Objection be served at least within 3 clear days, excluding Sundays and Public holidays. Objection must set a reasoned account of the grounds for objection, citing the law, principle and authorities to back it.

Respondent who feels that record is insufficient should lodge in the Registry the missing documents instead of seeking to strike out the appeal/application Rule 99

Notice of date of hearing of an appeal must be served on parties not less than 14 days, Rule 108. There is not express provision prescribing time limit within notice of hearing of an application should be served on parties. The provisions of Rule 108 relating to appeals may be extended to applications.

Rules 99 and 111 Amendment of notice of appeal, memorandum and record permissible any time. Party may amend notice of appeal, memorandum of appeal or any part of the record.

CERTIFICATE OF URGENCY

Rules 26(3); 51(2) and 53(2) and (3) specify grounds: special circumstances or serious hardship; must be made without delay

RULES ON APPLICATIONS FOR REVISION/ REVIEW

REVISION Rule 65

Mode of applying

Time limit where moved by party 60 days Rule 65(4)

But where review is by Court on its own Rule 65(6)

Review Rule 66 Grounds for review specified in Rule 66(1)

Time limit for applying 60 days Rule 66(3)

Composition of Judges must be same as those who heard the matter Rule 66(5)

APPLICATIONS WHICH CANNOT BE HEARD BY SINGLE JUDGE

Rule 60 (2):

- an application for leave to appeal
- an application for stay of execution
- an application to strike out Notice of Appeal/an appeal

ABATEMENT OF APPLICATIONS AND APPEALS IN COURT OF APPEAL

Rules 78 and 87: A Criminal matter where applicant is State will abate upon death of Respondent

Where applicant is individual, matter does not abate. Personal legal representatives may step in Rule 92.

Rationale: where applicant appeals in order to clear his name/restore his employment benefits the personal legal representatives may benefit if the matter is not allowed to abate.

However where in the judgment sought to be appealed against, appellant was ordered to pay fine, costs, compensation or forfeiture and appellant dies before the appeal is heard, the appeal does not abate upon death of appellant. A legal representative may apply to be paid the compensation from estate of deceased.

CRIMINAL MATTERS

Format of Documents Rule 12(2) – Record of Appeal must be bound in book form.

Pages must be numbered consecutively

Every 10th line of each page must indicated in the margin

Signature on documents may be made by appellant or a person entitled to appear on his behalf

Service of documents Rule 22(7) where a person is in prison, done on officer in charge and officer must write a letter to acknowledge receipt.

In the letter the officer must state whether appellant wants to be present at the hearing of the appeal Rule 68(5),

For Prisoners who cannot employ Counsel, presiding judge may assign an advocate Rule 31(1)

MODE OF PREFERRING APPLICATIONS IN CIVIL MATTERS

Where appeal lies with leave, in matters originating from subordinate courts or Where appeal requires High Court to certify point of law, application may be made informally before the High Court or ex parte.

Rule 44

Appellant may make the application himself Rule 46

Abatement of Application where State is applicant upon death of Respondent Rule 57(1). But where applicant is an individual application will not abate.

Rationale, prisoner may want to clear his name/restore employment rights.

FILING OF APPEALS IN CRIMINAL MATTERS

Notice of Appeal must lodged with Registry of High Court where decision was given Rule 68 within 30 days. The Notice of Appeal institutes the Appeal unlike in Civil Appeals where the memorandum institutes the appeal.

Content of Notice are specified in Rule 68(2)

On receipt of the Notice, Registrar of High Court sends a copy to Registrar, Court of Appeal.

Where the appeal originates from the High Court in its original jurisdiction, Registrar of High Court prepares the record of appeal containing documents listed in Rule 71(2)

Where the appeal is in the High Courts appellate jurisdiction, the record must contain documents specified in Rule 71(4)

Rule 72 Upon receiving the record from the Registrar, the appellant is required lodge memorandum of appeal within 21 days. Format of the memorandum is C First Schedule to the Rules. Alternatively, where an advocate is assigned, the counsel may lodge a memorandum of appeal within 21 days from the date he is notified about the assignment. Rule 73(2).

Presentation of Written Submissions

A party, be is the State or Respondent may file written submissions withn 21 days after lodging memorandum at the registry where the appeal will be heard.

Where the appellant is not represented, the time limited for lodging the appeal is specified in Rule 75(2) Time will start to run from the date his memorandum or statement by officer in charge is lodged with Registrar.

If on date of hearing appellant does not appear and has not lodged written submissions under Rule 74 appeal may be dismissed, heard ex parte.

Where appeal is dismissed appellant may apply to restore it if he shows he was prevented by sufficient cause from appearing.

2.10 Cutting down/minimizing delays in the administration of Justice;

There are several rules which read together minimize delays in determination of applications and appeal.

Rules 14(2),(3) on powers of Registrar to order amendment of documents which do not conform with the format in the Rules; Rules 83(Notice of Appeal within 30 days); Rule 60 lodging a memorandum within 60 days; where a document listed in Rule 96(1) and (2) has been omitted from the record of appeal appellant may within 14 days of lodging the record include the document in the record without leave of the Court under Rule 96(6); service of record to be done within 7 days under Rule 97(1); Under Rule 106. appellant must file written submissions within 60 days after lodging the record or filing notice of motion unless he has sought and been granted extension of time under Rule 106(9) AND Serve on Respondent within 14 days under Rule 106(7). Respondent must file written submissions in reply within 30 days from date of service Rule 106(8) unless he has been granted extension of time under Rule 106(10). When submissions are complete Court will fix a date and summon the parties under Rule 106(11) to present short address for 30 minutes only.

