IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 81 OF 2005

CRDB BANK LIMITED ..... APPLICANT
VERSUS
GEORGE MATHEW KILINDU ..... RESPONDENT

(Application for striking out Notice of Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kalegeya, J.)

dated the 20th day of May, 1999
in
Civil Case No. 269 of 1996

R U L I N G

3 & 10 July 2006

MSOFFE, J.A.:

This is an application to strike out a notice of appeal dated 1/6/1999 lodged by the respondent against the decision of the High Court (DSM) given on 20/5/1999 in Civil Case No. 269/1996. The application is supported by the affidavit sworn by Mr. Herbert Herme Hezekia Nyange on behalf of the applicant Bank.

Before going into the grounds upon which the application is based it is necessary to set out the background to the matter.

The applicant herein moved the High Court for an order

to amend its written statement of defence filed on 23/5/1997. The proposed amendment included a counter claim for mesne profits against the respondent. On 20/5/1999 the High Court (Kalegeya, J.) delivered a ruling in which he granted leave to the applicant to amend the written statement of defence. Consequently the respondent lodged the above mentioned notice of appeal. At the same time the respondent filed an application in the High Court seeking leave to appeal. On 22/7/2005 the High Court (Ihema, J.) granted the respondent leave to appeal. There is also no dispute that on 29/4/2002 in a letter Ref. No. GMF/CRDB/2002/4 written by Mgongo Fimbo & Co. (Advocates) the applicant intimated its intention to withdraw the counter claim. At the hearing of this application it transpired that the intention to withdraw the counter claim is yet to be effected apparently because any step towards that end is awaiting the fate of the intended appeal.

With the above background in mind the application is based on two grounds:-

> "(i) no appeal lies against interlocutory orders.
>
> (ii) that the respondent (read *applicant*) has notified both the High Court and the Respondent of its intention to

> abandon its counter claim that formed the basis of the intended appeal".

Messrs. Nyange and Mhango, learned advocates, appeared for the applicant and the respondent, respectively.

In arguing the first ground Mr. Nyange was of the view that with the enactment of Act No. 20/2002 (hereinafter to be referred to as the Act) which, *inter alia,* amended S. 5 of the Appellate Jurisdiction Act, 1979, no appeal would lie against the decision given by Kalegeya, J. because it was interlocutory in nature. As to whether or not the Act has retrospective effect so as to cover the decision given by Kalegeya, J. Mr. Nyange referred to rule 82 of the Court Rules, 1979, and submitted that the rule is couched in continuous tense and would therefore apply to decisions given before the above Act was enacted.

With respect, I do not agree with Mr. Nyange. On the contrary, I am in agreement with Mr. Mhango on his construction of S. 5 (2) of the Appellate Jurisdiction Act, 1979, as amended by the Act where paragraph (d) was deleted and substituted for the following :-

"(d) no appeal or application for revision

> shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit".

With respect, I do not read anything in the above paragraph to suggest that it was intended to have retrospective effect. Having said so, my view is that the decision given by Kalegeya, J. is not covered by the above amendment. In saying so, I am also attracted by Mr. Mhango's argument that in introducing the above amendment it could not have been the intention of the legislature to extinguish an existing right by legislating against the right hitherto existing for appealing against interlocutory orders.

I wish to add here that it is common ground that the Act was passed by the National Assembly on 14/11/2002 and assented to by the President on 14/12/2002. The Act made a number of amendments to various legislations. Among the amendments was section 3 of the Companies Ordinance Cap. 212 where paragraph (d) was added thereto "and deemed to have come into force on the 27th March, 1998".

Also, a proviso to paragraph (ii) of subsection (2) (w) of the Finance Act, 2002 was substituted to apply "to any investment made on or before the 30th June, 2002". The point I want to underscore here is that if the legislature by the above cited examples ordered the amendments to have retrospective effect, it could not have failed to order that the amendment introduced by paragraph (d) of section 5 (2) of the Appellate Jurisdiction Act, 1979 equally apply retrospectively if it had so intended. The fact that the legislature, in its wisdom, did not do so is further evidence or proof to the assertion or fact that it did not intend that the above paragraph apply retrospectively.

The second ground on the intention to withdraw the counter claim need not detain me. The point is neither here nor there because it is, at best, hypothetical and academic. The intention has so far not been effected. So, the intention stands for what it is: it is an intention, without more. This being the position there would be no firm basis or ground upon which the court could, at this stage, make a definitive finding on the point. Notwithstanding, and without prejudice to, this general statement, I think there is merit in the submission by Mr. Mhango that the intended withdrawal cannot prevent this Court in the intended appeal from scrutinizing the legality or otherwise of the ruling given by Kalegeya, J. At any rate, the intended withdrawal of the

counter claim cannot be one of the essential steps envisaged by rule 82. Essential steps are mainly those which are aimed at eventually meeting the requirements of rule 89. Any step towards that end, like compliance with rules 77 and 83 just to mention a few rules, would be an essential step in the proceedings.

In conclusion, I am satisfied that no sufficient or good ground has been advanced to justify the exercise of this Court's power under rule 82. Indeed, the essential steps envisaged by rule 82 are steps which advance the hearing of an appeal – see **Asmin Rashid v Boko Omari** (1997) TLR 146. In the instant case nothing material has been forthcoming to show that the respondent has so far failed to take any of the essential steps envisaged by rule 82.

The application has no merit. It is dismissed with costs.

DATED at DAR ES SALAAM this 10th day of July, 2006.

J.H. MSOFFE
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR