IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., KISANGA, J.A., And SAMATTA, J.A.)

CIVIL REFERENCE NO. 29 OF 1997
In the Matter of an Intended Appeal

BETWEEN

SADIK ABDALLAH ALAWI. . . . . APPLICANT

AND

1. ZULEKHA SULEMAN ALAWI
2. NATIONAL BANK OF COMMERCE } . . . . . RESPONDENTS

(Reference from the Ruling of a single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

(Ramadhani, J.A.)

dated the 18th day of December, 1997

in

Civil Application No. 56 of 1997

RULING OF THE COURT

KISANGA, J.A.:

This reference arises from the decision of a single Judge of this Court dismissing an application for a stay of execution pending appeal to this Court. Mr. Magafu, learned advocate, had filed a preliminary objection to the reference, and after hearing him for the respondent and Mr. Mwengela, learned counsel for the applicant, we overruled the objection and reserved our reasons therefor to be given in the final ruling. We now give our reasons.

Mr. Magafu alleged that the application is incompetent because it is supported by a defective affidavit. The application for reference although citing rule 57 (1) of the Court of Appeal Rules, was in fact brought by way of a Notice of Motion, and the operative part of the affidavit in support thereof states:

> "That the applicant apply (sic) for reference on the following grounds of facts and law.

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(i) That the Honourable Court misdirected itself in law and on the facts when it failed to grant an order for stay of execution.

(ii) That there was good and sufficient cause to grant the application."

Mr. Magafu said that the applicant's Notice of Motion is necessarily brought under rule 45 (1) of the Court of Appeal Rules which provides for formal applications. As such, counsel went on, the application was subject to rule 46 (1) of the Rules which requires such application to be supported by affidavit or affidavits consisting of statement of facts. In the instant case, however, counsel further contended, the affidavit does not contain a statement of facts but mere propositions or submissions. He concedes that rule 57 (1) which governs references to this Court and which was rightly cited by the applicant as being the basis for his application, does not prescribe any procedure for filing such references, but contends that once the applicant had decided to move the Court by way of a Notice of Motion then he must adhere strictly to the requirements of that procedure, which he did not.

Rule 57 (1) which governs references to this Court says:-

"57 (1) Where any person is dissatisfied with the decision of a single Judge exercising the powers conferred by section 68G of the Constitution he may apply informally to the Judge at the time when the decision is given or by writing, to the Registrar within seven days after the decision of the Judge -

(a)

(b) in any civil matter, to have any order, direction or decision of a

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single Judge varied, discharged
or reversed by the Court."

One thing is clear. When the application is made informally, the applicant simply applies orally to the judge, at the time of giving his decision, to have that decision reviewed or reconsidered by the Court. However, where the application is by writing to the Registrar, no particular form is prescribed for the purpose under the Rules and, to our knowledge, the Court has not formulated any. The practice so far has been that many of the applications under this provision have taken the form of a letter to the Registrar.

The applicant in the instant case appears to have preceeded partly under rule 57 (1) and partly under rules 45 (1) and 46 (1) of the Rules. He not only cited rule 57 (1), but he also got the Registrar to notify tl respondent that he was moving the Court, by way of a reference, to vary or reverse the decision of the single Judge. In other words the Registrar was clearly made aware of the steps which the applicant had set out to take in the matter. In those circumstances one may say that in the absence of any statutory or judge - made rule as to the procedure for filing a reference, and having regard to the current practice on the matter, the applicant in fact did more than was required to him. The written notification to the Registrar was alone sufficient and it was not necessary to file the affidavit. That is to say the Court can ignore the affidavit and proceed to consider the reference on the sole basis of the written notification to the Registrar and that is what we did. It is for these reasons then that we overruled the preliminary objection with an order that costs abide the results of the main application.

As intimated earlier, this reference arises from the decision of a single Judge of this Court refusing to grant a stay of execution of a decree/order of the High Court in a probate and administration matter, or

the ground that no leave to appeal against such decision of the High Court had been obtained or sought yet. At the hearing before us the question was raised whether or not this decision of the High Court in a probate and administration matter was appealable with or without leave. The same question had been raised before the single Judge who, citing the decision of this Court in Tanganyika Motors Ltd. v. Transcontinental Forwarders Ltd., Civil Appeal No. 44 of 1995 (unreported), held that the High Court decision in the instant case was appealable only with leave. In that case the Court held that for a decree to be appealable as of right, it must be one which was made in a suit under the Civil Procedure Code, 1966 (hereafter to be referred to simply as CPC) in the exercise of the original jurisdiction of the High Court.

Arguing the matter before us, Mr. Mwengela for the applicant, strenuously contended that having regard to sections 52 and 56 of the Probate and Administration Ordinance Cap. 445 (hereafter referred to as the Ordinance), the said decision of the High Court was one which was appealable without leave. Section 56 of the Ordinance in so far as is relevant to the facts of this case simply provides that the application for letters of administration shall be made by petition. Then section 52 provides that:-

> "52 Except as hereinafter provided, and subject to any Probate Rules made in that behalf -
>
> (a) the proceedings of the court relating to the grant of probate and letters of administration shall be regulated, so far the circumstances of the case admit, by the (Indian) Code of Civil Procedure, 1908, or any enactment replacing the same; and

(b) in any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be defendant."

Our understanding of paragraph (a) is that basically probate and administration proceedings are regulated by the provisions of the Ordinance and the Rules made thereunder, but that the provisions of the CPC may be resorted to in certain circumstances, e.g. where it becomes necessary for the Court to order discovery or to fix a date for the doing of anything by a party and there is no corresponding provision in the Ordinance or the Rules regulating the same. In our opinion this paragraph cannot, by any stretch of imagination, be construed to mean that probate and administration proceedings are a suit. For one thing, where the provisions of the CPC have not been resorted to, the proceedings remain wholly regulated by the provisions of the Ordinance and the Rules. In which case on the authority of Tanganyika Motors Ltd. case cited above, the resulting decision or decree is obviously not one which was made under the CPC. The same is true even where the provisions of the CPC have been resorted to, because in that case the CPC is resorted to or prayed in aid merely to supplement a procedure which is basically regulated by the provisions of the Ordinance and the Rules. As such the resulting decision or decree cannot, in any meaningful sense, be said to be made under the CPC.

Likewise we construe paragraph (b) of section 52 to mean that where a petition has been opposed, then the proceedings, which are basically regulated by the provisions of the Ordinance and the Rules, shall, as

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nearly as can be, take the form of a suit, in which case the petitioner becomes the plaintiff and anyone appearing to oppose the petition becomes defendant. The point to stress here is that the nature of the proceedings does not change. The proceedings should as nearly as can be, take the form of a suit while retaining their essential character of proceedings brought under and regulated by the Ordinance and the Rules thereto. Once again, as was said earlier, the decision or decree resulting from such proceedings is not one that was made under the CPC.

In yet another attempt to press his view point, Mr. Mwengela referred us to section 22 of the CPC which provides that:-

> "22. Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed."

Learned counsel took the view that a petition brought under section 56 of the Ordinance amounts to a "suit instituted ... in such other manner as may be prescribed," within the meaning of section 22 of the CPC. With due respect to the learned counsel, however, we cannot agree. We think that section 22 of the CPC applies only when the law in question provides for the institution of a suit, in the first place, and then proceeds to stipulate for the manner in which such suit may be instituted. Mr.Mwengela could not refer us to any provision of the Ordinance which provides or which can be construed to provide for the institution of a suit, and we have not been able to discover any. It is therefore futile to rely on the said section 22 and contend that a suit was brought in a manner prescribed by the Ordinance i.e. by a petition under section 56 thereof, when the Ordinance itself has not provided for the institution of a suit in the first place. Like the learned single Judge, therefore, we are satisfied that the decision or decree of the High Court resulting from probate and administration proceedings is appealable only with leave

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because it was not a decision or decree made in a suit under the CPC.

Having held that the decision in question was appealable with leave, the learned single Judge proceeded to inquire into whether such leave had been obtained or sought and having answered that question in the negative, he accordingly dismissed the application for a stay of execution, without considering the merits thereof, basing himself on the two decisions in Willow Investment v. Mrs. Maombo Ntumba and Two Others Civil Application No. 13 of 1997, and The Bank of Tanzania v. Minister of Labour and Eight Others Civil Application Nos. 11 and 12 (Consolidated) of 1997, both unreported.

In arguing this reference Mr. Mwengela's main pre-occupation was to demonstrate that the decision or decree of the High Court which it was intended to appeal against was appealable, without leave so that, in his view, the question of obtaining leave or seeking leave to appeal as a pre-requisite for his application for a stay of execution pending appeal did not arise. However, when the Court expressed anxiety over the view held in the two cases of Willow Investment and The Bank of Tanzania cited above, learned counsel argued, as an alternative, that after all leave to appeal was not a pre-requisite for an application for a stay of execution, and for this view he relied on rule 9 (2) (b) of the Court of Appeal Rules. Accordingly we shall now proceed to consider the application on the basis of this submission alone after rejecting Mr. Mwengela's other submission that the decision of the High Court being appealed against was appealable without leave.

Rule 9 (2) (b) of the Court of Appeal Rules which Mr. Mwengela relied on for his view provides that:-

> "9 (1).
>
> (2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any

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> this application is incompetent and cannot be heard. That is why I ordered it to be struck off."

In short the application for a stay of execution was struck out for being incompetent because the applicant had not obtained or sought leave to appeal, and the prescribed time for doing so had already expired. In The Bank of Tanzania, the other case cited above also involving an application for a stay of execution, the applicant's notice of appeal was lodged only after time for doing so had been extended, and his application for leave to appeal was pending in the High Court. In refusing the application for a stay of execution Ramadhani, J.A. also exercising the powers of a single Judge of the Court said:-

> "However, in my humble opinion, parties who want to benefit from these provisions which seek to delay the realisation of the fruits of judgments won by their adversaries, should be vigilant and take timely steps to do so. As I have already pointed out, BOT was late to file notice of appeal and had time enlarged to do so. This has also contributed to his delay to ask for leave to appeal. So, the applicant should not be allowed to inconvenience the respondents unduly. I, therefore, find that as there is no leave then the application is not properly before me. However, I must quickly add that I am not setting a general rule but in this case the applicant was dilatory. Otherwise I am aware that Rule 76 (4) allow leave to appeal to be sought after a notice of appeal has been filed. So, there can be instances where there is an application for stay while there is no leave to appeal. ... ... so I dismiss the application with costs."

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Thus a stay of execution was dismissed because the notice of appeal, though valid, had been lodged only after extending the time to do so, and also because no leave to appeal had been obtained even though the application for such leave was then pending in the High Court.

It seems desirable to point out that the learned single Judge having found that the application was not properly before him, then he should have struck it out rather than dismiss it. Because such application, which was not properly before him, was necessarily incompetent, and one which did not exist in law and consequently one which rendered the single Judge without jurisdiction to hear it. The proper order to make in those circumstances, therefore, was one of striking it out rather than one of dissmissed which implies or connotes prior hearing. This would be in conformity with the other case of Willow Investment cited earlier in which a similar application was struck out for being not properly before the Court, and hence incompetent.

But the basic question that falls for consideration is:- What are the grounds for saying that leave to appeal is a pre-requisite for granting a stay of execution pending appeal? Rule 9 (2) (b) which was reproduced earlier and which sanction a stay of execution does not make such leave a pre-requisite, and the question is whether there is justification for reading that requirement into the provision. Can the framers of the rule have intended that leave to appeal should be a pre-requisite for granting a stay of execution? We think not. Under the rule, only the notice of appeal is made a pre-requisite for granting a stay of execution. We think that if it was intended that leave to appeal also be made a pre-requisite, then it was only too easy for the framers of the rule to say so but they did not. Nor is there room for saying that the omission by the framers to say so was through inadvertence. For, under rule 76 (4) leave to appeal is not a

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pre-requisite for lodging a notice of appeal. An intending appellant may lodge his notice of intention to appeal even before seeking leave to appeal. That is to say leave to appeal is not used to block or restrict the right of an intending appellant to lodge a notice of appeal by requiring him to seek leave to appeal before lodging the notice of appeal. Then the question is: If leave to appeal is not used to block or restrict the appellant's right to lodge a notice of appeal why should such leave to appeal be used to block or restrict his right of a stay of execution which is equally of importance in the whole appeal process?

But what is more is this: It seems that if the view prevails that leave to appeal is a pre-requisite for granting a stay of execution pending appeal, this may in some cases lead to unfortunate and disastrous consequences which could never have been intended. Take for instance a situation where the High Court gave judgement against a party in a case involving a ship and the said party has lodged a notice of appeal. Leteral interpretation of rule 9 (2) (b) means that immediately after the judgement is given and the notice of appeal has been lodged, the party can lodge his application for a stay of execution, thus affording the Court the earliest opportunity to consider and decide on the matter. But if the other interpretation is adopted that prior leave to appeal is necessary, then considering the delay involved before the matter can be heared, this allows an unscrupulous respondent to sail and take away the ship, thereby preventing the Court from finally pronouncing on the rights of the parties in the suit.

And lastly, the view that an intending appellant must seek leave to appeal before applying for a stay of execution would involve inconvenience and extra cost. For, where an intending appellant has had his application for a stay of execution refused for failure to obtain prior leave to appeal, then provided that there is a valid notice of appeal, he can

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Judge. Accordingly we direct that the matter be placed before a single Judge of the Court for the hearing of the application on the merits. Costs of this reference shall be in the cause.

DATED at DAR ES SALAAM this 9th day of March, 1999.

L.M. MAKAME
JUSTICE OF APPEAL

R.H. KISANGA
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

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

(N.M. MWAIKUGILE)
SENIOR DEPUTY REGISTRAR