

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And BWANA, J.A.)

CIVIL APPEAL NO. 48 OF 2011

FRANCESCO PAULO TORREGROSSA APPELLANT

VERSUS

NASSOR SULEIMAN ABDALLA 1ST RESPONDENT

SULEIMAN ABDALLA SALUM 2ND RESPONDENT

(Appeal from the decision and order of the High Court of Zanzibar at Vuga)

(Mshibe, J.)

dated the 28th day of May, 2010

in

Civil Case No. 48 of 2009

RULING OF THE COURT

12th & 15th December, 2012

RUTAKANGWA, J.A.:

The appellant was the defendant in Civil Case No. 48 of 2009 (the suit) of the High Court of Zanzibar, at Vuga. The suit was determined **ex parte** on account of the appellant's alleged failure to enter appearance on the date of hearing. At the end of the trial, the High Court entered judgment for the respondents/Plaintiffs.

The appellant became aware of the **ex parte** decree against him at the execution stage. He then applied under "section 129 and Order XI rule 4 of the Civil Procedure Rules Cap 8 of the Laws of Zanzibar," to have the **exparte** judgment and decree set aside. The trial High Court dismissed the application, hence this appeal.

Acting through Mr. Abdalla Juma Mohamed learned advocate, the appellant instituted this appeal by a memorandum of appeal containing four grounds of complaint. As soon as the appeal was scheduled for hearing, Mr. Salim Mnkonje, learned advocate for the respondents, lodged a notice of preliminary objection containing two points of law.

When the appeal came before us for hearing, Mr. Mnkonje abandoned one of the raised points of objection. The remaining point reads:-

"That the Appeal is incompetent for want of leave."

In support of this point of objection, Mr. Mnkonje cited the case of **The Chief Executive Secretary Wakf and Trust Commission Mambomsiige Zanzibar v. Saide Salum Ambar** [1991] T.L.R. 198.

Mr. Mnkonje, on the whole, won without a fight. This is because, Mr. Abdalla, readily conceded the point of objection. All the same, he had one strange prayer, tracing its roots in the Court's decision in **Tanganyika Cheap Store v N.I.C. (T) Ltd**, Civil Appeal No. 51 of 2005 (unreported).

In the **Tanganyika Cheap Store case** (supra), the Court, re-affirming the legal position it had earlier established in **Robert John Mugo v. Adam Mollel**, Civil Appeal No. 2 of 1990 (unreported) and **William Shija v. Fortunatus Masha** [1997] T.L.R. 213, held that when an incompetent appeal is struck out, a notice of appeal which had initiated it is struck out automatically. Mr. Abdalla was aware of this position. For

the sake of his personal convenience, we so believe, he urged us to strike out his incompetent appeal but at the same time proceed to grant him an extension of time to file a fresh notice of appeal. He also pressed that the appellant be not condemned to pay costs.

The two prayers were stiffly resisted by Mr. Mnkonje. It was Mr. Mnkonje's contention that the first prayer was legally untenable, as this Court in terms of section 11 of the Appellate Jurisdiction Act, Cap 141 (the Act) read together with Rule 47 of the Tanzania Court of Appeal Rules, 2009 (the Rules), has no jurisdiction to grant it before the appellant had first unsuccessfully sought the same in the High Court. On costs, he prayed to be granted the same as the same counsel for the appellant had flatly rejected his plea to him to concede the point of objection, last December, 2011 when the appeal was first called to hearing.

After considering the arguments of both counsel we are of the decided opinion that the issues raised by Mr. Abdalla need not detain us unnecessarily. In our determination of the same, we shall begin by holding

that indeed the impugned order is only appealable to this Court with leave as conceded by both sides. As the appellant never sought and obtained leave to appeal against the impugned order either from the High Court or from this Court, this purported appeal is incompetent. It is accordingly struck out. Inevitably, the notice of appeal lodged on 31st May, 2010 is also struck out. Having struck out the incompetent appeal there remains nothing before us to form a basis for the making of any incidental order in the abortive appeal. This, then, leads us to the appellant's first prayer.

We have found ourselves in full agreement with Mr. Mnkonje that this Court at this stage, lacks the jurisdiction to entertain and grant the prayer for extension of time to lodge a fresh notice of appeal out of time. It is true that ordinarily we have such a jurisdiction, but we share it concurrently with the High Court in terms of section 11(1) of the Act and Rule 10 of the Rules, as rightly posited by Mr. Mnkonje. Under rule 47 of the Rules, such application for extension of time has to be made first in the High Court. An applicant for such an order can only access this Court by way of a second bite under rule 10, if the High Court rejects the

application. It goes without saying, therefore, that Mr. Abdalla has no short-cut. He has to go back to the High Court to seek that relief. This has been settled law since our decision in **Robert John Mugo** (supra). There is no going back. At any rate, even if we had that power at this stage, there are no proceedings before us in which we could peg the order sought by Mr. Abdalla. We accordingly reject his first prayer.

The second prayer on costs, is equally untenable. It is true that the notice of preliminary objection was lodged on 5th December, 2011. When the incompetent appeal was called on for hearing on 6th December, 2011, Mr. Abdalla prayed for an adjournment because the notice was not served on him within the prescribed three days. Not only that; he is on record saying:-

"I still insist that the preliminary objection should be refused."

to look him rightly over the year to realize that the points of law raised have merits. He has himself to blame. We accordingly order that the respondents have their costs in this abortive appeal.

In fine, we strike out the incompetent appeal with costs to the respondents.

DATED at **ZANZIBAR** this 14th day of December, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

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

