IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MROSO, J. A., NSEKELA, J. A. and RUTAKANGWA, J. A.)

CIVIL APPEAL No. 57 OF 2002

OLAM UGANDA LIMITED SUING
THROUGH ITS ATTORNEY UNITED
YOUTH SHIPPING COMPANY LIMITED.....APPELLANT

VERSUS

TANZANIA HARBOURS AUTHORITY.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania (Commercial Division)

(Dr. Bwana, J)
Dated the 22nd day of April, 2002
In
Commercial Case No. 50 of 2002

RULING OF THE COURT

9th May & 11th June, 2007

RUTAKANGWA. J. A

This is an appeal against the ruling and order of the High Court (Commercial Division) (Dr. Bwana J.) sitting at Dar es Salaam which was delivered on 22nd December, 2002.

When the appeal was called on for hearing Mr. Magafu, learned advocate for the appellant, made an oral application for the withdrawal of the appeal with leave to re-file. He predicated his application on rule 95 (1) of the Tanzania Court of Appeal Rules, 1979 (henceforth the Rules). The reason assigned for the application was that their appeal was against the ruling of the High Court on a preliminary objection challenging the maintainability of the suit on the ground that it had been filed out of time. Upholding the preliminary objection, the High Court dismissed the entire suit with costs. The suit's dismissal, according to him, conclusively determined the rights of the parties in the suit. As a consequence, the drawn order amounted to a decree in terms of section 3 of the Civil Procedure Code, 1966 (the C. P.C. hereinafter).

It was his further contention that as the order dismissing the suit amounted to a decree in law, then the same ought to have been signed by the trial judge (or successor judge) as is mandatorily required under Order XX, rule 7 of the C. P. C. As in the instant case the drawn order was signed by the Deputy Registrar the same is

invalid and this defect renders the entire appeal incompetent, he maintained.

Mr. Magafu pegged his prayer for leave to refile on the decisions of this Court in the cases of :

(1) LUSHOTO TEA COMPANY vs TANZANIA TEA BLENDERS, CIVIL APPEAL No. 71 OF 2004 (unreported),

(2) ALLY YUSUF MPORE vs NICAS ELIKANA, CIVIL APPEAL No. 33 OF 2001 (unreported), AND

(3) TANZANIA SISAL AUTHORITY vs ANDREW WILSON NKUZI, CIVIL APPEAL No. 34 OF 2004 (unreported).

The above appeals were held by the Court to be incompetent and struck out on the ground that the decrees contained in the records of appeal had been signed by a registrar and not a judge. The Court, in all those cases, proceeded to direct the appellants to re- institute the appeals within the stipulated time from the date either of the Court's ruling or after obtaining a properly signed decree from the High Court. It is not insignificant to mention here in passing that these decisions were delivered in March and June, 2005.

Mr. Magafu's application was roundly resisted by Mr. Mhina, learned counsel for the respondent. Although he tended to agree with Mr. Magafu that there are some orders which in law amount to a decree, he objected that the drawn order under scrutiny in this appeal was a decree. To Mr. Mhina, only an order rejecting a plaint under Order VII, rule 11 of the C. P. C. amounts to a decree.

Mr. Mhina further resisted the application to withdraw from the aspect of procedure. It was his contention that the application to withdraw under rule 95 (1) of the Rules was misconceived as no formal notice had been filed and a copy served on the respondent. To him, there is no specific provision in the rules governing an oral application to withdraw an appeal on the day it is called on for hearing.

Lastly, Mr. Mhina submitted that if he is upheld on his contention that the order in question is not a decree, then the Court should strike out with costs the appeal as incompetent for no leave to appeal was granted either by the High Court or this Court.

As a rejoinder, Mr. Magafu maintained that as the dismissal order amounted to a decree, there was no need for obtaining leave

to appeal. He further argued that there is "no formal procedure under the Rules covering this particular situation where an application is made to withdraw an incompetent appeal with leave to re-institute it after rectifying the defects". He, therefore, prayed that his application be entertained and allowed under rule 3 (2) (a) of the Rules.

We shall begin our discussion by resolving the issue on whether or not an application to withdraw an appeal which has already been cause listed for hearing could be appropriately made and granted under rule 95 of the Rules. We appreciate that this is a perennial problem in this Court which calls for a determination by the Court.

We agree with Mr. Mhina that an application for the withdrawal of an appeal under rule 95 has a number of conditions attached to it. Apart from the requirements of a written notice being lodged and copies of it being served on each respondent who has lodged in Court and served a copy of the notice of his full address of service to the appellant, the other condition precedent is that such notice must be given ***"before the appeal is called on for hearing"*** - see rule 95 (1). Therefore, a notice given after the appeal has been cause

listed for hearing does not only fail to meet the above condition, but it tends to defeat the entire purpose of rule 95.

In our considered view the rationale behind rule 95 is to rid the Court registry of duly lodged appeals which the appellants no longer intend to prosecute before they are cause – listed for hearing so that other worthy matters could take their place. It makes no sense to fix an appeal for hearing only to be told on the hearing day that the appellant has lost interest in it and wishes to withdraw it. Although the Court cannot force such a recalcitrant appellant to prosecute the appeal, it is, definitely a waste of the court's and the opposite party's resources. That this was the spirit behind rule 95 is evident in sub rule (3) which reads thus:-

> "If all the parties to the appeal consent to the withdrawal of the appeal, the appellant may lodge in the appropriate registry the document or documents signifying the consent of the parties and ***thereupon the appeal shall be struck out of the list of pending appeals".*** (Emphasis is ours).

In view of the above, we accept Mr. Mhina's contention that the application for withdrawal of the appeal under rule 95 (1) of the

Rules is totally misconceived. However, as we cannot compel the appellant to prosecute the appeal, we are of the firm view that since there is no specific rule to cater for such a situation the application for withdrawal in this appeal is maintainable under rule 3 (2) (a) of the Rules.

The issue of leave to appeal need not detain us. Both counsel in this appeal appear to agree that if the drawn order contained in the record of appeal does not amount to a decree then leave ought to have been sought and granted in terms of section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. As no leave to appeal was sought and granted, if the order dismissing the suit will be held to be not a decree then the appeal will be struck out for being incompetent. This conclusion leads us to the crucial issue in the appeal of whether or not the order dismissing the suit was a decree.

As already alluded to above, the appellant's suit was dismissed by the High court for being time barred. In the suit the appellant was claiming from the respondent payment of US dollars 61,740 "being actual compensation for short delivery of the Imported

Vietnam Rice Long Grain occasioned" by the respondent in January, 2000.

The respondent's preliminary objection was predicated upon section 67 (b) of the now repealed Tanzania Harbours Act, 1977. The said provision then read as follows:-

> 67- Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance of execution or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any duty or authority, the following provisions shall have effect:-
>
> (a) .....
>
> (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof."

After considering the parties pleadings, counsel's submissions on the preliminary objection and section 67 (b) of the Tanzania

Harbours Act, 1977, the learned High Court judge conclusively ruled thus:-

> "Having been time barred, this suit cannot be allowed to proceed now. I do concur with the defendant on this point. The preliminary objection on this point therefore, is upheld. The case is dismissed as it is time barred. Each party to bear its own costs of this suit. I order accordingly."

At this stage we are not concerned with whether the learned judge was right or wrong in ruling the suit to be time barred under the said section 67 (b). We are only concerned with whether the dismissal order amounted to a decree or not. The answer to this issue lies in section 3 of the Civil Procedure Code, 1966 and section 67 (b) of the Tanzania Harbours Act, 1977 read together with sections 46 and 3 (1) of Law of Limitation Act, 1971.

As already shown above, section 67 (b) barred the institution of any suit or legal proceeding against the Harbours Authority after the expiration of 12 months of the accruing of the cause of action. A suit or legal proceeding instituted beyond that period does not lie and in the light of the mandatory provisions of section 3 (1) of the Law of

Limitation Act, 1971 ***"shall be dismissed whether or not limitation has been set up as a defence".***

What, then, was the effect in law, of the dismissal order on the ground of limitation? Was it a dismissal without prejudice that is not barring the plaintiff/appellant from refilling the same suit based on the same cause of action? Or, was it a dismissal with prejudice, that is barring the plaintiff/appellant from refilling the same suit?

Section 67 (b) explicitly provided that no action or legal proceeding shall lie or be instituted unless it is commenced within the period stipulated therein. The word "lie" is given the following meaning in BLACK'S LAW DICTIONARY, 7TH EDITION:

> "To have foundation in the law, to be legally supportable, sustainable or proper", pg. 933.

So the suit was found to be not "legally supportable or sustainable" and dismissed.

In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause action unless and until the dismissal order has been vacated either on

review by the same court or on appeal or revision, by this Court. If that is the case, did the order amount to a decree as gallantly argued by Mr. Magafu? The answer to this crucial question is provided by section 3 of the C. P. C.

In section 3 of the C. P. C. a decree is defined as follows:-

> ".....the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. ***It shall be deemed to include*** the rejection of a plaint and the determination of any question within section 38 or section 89, but ***shall not include*** –
>
> (a) an adjudication from which an appeal lies as an appeal from an order; or
>
> (b) any order of dismissal for default". (Emphasis is ours).

It is further provided in the explanation to the definition that a "decree is final when such adjudication completely disposes of the suit".

ordinary usage the word 'include' has a broader meaning than the word 'comprise'. The word may be used:

> "..... in a non-restrictive way implying that there may be other things not mentioned that are part of the same category": see CONCISE OXFORD ENGLISH DICTIONARY at page 720.

For this reason, we find ourselves constrained to disagree with Mr. Mhina on his submission that "under the C. P. C., only an order rejecting a plaint amounts to a decree". On the contrary, the only orders expressly excluded from the definition of a decree are those mentioned in items (a) and (b) of the definition. Other orders may amount to a decree so long as they conclusively dispose of the suit.

In the case at hand there was an adjudication by a Court of competent jurisdiction, to the effect that the suit by the appellant against the respondent on the basis of the pleaded facts was not legally sustainable. As far as the trial High Court was concerned that determination was final and conclusive as already shown above.

Under the circumstances, therefore, it is our firm view that the order of the High Court dismissing the suit for being time barred was, in law, a decree and appealable as of right. On this we find support from V. V. Chitaley and K. N. A. Rao in their commentaries on the Indian Limitation Act (IX of 1908). The learned authors, after a review of Indian Courts' decisions touching on section 3 of that Act, which is identical with section 3 of our Limitation Act, 1971 say as follows:-

> "An order dismissing a suit or appeal from a decree as being time barred by limitation is a decree" at page 193 of Vol. 1.

The order dismissing the appellant's suit as being time barred being a decree ought, therefore, to have been signed by the trial judge as is mandatorily required under order XX, rule 7 of the C. P. C. Since the drawn Order in the record of appeal was signed by a Deputy Registrar of the High Court, consistent with earlier decisions of the Court on the issue, we hold that it is invalid, as submitted by Mr. Magafu.

Having held the drawn order in the record of appeal to be invalid, rendering the appeal incompetent, we would have forthwith

struck out the appeal. Unfortunately, there is a prayer by Mr. Magafu that the appeal be struck out but with leave to re-institute the same after obtaining a valid drawn order or decree.

It is true, as argued by Mr Magafu, that in the cases he referred to us, the Court had struck out the appeals and proceeded to direct the appellants to reinstitute their appeals within a given time. But we can now safely say that that is all history. In the case of TANGANYIKA CHEAP STORE v NATIONAL INSURANCE CORPORATION (T) LIMITED, CIVIL APPEAL No. 37 OF 2001 (unreported), the Court tellingly observed that the earlier decisions giving leave to re-institute were "wake-up calls". Indeed, in N. B. C. HOLDING CORPORATION v MAZIGE MAGAYA AND ANOTHER, Civil appeal No. 36 of 2004, the Court advised the defaulting parties:

> ".....to resort to Rule 93 (3) of the Court of Appeal Rules, 1979 to rectify defects and regularize the same in conformity with the law".

That was on 03.06.2006.

Since the advice given in N. B. C. HOLDING CORPORATION v MAZINGE MGAYA (supra) went unheeded to some, the Court reconsidered its position regarding invitations to re-institute appeals

of this nature. In the case of TANZANIA SEWING MACHINES CO. LTD vs NJAKE ENTERPRISES LTD, Civil Appeal No. 28 of 2004 delivered on 09/06/06, the Court boldly departed from its previous lenient stance. The Court stated that the appellant had failed to take the advice in N. B. C. HOLDING CORPORATION (supra) seriously and had taken no steps to rectify the defect. It went on to say:-

> "..... We are satisfied that had the appellant been diligent enough it would have rectified the offerding decree before the appeal was called on for hearing. A decree which has not been signed by a judge is not a decree but merely a purported decree. A record of appeal containing an invalid decree offends the provisions of Rule 89 (1) (h) of the Court of Appeal Rules, 1979 and renders the appeal incompetent".

The appeal was thus struck with costs. That has been the stance of the Court since then. No reason has been advanced by the appellant to force us to depart from it.

This appeal was dully filed on 23rd July,2002. It is almost two years since we delivered our decision in N. B. C. HOLDING CORPORATION. As in TANZANIA SEWING MACHINES CO. LTD vs

NJAKE ENTERPRISES LTD (supra) the appellant "never complied with the advice and took no further steps to rectify and regularize the defect".

As the drawn order which we have held to be a decree, remarkably at the urging of the appellant, is invalid, this appeal is rendered incompetent. The same is accordingly struck out with costs.

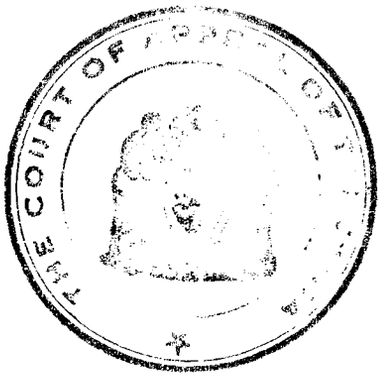
DATED at DAR ES SALAAM this 11th day of June, 2007

J. A. MROSO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the Original



I. P. KITUSI
DEPUTY REGISTRAR