IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 67 OF 1997
In the Matter of an Intended Appeal

BETWEEN

1. BENEDICTA RUGEMALIRA
2. JAMES RUGEMALIRA
3. JEROME RUGEMALIRA

. . . . . APPLICANTS

AND

1. MOHAMED VERSI
2. FARIDA VERSI
3. SHABANI KIBOGOTI

. . . . . RESPONDENTS

(Application for striking out the Notice of Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kaji, J.)

dated the 19th day of July, 1996

in

(PC) Civil Appeal No.66 of 1995

R U L I N G

LUBUVA, J.A.:

This is an application to strike out notice of appeal for failure to take an essential step in instituting the intended appeal. The matter arises from the decision of the High Court (Kaji, J.) in (PC) Civil Appeal No. 66 of 1995 of 19th July, 1996 dismissing the appeal against the respondents in this application who were the appellants. The respondents were dissatisfied, they gave notice of intention of appeal to this Court. The notice was lodged on 1.8.1996. As the matter originated from the Primary Court, leave to appeal had to be obtained. On 18.1.1997, leave to appeal was granted by the High Court. On 3.3.1997, the respondents wrote a letter to the Registrar, High Court applying for a copy of the proceedings and ruling in the High Court. It is also not in

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dispute that a copy of the letter to the Registrar was served upon the respondents, the applicants in this matter.

As indicated, by way of notice, the applicants have filed an application seeking to have the notice of appeal filed on 1.8.1997 struck out. The reason advanced for the application is that the essential step in instituting the appeal by lodging in the registry a memorandum and record of appeal was not taken within 60 days of the date when the notice of appeal was lodged i.e. 1.8.1996. That is, the institution of the intended appeal should have been effected by 20.9.1996.

As an essential step was not taken within the prescribed time, this application has therefore been filed under rule 82 of the Court's Rules, 1979. It is supported by an affidavit sworn by James Rugemalira, the second applicant. In this application the applicants were represented by Miss Bayona, learned Counsel while Dr. Sengondo Mvungi, learned Counsel appeared for the respondents. Dr. Mvungi had filed a counter affidavit in which he has raised a preliminary objection against the affidavit of James Rugemalira. In response to the counter affidavit by Dr. Mvungi, Miss Bayona, learned Counsel for the applicants also filed a notice of preliminary objection against Dr. Mvungi's counter affidavit. That it was defective and incapable of being acted upon.

When the application was called on for hearing, Dr. Mvungi raised the preliminary objection. He strongly contended that the affidavit of James Buchard Rugemalira, the second applicant, was fatally defective in law. He urged that it should not be acted upon. It was Dr. Mvungi's strong contention that in

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paragraph 2 of Rugemalira's affidavit, it is stated that he, Rugemalira is authorised by the first and third respondents to swear the affidavit on their (1st and 3rd respondents) bahalf. This, he stated, was improper in law because, a deponent cannot swear an affidavit on behalf of another person. A deponent, he stressed, deposes on matters of his own knowledge or on information the sources of which are disclosed. In this case, Dr. Mvungi insisted, the affidavit having been made on behalf of the other applicants, it was fatally defective, it offends Order 19 rules 1 and 3 (1) of the Civil Procedure Code, it should not be acted upon.

Responding to this submission on the preliminary objection, Miss Bayona, learned Counsel for the applicants, submitted that the preliminary objection raised by Dr. Mvungi has no merit, it should be dismissed. She advanced the following reasons: First, that the affidavit sworn by Dr. Mvungi is fatally defective. Second, that in paragraph 3 of Dr. Mvungi's affidavit as well as in the verification clause, it is clearly stated that he had no objection to what was stated in the affidavit of James Rugemalira. Thirdly, that Rugemalira deposed in the affidavit facts which are within his knowledge. Fourthly, that the Civil Procedure Code, does not apply in the Court of Appeal. For these reasons, Miss Bayona urged the Court to overrule the preliminary objection.

At the conclusion of the submissions on the preliminary objection, I reserved the ruling on it to be given in the body of the ruling on the main application. The hearing of the main application was thus proceeded. Now I intend to deal first with these submissions on the preliminary objection.

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While I am respectfully in agreement with Miss Bayona, learned Counsel that the Civil Procedure does not apply in this Court, it must be pointed out at once that when the legality of admitting facts or documents in the Court below under the Civil Procedure Code is in issue, the Court is entitled to address on the particular aspect raised in order to ensure that the law was complied with. In that case, the Court would examine the provisions of the Civil Procedure Code in relation to the facts or documents in question. Having stated that, I will next address on the specific complaint by Dr. Mvungi, namely, that the affidavit of James Rugemalira was defective. As already indicated, the reason advanced by Dr. Mvungi was that in paragraph 2 of the affidavit, Rugemalira states that he was authorised by the first and third applicants to swear the affidavits on their behalf. For my part, the central issue is whether the deponent (Rugemalira) was deposing in the affidavit on information or matters which are within his personal knowledge. While, I am in agreement with Dr. Mvungi that in paragraph 2 of the affidavit of James Rugemalira it is stated that he was instructed to swear on behalf of the others, it appears to me plain that what is deposed in his affidavit are, as rightly submitted by Miss Bayona, matters which are within his own personal knowledge. On the other hand, even if it is granted that the affidavit was made on information, the source of which was disclosed, still I venture to think that the affidavit would be valid. For it is trite that where an affidavit is made on information, it should not be acted upon unless the source of the information is disclosed. Decided cases on this are numerous - see for instance, Standard Goods incorporation Ltd. V Horakhand Nathu & Co. (1950) 17 EACA 99; Bombay Flour Mill V Hunibhai M. Patel

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(1962) E.A. 803 and a decision of this Court in Silima Vuai Foum V Registrar of Cooperative Societies and Three Others. Civil Appeal No. 36 of 1994 (unreported). In the instant case the situation is different. For, I am satisfied that apart from the mere assertion in the affidavit that the deponent was swearing on behalf of the others, in substance, the affidavit was made by the deponent, James Rugemalira on matters which were within his personal knowledge. For these reasons, I hold that the affidavit was valid. Consequently, the preliminary objection raised by Dr. Mvungi is overruled. Likewise, I overrule Miss Bayona's objection to Dr. Mvungi's counter affidavit for, there is hardly any reason of substance to invalidate the affidavit as claimed.

I will next proceed to deal with the main application. Miss Bayona vehemently pressed for the striking out of the notice of appeal. In further elaboration of the affidavit of James Rugemalira, she maintained that the respondents are not serious in pursuing the intended appeal for if they were, she said, they would have pursued the matter by instituting the appeal within the time laid down under the rules. Furthermore, Miss Bayona stated, no cogent reason has been advanced by the respondent to justify the failure to take essential steps in instituting the intended appeal.

From the very attractive and forceful submissions before me by Dr. Mvungi I could glean the following reasons for the failure to take the essential step, namely, lodging the memorandum and record of appeal within 60 days of the date the notice of appeal was filed (1.8.1996): Firstly, that Dr. Mapunda, the learned counsel who was conducting the case on behalf of the respondents in the High Court genuinely believed that he had first to obtain

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leave to appeal before writing a letter to the Registrar requesting for a copy of proceedings and ruling. As a result, while awaiting the granting of leave which was obtained on 18.2.1997, time was lost. Secondly, that as the matter involves a constitutional right to be heard, under Section 13 (6) (a) of the Constitution the Court should interpret the rules liberally as the applicants are not prejudiced, they were served with the copy of the letter to the Registrar though lately. Thirdly, that the Court should invoke rule 8 to grant an extension of time in order to enable the respondents an opportunity to remedy the situation.

I appreciate Dr. Mvungi's predicament in this matter. He did not handle the case before the trial High Court. Dr. Mapunda had the conduct of the case on behalf of the respondents. In that case, Dr. Mvungi is understandably handicapped in so far as certain aspects of the case were concerned at that stage. Even then, this state of affairs can hardly change the stringent requirement of 83 of the Court's rules. It lays down the time schedule within which the requisite steps have to be taken towards the institution of appeals. It is a mandatory requirement that within 60 days of the date when the notice of appeal was lodged, a memorandum and record of appeal are to be lodged. This was not done in this case and the respondent cannot take the advantage of the exception under rule 83 (1) in computing the time within which to institute the appeal. This is because the letter to the Registrar, High Court was not written within 30 days of the date of the High Court decision i.e. 13.7.96. It was written and copied to the applicants on 3.3.1997 when already time had expired.

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The fact that Dr. Mapunda was labouring under an honest but mistaken belief that he had first to obtain leave to appeal is not provided in the rules. In the case of Harnam Singh Bhogal, t/a Harnam Singh & Co. V Jadva Karsan (1953) Vol. 20 E.A.C.A 17 the Court of Appeal for Eastern Africa held that the mistaken opinion of an advocate could not validate an application in terms of the applicable rules. And so, I cannot accept Dr. Mapunda's honest but mistaken belief as sufficient ground to justify the non-compliance with the Court's rules.

Then there is the other equally interesting and persuasive argument by Dr. Mvungi that the matter involves a constitutional right. He took the view that under Section 13 (6) (a) of the Constitution the respondents had a right to be heard, and so, he urged the Court to interpret the rules liberally so as to afford the respondents the chance of being heard. On this, I fully associate myself with the sentiments of the Court of Appeal for Eastern Africa in the case of Harnam Singh Bhogal t/a Harnam Sing & Co. (Supra) where, inter alia, it was stated:

> "A right to appeal can only be founded on a statute and an appellant must strictly comply with the conditions prescribed by the statute."

From this, my understanding is that a right of appeal can only be realised by instituting appeals in terms of the procedure laid down by the relevant legislation. In this case, the procedure and time frame is laid down under rule 83 of the Court's rules, 1979. In instituting appeals to this Court, the requirements of this rule are to be complied with in each and every appeal. As no exception is made of appeals involving a constitutional right,

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Dr. Mvungi's plea that the application for striking out notice should not be sustained on grounds that a constitutional right is involved is, with respect, untenable. I have no doubts whatsoever in my mind that no exception of this kind is made under the rules however liberally they may be interpreted. In the case of Leonsi Silayo Ngalai V Hon Justine Alfred Salakana and Attorney General, Civil Appeal No. 38 of 1996, (not yet reported) this Court had occasion to point out the need for a party who, under the constitution has a right of appeal, to adhere to the rules. There, the Court among others, emphasized:

> "For the avoidance of doubts, we must emphasize that this right of appeal, like all other rights of appeal to this Court, has to be exercised in accordance with the procedural rules regulating appeals to this Court."

In the event, it seems to me that any liberal interpretation of the rules as urged by Dr. Mvungi, would not help in circumventing the requirement of the rules. Consequently, I am satisfied that in this case, an essential step was not taken in instituting the intended appeal were not taken within the time prescribed under rule 83. That is, the appeal was not instituted within 60 days from 1.8.1996 when the notice of appeal was lodged. Such failure, with great respect to Dr. Mvungi, cannot be justified in any way for flouting of the mandatory requirement of the rule. And worse still, no effort seems to have been made to seek an extension of time in which to remed the situation by filing the appeal out of time. The consequences were thus fatal.

In the event, the notice of appeal is accordingly struck out with costs.

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

D.Z. LUBUVA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR