IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CORAM: (MJASIRI, J.A., MWARIJA, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 41 OF 2014

GODFREY KIMBE .....APPLICANT

VERSUS

PETER NGONYANI ..... RESPONDENT

[Appeal From the Decision of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Longway, J.)

Dated the 27th day of June, 2006
in
Miscellaneous Land Appeal No. 6 of 2005

RULING OF THE COURT

13th & 25th July, 2017

MWAMBEGELE, J.A.:

The appellant Godfrey Kimbe was dissatisfied with the decision of the High Court (Land Division) in Miscellaneous Land Appeal No. 6 of 2005. He lodged an appeal to this Court. On 07.10.2014, the respondent lodged a preliminary objection against the appeal. He took out the preliminary objection under rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (henceforth "the Rules").

When the application was called on for hearing before us on 16.07.2017, the appellant appeared in person and unrepresented. The respondent appeared through Mr. Elisa Abel Msuya, learned advocate. Before we could call upon Mr. Msuya to address us on the preliminary objection, the appellant rose to pray that the preliminary objection should be disposed of by way of written submissions. As Mr. Msuya for the respondent had no objection to the prayer, and as the appellant is a lay person, we granted the appellant's prayer and proceeded to schedule the dates within which the written submissions by the parties could be lodged in Court. We ordered that the respondent should lodge the submissions in chief in support of the preliminary objection by 23.06.2017, the reply submissions by 30.06.2017 and rejoinder submissions, if any, by 13.07.2017. It is only the respondent who has complied with the scheduling order fixed by the Court. He lodged his submissions in chief on 19.06.2017; quite timely. Up to the moment we were composing this ruling, well after the expiry of the time fixed within which the applicant could have filed his written submissions against the preliminary objection, he had not filed them.

In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are

taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case – see: **National Insurance Corporation of (T) Ltd & another v. Shengena Limited**, Civil Application No. 20 of 2007 and **Patson Matonya v. The Registrar Industrial Court of Tanzania & another**, Civil Application No. 90 of 2011 (both unreported). In both cases, among many others, the Court held that failure by a party to lodge written submissions after the Court has ordered a hearing by written submissions is tantamount to being absent without notice on the date of hearing. In the **Shengena** case, for instance, we observed:

> *"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ...* ***it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case.***"
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> [Emphasis supplied].

By not filing any reply submissions contrary to the order of the Court of 16.06.2017, the appellant has therefore failed to defend the preliminary

objection and the Court is entitled to proceed with the ruling as if he did not appear at the hearing despite being duly served with the Notice of Hearing.

Reverting to the the matter under consideration, the respondent lodged the preliminary objection which is comprised the following four points:

1. That no valid Notice of Appeal was filed prior to filing the Appeal and Memorandum of Appeal as required under rule 83 (1) of the Rules;
2. No leave to appeal was sought and obtained as required under section 5 (1) (c) and section 47 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 and the Land Disputes Courts Act (as amended), respectively;
3. The Appeal has been filed out of time in contravention of the provisions of rule 90 (1) of the Rules; and
4. The appeal is incompetent for contravening rule 96 (1) (f) of the Rules.

Having closely examined the four points of objection, we think we can dispose of the matter on the second point only. But before we go into the

nitty gritty of it, we find it appropriate to narrate briefly the background to the matter.

The respondent was a successful party in the Bunju Ward Tribunal in which he had sued the appellant vide *Shauri No. 129/2004* over ownership of a parcel of land. The appellant successfully appealed to the District Land and Housing Tribunal of Kinondoni. Dissatisfied, the respondent successfully appealed to the High Court (Land Division) which restored the decision of the Ward Tribunal. Still thinking that the decision of the District Land and Housing Tribunal was the correct one, the appellant lodged in this Court Civil Appeal No. 31 of 2007 challenging the decision of the High Court (Land Division). However, the appeal was struck out by the Court on 12.07.2010 for being incompetent.

His appeal having been struck out, undeterred, the appellant commenced afresh the process of appeal in the High Court (Land Division). On 19.05.2011, he filed in the High Court (Land Division) an application for extension of time to file an application for leave to appeal to this Court. That application was titled "Notice of Motion" and was made under rule 10 of the Tanzania Court of Appeal Rules, 2009. The application was heard *ex parte* on 12.03.2012 the respondent having defaulted appearance after he was

duly served by publication. The High Court (Land Division) granted the application thereby allowing the appellant to file out of time an application for leave to appeal to the Court.

The second point of objection is predicated upon the application for extension of time we have referred to in the foregoing paragraph. It is the respondent's argument that the applicant should not have filed the application by a Notice of Motion and that he should not have made it under rule 10 of the Rules. Further, the respondent contends, the affidavit in support of that application was incurably defective because it lacked the date on which the oath was taken.

We have considered the second preliminary objection raised by the respondent. Having so done, we think, save for the defect of the title of the application which we do not find fatal, the respondent is right in his complaints. In this point of objection, as already pointed out above, the respondent is complaining that the application for extension of time to file an application for leave to appeal to this Court had three shortcomings; first, it was titled "Notice of Motion", secondly, it was made under rule 10 of the Rules and thirdly, the affidavit supporting it was incurably defective for want

of date in the jurat on which the oath was taken. We shall take time to address each of them.

On the first complaint, it evident on the record of appeal at p 55 that the applicant titled that application "Notice of Motion". We wish to clarify here that titling an application as "Notice of Motion" or "Chamber Summons" depends on which court that application is made. While an application is preferred by a "Notice of Motion" in the Court of Appeal by virtue of the Rules, "Chamber Summons" is its kith and kin used in the High Court by virtue of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"). The Rules provide under rule 48 (1) that:

> *"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application,* ***every application to the Court shall be by notice of motion*** *supported by affidavit ..."*
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> [Emphasis supplied].

Its sister provision in the High Court is Order XLIII rule 2 of the CPC. It provides:

"Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit ..."

The court is defined by the CPC under section 2 as follows:

""court", except in the expression "foreign court", means the High Court of the United Republic, a court of a resident magistrate or a district court presided over by a civil magistrate and references to a district court are references to a district court presided over by a civil magistrate;"

It is apparent in the above provisions therefore that "Notice of Motion" and "Chamber Summons" is a mere matter of nomenclature; while an application is made by way of a "Notice of Motion" in the Court of Appeal, the same application is made by a "Chamber Summons" in the High Court. That has been the practice all along and in accordance with the Rules and the CPC respectively as expounded above. However, we, on our part, do not think an application may be rendered incompetent for a mere misnomer as "Notice of Motion" or "Chamber Application" in the title. It is desirable,

though, that any application should be titled in consonance with the provisions under which it is made. The respondent's complaint to this effect is therefore without merit. We dismiss it.

The second complaint in the second point of preliminary objection hinges on the provision under which the application for extension of time was made in the High Court (Land Division). As already alluded to above, it was made under rule 10 of the Rules. The respondent's complaint under this arm is, we think, meritorious. We wish to underline here that while the High Court and the Court have concurrent jurisdiction in respect of extension of time, such powers are exercisable under different laws. Powers to extend time under rule 10 of the Rules, is within the exclusive empire of the Court. An elucidation here may be apt. Rule 10 of the Rules provide:

> *"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall*

be construed as a reference to that time as so extended."

The "Court" is defined by the provisions of rule 2 of the Rules as:

""... the Court of Appeal of the United Republic of Tanzania established by the Constitution, and includes any division of that Court and a single Judge exercising any power vested in him sitting alone;"

The foregoing definition, certainly, excludes the High Court. It is apparent therefore that an application for extension of time in the High Court cannot legally be preferred under rule 10 of the Rules, for, that provision is within the exclusive jurisdiction of this Court. On our part, we are certain that had the High Court paid commensurate attention to the provisions under which the application for extension of time to file an application for leave to appeal to this Court was made, it would not have proceeded to entertain and hear it. As rightly submitted by the respondent, the applicant ought to have taken his application under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002. Having made the application for

extension of time under the wrong provision of the law, the High Court (Land Division) ought to have struck out that application for being incompetent. It is trite law that wrong citation of the provisions under which an application is made makes that application incompetent and must be struck out. That this is the law, has been held in a number of decisions some of which have been cited by the respondent. In ***Chama cha Walimu Tanzania v. the Attorney General*** Civil Application No. 151 of 2008 (unreported), for instance, the Court held:

> *"... non-citation and/or wrong citation of an enabling provision renders the proceedings incompetent. Decisions by this court in which this principle of law has been enunciated are now legendary. Most of them are cited in the case of* ***Edward Bachwa & 3 Others v. the Attorney General & Another*** *[Civil Application No. 128 of 2006]. To that list may be added:*
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> i. ***Fabian Akoonay v. Mathias Dawite****, civil Application No. 11 of 2003 (unreported) and*

ii. ***Harish Jina By His Attorney Ajay Patel v. Abdulrazak Jussa Suleiman*** [ZNZ Civil Application No. 2 of 2003] "

The foregoing said, we find merit on the complaint by the respondent under this arm of the second point of the preliminary objection. This finding suffices to dispose of the matter. However, for completeness, we find it appropriate to determine on the third limb of complaint in the second point of the preliminary objection.

The respondent has complained on the jurat of the affidavit supporting the applicant's application as defective for lacking the date on which the oath was taken. He is, we think, again right. Oaths are sworn under the provisions of the Notaries Public and Commissioners for Oaths Act, Cap. 12 of the Revised Edition, 2002. Section 8 thereof provided [before the amendment vide the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 which added the words "insert his name" between the word "shall" and "state" in the section and to which that application was bound to comply] that the jurat must state when oath is taken. It read:

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what place and ***on what date the oath or affidavit is taken or made.****"*

[Emphasis ours].

The foregoing section, by the use of the word "shall", has been couched in mandatory terms. It is elementary that whenever the word "shall" is used in a provision, it means that the provision is imperative. This is by virtue of the provisions of section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002. It reads:

"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

In view of the above provisions, therefore, the applicant ought to have mandatorily indicated in the jurat of attestation the date on which the affidavit supporting the application for extension of time to file the

application for leave to file an appeal to this Court was taken. Failure to do that made the affidavit incurably defective and, for that reason, the application lacked the necessary support and therefore incompetent. The respondent's complaint on this point is therefore meritorious.

The foregoing said, the application for extension of time having been defective, the High Court (Land Division) had no jurisdiction to entertain and hear an incompetent application, the order extending time was illegal and all that followed thereafter was null and avoid as well. That is to say, the consequent order by the High Court granting leave on 26.03.2014 to appeal to this Court, having been founded on an illegal order for extension of time, was illegal as well. The respondent is therefore right to complain that the applicant did not obtain the requisite leave to appeal to this Court.

The foregoing stated and done, we sustain the second point of the preliminary objection to the extent shown above. Having so done, we do not find it necessary to determine on other points of the preliminary objection as the result will be but an academic exercise in which we do not find it necessary to indulge at the moment.

In the upshot, the appeal is struck out with costs for being incompetent.

Order accordingly.

DATED at **DAR ES SALAAM** this 21st day of July, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL