IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MFALILA, J.A., LUBUVA, J.A., And SAMATTA, J.A.)

CIVIL APPEAL NO. 31 OF 1997

BETWEEN

SAID SALIM BAKHRESSA ..... APPELLANT

AND

ALLY A. NGUME ..... RESPONDENT

(Appeal from the Ruling and Order of the
High Court of Tanzania at Dar es Salaam)

(Maina, J)

dated 7th November, 1995

in

Civil Revision No. 28 of 1995

JUDGMENT OF THE COURT

LUBUVA, J.A.:

This is an appeal against the decision of the High Court (Maina J.) in High Court Civil Revision No. 28 of 1995 dismissing an application for revising Morogoro District Court Civil Case No. 16 of 1993. The facts as found at the trial are brief and may be stated as follows: In Civil Case No. 16 of 1993 at Morogoro Resident Magistrate Court, the respondent had sued Ally Abdallah Kigozi, Jamal Suleiman and Said Salim Bakhressa, the appellant who, at the trial were respectively referred to as the 1st, 2nd and 3rd defendants. The respondent claimed a total of shillings 9,930,910/= as damages suffered following an accident which involved the respondent's lorry Mercedez

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Benz in make, Registration No. MG.4709. The other motor vehicle Registration No. TZC.7632 which collided with the respondent's lorry belonged to the second defendant and its driver was the first defendant. It pulled a trailer, Registration No. TZC.91574 belonging to the third defendant as the registered owner. At the end of the trial, the respondent obtained judgment against the defendants who were severally held liable to pay him a total sum of shillings 7,948,457/= including costs and interests. From that decision the 3rd defendant at the trial, Said Salum Bakhressa, the appellant applied for revision in the High Court. The application for revision was dismissed. The appellant is appealing to this Court.

Mr. Kisusi, learned counsel who represented the appellant in the High Court, is also appearing in this appeal. He has filed an eight-point memorandum of appeal. From these grounds, it is our view that the following are the issues of substance upon which the determination of the appeal turns around. These are as follows:

1. Whether Mr. Mbezi had been instructed to represent the appellant;

2. Whether the service of summons was effected on the appellant and

3. The jurisdiction of the Resident Magistrate Court Morogoro to entertain the appellant's application for extension of time.

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We will first deal with the question of jurisdiction. This is raised in grounds two and seven of the memorandum of appeal. As indicated, following the decision in Morogoro Civil Case No. 16 of 1993, the matter was taken on appeal as High Court Civil Appeal No. 32 of 1994. On 3.8.1994, the appeal was dismissed by the High Court on account of the fact that it was defective. As a result the appellant took the matter back to the Resident Magistrate's Court Morogoro applying for extension of time in which to apply for extension of time in which to apply for setting aside the decision of 25.4.1994 in Morogoro RM Civil Case No. 16 of 1993, the subject matter of the dismissal by the High Court on 3.8.1994. The learned Senior Resident Magistrate held inter alia that the court had no jurisdiction to deal with the matter which had been dealt with by the High Court (Mackanja J). As already observed, in Civil Revision No. 28 of 1995 the High Court (Maina J.) upheld the decision of the Resident Magistrate on the point of jurisdiction.

Mr. Kisusi, learned counsel forcefully criticised the learned judge for upholding the trial magistrate on the question of jurisdiction. In support of this submission, he advanced two reasons. Firstly, that the appellant Said Salim Bakhressa, had not appealed to the High Court. It was the first defendant in Morogoro RM Civil Case No. 16 of 1993 who, through the services of Mr. Mbezi, learned advocate preferred Civil Appeal No. 32 of 1994 Mr. Kisusi

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urged. That is, Mr. Mbezi was not instructed to prefer the appeal on behalf of the appellant. Secondly Mr. Kisusi stated, the appeal was dismissed by the High Court on a mere technicality in which case the applicant was not barred from filing such an application before the Court of the Resident Magistrate at Morogoro.

The respondent who appeared in person at the hearing of the appeal did not have much in response to this submission. Naturally, being a lay person, he left the matter to the court to decide.

As the complaint on jurisdiction is based on the High Court Civil Appeal No. 32 of 1994, we think it is desirable to examine briefly the manner in which the appeal was dealt with by the High Court on 3.8.1994 (Mackanja J.). From the record it is apparent that the learned judge dismissed the appeal because of what he described as incurable defect in that the memorandum of appeal was not accompanied by a copy of the extract of the decree. This is provided for under Order XXXIX, Rule 1(1) of the Civil Procedure Code, 1966. However, with respect we think the learned judge invoked a course of action which is not provided in the Civil Procedure by dismissing the appeal when he found the memorandum of appeal did not conform with the requirement of Order XXXIX Rule 2. Instead of dismissing the appeal the proper course is to reject or strike out the appeal or return it to the appellant for amendment. Rule 3(1) of Order XXXIX of the Civil Procedure Code provides to this effect.

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With regard to Mr. Kisusi's complaint that the learned judge erred in upholding the decision of the trial magistrate that the magistrate's court at Morogoro had no jurisdiction to entertain the application, we have no hesitation in stating at once that there is no merit in it. As observed, following the decision in Morogoro RM Civil Case No. 16 of 1993, the matter was taken on appeal on behalf of the appellant and his other two co-defendants. That was Appeal No. 32 of 1994 in the High Court at Dar es Salaam which was dismissed on 3.8.1994. Notwithstanding the impropriety of the order of dismissing the appeal in terms of the provisions of the Civil Procedure Code, we are of the view that so long as the order still remained unvacated, the remedy open to the appellant was either to appeal to this Court or to seek review of the matter by the High Court. To take the matter back to the Court of the Resident Magistrate at Morogoro, was, with respect, highly misconceived. The claim by Mr. Kisusi that the Appeal No. 32 of 1994 was dismissed on technicalities as a justification for that course of action is to say the least, a lame excuse which cannot invest the Court of the Resident Magistrate at Morogoro with jurisdiction to deal with a case that had already been dealt with by the High Court. We are therefore satisfied that the learned judge correctly upheld the trial magistrate in the decision that the trial magistrate's court had no jurisdiction to entertain the application. This ground thus fails.

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The next important issue concerns the instructions to the advocate. That is, whether in the circumstances of the case, Mr. Mbezi, learned counsel was infact instructed to represent the appellant. This falls within ground three of the memorandum of appeal. Mr. Kisusi vehemently maintained that Mr. Mbezi was not instructed by the appellant to represent him (Appellant) at the trial. That it was one Islam Ally Salehe who had instructed Mr. Mbezi to represent all the three defendants including the appellant. In that case, Mr. Kisusi insisted, as the advocate appeared in court on behalf of the appellant without the instructions of the appellant, the effect of it was that the appellant was not represented at all at the hearing of the case. The learned judge like the trial Senior Resident Magistrate believed that Mr. Mbezi, learned advocate had been duly instructed to represent the appellant at the trial. Mr. Kisusi strongly seeks to fault the judge on that. In considering this matter the following factors are, to our minds, relevant. First, from the initial stages of the case, it is common ground that Mr. Mbezi, learned advocate was instructed by Islam Ally Salehe (DW2) a nephew of the appellant to defend the three defendants at the trial including the appellant. Generally, there is no formal procedure laid down for instructing an advocate to defend a client in a trial. The instructions may be given by the client himself or any other person in that behalf. Here, the instructions were given by Islam Ally Salehe (DW2) based in Morogoro and who describes the appellant as his uncle.

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Secondly, Mr. Mbezi filed the written statement of defence in the case for the three defendants including the appellant. Thirdly, from the record, it is clear that Mr. Mbezi makes it clear in his letter of 29.9.1993 addressed to Mr. Massati, learned advocate for the respondent, (the original plaintiff) that he was instructed by Jamal Suleiman personally and on behalf of Said Suleiman Bakhressa, the appellant. He denied liability on the part of the appellant. Fourthly, on the dates set for the hearing of the case, Mr. Mbezi appeared in court in defence of the defendants including the appellant. Fifthly, it is most unusual and indeed improbable that an advocate would go the whole length in preparing a case as well as conducting its defence in court if he is not assured of the instructions and the attendant fees. With respect, we do not think that Mr. Mbezi, a lawyer of long standing, is an exception to this practical principle in the legal practice. From these circumstances, on a balance of probabilities, we agree with the learned judge that Mr. Mbezi, learned counsel was duly instructed to represent the appellant at the trial. We can find no reason to differ with the learned judge in his finding of fact on this issue. The complaint on this ground is unfounded.

Then there is the question of the service of the summons which was raised in ground three of the memorandum of appeal. The learned judge was satisfied that the appellant was served. Mr. Kisusi, learned counsel has

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strongly contended that the appellant was not served. He advanced two reasons. One, that the summons was served on an employee of a limited liability company which is a separate legal personality. Second, that as the appellant was at the time outside the country, he was not aware of the case. Having taken the view that Mr. Mbezi, learned counsel had been instructed to represent the appellant, we proceed to examine the issue of the service of summons against that background. We are respectfully in agreement with Mr. Kisusi, learned counsel that there was no personal service on the appellant. This is so because the notice of hearing which was addressed to the appellant was not served on him. According to the process server, it was served on one Holla Salum Hafidh, an employee of Said Salim Bakhressa and Company, a limited liability company. As seen from Annexure "SSB4" the process server had endorsed the summons in Kiswahili "Bakhressa nimeambiwa yuko nje ya nchi, amesafiri." This translates to the effect that Bakhressa is away on safari out of the country. It was however the same address i.e. Pa[illegible] Street Kariakoo which was indicated in respect of Said Salim Bakhressa as an individual and Said Salum Bakhressa and Company Limited. With that address used in effecting the service of summons the question is whether the appellant was made aware of the case and the date set for trial. In their affidavits, the appellant and Islam Ally Salehe deny that Holla Salum Hafidh passed on the summons or message to the appellant. The learned judge did not believe them on this. It being a matter of credibility on the part

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of the appellant, it is incomprehensible that no affidavit sworn by Holla Salum Hafidh was filed. That would have supported the appellant's claim that the employee Holla Salum Hafidh did not pass on the summons or information regarding the case to the appellant. Nor is there any explanation by Mr. Kisusi, learned counsel as to why the affidavit of Holla was not filed. In somewhat similar situation, in the case of Kighoma Alli Malima v Abas Yusuf Mwingamno, Civil Application No. 5 of 1987 (unreported), counsel for the applicant had failed to file an affidavit of the messenger who was instructed to serve the respondent's counsel to show the reason for failing to effect the service as instructed. There, this Court held, among others that counsel's mistake in not filing the affidavit of the messenger was not sufficient reason for extension of time, it was fatal. In the instant case, the unexplained omission to file the affidavit of Holla was further testimony raising doubts that the appellant was not truthful. Accordingly, applying the principle from the Kighoma Alli Malima's case (supra) to this case, we are in agreement with the learned judge that the appellant was served. Furthermore, as Mr. Mbezi, learned counsel had appeared and defended the appellant throughout the trial, it goes without saying that the question of the case being heard ex-parte does not arise. For these reasons we dismiss the appellant's complaint on service of summons.

Before concluding this matter, we would like to comment briefly on the following issue. That concerns an advocate's denial to have instructions to represent a party at the trial

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and to raise that as a ground of appeal. At the hearing of this appeal, Mr. Kisusi had repeatedly made the point that though Mr. Mbezi defended the appellant at the trial, he had not been instructed by the appellant. This is also apparent from the affidavits of Mr. Mbezi and Mr. Kisusi on this point. As observed by Kaji J. when granting leave to appeal, this is a very perculiar and novel aspect pertaining to counsel's instructions to defend. It is common knowledge and elementary that there is no rigid or formal manner in which counsel receive instructions from clients to enter appearance in court. That is a matter for agreement between counsel and clients. Under Order 3 Rule 4 of the Civil Procedure Code, Mr. Kisusi urges that the courts below should have pressed for Mr. Mbezi to identify which client among the defendants he was representing. With respect, we do not agree. On record Mr. Mbezi quite clearly stated that he was appearing for all the three defendants including the appellant. The power under Order 3 Rule 4 of the Civil Procedure Code, is discretionary and it is invoked where the court has reason to require an advocate to produce written authority by the party to act on behalf of such a party. Otherwise, it is normal practice to take on the word of counsel appearing in court as officers of the court to be authentic. As a matter of fact, at the hearing of the appeal when the Court asked for a written authority from Mr. Kisusi to act for the appellant, he had none! In that situation it is, to say the least, absurd for authority from Mr. Mbezi in proof that Mr. Mbezi was appearing on behalf of the appellant.

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In our considered view what is important from the court's point of view is the ascertainment that the party is represented by counsel or not. In the event that the party is represented by counsel, the court is not bound to go further behind inquiring whether infact counsel was instructed. As a matter of ethics, counsel as officers of the court are taken seriously and solemnly on what they say in court. It is therefore highly improper in our view for counsel who has represented a party throughout the trial to swear an affidavit later on appeal complaining of lack of proper instruction to appear on behalf of the party. We think that this kind of behaviour not only borders on unprofessional misconduct but also gives an opportunity to dishonest loosing parties to start cases afresh or institute appeals on grounds that they were represented at the trial without their instruction. This, if left unchecked, would lead to the perpetration, of injustice and indefinite litigation in court. It is hoped that the relevant authorities in the judiciary and the bar would be vigilant against a recurrence of such conduct.

In the event, for the foregoing reasons, we are satisfied that this appeal is devoid of any merit. It is dismissed with costs.

DATED at DAR ES SALAAM this 12th day of December, 1997.

L. M. MFALILA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR