IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., KILEO, J.A., And KIMARO, J.A.)

CIVIL APPEAL NO. 13 OF 2001

MANSOOR DAYA ..... APPELLANT
VERSUS
JENUS LIMITED ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Mapigano, J.)

dated the 25th day of October, 1994
in
Misc. Civil Appeal No. 14 of 1983

JUDGMENT OF THE COURT

14 November & 12 December 2006

LUBUVA, J.A.:

This appeal arises from the decision of the High Court (Mapigano, J. as he then was) in Miscellaneous Civil Appeal No. 1 of 1983. Aggrieved, the appellant has preferred this appeal.

Briefly stated, the background giving rise to the matter is as follows: The appellant, Jenus Limited, had applied to the Registrar of Trade Marks in February, 1978 for registration in its name of a mark "FLYEX" in respect of insect spray in Part B of the Register of Trade

Marks. The application was opposed by the appellant, Mansoor Daya, the proprietor of a mark "X-Pel" registered as Trade Mark No. 8376 in Part A of the register in respect of insecticides, fungicides, herbicides and weed killing preparations. The application in opposition was No. B – 17334 FLYEX (WORD) in Class 5 Schedule III. The objection was overruled by the Registrar of Trade Marks and the respondent's application for the registration of trade mark "Flyex" was allowed.

In this appeal, the appellant was represented by Mrs. Daya, learned counsel, and for the respondent, Jenus Limited, Mr. Mchome, learned counsel, appeared.

When the appeal was called on for hearing Mr. Mchome, learned counsel, raised a preliminary objection, notice of which he had duly given in terms of the provisions of rule 100 of the Court Rules, 1979. The essence of the objection was that the appeal before this Court is incompetent because no leave to appeal was sought and obtained. He said under section 5 (1) (c) of the

Appellate Jurisdiction Act, 1979 it is necessary to obtain leave to appeal from the High Court or the Court of Appeal in order for an appeal to be entertained by this Court. In that situation Mr. Mchome urged, the appeal before the Court being incompetent, it should be struck out.

In ground two in support of the preliminary objection, Mr. Mchome urged that the appellant, Mansoor Daya has no *locus standi* to prosecute the appeal on behalf of Mansoor Daya Chemicals Limited, the proprietor of the trade mark. While conceding that this issue was not raised at the trial in the High Court, Mr. Mchome however maintained that because the issue raises a fundamental issue of jurisdiction, he prayed the court to deal with it at this stage and strike out the appeal.

With regard to the third ground in support of the preliminary objection, Mr. Mchome submitted that the notice of appeal lodged in this case was not substantially in conformity with Form B in the First Schedule to the rules under the provisions of rule 61 of the Court

Rules, 1979. For instance, counsel further submitted, the notice of appeal was wrongly titled "In the High Court of Tanzania" instead of "In the Court of Appeal of Tanzania". In that situation, Mr. Mchome firmly maintained that there was no proper notice of appeal in terms of the provisions of rule 76 (1) of the Court Rules, 1979. In the absence of a proper notice, he submitted that the appeal was incompetent, it had no leg upon which to stand. He prayed the Court to strike it out.

For the applicant, Mrs. S.M. Daya, learned Counsel, vehemently opposed the preliminary objection. First, she said the history of this case is long and protracted. According to her, at some stage the file relevant to the case got lost together with other documents. It was therefore not possible to proceed with the preparation of the record of appeal as required under rule 89 (2) such as the extract of the decree or order. For this reason, Mrs. Daya went on in her submission, in High Court Miscellaneous Civil Case No. 14 of 1993, she applied for exemption from the requirement of rule 89 (1) of the Court Rules, 1979. This, as said before, was on account of the fact

that the court proceedings could not be obtained as the file was lost. The application she said was heard by Bubeshi, J. (as she then was) who directed the matter to be taken up with the Court of Appeal. Counsel however, conceded that she did not take up the matter with the Court of Appeal as ordered by Bubeshi, J. to seek what she had sought from the High Court.

With regard to ground two of the preliminary objection, Mrs. Daya submitted that there was no merit because from 1st January, 1971, the registered proprietor of the trade mark "X-Pel" is Mansoor Daya of P.O. Box 2999 Dar-es-Salaam. She further stated that this change was duly effected by the Registrar of Trade Marks from the original owner Mansoor Daya Chemicals Ltd.

On the third ground, Mrs. Daya, learned counsel, maintained that the main body of the notice of appeal substantially complied with what is shown in Form B in terms of rule 61 (1) of the Court Rules, 1979. She insisted that the notice of appeal is valid.

It is not disputed that this appeal arises from the decision of the Registrar of Trade Mark under the Trade Marks Ordinance Chapter 394 of the Laws, now Chapter 327 of the Revised Edition 2002. That was Trade Mark Application No. B. 17334. The application was unsuccessfully opposed by the appellant, Mansoor Daya. As already observed, the appeal to the High Court, was also dismissed.

In the circumstances, the question falling for consideration is whether leave to appeal to the Court in this matter is required. The answer in our view is affirmative. The reason is that the matter falls under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. In order for an appeal against the order or decree in this category to be entertained in this Court leave to appeal has to be sought and obtained from the High Court.

In this case, the position is intricate and peculiar. Mrs. Daya, learned counsel for the appellant has firmly maintained that leave was obtained from the High Court but because the court record was

lost, the appellant was not in a position to comply with some of the requirement of rule 89 (2) such as the order, if any, giving leave to appeal. For this reason, Mrs. Daya further submitted, the application to the High Court for an order that the appellant be exempted from the requirement of rule 89 (2) was made. The application was not granted, instead, Bubeshi, J. (as she then was) directed the appellant to make the application in the Court of Appeal which, if satisfied could grant the exemption.

As Mrs. Daya conceded, no such application was lodged in this Court. Instead, this appeal was lodged without the requisite documents set out under rule 89 (2). For instance, under item (i) of sub-rule (2) of rule 89, it is a mandatory for the record of appeal to contain among others, the order if any, giving leave to appeal.

In the instant case, what authentic evidence is there to show that leave to appeal had been granted by the High Court. We do not think that the Court should take the word of Mrs. Daya, learned counsel from the bar as sufficient evidence. Had the learned counsel

heeded to the direction of the High Court (Bubeshi, J.) to apply possibly under rule 3 (2) (a) for the order exempting the appellant from compliance with rule 89 (2) of the Court Rules, 1979, such an order, if granted, would perhaps have saved the purpose. As happened, the Court cannot act on the word of counsel from the bar.

Consequently, as submitted by Mr. Mchome, learned counsel for the respondent, and we think correctly so, the record of appeal does not contain the necessary documents, among others, namely the order giving leave to appeal. In the absence of such orders or an order of the court exempting compliance from the requirement of the rule, the Court cannot therefore presume that leave to appeal had in fact been sought and obtained. This, the Court cannot do. It follows therefore that in terms of the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, 1979, the appeal is incompetent as urged by Mr. Mchome. There is no evidence that leave to appeal was obtained and that the order granting leave if any, has not been attached to the record as required under rule 89 (2) (1).

This ground alone, we think is sufficient to dispose of this appeal. However, we desire to touch very briefly on the other grounds which were argued by counsel for both parties.

With regard to the ground that the appellant has no *locus standi* in this matter we wish to point out at once that this ground has no merit. As observed by Mrs. Daya, learned counsel, with effect from 1st January, 1971, a change was effected which was duly registered by the Registrar of Trade Marks. Since then the registered proprietor of the trade mark "X-Pel" is Mansoor Daya, the appellant. In the circumstances, it is clear to us that the submission that the appellant has no *locus standi* in this matter is without foundation.

Lastly, we think the point raised by Mr. Mchome in ground three has merit. The notice of appeal does not comply with the format set out in Form B, First Schedule to the Court of Appeal Rules, 1979. While we agree with Mrs. Daya that the main body of the notice of appeal was substantially in compliance with Form B in the First Schedule to the rules, there is no denying the fact that the

notice of appeal is fundamentally defective in one aspect. That is that it is wrongly titled "In the High Court of Tanzania" instead of "In the Court of Appeal of Tanzania". This was certainly not a minor defect in the notice of appeal as submitted by Mrs. Daya. It was a fundamental irregularity which goes to the root of the matter, it affects the validity of the notice of appeal.

For the foregoing reasons, the appeal being incompetent, it is accordingly struck out with costs.

DATED at DAR ES SALAAM this 12th day of December, 2006

D.Z. LUBUVA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR