IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A, WAMBALI, J.A. And GALEBA, J.A.)

CIVIL APPLICATION NO. 55 OF 2020

YUSUF HAMISI MUSHI .....1ST APPLICANT
ZAMZAM YUSUF MUSHI .....2ND APPLICANT

VERSUS

ABUBAKARI KHALID HAJJ .....1ST RESPONDENT
GEMACO AUCTION MART
INTERNATIONAL LIMITED .....2ND RESPONDENT
FRANK LIONEL MARIALLE .....3RD RESPONDENT

(Application for striking out the notice of appeal from the Ruling and Drawn Order of the High Court of Tanzania, Land Division at Dar es Salaam)

(Maghimbi, J.)

Dated the 24th day of September, 2019

in

Miscellaneous Land Application No. 472 of 2019

RULING OF THE COURT

28th May & 15th October, 2021

WAMBALI, J.A.:

The applicants, Yusuf Hamis Mushi and Zamzam Yusuf Mushi instituted Land Case No. 142 of 2016 before the High Court of Tanzania, Land Division at Dar es Salaam against the respondents; Abubakar Khalid Hajj, GEMACO Auction Mart International Limited and Frank Lionel Marialle. In that suit, they prayed for nullification of the purported sale of their matrimonial house situated on Plot No. 139, Migombani Street in Dar es Salaam. It is noted from the record of the application that though the High

Court heard the evidence of the applicants until the closure of their case, the respondents could not enter their defence. As it were, the trial court's proceedings were stalled as the suit was confronted by a preliminary objection lodged by the respondents on the point of law concerning time limit. After hearing the parties on that point of law, the High Court (Kairo, J as she then was) sustained the preliminary objection and dismissed the suit with costs for being time barred.

Aggrieved, the applicants approached the High Court through Miscellaneous Land Application No. 472 of 2019 in which they sought review of the Ruling of Kairo, J in Land Case No. 142 of 2016. Having heard the parties for and against the grounds of review, the High Court (Maghimbi, J) granted the application resulting in setting aside the ruling that dismissed the suit for being time barred. Ultimately, it was ordered that Land Case No. 142 of 2016 should proceed for hearing on merits.

The decision of the High Court did not please the first and second respondents and thus on 10th October, 2019 they lodged a notice of appeal in this Court to challenge it. However, according to the record of the application and the submissions of the applicants at the hearing, to date no appeal has been instituted by the first and second respondents as required by law.

To this end, on 21st February, 2020, the applicants lodged a notice of motion supported by the affidavit of Mr. Salim Juma Mushi, learned advocate predicated under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) beseeching the Court to strike out the notice of appeal lodged by the first and second respondents for failure to take essential steps towards lodging the appeal.

We note that the thrust of the applicants' prayer for striking out the notice of appeal is premised on the argument that the first and second respondents have not taken essential steps because; firstly, no appeal lies to this Court as the notice of appeal has been preferred against an interlocutory decision of the High Court. Secondly, that no leave to appeal against that decision has been sought and obtained from the High Court or this Court. The application is resisted by the respondents who earlier on lodged their respective affidavits in reply.

At the hearing of the application, Mr. Salim Juma Mushi and Ms. Agnes Dominick, learned advocates appeared for the applicants. On the adversary side, Mr. Ditrick Mwesigwa, learned advocate appeared for the first and second respondents whereas Ms. Rita Odunga Chihoma, learned advocate appeared for the third respondent. Remarkably, in support of

their respective positions for and against the application, counsel for the parties adopted their respective affidavits and written submissions.

With regard to the first ground seeking the striking out of the notice of appeal, it was categorically contended for the applicants by Mr. Mushi that no appeal lies because the ruling of the High Court in Miscellaneous Land Application No. 472 of 2019 which restored Land Case No. 142 of 2016 for hearing on merit is not appealable as it is on interlocutory decision which is barred by the provisions of section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA). To support his contention, the learned counsel placed reliance on the decision of the Court in **Vodacom Tanzania Public Limited Company v. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (unreported). In this regard, he strongly contended that in the circumstances of the proceedings in the record of the application, the ruling of the High Court in respect of the application for review, the subject of the notice of appeal, did not finally determine Land Case No. 142 of 2016 as the same has been remitted before the same court for hearing.

Admittedly, though Mr. Mushi acknowledged that Order XLII rule 7 (1) (c) of the Civil Procedure Act, Cap. 33 R.E. 2019 (the CPC) provides for the right of appeal to an aggrieved party against the decision of the High

Court granting an application for review at once or after the final decree is passed, he firmly maintained that for that to prevail, the conditions provided under rule 7 (1) (a) and (b) must be met. In his submission, in the instant case, none of the conditions stipulated on those provisions have been met by the first and second respondents. In the event, the learned counsel urged us to strike out the notice of appeal based on this ground as no appeal lies to this Court.

In response, Mr. Mwesigwa argued that the intended appeal in the present matter is not barred by the provisions of section 5 (2) (d) of the AJA because the ruling of the High Court which is the subject of the notice of appeal, is not a preliminary or interlocutory decision or order as it was in respect of the application for review which was finally concluded. He emphasized that the said ruling finally determined the right of the parties as it was granted in favour of the applicants against the respondents. To support his contention, he submitted that in terms of Order XLII rule 7 (1) (c) of the CPC a decision or order, granting an application for review, as is the case in the present matter, may be objected by the aggrieved party through an appeal at once or in any appeal from the final decree or order passed or made in the final suit.

In this regard, Mr. Mwesigwa distinguished the decision of the Court in **Vodacom Tanzania Public Limited Company** (supra), arguing that unlike in the present matter in which the notice of appeal emanates from a ruling granting review, in the former case the decision was held to be interlocutory because it concerned the determination of the application for temporary injunction. In conclusion, the learned counsel urged us to reject the contention of the applicants to the effect that the ruling of the High Court, the subject of the notice of appeal, is interlocutory.

On her part, Ms. Chihoma supported the submission of Mr. Mwesigwa and emphasized that the ruling of the High Court which determined the review is appealable as it determined the rights of the parties. To bolster her stance on the test as to whether the decision is final or preliminary, she sought refuge in the decision of the Court in **Tanzania Motors Services Ltd and Another v. Nehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005 (unreported). In the premises, she pressed the Court to find that the submission of the counsel for the applicants is misconceived and reject it.

Having heard the contending submissions of the counsel for the parties on this ground for and against the prayer for striking out the appeal, the crucial issue for our determination is whether the ruling of the

High Court, the subject of the notice of appeal is preliminary or interlocutory.

There is no doubt that section 5 (2) (d) of the AJA bars an appeal or application for revision to be preferred by a party in respect of any preliminary or interlocutory decision or order of the High Court or subordinate court exercising extended jurisdiction. For clarity paragraph (d) of section 5 (2) of the AJA provides that: -

> *"No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit".*

It is clear from the reproduced provisions that an appeal or application for revision is barred against any preliminary or interlocutory decision or order of the High Court unless such decision or order has finally determined the suit.

Admittedly, the determination as to whether the decision or order is final, preliminary or interlocutory depends on the circumstances of each case. It is in this regard that in **Tanzania Motors Services Limited decision** (supra) the Court adopted the test propounded in **Bozson v.**

Artincham Urban District Council (1903) I KB 547 where Lord Alverston observed as follows: -

> *"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as final order; but if it does not it is then in my opinion, an interlocutory order".*

The above referred "nature of the order test" approach was also applied by the Court in **Murtaza Ally Mangungu v. The Returning Officer for Kilwa & 2 Others**, Civil Application No. 80 of 2016 and **Peter Noel Kingamkono v. Tropical Pesticides Research**, Civil Application No. 2 of 2009 (both unreported).

On our part, applying the said test to the instant matter, we are of the settled opinion that the ruling of the High Court, the subject of the notice of appeal, finally determined the rights of the parties as the application for review was granted against the respondents as prayed by the applicants.

We are however mindful of the submission of the learned counsel for the applicants that the ruling of the High Court to be contested in the intended appeal is preliminary because Land Case No. 142 of 2016 which

was the subject of Miscellaneous Land Application No. 472 of 2019 was restored to be heard afresh before the same court. Nonetheless, we have no hesitation to state that the said ruling in an application for review finally determined the rights of the parties in so far as they cannot go before the same court to object to that decision. Indeed, as stated by the Court in **Murtaza Ally Mangungu** (supra) the order or decision of the court which is taken to have finally determined the rights of the parties must be such that it could not bring back the matter to the same court on the same matter. Besides, in the circumstances of the matter at hand, it is no wonder that cognizant of the fact that the decision or order of the trial court on review is taken to be final, the relevant provisions of the CPC stipulate that the proper recourse to an aggrieved party wishing to contest the decision or order granting of the application for review made by the court, in case of the High Court, is to appeal to this Court either at once or later after the final decree is passed. To this end, Order XLII rule 7 (1) (c) of the CPC provides as follows: -

> "7(1) A*n order of the Court rejecting the application shall not be appealable; but order granting an application may be objected on the ground that the application was: -*
> *(a) N/A*

(b) N/A

(c) .....and such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the final suit".

Thus, from the reproduced provisions, it is plain that an aggrieved party or parties may either opt to appeal at once after the application for review is granted or later from the final decree or order passed in the suit. In the premises, in our considered opinion once the aggrieved party, like in the present matter, has opted to lodge a notice of appeal, the order restoring the suit to hearing cannot be implemented until the outcome of the intended appeal is made known to the parties. We do not, therefore, think that for the aggrieved party to appeal he must meet the conditions stipulated under paragraphs (a) and (b) of rule 7 (1) of the CPC as argued by the counsel for the applicants as they are not applicable in the circumstances of this matter. More so, looking at the manner the provision is couched does not suggest that all the conditions must be met.

In the circumstances, in view of our deliberation above on the position of the law with regard to the clear provisions of the CPC we have made reference to, we hold that the ruling of the High Court, the subject of

the notice of appeal being sought to be struck out, is not preliminary or interlocutory but final as it determined the rights of the parties. We therefore, hold that the first and second respondents rightly exercised their rights under the provisions of Order XLII rule 7 (1) (c) of the CPC to lodge the notice of appeal to this Court to challenge the High Court's finding in Miscellaneous Land Application No. 472 of 2019.

In the event, we respectfully disagree with the applicants' counsel contention that the intended appeal is barred by the provisions of section 5 (2) (d) of the AJA. In the result, we accordingly reject the first ground for seeking the striking out of the notice of appeal.

The next issue for our consideration is whether the respondents are bound to obtain leave of the High Court or this Court before lodging the intended appeal.

It was strongly submitted by the learned counsel for the applicants that the intended appeal is not covered by the provisions of section 5 (1) (a) and 5 (1) (b) (i-ix) of the AJA. On the contrary, Mr. Mushi submitted, it is covered by section 5 (1) (c) of the AJA in which the ruling the subject of the notice of appeal is categorized to be any other decision or order of the High Court requiring leave. To this end, he emphasized that for an appeal

to be properly before the Court, leave of the High Court or this Court is required as prescribed by section 5 (1) (c) of the AJA.

In the premises, Mr. Mushi implored us to find that as the respondents have not applied for leave to appeal from the High Court or this Court within fourteen days of the date of the ruling as prescribed under Rule 45 (a) and (b) of the Rules, they should be taken to have failed to take essential steps to lodge the intended appeal. Ultimately, placing strong reliance on the decision of the Court in **Enifa Kajumba v. Kilimanjaro Truck Company Limited,** Civil Application No. 47 of 2011 (unreported), the learned counsel pressed us to grant the application in terms of Rule 89 (2) of the Rules and thereby strike out the notice of appeal lodged by the first and second respondents with costs.

On the adversary side, in their written and oral submissions, both counsel for the first, second and third respondents respectively expressed concurrent views that as the proceedings emanated from the Land Division of the High Court exercising original jurisdiction, the respondents are entitled to appeal in terms of section 47 (1) of the Land Disputes Courts Act, [Cap. 216 R.E. 2019] (Cap 216). Moreover, they also concurrently contended that since the application for review was predicated under the provisions of section 78 (1) (a) (b) and Order XLII rule 1 (1) (a) (b) of the

CPC, the first and second respondents are entitled to appeal to this Court in terms of section 5 (1) (a) of the AJA and Order XLII rule 7 (1) (c) of the CPC. In the circumstances, they argued that no leave is required in terms of section 5 (1) (c) of the AJA as argued by Mr. Mushi as the right of appeal is provided under the provisions of Order XLII Rule 7 (1) (c) of the CPC.

Ultimately, the respondents' counsel implored upon the Court to reject the second ground in support of the application and, consequently, dismiss the application with costs for lacking merits.

In rejoinder, Mr. Mushi contended that section 47 (1) of Cap. 216 relied on by the respondents' counsel to justify the contention that the first and second respondents have an automatic right of appeal is not applicable as in that application the High Court was not exercising original jurisdiction. He thus reiterated his earlier prayer that the application be granted with costs.

Firstly, at this juncture we deem it pertinent to reproduce section 5 (1) (a) (b) and (c) of the AJA which states as follows: -

> *"5-(1) in civil proceedings, except where any other written law for the time being in force provides*

otherwise, an appeal shall lie to the Court of Appeal-

(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;

(b) against the following orders of the High Court made under its original jurisdiction, that is to say: -

(i) – (ix) .....N/A

(c) with leave of the High Court or of the Court of Appeal, against every decree, order judgment, decision or finding of the High Court."

Secondly, we wish to reaffirm the finding we made above in respect of the first ground that the ruling of the High Court in Miscellaneous Land Application No. 472 of 2019 is not an interlocutory or preliminary, but a final decision. Therefore, the provisions of Order XLII rule 7 (1) (c) of the CPC which provides the right of appeal to an aggrieved party after a review is granted to appeal to this Court either at once or after the final decree is passed or order is made by the trial court equally applies in the circumstances of this case.

We do not, thus, think that leave to appeal is required under section 5 (1) (c) of the AJA as contended by the applicants. We hold this view

because in view of the provisions of the CPC we have made reference to above, it cannot be doubted that even where the aggrieved party does not opt to appeal at once but opts to appeal against the final decree which may be varied or rectified after parties are heard afresh on the particular point, regardless of the decision granting review, that right will be exercised without a requirement of leave under section 5 (1) (c) of the AJA as the High Court will still be taken to have exercised original jurisdiction.

Besides, though in terms of Order XLII rule 7 (1) of the CPC no appeal is allowed where an application for review is rejected, yet the aggrieved party will have a right to apply for revision against the decision or order of the High Court to this Court. For this stance see the decision of the Court in **Hassan Kibasa v. Angelisia Chang'a,** Civil Application No. 405 of 2018 (unreported).

In the premises, we are of the considered opinion that in view of the plain meaning of the provisions of Order XLII rule 7 (1) (a) and (c) of the CPC on the right of appeal, it would be absurd to subject an aggrieved party against the granted application for review to obtain leave of either the High Court or this Court before lodging the intended appeal in terms of section 5 (1) (c) of the AJA. This will not be consistent with the overriding objective in the administration of justice which aim to facilitate the just,

expeditious, proportionate and affordable resolution of all matters before the Court governed by the AJA in terms of section 3A (1).

In the circumstances, since the ruling of the High Court, the subject of the notice of appeal, was predicated under provisions of the CPC as acknowledged above in which Order XLII rule 7 (1) (a) (c) provides for the right of appeal to a party aggrieved by the decision granting review, we are settled that section 5 (1) (a) of the AJA and section 47 (1) of Cap 216 cannot apply in the circumstances of the instant case. Similarly, as we have held earlier section 5 (1) (c) of the AJA cannot apply where there is also another law which provides for the right of appeal as alluded above.

We are supported in our view by the decision of the Court in **Tanzania Teachers Union v. The Chief Secretary and 3 Others,** Civil Appeal No. 96 of 2012 (unreported) in which it was stated that: -

> *"where there are provisions of written laws like the LIA which provide the right of appeal that is unfettered by the requirements of leave to appeal, the unfettered provisions should not be made subject of the requirement of leave under section 5 (1) (c) of the AJA."*

Notably, in that decision the Court considered conflicting decisions on the requirement of leave for appeals originating from the High Court

Labour Division exercising original jurisdiction and settled the position stated above. More importantly, the Court affirmed the decision in **Bulyanhulu Gold Mines (T) Ltd v. Nichodemus Kajungu and 1151 Others,** Civil Application No. 37 of 2013 (unreported) and quoted the following passage:-

> *"We are constrained to emphasize at this stage that a statute should not, in the absence of any express provision, be construed so that it deprives people of their accrued rights, and that in fact it is the duty of the court to give sensible meaning with a view of promoting the employment of such rights instead of narrowing them down. In other words, we are duty bound to interpret the law accommodatingly with a view of expanding its frontiers rather than narrowing frontiers, the purpose being to see to it that the procedure is reasonable, fair and just. That way, we think, we will have invested the provision with sound reasoning and content."*

Equally, in the instant case we hold that since rule 7 (1) (a) and (c) of Order XLII of the CPC provides for a right to an aggrieved party against the decision or order granting an application for review arising from the proceedings of the High Court, the provisions of section 5 (1) (c) of the AJA cannot apply.

In the premises, we reject the second ground of the application in support of the prayer for striking out the notice of appeal on the alleged failure of the respondents to obtain leave as an essential step to appeal. Consequently, we find that the applicants have not substantiated the merits of the application which we accordingly dismiss with costs.

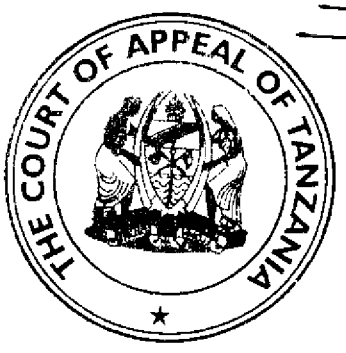
DATED at **DAR ES SALAAM** this 12th day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APEAL

This Ruling delivered on 18th day of October, 2021 in the presence of Mr. Salim Mushi, learned counsel for the applicants, and Mr. Shaaban Mwaita, learned counsel who hold brief for Mr. George Mushumba, for the 1st & 2nd respondents, also hold brief for Ms. Rita Chihoma, learned counsel for the 3rd respondent, is hereby certified as a true copy of original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL