

Amendment of Pleading/Record, the former cases

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: RAMADHANI, J.A.; KAJI, J. A. And KILEO, J. A.)
CIVIL APPEAL NO 58 OF 2000
CONSOLIDATED HOLDING ... APPELLANT
CORPORATION
VERSUS
NYAKATO SOAP INDUSTRIES LTD ... RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania at
Dar es Salaam)
(Bubeshi, J.)
dated 5th October, 2000
in
Civil Case No. 205 of 1999**

.....
RULING

16 & 27 October, 2006.

RAMADHANI, J. A.:

The appellants, Consolidated Holding Corporation, brought this appeal on 28th November, 2000, in the name of the National Bank of Commerce Holding Corporation. However, that name was changed by Act No. 10 of 2001. So, the appellant, through Mr. Mwandambo, learned advocate, applied to change the name accordingly. That was not objected to by Mr. Ndyanabo, learned counsel for the respondent and MROSO, J. A. granted that application on 12th February, 2004. So, the appellant filed a "Supplementary Record and Amended Memorandum of Appeal" on 18th February, 2004.

When the appeal came before a full Court on 8th July, 2005, the Court, *suo motu*, raised the issue of whether or not there was a valid extracted decree. The Court adjourned the proceedings to enable both parties to prepare arguments on that issue. The matter came again before another panel of full Court on 24th May, 2006, whereupon Mr. Mwandambo applied to file another supplementary record of appeal containing a proper decree. That again was not objected to by Mr. Rutashoborwa, learned advocate, who replaced Mr. Ndyanabo as the counsel for the respondents.

However, a notice of preliminary of objection had been filed since 25th February, 2005, that is, before this appeal came before the full Court on 8th July, 2005, and on 24th May, 2006. On both occasions, neither Mr. Ndyanabo nor Mr. Rutashoborwa, drew the attention of the Court to the preliminary objection.

When the appeal came up for the third time before a full Court on 16th October, 2006, Mr. Rutashoborwa raised the preliminary objection saying that it was not covered by the two previous orders given by this Court. That objection in the relevant part reads as follows:

... the filed Memorandum of Appeal and the subsequent Amended Memorandum of Appeal to the extent of change of the name of the appellant are unmaintainable and improperly placed before the Court for violating the mandatory provision of sub-

Rule 3 of Rule 86 of the Tanzania Court of Appeal Rules, 1979.

Briefly the argument of Mr. Rutashoborwa is that a memorandum of appeal is required by Rule 86(3) to be substantially as Form F which provides, *inter alia*, for a place for the Registrar's endorsement when it is lodged. The memorandum of appeal before MROSO, J. A. did not have that part and was, therefore, not endorsed and so, was not instituted. Mr. Rutashoborwa pointed out further that the appellant used the leave granted by MROSO, J. A. to amend the memorandum of appeal to provide for endorsement by the Registrar. He said that that was wrong.

Mr. Mwandambo relied on Warner v. Sampson & Another, [1958] 1 Q. B. 297, which was quoted with approval by this Court in Tanga Hardware & Autoparts Ltd. & Six Others v. CRDB Bank Ltd., Civil Application No. 144 of 2005, that:

... once pleadings are amended, that which stood before amendment is no longer material before the court.

Following that a single Justice of Appeal of this Court said:

I have no doubt in my mind that pleadings, which was the subject matter before their lordships, covers notices of motions but in any case I am positive that that holding can be extended to cover all documents presented to courts. What their Lordships meant, I think, is that once there is an amended document then the previous one before the amendment should be treated as if it never existed at all.

So, Mr. Mwandambo wanted us to treat the memorandum of appeal which had not been endorsed and which was before MROSO, J. A. not to have existed at all and that we should consider the one which has been endorsed after the amendment.

We refuse to accept the invitation of Mr. Mwandambo and instead we uphold Mr. Rutashoborwa. MROSO, J. A. did not grant leave to amend the memorandum of appeal so as to include a place for the endorsement by the Registrar as provided in Form F. Had he done so the authorities cited to us by Mr Mwandambo would have a purchase.

Therefore, we agree with Mr. Rutashoborwa that as the memorandum of appeal did not contain a place for the endorsement of the Registrar, it was not so endorsed and, therefore, the appeal was not instituted and that there was nothing before MROSO, J. A. That anomaly could not have been cured by the purported amended memorandum of appeal, which had not been authorized by MROSO, J. A., and its subsequent endorsement.

Before we finish we wish to observe that had this preliminary objection been argued on either of the two previous occasions before this Court this matter would have been finalized long time ago instead of dragging it on as has been done. Mr. Rutashoborwa conceded that and said that it was an oversight on his part.

We, therefore, strike out the purported appeal with costs.

DATED in DAR ES SALAAM, this 20th day of October, 2006.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

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




(S. M. RUMANYIKA)
DEPUTY REGISTRAR