IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CIVIL APPEAL NO. 42 OF 2020

(Originating from Simanjiro District Magistrate Court Civil Case No. 2 of 2017)

LAIBON @ ASKOFU.....APPELLANT

VERSUS

LEMOMO MOLLEL.....RESPONDENT

RULING

7/4/2022 & 12/4/2022

GWAE, J

This ruling emanates from a preliminary objection of a point law raised by the respondent's counsel one Lengai S. Loitha, the point of law reads and I quote;

> "That, grounds of Memorandum of Appeal are not set forth concisely and the same contravene Order 39 Rule (2) of the Civil Procedure"

The questioned grounds of the appellant's appeal contained in his Memorandum of Appeal are; **one,** that, the trial erred in law and fact to entertain the matter in which had no jurisdiction, **two**, that, the trial which wrongly or unprocedurally filled and **three,** that, the trial erred in law and

fact to grant an order to pay the damage of Tshs. 42,000,000/=which is excessive.

The hearing of the respondent's preliminary objection was scheduled by way of written submission after the parties' advocates namely; Mr. Samson Rumende and Lengai Loitha for the appellant and respondent respectively had sought and obtained the court's leave to argue the same in the style.

The learned counsel for the respondent seriously sought an order of the court dismissing the appellant's appeal on the ground that there is an omission to insert the word "court" immediately after the word "trial". According to him, the omission is not a curable defect as the omitted court is the root of each appellant's ground of appeal. Mr. Lengai further argued that the omission is fatal since the word court goes to the root of the appeal, thus making the appeal incurably defective.

In his opinion, the defect appearing the appellant's Memorandum of Appeal cannot be rescued by the overriding principle as the same principle does not require the court to disregard jurisdictional matter which goes to the root of the trial of the matter. He then urged this court to make a

reference to the decision of the Court of Appeal of Tanzania in the case of **Mariam Sambuko vs. Masoud Mohamed Joshi and two others**, Civil Appeal No. 109 of 2006 (unreported) delivered on the 11th September 2019.

The respondent's counsel went on arguing that there is sloppiness on the part of the appellant and his advocate due to reasons, that, he initially filed the appeal of this nature vide Civil Appeal No. 16 of 2018 but the same was struck out by the court (Mzuna, J) for joining a wrong party, Application No. 103 of 2019 for extension of time which was equally struck out by the Court (Masara, J) for not being accompanied by necessary documents and Misc. Civil Application No. 21 of 2020 for extension of time within which to appeal against the decision of the trial court, it was granted by the Court (Mzuna, J). Hence, this appeal which according to him (Lengai) is poorly and carelessly drawn. It is therefore the view of Mr. Lengai that litigation should come to an end. He cited the case of **Julius and 4 others v. Lengoya Sademaki** and **Loseiku Nambari @ Laibon Askofu vs. Lemomo Mollel,** Miscellaneous Criminal Application (unreported) (unreported-H.C) where repeated errors were to be inexcusable or condemned.

It was however the argument by the appellant's counsel that, the PO raised by the counsel for the respondent contravenes provisions of Order

XXXIX Rule 1 (2) of the Civil Procedure Code Cap 33 Revised Edition, 2019 (CPC) since he wrongly cited non-existent Order 39 Rule 1 (1) of the CPC and that the PO canvassed by the learned counsel for the respondent does not fall under ambit of the legal meaning of preliminary objection in **Raytheon Aircraft Credit Corporation and another vs. Air Al-Faraj Limited** (2005) 2 EA 259 it was stated;

> "A preliminary objection consists of a point law has been pleaded ow which arises by clear implication out of a pleading or an application before the court and which, if argued as a preliminary objection may dispose of the main"

After doing away with his PO over a PO, the learned advocate for the appellant admittedly argued that the omission to type the word "court" or "magistrate" is a mere slip of pen or secretarial problem which is curable under the principle of overriding objective recently introduced in our laws. He invited the court to make reference to the decisions of the courts in **Puma Tanzania Limited v. Ruby Roadway** (T) Limited, Civil Appeal No. 3 of 2018 (unreported-CAT), **Alliance One Tobacco and another vs. Mwajuma Hamis** (Administratix of estate of Philemon R. Kilenyi) **and another**, Misc. Civil Application No. 803 of 2018 (unreported-H.C) and

Erasto Mwambuse vs. Jubilee Insurance Co. Tanzania Ltd and another, Civil Appeal No. 13 of 2020 (unreported -H.C).

In determining the parties' P0s, I should herein under address myself into two issues to wit; whether the appellant's PO raised in the course of submission is attainable and whether the respondent's PO is sustainable or the alleged defect appearing in the appeal justifies this court not invoke the principle of overriding objective.

Regarding the **first issue herein**, it is evident from the records that, the appellant's counsel never raised any preliminary objection by filing a notice of preliminary objection to the court save to his written submission. Above all the counsel for the appellant has raised the PO over the P0 raised by the respondent's counsel. This kind of raising PO is legally prohibited. You cannot raise a P0 over PO in the course responding to the written submission in support of preliminary objection unless the same touches jurisdictional issue of the court or limitation of time for example a party's written submission is filed outside the court's schedule. It follows therefore, the PO canvassed by the counsel for the appellant in the course of his reply written submission to the respondent's written submission in support of the PO is misplaced.

In the **2nd issue**, as lucidly observed from the appellant's grounds of appeal and as rightly raised and admitted by the respondent's counsel, Mr. Rumende that, there is a clear omission of the word either "court or magistrate" in all three grounds of appeal advanced by the appellant. Issue that follows is whether the omission is curable by the principle of overriding objective.

I am not unsound of the principle of overriding objective enacted in the year 2018 by our Parliament by amending various pieces of legislation namely CPC and Appellate Jurisdiction Act, Cap 141 Revised Edition, 2002. Principally, it was aimed at calling upon our courts to dispense justice without being tied up by legal technicalities unless the impugned error goes to the root of the case. The omission of either writing the word court or magistrate, in my considered view, did not prejudice the respondent just like citing Order 39 of CPC instead of Order XXXIX of the said Code, the difference is the matter of use of Roman format or Numerical format. Despite the omission done in the grounds of appeal yet the respondent and or his counsel, in my firm view, cannot be confidently said to have failed to understand what was merely omitted or what was meant in the grounds of appeal.

Since the principle of overriding objective encourages our courts to refrain from technicalities for expeditious disposal and conclusive administration of justice I think, it is not only quiet unjust and unfair to strike out the appellant's appeal, leave alone the dismissal order of the same as wrongly prayed by the counsel for the respondent, but also it is boredom to have the same parties in very near future appearing for the same appeal. I would like to cement my holding by the decision of the Court of Appeal of Tanzania in the case of **Bernard Gindo & 27 others vs. TOL Gases Limited,** Civil Appeal No. 128 of 2016, (Unreported) where it was held;

> "..we hasten to add that the overall objective of the introduction of the oxygen principle in the Appellate Jurisdiction Act, Cap. 141 R.E 2002 (the Act) vide Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 (Act No. 8 of 2018) is to facilitate justice delivery and ensure that the ends of justice is met to both parties, expeditiously, proportionately and at affordable cost."

(See also a decision of the Court of Appeal in the case of **Ibrahim, CJ**) in **Yakobo Magoiga Gicherevs. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported-CAT) See section 3A of the CPC as amended by Act No. 3 of 2018).

In our instant appeal, I am of the concern that if the respondent's PO is sustained the intention of the Parliament will not be achieved if this kind of omission or minor defect is going to be entertained by the court and an order striking out the appeal be issued. Obviously, if granted as sought by the counsel for the respondent, the parties shall inevitably incur unnecessary expenses in terms of drafting another Memorandum of Appeal, paying court's fees for the same, re-summoning the respondent, parties' entering appearances in subsequent court's sessions and that they will further continue wasting their precious time which would perhaps have been used in engaging in other businesses.

Therefore, I am of the firm opinion that, the error appearing in the grounds of appeal may conveniently and fairly be cured by the court by inserting the word "court" omitted by the appellant so that the court may substantially dispense justice of the dispute between the parties. I am however aware of the decisions of the Court of Appeal like the one cited by the respondent's counsel in the case of **Mariam Sambuko vs. Masoud Mohamed Joshi and two others** (supra) which binds this court where there are errors which go to the root of the matter but the error in this appeal, in my firm understanding, does not go to the root of the case. The

error on the former case of **Mariam** was on a failure by the trial successor to give reason for the change of the trial magistrate which goes to the root of the case as was authoritatively held so as opposed to the present appeal where the error is a mere omission to insert the word "court".

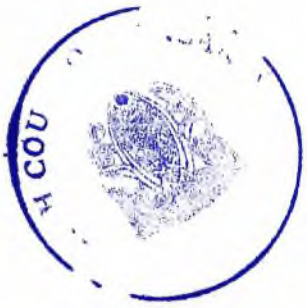
The questioned anomaly, in my decided opinion, does not violate the mandatory procedural law stipulated under Order XXXIX Rule 1 (1) of the CPC. More so, section 96 of the CPC authorizes correction of clerical errors and related errors. Justice in this particular appeal requires invocation of the principles of overriding objective.

On the issue of repeated errors, I am of the thinking that, I should not be curtailed by this issue despite the fact that the appellant or his advocate or both have proved to have not been diligent in properly moving the court yet it sounds to me that, it is more just and fair if this appeal is heard on merit than dismissing it on the ground that the appellant or his advocate has repeatedly failed to comply with procedural law so that substantive justice may be accomplished.

Basing on the reason given above, the respondent's PO is overruled, the defect appearing in the grounds of appeal is hereby rectified by making an order of inserting the world "**court**" between the word "**trial**" and

"erred" in each appellant's ground of appeal. As the PO was not raised without any shred of merit, each party shall bear his costs.

Order accordingly



M. R. GWAE
JUDGE
12/04/2022