IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KISANGA, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL REFERENCE NO. 6 OF 1998

BETWEEN

LIVINGSTONE SILAYO @ SHARU. . . . APPLICANT

AND

COLLIN FRED TEMU. . . . . RESPONDENT

(Reference from the decision of a
Single Judge of the Court of Appeal
of Tanzania at Arusha)

(Ramadhani, J.A.)

dated the 27th day of July, 1998

in

Civil Application No. 3 of 1995

RULING OF THE COURT

LUBUVA, J.A.:

This reference arises from the decision of a Single Judge of this Court (Ramadhani, J.A.) in AR-Civil Application No. 3 of 1995. The historical background to the matter may be briefly summarised as follows: The applicant, Livingstone Silayo @ Sharu, having lost in Arusha High Court Civil Appeal No. 10 of 1990, was dissatisfied. He sought to lodge a second appeal to this Court which required leave of the High Court. Consequently, he filed Miscellaneous Application No. 111 of 1993 in the High Court Arusha seeking extension of time in which to appeal and leave to appeal. The learned judge of the High Court (Mroso, J.) was satisfied that there was no point of law or mixed law and fact for consideration of the Court. He accordingly dismissed the application on 18.3.1993. Undaunted, the applicant filed this application

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in this Court praying for the same reliefs. That was AR-Civil Application No. 3 of 1995. Before the learned Single Judge it was contended on behalf of the applicant that an important point of law was involved in the intended appeal such that the extension of time was warranted. The legal point was that as there was no certified copy of the decree attached to the memorandum of appeal the decision of the High Court was incompetent. Upon a careful consideration of the matter the learned single judge was of the settled view that the omission was a mere procedural irregularity which did not render the decision of the High Court incompetent. The learned single judge found no point of law involved, he dismissed the application. The applicant was aggrieved, and hence this reference.

In this reference the applicant was represented by Mr. Chadha, learned counsel and for the respondent, Mr. De'Souza, learned counsel appeared.

Mr. Chadha vigorously criticised the learned single judge in his decision that the omission to attach certified copy of the decree to the memorandum of appeal was a mere procedural irregularity. The reason Mr. Chadha said was that the mandatory requirement under Order 39 Rule 1 (1) of the Civil Procedure Code was breached. As a result, he went on in his submission, the decision of the High Court in Civil Appeal No. 10 of 1990 (Munuo, J.) was rendered incompetent. While Mr. Chadha conceded that Order 39 Rule 1 (1) refers to a copy of the decree and not a certified copy, he urged the Court to follow the practice of the courts in

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India which has a similar provision in interpreting the word "copy" to mean a "certified copy". In support of this contention, the Court was referred to the commentaries of the distincuished authors, D.V. Chitaley and S. Appu Rao in A.I.R. Manual, Volume 3, Third Edition at page 1173, Note 38 where it is stated:

> 38 - The word "copy" in the rule means a certified copy.

In this case, Mr. Chadha concluded, had the learned single judge taken the interpretation of the word "copy" of the decree to mean a certified copy, he would have allowed the application to extent the time in which to appeal.

Strongly opposing the application Mr. De Souza, learned counsel for the respondent submitted that the application was devoid of any merit. First, he said, the learned single judge cannot be faulted in his decision to refuse granting leave to extend the time in which to appeal. In exercising his discretion, the single judge was satisfied on the material laid before him that no sufficient reason had been given for the inordinate delay in appealing against the High Court decision.

With respect, we agree with Mr. De Souza that no sufficient reason had been advanced by the applicant to justify the enlargement of time in which to appeal and for leave to appeal. It is common ground that what was sought from the learned single judge was an application for extension of time. It is discretionary on the part of the court to

grant the extension of time depending on sufficient reason being given to explain the delay. In this case, we are unable to find any reason, let alone sufficient reason given before the learned single judge for the inordinate delay. Reasons such as that the advocate handling the case for the applicant at the time being in error in the handling of the intended appeal as held by the learned single judge is no sufficient reason for extending time. From 29.5.1992, when the High Court decision in Civil Appeal No. 10 of 1990 was delivered from which it was intended to appeal to this Court to 16.6.1993 when Miscellaneous Civil Application No. 111 of 1993, was filed it was a delay of well over one year. For this, there was no sufficient reason given by the applicant and so, the learned single judge cannot, in our view be faulted in exercising his discretion to refuse to extend the time.

Secondly, Mr. De Souza, contended, the issue of the illegality in the High Court decision in Civil Appeal No. 10 of 1990, was not raised before the High Court judges Munuo, J. (29.5.1992) and Mroso, J. (18.3.1994). It was bilatedly raised before the Single Judge (27.7.1998). This, he further stated, is an indication that the matter came to the mind of the learned advocate as an afterthought when the application was before the learned single judge, almost six years after the decision of the High Court. We think there is merit in Mr. De Souza's submission. If counsel for the applicant had this point in mind at the time the appeal was being dealt with in the High Court, there is no reason why he did not raise it before Madam Munuo, J. who, no doubt, would, very likely have looked into it. With respect, this was not done,

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and now, Mr. Chadha, learned counsel, is raising it before us at this stage with a view to have the time extended, nearly eight years after the original judgment. Such inordinate and excessively long delay the Court has consistently held may constitute sufficient cause for refusing extention of time.

With regard to what seems us to be the main thrust of Mr. Chadha's application in this reference that it is a mandatory requirement under Order 39 Rule 1 to attach a certified copy of the decree, Mr. De Souza strongly took the opposite view. He said that the Indian authorities cited should not be given any weight because the rule itself does not provide to that effect. Under Order 39 Rule 1 (1) of the Civil Procedure Code, what is required to be attached is a copy of the decree and not a certified copy, Mr. De Souza further pointed out. In his view, Mr. Chadha's contention is based on a false interpretation of Order 39 Rule 1 (1) of the Civil Procedure Code. That is, by giving the provision a meaning which was not intended by the drafters of the rule.

We wish to point it out at once that we have no difficulty at all in agreeing with Mr. Chadha, learned counsel that the genesis of the Civil Procedure Code in Tanzania is the Indian Civil Procedure Code. In part, Order 39 Rule 1 (1) provides that:

> ... The memorandum shall be accompanied by a copy of the decree appealed from... (emphasis supplied).

On the other hand, the corresponding part of the Indian Code, Order 41 Rule 1 provides in part, exactly in similar words as follows:

> ... The memorandum shall be accompanied by a copy of the decree appealed from... (emphasis supplied).

From our reading of the Tanzania Code of Civil Procedure extracted above, it is clear that the memorandum of appeal shall be accompanied by a copy of the decree appealed from. It is therefore not a mandatory requirement under the rule as Mr. Chadha urges the Court to accept that a certified copy of the decree shall accompany the memorandum of appeal. On the contrary, the mandatory requirement under the rule is the attachment of a copy of the decree to the memorandum of appeal. From the clear provisions of rule 1 order 39, Mr. Chadha's submission that a certified copy of the decree is a mandatory requirement is, with respect, untenable. Similarly, the position of the law in India in this regard, as seem from the extract above, is similar in material particulars to that obtaining in Tanzania. On this, Mulla, on the Code of Civil Procedure Act of 1908, 15th Edition, bears us out. At page 2547, paragraph 4 commentaries on Order 41 Rule 1 of the Indian Code, the equivalent of Order 39 Rule 1 (1) of Tanzania are to the effect that:

> "Order 41 Rule 1, makes it an inflexible rule that in the case of appeals from decrees, the memorandum of appeal shall be accompanied by a copy of the decree. The court cannot dispense with it, for the rule is imperative"

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It is apparent therefore that the statutory provisions both in India and Tanzania are inflexible and imperative in so far as the attachment of a copy of the decree is concerned. In the case before us there is no dispute that a copy of the decree was attached to the memorandum of appeal and that, we think, was sufficient compliance with the requirement of Order 39 Rule 1 (1) of the Civil Procedure Code. In this situation, Mr. Chadha's complaint that a mandatory requirement of the rule is clearly without foundation.

On the other hand, it is common knowledge that in practice certified copies of decrees are normally sought in the process of filing appeals. The reason is not far to seek. It is because of ensuring the authenticity of the decrees or judgments. Because of the overriding need and importance of having authentic documents relating to decrees and other documents in the judicial process, it has become a rule of practice for the courts to prefer certified copies of decrees. That we think is what the learned single judge referred to as a procedural irregularity.

The matter can be carried even further. From the submissions of the learned counsel for both parties before us, we are increasingly satisfied that in this case what is normally sought to be achieved by certifying a copy of the decree was also achieved. This is because a copy of the decree of the Resident Magistrate's Court Arusha in Civil Case No. 7 of 1989 was signed, sealed and annexed to the memorandum of appeal to the High Court by the trial magistrate.

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In this regard, at the hearing of the reference, from the bar, Mr. De Souza availed to the Court a copy of the counter affidavit which he filed in response to the affidavit filed by Mr. J. Mwale, then the advocate for the applicant in Miscellaneous Civil Application No. 3 of 1995. In paragraph 11 of the respondent's counter-affidavit, this aspect is clearly spelled out. Mr. De Souza's affidavit is evidence on oath which was not controverted and above all, he is an officer of the court. It is therefore credible evidence that the copy of the decree filed was signed and sealed by the trial magistrate. In the circumstances, is the decree so signed and sealed by the trial magistrate in any way less authentic than a certified copy? As already indicated, the purpose of certification is to ensure the authenticity of the decree or judgment. In this case, with the copy of the decree signed and sealed by the trial magistrate, it is our considered view that the signed copy of the decree was even more authentic than a certified copy signed by another person other than the author. For this reason, we are settled in our minds that there was neither any illegality nor irregularity in the proceedings before the High Court as contended by Mr. Chadha. With respect, it is also our view that the learned single judge overlooked the fact that the copy of the decree was signed and sealed by the trial magistrate. Otherwise, we think, he would have come to the same conclusion.

Finally, we wish to make brief comment on the decision of the Court in Stanley Kalama Mariki V. Chihiyo Kwisia w/o

Nderingo Ngomuo [1981] TLR 143 which Mr. Chadha, learned counsel heavily relied upon. As abundantly shown, Mr. Chadha's contension was that on the basis of the Court's decision in Kalama (supra) the learned single judge should have allowed the application and extend the time in which to appeal because of the illegality pertaining to the proceedings before the High Court. We agree with Mr. De Souza that the decision in Kalama does not in any way assist the applicant in this case. It is clearly distinguishable. While in Kalama the memorandum of appeal was not accompanied by a copy of the order appealed from, contrary to the provisions of Order 39 Rule 1 (1) of the Civil Procedure Code, the Court held:

> "It is established procedure of our Courts that where such a copy is not attached the appeal is rendered incompetent."

In the instant case, the situation is different. There was a copy of the decree duly signed and sealed by the trial Court. There was therefore no basis upon which the appeal before the High Court could be rendered incompetent as Order 39 Rule 1 (1) of the Civil Procedure Code was complied with.

All in all therefore, in the circumstances of the case, we are satisfied that the reference is devoid of any merit. The decision of the learned single judge is properly founded. The reference is dismissed with costs.

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DATED at ARUSHA this 26th day of October, 2000.

R.H. KISANGA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR