IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL CASE APPEAL NO. 6/2016

(Arising from Civil Case No. 18/2011 at the Resident Magistrate's Court of Bukoba at Bukoba)

VICENT FRANCIS ---------- APPELLANT

VERSUS

RODRICK MAIMBALI ---------- RESPONDENT

RULING

14/5/2018 & 6/7/2018

Kairo, J.

When replying to the petition of appeal filed by the Appellant, the Respondent has raised four points of preliminary objections as follows:-

i. That the purported appeal is incurably defective for failure to file proper document for purpose of appeal.

ii. That the incurable appeal was filed in non existing court.

iii. That the purported appeal is incurably defective for failure to attach proper decree of which the appeal is arising from.

iv. That the purported appeal was drawn by incompetent person contrary to section 43 and 44 of the Advocates Act Cap 341 RE 2002.

He thus prayed this court to dismiss the appeal with cost.

The appellant is being represented by the Learned Advocate Bengesi while the Respondent is being represented by the Learned Advocate Zeddy Ally. When the matter was scheduled for hearing, Advocate Zeddy Ally informed the court that he will argue on the first three P.Os and abandon the last one. In his oral submission to amplify the P.Os raised stating with the first one, the Advocate for the Respondent argued that the purported appeal is incurably defective for failure by the Appellant to file the proper documents for the purpose of appeal. He went on that, the filed document is written as *"petition of appeal"* but order XXXIXR (1) of Cap 33 RE 2002 talk of memorandum of appeal and not petition. He thus prayed the court to struck it out as it is not in the form prescribed by the law.

In reply, Advocate Bengesi submitted that section 20 of the MCA talks on petition of appeal arguing that the Appellant was correct to use the word petition as well. He thus prayed the court to reject the raised P.O.

In his rejoinder, Advocate Zeddy Ally argued that according to section 20 (3) of the MCA, the use of the word *"petition of appeal"* provides for matters appealed to the District and RM's court from subordinate courts and not for

the matters coming to the High Court as this one. He added that in the latter instance, the law applicable is order XXXIX R 1 (I) of the CPC (supra) which requires a memorandum of appeal to be filed. He thus reiterated that the document brought wasn't proper.

Going through the document at issue, it is not in dispute that it is titled "*petition of appeal*". It is further not in dispute that an appeal to the High Court for the matters originating from the RM's court is governed by order XXXIX R 1 (I) which stipulates that the appeal shall be preferred in a form of a "*memorandum*".

The begging question to be addressed by the court is whether the use of the word "*petition*" instead of "*memorandum*" has prejudiced the rights of the parties. Order XXXIX R 1 (2) can give guidance to the said question and I wish to quote.

> "*The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative and such grounds shall be numbered consecutively*".

Looking at the document at issue, I am convinced that it abides to the above provision quoted, despite being titled "*petition*". In the circumstances therefore, it has not prejudiced the rights of the parties and the P.O is bound to fail.

I will start with addressing the 3rd P.O as per the order listed by the Respondent for the reason to be stated later.

Advocate Zeddy Ally has argued that, the purported appeal is incurably defective for failure to attach a proper decree of which the appeal is raised from. The gist of his argument is centered on the title of the decree attached, as he argued that it was titled "*Drawn decree*" and not "*a decree*" to which he argued to be a new creature and contrary to Order XXXIX R 1 (I) which termed it "*a decree*". Advocate Zeddy Ally went on that, the drawn decree has originated from Civil Case No. 18/2011. However the drawn decree has referred to one party as the petitioner which means what had been filed was a petition. He argued that the attached decree is not the one emanated from the RM's Case No. 18/2011 and the same is a new creature for being titled "*drawn decree*". He thus prayed the court to dismiss the appeal for want of attaching a proper decree. In replying to the said P.O, Advocate Bengesi argued that the word petitioner is sometimes used interchangeably with the word "*Plaintiff*" when making reference to the person who brought a complaint to the court. He further contended that Advocate Zeddy Ally has cited no law forbidding the use of the word at issue. He also added that the titles of the parties at the document at issue were "*Plaintiff and Defendant*" as such he pleaded with the court to reject the said P.O. for want of merit

According to court record, the document at issue was titled "*drawn decree*" which the Advocate for the Respondent argued to be not as per Order XXXIX

R 1 (I) which provides for the word *"a decree"*. However in my opinion, the word *drawn* doesn't change or alter the contents of the same, as such I found the argument to be redundant.

With regards to the use of the word *"petitioner"* in the attacked document; I observed that the citation or reference of parties to the disputes were *"Plaintiff and Defendant"*. The attacked word *"petition"* is in the body of the document and it referred to the *"Plaintiff"*. Though I don't subscribe to the argument that the words are used interchangeably as argued by Advocate Bengesi, nevertheless I consider the insertion of the same to be *"a slip of a pen"*. Besides its usage hasn't changed or altered the meaning of the document having in mind that both words are used when making reference to a party who brought a complaint to court, but the distinguishing or determinant factor is whether a complaint is a petition (petitioner) or a plaint (Plaintiff). Thus I don't consider the swapping of the two words to be legally fatal to render the appeal dismissed as prayed by the Advocate for the Respondent with due respect. Rather it is a *bonafide* mistake.

Reverting to the 2nd P.O, Advocate Zeddy Ally argued that the appeal is incurably defective for being filed in non existing court to wit *"In the High Court of Bukoba, at Bukoba"*. As earlier pointed out, I have decided to discuss this PO lastly as it has the effect of disposing off the matter if uphold.

Advocate Zeddy Ally contended that, there has never existed such a court in Tanzania, adding that the designated High Courts are established in Article

151 (1) of the constitution of the United Republic of Tanzania, Cap 1 RE 2002. He thus prayed the court to struck out the said appeal. In reply Advocate Bengesi conceded that the attacked heading/citation was incorrect, but argued that the one proposed ie. *"the High court of United Republic of Tanzania as per the rules"* is not correct as well as Zanzibar being a part of the United Republic of Tanzania has got its own High Court, adding that the courts have now and then observed that flaw. In rejoinder Advocate Zeddy Ally has noted with approval the conceding by Advocate Bengesi and went on that what he has cited was a constitution and not rules. He added that the rules are guidance and thus they can't be attacked to be incorrect in the absence of the correct one. He reiterated his prayer to the court to uphold the P.O.

Going through the record, it is true that the appeal shows to have been filed at the **High Court of Bukoba at Bukoba** as conceded by Advocate Bengesi for the Appellant. While it is true that there is a High Court at Bukoba but it is a District Registry of the High Court of Tanzania according to Article 151 (1) which provides

"The High Court" means the High court of the United Republic or the High Court of Zanzibar".

In my judicial understanding of the above cited Article; there is nothing called the High Court of Bukoba, for obvious reason – Bukoba is not synonymous to *"United Republic"*. Advocate Bengesi has argued that it is

neither correct to term it as the *"High court of the United Republic"* because Zanzibar has got its own High Court. But Article 151 (1) is clear that the High Court is either *"of the United Republic"* or of *"Zanzibar"* while the High Court into which he purported to file its appeal is neither of the two. Much as his argument sounds attractive, but two wrongs do not make a right, as such I concede to the argument by Advocate Zeddy Ally that the cited **High Court of Bukoba** is non existing. In the said circumstances, this appeal has been filed in a wrong registry and I am thus constrained to struck it out as I hereby do.

However the Appellant is at liberty to re-file the same subject to limitation. As a rule of thumb goes, cost to follow the event.

It is so ordered.

L.G. Kairo

Judge

At Bukoba

16/7/2018

Date: 06/07/2018

Coram: Hon. J.P. Rwehabula, Ag DR.

Appellant: Present

Respondent: Absent

B/C: R. Bamporiki

Court: Ruling delivered in chamber in the presence of Appellant.

J.P. Rwehabula

Ag DR

06/07/2018