

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., MNZAVAS, J.A., And MFALILA, J.A.)

CIVIL APPEAL NO. 22 OF 1994

BETWEEN

JOSE X. FERREIRA. APPELLANT

AND

MBARAKA SALUM RESPONDENT

(Appeal from the judgement and order of
the High Court of Tanzania at D'Salaam)

(Kyando, J.)

Dated the 25th day of June, 1993

in

Civil Case No. 66 of 1993

R U L I N G

KISANGA, J.A.:

At the hearing of this appeal Dr. Lamwai, learned Counsel for the applicant, raised a preliminary objection to the appeal, he having given due notice of that objection in terms of rule 100 of the Court of Appeal Rules. The objection is based on a number of grounds.

Firstly, the appeal is incompetent because no leave to appeal to this Court was granted or sought. Elaborating on that ground Dr. Lamwai submitted that the decision of the High Court being appealed against i.e. the Order dated 25.6.93 is not appealable as of right. That order is appealable only with leave in terms of section 5 (1) (c) of the Appellate Jurisdiction Act, but no such leave has been granted or sought.

In reply thereto Mr. Mbuya, learned Counsel for the respondent, contended that the said order fell within the ambit of section 5 (1) (b) (viii) of the Appellate Jurisdiction Act

and therefore it was appealable as of right. The relevant provisions of section 5 of the Appellate Jurisdiction Act say that:

"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 -

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

(viii) an order under any of the provisions of the Civil Procedure Code, 1966 imposing a fine or directing the arrest or detention, in the civil prison, of any person except where the arrest or detention is in execution of a decree;"

The record shows that on 23.6.93 Counsel for the applicant applied under Order XXXVI rules 1 (b) (3) (1) and 5 of the Civil Procedure Code for the following orders:-

"(1) That the respondent should show cause why he should not furnish security in the sum of Shs. 10m/= for the due performance of the decree that may be passed against him.

(2) If he fails to show cause he should be required to deposit Shs. 10m/= into court.

(3) Upon his failure to deposit, he be committed to civil prison."

After hearing arguments for both sides the learned judge on 25.6.93 made the following order:

"ORDER

After examining the papers in relation to this case, especially the affidavits in the application, and after hearing counsel for both sides, I am satisfied that this is a fit case for ordering security for appearance Under O. XXXVI r. 1 (b) & s. 5 of the Civil Procedure Code. This is the case especially because the respondent/2nd defendant was in the process, when he was arrested under a warrant of arrest issued by this court, of leaving the country for India. Also, he (the respondent) is a non-citizen. It cannot be said at all under those circumstances, that the applicant's apprehensions that he (respondent) may be leaving permanently are altogether unfounded. Accordingly, I grant the application and make the following orders:-

- I The respondent is to furnish security for his appearance by executing a bond of Shs. 5,000,000/= with two sureties with each in the likesome. The sureties should be holders of Tanzanian passports and should be having immovable property in this country and they are to deposit the title deeds of properties in court.
- II If he fails to execute the bond he should deposit Shs. 7,000,000/= in court as a security.
- III Failing the above i.e. (I) & (II), he is not to leave the jurisdiction of this court and for this purpose the passport which the Registrar ordered to be surrendered to the Police is to remain in Police hands.
- IV Applicant awarded the costs of this application."

We can find nothing either in the application dated 23.6.93 or in the corresponding order of 25.6.93 to show or suggest that the Court imposed a fine on or directed the arrest or detention, in the civil prison, of the respondent. The case, therefore did not come within the ambit of section 5 (1) (b) (viii) as asserted

by Mr. Mbuya. As Dr. Lamwai rightly submitted this was a matter which fell under section 5 (1) (c) of that Act in which leave to appeal was required. As no leave has been obtained or sought the appeal is clearly incompetent and must be struck out.

That then was sufficient to dispose of this matter, but Dr. Lamwai further charged that the appeal was incompetent for lack of the extracted order in appeal and that it was also time barred. Upon our examination of the record, and having heard Counsel arguments for both sides, we are satisfied that objection on those grounds was also well taken.

In the event, Dr. Lamwai's preliminary objection succeeds, and accordingly the appeal is struck out with costs.

DATED at DAR ES SALAAM this 10th day of November, 1994.

R.H. KISANGA
JUSTICE OF APPEAL

N.S. MNZAVAS
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

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


(M.S. SHANGALI)
DEPUTY REGISTRAR