IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., MUNUO, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 92 OF 2004

DERO INVESTMENT LIMITED…….
APPELLANT

VERSUS

HEYKEL BERETE……..
RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania – Land Division at Dar es Salaam)

(Longway, J.)

dated the 20th day of May, 2004
in
Land Case No. 6 of 2004

R U L I N G

MROSO, J.A.:

The respondent, through his advocate Dr. Tenga of Law Associates, Advocates, filed a Notice of Preliminary Objection under Rule 100 of the Court Rules against an appeal which was filed by the appellant who had been aggrieved by a decision of the Land Division of the High Court at Dar es Salaam and sought to appeal as of right to this Court. Dr. Tenga contends that although the appeal is against a decree of the High Court, Land Division in its original jurisdiction, the appellant ought to have sought leave from that court to appeal as required under section 47 (1) of the Land Disputes Courts Act, No. 2 of 2002, henceforth to be referred to as the

Act. He submitted that the appeal was, therefore, incompetent and ought to be struck out with costs for want of requisite leave.

Mr. Mnyele, learned advocate from Marando, Mnyele and Co., Advocates, conceded that it is clear Section 47 (1) of the Act requires that an appeal from the original decree of the Land Division of the High Court must have leave of that court. He argues, however, that sub-section (3) of the same section 47 of the Act provides that the procedure for appeal to the Court of Appeal "under this section" shall be governed by the Court of Appeal Rules. Similarly, section 48 (b) of the Act provides that the Appellate Jurisdiction Act shall apply to proceedings in the Court of Appeal. If that be the case, under Section 5 (1) (a) of that Act, leave of the High Court is not required in an appeal against the original decree of the High Court, whichever may be the division of the court. Alternatively, he argued, appeals from the Land Division of the High Court were governed by two legislations namely the Land Disputes Courts Act, 2002 (Section 47 (1) of the Act) and the Appellate Jurisdiction Act, 1979 (section 5 (1) (a) of the latter Act. That was an anomaly and no explanation is discernible from Act No. 2 of 2002 why an appeal against a decision of the Land Division of the High Court in original jurisdiction should differ so radically from an appeal from the same court, say, the Commercial Division. He submitted that since appeals to the Court of Appeal are governed by

the Appellate Jurisdiction Act, 1979 and the Court Rules, 1979 made under it, it should follow that the provisions of the Appellate Jurisdiction Act, 1979 should prevail over any other law which provides to the contrary. In further alternative, he argued, in order to rationalize the position, the Court should "read out" from section 47 (1) of the Act the words – "in the exercise of its original, revisional or appellate jurisdiction" in order to bring section 47 (1) of the Act in conformity with section 5 (1) (a) of the Appellate Jurisdiction Act, 1979. He said that if this Court can "read into" a section what was not there, it can also "read out" from a section what is there. He cited the case of **Joseph Warioba v. Stephen Wassira** [1997] TLR 272 in which this Court "read into" Section 114 of the Elections Act, 1995 the offence of corrupt practice which was missing from the section. He asked the Court to dismiss the preliminary objection with costs.

Dr. Tenga agreed that section 47 (1) of the Act was problematic and that the Court could read out of a section words to remove ambiguity. As regards section 47 (1) however, it was his proposition that the word "original" could be read out to remove the requirement to seek leave of the Land Division of the High Court in case of an appeal from a decision of that court in its original jurisdiction. He argued

that section 47 (1) as it now reads brings about discrimination and is even unconstitutional. There was no logic for a person to appeal as of right to the High Court (Land Division) from a decision of the District Land and Housing Tribunal but to have to seek leave, which may be refused, in case of an appeal from the original decision of the High Court, Land Division, he argued. Considering that there is a constitutional right to appeal from an original decision, the requirement for leave under section 47 (1) derogated from that constitutional right. He then submitted that if the Court was minded not to read out the word "original" from the section then it would have to sustain the preliminary objection. If, on the other hand, the Court dismissed the preliminary objection, it should not make an order for costs because the notice of preliminary objection was prompted by a real problem arising from the way section 47 (1) was structured.

It is now opportune to know the wording of section 47 (1) of the Act. It reads –

> 47. – (1) Any person who is aggrieved by the decision of the High Court (Land Division) in the exercise of its original, revisional or appellate jurisdiction, may

> with the leave from the High Court (Land Division) appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act.

It is apparent from this provision that all appeals to the Court of Appeal from decisions of the Land Division of the High Court are by leave of the Land Division of the High Court. As submitted by both counsel, this is a marked departure from what is provided in section 5 (1) (a) of the Appellate Jurisdiction Act, 1979 as regards civil proceedings. The provision reads as under:-

> 5 (1). In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal –
>
> (a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, 1966, in the exercise of its original jurisdiction;

It is clear, therefore, that unless any other written law for the time being in force provides to the contrary, a decision of the High Court in its original jurisdiction and under the Civil Procedure Code, 1966 is appellable to the Court of Appeal as of right.

There is no clue in the Act or in section 47 why all appeals from decisions of the Land Division of the High Court, except in a case originating in the Ward tribunal, need leave of that Division of the High Court. In particular, it is not the norm that appeals from decisions of a division of the High Court in its original jurisdiction should require leave of that division of the High Court. To that extent section 47 (1) of the Act may be said to be an anomaly. But could that be what was envisaged in Section 5 (1) of the Appellate Jurisdiction Act, 1979, that there could be a written law which can provide differently from what is provided in paragraphs (a) to (c) of section 5 (1) of that Act?

Our reading of section 47 (1) of the Act gives us a firm conviction that Parliament, curiously, intended every word of that provision. In other words it intended the departure from the provisions of section 5 (1) (a), of the Appellate

Jurisdiction Act, 1979. Although we agree that in certain compelling circumstances the Court may have to “read into” a section or “read out” of a section words in order to bring out the intention of Parliament, there is no need here to “read out” any words from section 47 (1) as suggested by both counsel for the parties. The ‘reading in” that occurred in **Joseph Warioba v. Stephen Wassira** case is distinguishable on the facts. In that case, which was an election petition in the High Court, **Stephen Wassira** was found to have committed an act of corrupt practice. Even so, the Judge, Lugakingira, J. as he then was, did not certify to the Director of Elections under section 114 of the Elections Act because the Act provided for certification in the case of illegal practices only but not for corrupt practice. The petitioner in that case, **Joseph Warioba,** was dissatisfied by the failure of the High Court to certify the offence and appealed to the Court of Appeal.

The Court of Appeal asked itself whether the omission to include corrupt practice among the offences which needed to be certified by the High Court to the Director of Elections was deliberate or inadvertent. In its search for an answer the Court looked at the Hansard and the Objects and Reasons of the Bill which had proposed amendments to the Elections Act, including Section 114 of the Elections Act.

Eventually it was of the firm view that the omission of the words “corrupt practice” from section 114 of the Act was inadvertent. Parliament could not have intended to retain reference to illegal practice in section 114 of the Elections Act to empower the elections court to deal with persons found to have committed that offence where the Director of Public Prosecutions did not institute criminal proceedings but exempt people who were found to have committed an act of corrupt practice where the Director of Public Prosecutions did not prosecute. To manifest what was considered the obvious intention of Parliament the Court read into section 114 of the Elections Act the words “corrupt practice”.

As already said, in the case of section 47 (1) of Act No. 2 of 2002, it was not entirely illogical for Parliament to have intended to impose a restriction on appeals from the decisions of the High Court in land disputes. In requiring leave of the High Court, Land Division, Parliament was acting within the provisions of section 5 (1) of the Appellate Jurisdiction Act, 1979 when it competently legislated as it did in section 47 (1) of Act No. 2 of 2002. We do not therefore accept the argument that there is necessarily a contradiction between Section 47 (1) and 48 (2) of the Act where it is provided that the Appellate Jurisdiction Act, 1979 shall apply to proceedings in the Court of Appeal regarding appeals from

the High Court (Land Division).

It may well be that in restricting appeals to the Court of Appeal from decisions of the High Court (Land Division) in its original jurisdiction Parliament was curtailing the constitutional rights of the litigants. If it is thought so however, an aggrieved party or parties may wish to argue it before the High Court in a constitutional case. It cannot be argued and decided in the first instance in this Court. We therefore uphold the preliminary objection and strike out the appeal as incompetent for non-compliance with section 47 (1) of the Land Disputes Courts Act, 2002. The respondent to have his costs.

GIVEN at DAR ES SALAAM this 29th day of July, 2005.

J. A. MROSO
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR