IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CIVIL APPEAL NO. 58 OF 1997

KANTIBHAI M. PATEL .....APPELLANT

AND

DAHYABHAI F. MISTRY .....DEFENDANT

(Appeal arising out of the Judgement/Decree of the High Court of Tanzania at Mwanza)

(Munyera, J.)

dated the 2nd day of July, 1997

in

Mwanza High Court Civil Case No. 29 of 1995

R U L I N G

LUGAKINGIRA, J.A.:

This is a ruling on a preliminary objection raised on the respondent's behalf when this appeal came on for hearing. The background to the litigation is, as the trial judge observed, rather complex and we will do no more than highlight those areas relevant to the ruling.

The appellant, Kantibhai M. Patel, and the respondent, Dahyabhai F. Mistry, were partners in a grain milling firm known as MINI MILLERS. The firm operated from Plot Nos. 8 and 9, Block 'A', Mwanza South, comprised in Certificate of Title No. C3347/109. The business was not happy going, therefore the appellant instituted a suit in the High Court at Mwanza praying for his share of profits, nullification of transfers of landed properties, costs and any other reliefs. It transpired in the course of evidence that at some stage the appellant retired from the partnership leaving the respondent sole proprietor and the respondent soon transformed

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the firm into a limited liability company known as MINI MILLERS LTD. It also transpired that the property comprised in C.T. No. 033047/109 passed to the company by operation of law. The suit was dismissed in its entirety and the appellant brought this appeal seeking the same reliefs.

When the appeal was called for hearing, learned counsel for the respondent, Mr. Magongo, raised a preliminary objection comprising two grounds. First, he contended that the record of appeal did not include a proper certificate under rule 83 (1) of the Court Rules and, therefore, that the appeal was out of time. Second, he contended that the appellant had omitted to serve a copy of the notice of appeal on all person directly affected by the appeal as required by rule 77 (1) and, therefore, that the appeal was incompetent. With regard to the first ground, Mr. Magongo pointed out that although the certificate stated that the period 8/7/97 to 10/10/97 was to be excluded in computing the time within which the appeal was to be instituted, it was itself issued on 30/9/97. He submitted that the certificate was invalid as it appeared to have been prepared and issued before the appeal documents were supplied to the appellant - a certificate in futuro, as it were. Turning to the second ground, Mr. Magongo submitted that since one of the prayers in the appeal was nullification of transfers of land properties, the appellant ought to have served a copy of the notice of appeal on MINI MILLERS LTD. in whom the right of occupancy under C.T. No. 033047/109 had vested as evidenced by Exhibit D3.

Learned counsel for the appellant, Mr. Rweyemamu, replied to the argument on the first ground that the date of issuance of the certificate was a typographical error. He maintained that the appeal documents were

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in fact supplied on 10/10/97 and fortified the contention with reference to the exchequer receipt issued on that date for the purchase of the documents. He further stated that the error in the date of issuance had been noticed subsequently but it could not be remedied as the District Registrar who issued the certificate had passed away. He argued that in any case the body of the certificate was correct and invited the Court to overlook the error in the date of its issuance. Alternatively, he prayed that the appellant be allowed to obtain a proper certificate.

On the second ground, Mr. Rweyemamu submitted that rule 77 (1) requires an appellant to serve copies of the notice of appeal on "persons who seem to him" to be affected by the appeal. He submitted that MINI MILLERS LTD. did not so seem to the appellant because they were a third party. He said, moreover, the proceedings did not make significant reference to the company. Exhibit D3 evidenced a transaction with a third party and had nothing to do with the appellant. But in what seemed to be a change of track, Mr. Rweyemamu argued that in any case the notice of appeal was served on Mr. Magongo who appeared to be counsel for MINI MILLERS LTD as well. The company's address was otherwise not on record. He concluded that if the Court itself found that the company seemed to be directly affected by the appeal, it should, instead of striking out the appeal, direct the appellant to effect service of the notice of appeal on them.

It seems to us that the issues in the preliminary objection are straight forward. Beginning with the first ground, it is at least common ground that the certificate contained in the record of appeal is improper. Rule 83 (1) provides in part:

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> ... there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery [of a copy of the proceedings] to the appellant.

A proper certificate under the rule is, therefore, one issued after the preparation and delivery of a copy of the proceedings to the appellant. The words "as having been required" clearly refer to a past event. The certificate on record purports to operate futuristically and our scrutiny of all the copies in the original record consistently met with the anomaly. We are prepared to agree with Mr. Rweyemamu that the date of issuance was an inadvertent error, and no mischief was involved, particularly as the exchequer receipt records that the documents were delivered on 10/10/97. But what are the consequences of the error? The simple answer is that it renders the certificate invalid. The very nature of anything termed a certificate requires that it be free from error and should an error crop into it, the certificate is vitiated. It cannot be used for any purpose because ti is no better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over but it goes to the very root of the document. You cannot sever the erroneous part from it and expect the remaining part to be a perfect certificate; you can only amend it or replace it altogether as by law provided.

Mr. Rweyemamu's claim that the appellant's side discovered the error but could do nothing because the issuing District Registrar was already dead, was, with respect, face saving. Rule 83 (1) does not stipulate

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that the certificate must be issued by a particular person. That power is exercisable by any person who is for the time being the Registrar of the High Court, which expression includes a district registrar, a deputy registrar and an acting district registrar. The rule does not, either, provide for the certificate to be issued at a particualar time, save only that it may be issued after the preparation and delivery of the record of proceedings. The appellant, therefore, had all the past four years to apply to the High Court for a proper certificate but did not do so. The unfortunate truth appears to be what slipped from Mr. Rweyemamu, namely, that once the record of appeal is lodged, it is forgotten until the appeal is called for hearing.

Mr. Rweyemamu prayed the Court to allow the appellant to present a proper certificate but the prayer cannot be acceded to. The Court has held on a number of occasions that once an objection is taken to the competence of an appeal, it would be contrary to law to entertain a prayer the effect of which is to defeat the objection. If such prayers were entertained, rule 100 which permits preliminary objections would be negated. This position is clearly stated in Minister for Labour & Another v. Gaspar Swai & Others, Civil Appeal No. 101 of 1998, and the decisions cited therein.

It follows from the foregoing that there is no certificate under rule 83 (1) accompanying the record of appeal, in the absence of a valid certificate. The consequence is that the appellant cannot take advantage of the exclusion of time in computing the time within which the appeal ought to have been instituted but the time has tobb be reckoned from the date the notice of appeal was filed. Notice of appeal was indisputably lodged in time on 8/7/97 and the appeal was

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instituted on 13/10/97. That was more than 60 days from 8/7/97 and therefore out of time. This alone is sufficient to dispose of the matter but we will also consider the second ground of objection as it raises important questions.

The second ground turns on the construction of rule 77 (1). It reads thus:

> An intended appellant shall, before, or within seven days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court.

Analysing the rule, Mr. Magongo stated that there are two categories of persons who should be served: first, those who took part in the proceedings in the High Court; second, those who did not but who stand to be directly affected by the appeal. We agree with the analysis but we wish to observe that there may be persons who took part in the proceedings in the High Court but who need not be appealed against and, therefore, need not be served if they do not seem to be directly affected by the appeal. For those persons who took no part in the proceedings in the High Court, an appellant has to serve them with copies of the notice of appeal if they seem to him to be directly affected by the appeal, except where the Court, on ex parte application, directs that service need not be effected on them. The argument advanced by Mr. Rweyemamu is that it is in the discretion of the appellant to decide which persons seem to him to be directly affected by the appeal. He contended that MINI MILLERS LTD, not being a person who took part in the proceedings in the High Court, did not seem to the appellant to be a person directly affected by the appeal.

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We think, with respect, Mr. Rweyemamu's appreciation of the rule is not entirely correct. To demonstrate this, we propose to approach the subject in two stages: first to determine whether there was sufficient material in the proceedings to bring it to the attention of the appellant that MINI MILLERS LTD. was directly affected by the appeal, and, if so, to determine whether the appellant had a discretion to decide whether the company was a person who seemed to him to be so affected.

Mr. Magongo referred to four arease in the proceedings in connection with the first stage. These were, first, paragraph 2 of the plaint which gives the address for service of the respondent as " his business premises of (sic) Plot No. 8 and 9 Mwanza South Industrial Area under the name and style of MINI MILLERS LTD." Mr. Rweyemamu argued that a mere address does not make the owner a party to the suit. We think, however, there was more than an address to this. MINI MILLERS LTD is shown by the appellant himself to be in occupation of the property the transfer of which he is seeking to be nullified. It is an acknowledgement that the company had an interest of sorts in the property. Next, Mr. Magongo referred to the evidence of PW4, an accountant, who sated in cross-examination: " I saw the memorandum of association in respect of the MINI MILLERS LTD." Mr. Rweyemamu made no reference to this. At first sight the statement appears to convey nothing but when considered in its context a different picture tends to emerge. The witness said:

> Yes I supplied the plaintiff with an audit report, he asked for it, I did not know when he ceased to be a partner. We were not told he had ceased. I saw the memorandum of association in respect of the Mini Millers Ltd.

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It seems to us that this line of cross-examination was intended to link up the fact of the appellant's retirement from the partinership and its transformation into a limited liability company. That again would have impacted on the partnership property which would pass to the company by operation of law. Third, Mr. Magongo referred to the evidence of DW3 in cross-examination where he said: " I was employed by Mini Millers on 11/7/88, it was not Mini Millers Ltd., I don't know when it became a limited liability company." Mr. Rweyemamu referred to this but could not read anything into it, but we think the intention of the examining counsel was to show that what was MINI MILLERS was reborn as MINI MILLERS LTD. with all the consequences.

Finally, Mr. Magongo referred to Exhibit D3. This is an application to the Registrar of Titles for registration of a transmission by operation of law in respect of the property comprised in C.T. No. 033047/109 from "DAHYABHAI FAKIRBHAI MISTRY trading under the name and style of MINI MILLERS ... to MINI MILLERS LIMITED." The document carries this significant declaration by the respondent:

> That by virtue of the Memorandum and Articles of Association of MINI MILLERS LIMITED incorporated on the 19th of June, 1992 under Certificate of In Incorporation No. 21138, the business rights, liabilities and properties carried under the name and style of MINI MILLERS was taken over by the said MINI MILLERS LIMITED.

The document was admitted in evidence without resistance and it is duly contained in Vol.II of the appellant's record of appeal. As told before, Mr. Rweyemamu stated that the appellant had nothing to do with Exhibit D3. This document, in our view, puts it beyond

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peradventure that Plot Nos. 8 and 9 had passed to MINI MILLERS LTD. It carries the stamp of the Registrar of Titles showing that the transmission was registered on 14/10/93 as Filed Document No. 3969. Since one of the prayers in the appeal is to nullify transfers of landed properties, we are bound to hold in the light of all this material that MINI MILLERS LTD. is directly affected by the appeal and the appellant cannot be seen to deny seeing that position.

Did the appellant have discretion to decide whether, in view of the foregoing, MINI MILLERS LTD. did or did not seem to him to be directly affected by the appeal? It has been shown that Mr. Rweyemamu thought that the appellant had that discretion. The language of rule 77 (1) is that an intended appellant shall serve copies of the notice of appeal "on all persons who seem to him to be directly affected by the appeal." On the face of it, seems to lie in the discretion of an intended appellant to decide which persons "seem to him" to be directly affected by the appeal. However, it is long-established in judicial interpretation that words and expressions which prima facie appear permissive may in certain circumstances assume an imperative character. The test is whether there is anything that makes it the duty of the person on whom the power is conferred to do this or that to exercise that power. When the power is coupled with a duty it ceases to be discretionary and becomes imperative. MAXWELL ON INTERPRETATION OF STATUTES, 9th ed., pp. 252/3, sets out the considerations which may transform a discretionary power into a duty in these words:

> ... there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may

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> couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise it when called upon to do so. It lies on those who contend that an obligation exists to exercise the power to show in the circumstances of the case something which, according to the above principles, ereated that obligation ....

Mr. Magongo argued that rule 77 (1) was aimed against the mischief of condemning a person without the opportunity of being heard. In other words, it is a rule which translates into practical terms the principles of natural justice. As the title of MINI MILLERS LTD. over Plot Nos. 8 and 9 is at stake, it is also to their benefit that they must "seem" to the appellant to be directly affecte by the appeal. Mr. Magongo further said that it would be contrary to the Constitution of the United Republic if, the company were not served with the notice of appeal. That is certainly so in the light of Article 13 (6) (a) of the Constitution. It states in part:

> wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu ...

In this case what the appellant seeks is, interalia, the nullification of transfers of landed properties. Mr. Rweyemamu ruluctantly conceded that that would include the transfer of Plot Nos. 8 and 9 to MINI MILLERS LTD. In fact there was no evidence of any other transfer apart from this. In these circumstances we are of the firm view that the power granted to the appellant to decide which persons seem to him to be directly affected by the appeal ceases to be discretionary but a duty arises to exercise it. In other words, where a person

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would in fact be directly affected by an appeal, that person must seem to the appellant to be so affected. Once that is the position, there is further no discretion but to serve that person with the notice of appeal. Where, as in this case, that person took no part in the proceedings in the High Court, it is the Court of Appeal, rather than the appellant, which is vested with power to direct that service need not be effected on that person. Rule 77 (1) does not constitute the appellant a judge in his own cause. The argument that there was no address for service on MINI MILLERS LTD cannot avail the appellant in this case for that is an argument that could have been raised in an application to the Court to exempt service.

In accordance with the authorities cited to us by Mr. Magongo, omission to serve a copy of the notice of appeal on a respondent is fatal to the appeal. We are of the view that it is similarly fatal to omit to serve a person who seems directly affected by the appeal although he took no part in the proceedings in the High Court. Mr. Rweyemamu prayed that if the Court came to this view it should allow the appellant to serve MINI MILLERS LTD. rather than strike out the appeal. For reasons already stated in connection with the certificate under rule 83 (1), the Court is precluded from granting the prayer.

The preliminary objection thus succeeds on both grounds and it is accordingly upheld. The appeal pending before the court is therefore incompetent; it is struck out with costs.

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DATED at MWANZA this 19th day of November, 2001.

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.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR