IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO,J.A., RUTAKANGWA, J.A., AND KILEO, J.A.)

CIVIL APPEAL NO. 20 OF 2007

THE HONOURABLE ATTORNEY GENERAL.....APPELLANT
VERSUS
REVEREND CHRISTOPHER MTIKILA..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es salaam)

(Ramadhani, Principal Judge, Massati, J. and Mihayo, J.)

Dated the 5th day of May 2006
in
Misc. Civil Cause No. 10 of 2005

RULING OF THE COURT

Date 12th March, 2008 & 15th May, 2008

RUTAKANGWA, J.A.:

The respondent in this appeal, Rev. Christopher Mtikila, was aggrieved by the amendments in articles 39 and 67 of the Constitution of the United Republic of Tanzania of 1977, henceforth "*the Constitution*", effected *vide* Act No. 34 of 1994, otherwise known as the Eleventh Amendment.

The respondent believed that the said amendments were violative of his basic human rights guaranteed under articles 9(a) and

(f),13(2), 20(4) and 21(1) of the Constitution as well as under the International Covenants on Human Rights which Tanzania has ratified. He accordingly sought redress in court by instituting Miscellaneous Civil Cause No. 10 of 2005 in the High Court of Tanzania at Dar es salaam (Main Registry), against the Attorney General, who is the appellant herein.

Before the High Court, the respondent was seeking the following main reliefs:-

(a) A declaration that amendments to articles 39 and 67 of the Constitution were unconstitutional; and

(b) A declaration that he had a constitutional right under article 21 (1) of the Constitution to run for the presidency of the United Republic of Tanzania and / or for a parliamentary seat as a private candidate.

The claim for these reliefs was roundly opposed by the appellant.

In its reasoned judgment, the High Court unanimously decided the case in the favour of the respondent. It held that the impugned amendments were indeed "unconstitutional and contrary to the International Covenants to which Tanzania is a party". It then declared that it shall be lawful for private candidates to contest for the posts of president and member of Parliament along with

candidates nominated by political parties". The appellant was ordered to " put in place a legislative mechanism " to regulate the activities of the private candidates between the date of the judgment and the next general elections. The appellant was aggrieved by the entire High Court judgment. Hence this appeal.

In this appeal the appellant is represented by Mr. Mathew Mwaimu and Mr. Joseph Ndunguru, both Principal State Attorneys, while Mr. Richard Rweyongeza and Mr. Mpale Mpoki, learned advocates, are representing the respondent.

When the appeal was called on for hearing, Mr. Rweyongeza rose to argue a point of preliminary objection. Notice to that effect had earlier on been lodged under rule 100 of the Court Rules, 1979, henceforth the Rules. The objection was to the effect that the appeal is incompetent as it was based on a defective decree which is found on pages 129-130 of the record of appeal.

The submission by Mr. Rweyongeza in support of the preliminary objection was short and focused. He argued that although the impugned order appealed from is entitled, *"drawn order."*, it has all the attributes of a decree and emanated from a proceeding which for all intents and purposes was a suit. He further submitted that since the High Court in its judgment clearly expressed

the rights of the parties and conclusively determined them, then the order extracted from that judgment was in law a decree. That being the case, he maintained, the said decree ought to have been drawn in accordance with the mandatory provisions of Order XX, rule 7 of the Civil Procedure Code, Cap 33 R.E. 2002 or the C.P.C. hereafter. The said rule 7 provides, ***inter alia,*** that a decree shall bear the date of the day on which the judgment was delivered. Since the *"decree"* entitled *"Drawn Order"* in the record of appeal bears a different date from the date of the judgment, he stressed, the same is incurably defective and rendered the appeal incompetent. In support of his position, he referred us to section 3 of the C.P.C. as well as to two decisions of this Court on the issue, namely:-

(i) THE PERMANENT SECRETARY, MINISTRY OF NATURAL RESOURCES & TOURISM & ANOTHER V. HOTEL TRAVETINE LTD, Civil Appeal No. 138 of 2004 (unreported), and

(ii) UNIAFRICO LIMITED & ANOTHER V. EXIM BANK (T) LTD, Civil Appeal No. 30 of 2006 (unreported).

He, accordingly, urged us to strike out the appeal with costs.

Urging us to dismiss the preliminary objection, Mr. Ndunguru maintained that the challenged drawn order is not a decree because the proceedings before the High Court were instituted under the

Basic Rights and Duties Enforcement Act, Cap 3, R.E. 2002 henceforth *"the Act," by* an originating summons. He also argued that under sections 8 (1) and 13 (3) of the Act, the High Court has powers only to make orders and not to issue decrees. He further contended that as the matter before the High Court was *"an application by way of a petition"* and not a suit, the High Court would not have issued a decree. He invited us to take cognizance of the fact that there is a defference, even under the C.P.C., between a decree and an order. For the latter proposition he referred us to the cases of CLEOPHACE M. MOTIBA and SIX OTHERS V. THE PERMANENT SECRETARY, MINISTRY OF FINANCE AND TWO OTHERS, Civil Appeal No.17 of 2003 and WENGERT WINDROSE SAFARI (T) LTD AND TWO OTHERS V. BIDUGA & CO. LTD AND ANOTHER, Civil Appeal No. 39 of 2000 (both unreported).

After conceding that the two cases he cited related only to the signing of decrees, Mr. Ndunguru rested his submission confidently asserting that as the Act provides for its own procedures in proceedings under it, the C.P.C. does not apply to such proceedings.

Advancing further the appellant's case against the preliminary objection, Mr. Mwaimu concurred with Mr. Ndunguru to the effect that the Act spells out its own procedures on how an aggrieved party

shall access the courts and how evidence shall be produced, thereby barring the application of the C.P.C. On further reflection, however, he conceded that if a lacuna occurs in the procedures provided in the Act, then it would be permissible for the courts to resort to the C.P.C.

Having thus softened their stance, Mr. Mwaimu courageously argued that, all the same, the impugned drawn order was signed and dated by a judge who participated in the decision. So in the event the Court held that the drawn order amounted to a decree, then the appellant should not be punished for the defect, he argued. He assigned two reasons. Firstly, the error was committed by the court itself. Secondly, the defect is a technical one and should not be allowed to defeat substantive justice. He then referred us to article 107 A (2) (e) of the Constitution and the decision of the Supreme Court of Nigeria, in FAMFA OIL LIMITED VS THE ATTORNEY GENERAL OF THE FEDERATION OF NIGERIA & ANOTHER, (cited in the 2003 monthly Judgments of the Supreme Court). He also pleadingly urged us to resort to rule 3 (2) (b) of the Rules, and *"depart from the requirements of the rules for the ends of justice."*

In his short rejoinder, Mr. Rweyongeza emphatically submitted that the provisions of the C.P.C. cover proceedings under the Act except for those exempted under S. 14 (3). He distinguished the

FAMFA OIL case (supra) from the facts of this case by showing that in the former case it was the originating summons which had not been duly signed, but the parties had all the same entered appearance. On article 107 A (2) (e) of the Constitution he claimed that the issue was settled by this Court in the case of AMI (TANZANIA) LIMITED V. OTTU ON BEHALF OF P.L. ASSENGA & 106 OTHERS, Civil Application No. 76 of 2002 (unreported). He also contended that the provisions of rule 3 (2) (b) of the Rules could not be invoked in aid of the appellant for two basic reasons. One, the better ends of justice would never be met by violating the law. Two, the requirement of a properly signed and/or dated decree is a requirement of the C.P.C. and not of the Rules. The Court cannot invoke rule 3 to dispense with and/or depart from this requirement, he concluded.

After dispassionately considering the competing contentions of counsel for both sides, we are of the opinion that the following salient issues call for our consideration and determination:-

"(a) Whether or not the constitutionally mandated actions instituted in the High Court under sections 4 and 5 of the Act are suits;

(b) Without prejudice to the answer given to issue (a) above, whether or not the provisions of the C.P.C.

govern such proceedings or actions; and

(c) *If the answer to issue (b) above is in the affirmative, whether the impugned drawn order is a decree or not and if it is, whether it is a valid decree."*

We shall discuss and dispose of these issues ***seriatim.***

As is already apparent, counsel for both parties are at variance with each other on the first issue. While counsel for the respondent has vehemently argued that proceedings under the Act are suits, both counsel for appellant have emphatically maintained that they are not.

As this Court correctly observed in the HOTEL TRAVERTINE LTD case (supra), the word "suit" has not been defined in the C.P.C. On our part we have assiduously studied every provision in the Act. We have found the word *"suit"* mentioned more than twice but it has not been defined therein. What, then, is a suit? In view of the obvious lack of a statutory definition of the word and in order to move forward, we have found it appropriate to have recourse to both legal and ordinary English dictionaries.

In ordinary parlance, the word "suit" or "lawsuit" is defined in the NEW CONCISE OXFORD ENGLISH DICTIONARY, 11th edition, at page 808, to be :-

"a claim or dispute brought to a court of law for adjudication".

Also, the OXFORD ADVANCED LEARNER'S DICTIONARY OF CURRENT ENGLISH, 6th edition provides this definition at page 759:-

"A claim or complaint against somebody that a person can make in a court of law".

Legal dictionaries provide almost identical definitions. These are:

(i) "Any legal proceeding of a civil kind brought by one person against another; action": P.G. OSBORN'S CONCISE LAW DICTIONARY, 5th edition at page 305;

(ii) "Any legal proceeding by a party or parties against another in a court of law," : BLACK'S LAW DICTIONARY, 8TH edition at page 1475; and

(iii) "A process instituted in a court of justice for recovery or protection of a right, the enforcement of a claim or the redress of a wrong": the LAW LEXICON THE ENCYCLOPAEDIC LEGAL & COMMERCIAL DICTIONARY.

The last given definition was adopted by this Court in the HOTEL TRAVERTINE LTD case (supra).

It is eminently clear from these definitions that suits are proceedings of a civil nature in a court of law involving two or more parties on a dispute or claim which needs to be adjudicated upon, to determine or declare the rights of the disputing parties. The

procedure for instituting and conducting such proceedings in a court of law is governed either by the C.P.C. or as provided under any other written law.

We showed at the outset of this ruling that the respondent took the appellant to Court because he was aggrieved by the 11th Constitutional Amendment. He had the right to institute that action under article 30(3) of the Constitution. The English version of the said-sub article reads as follows:-

> *"30 (3) Any person alleging that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic,* ***may institute proceedings*** *for redress in the High Court." [Emphasis is ours].*

To enable the aggrieved person to pursue that guaranteed right of redress effectively, the Constitution, in article 30 (4), directs the State authority to enact legislation for purposes of, ***inter alia:-***

> *"(a) regulating procedure for* ***instituting proceedings*** *pursuant to this Article;*
>
> *(b) specifying the powers of the High Court in relation to the hearing of* ***proceedings instituted*** *pursuant to this Article". [Emphasis is ours].*

On the authority of sub-article (4), the Act was enacted by Parliament in 1994, for that purpose.

From our careful reading of the Act, we have discerned that the actions sanctioned by article 30(3) of the Constitution and section 4 of the Act, have been referred to as an application, petition, proceedings and/or suit in different sections of the same Act. This bolsters the contention of Mr. Rweyongeza to the effect that the respondent's action in the High Court was a suit. We, too, after considering the definitions given above, respectfully accept this contention. After all, these words are regularly used interchangeably as the Act shows. It is, therefore, our holding that civil proceedings under the Act for the protection and enforcement of basic rights, duties and/or freedoms are suits. We find support for this view in section 2 of the Act. The section provides that the *"Act shall apply to Tanzania Zanzibar as well as Mainland Tanzania in relation to all* ***suits*** *the courses (sic) of action in which concern the provisions of section 12 to 29 of the Constitution"*.

The answer to the question of whether or not the C.P.C. applies to these proceedings is satisfactorily supplied by the Constitution, the C.P.C. and the Act. Section 2 of the C.P.C. provides as follows:-

> *"2. Subject to the express provisions of any written law, the provisions of this Code shall apply to all proceedings in the High Court of the United Republic, courts of resident magistrates and district courts".*

Of course by saying *"all proceedings"* we are sure the legislature meant only **civil** proceedings.

It is also provided in section 5 of the C. P. C. that :-

> *"In the absence of any specific provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force."*

It is clear from section 2 of the C.P.C. that in the absence of any express provisions in any written law to the contrary, the C.P.C. shall regulate the procedures for the institution and conduct of any civil proceedings in those courts. Under normal circumstances, therefore, civil proceedings for the enforcement and protection of basic rights, duties and freedoms, ought to be regulated by the provisions of the C.P.C. However, strictly speaking, this should not be the case. This is because the Act, in conformity with article 30(4) of the Constitution was specifically enacted-

> *"..... to provide for the procedure for enforcement of constitutional basic rights, for duties and for related matters."*

That is why we find provisions in the Act providing broadly for the modes of instituting such proceedings (s.5), the contents of the petition (s.6), service of petition (s.7), the fixing and the notifying of hearing dates to the concerned parties and how they should enter

appearance (s.11), as well as the form of evidence to be received (s.12). More significant is section 15 which provides as follows:

> *"15-Subject to the provisions of the Act, the Chief Justice may, after consultation with the Minister, make rules with respect to other matters relating to the practice and procedure of the High Court and of subordinate courts in relation to jurisdiction and powers conferred by or under this Act, including rules with respect to the time within which application may be made to the High court from subordinate courts".*

It would appear, therefore, that from the general scheme of the Act, the legislature intended the Act to be self sufficient in relation to the form of procedure for the conduct of all suits instituted under it once the rules of practice and procedure were promulgated. This will not be a unique development. The same is the case under the Elections Act, 1985 in relation to election petitions, as we shall briefly show.

Under article 85 (1) of the Constitution, every proceeding for the purposes of determining the validity of a person's membership of parliament shall first be instituted and heard in the High Court. It is provided in article 83 (3) that Parliament may enact legislation providing for, among other things, the procedure for instituting such proceedings and "*prescribing the powers of the High Court over such*

proceedings and specifying the procedure for the hearing of the matter itself."
The provisions of article 83 (1) and (3) are similar to those of article 30 (3) and (4) already discussed in this ruling.

The legislation envisaged under article 83 (3) is now the Elections Act, 1985. The Elections Act contains provisions almost similar to sections 4,8,11,12 and 13 of the Act. There is also section 117 (1) which, like section 15 of the Act, empowers the Chief Justice to "*make rules of Court regulating the procedure and practice to be followed ..... in relation*" to such election petitions. Such rules are already in place. They are the National Elections (Election Petitions) Rules, 1971 which were saved by section 129 (b) of the Elections Act, 1985. Rule 26 of these Elections Petitions Rules specifically provides that certain provisions of the C.P.C. shall apply **mutatis mutandis** to "*proceedings on a trial of a petition and the enforcement of an order for costs".* Some of the provisions of the C.P.C. specifically mentioned are those relating to *"awarding of costs, judgment and execution of a decree".*

The C.P.C. expressly provides in section 28 that once the *"case has been heard"*, the court *"shall pronounce judgment , and on such judgment a decree shall follow".* The contents of judgments and decrees are spelt out in Order XX rules 4 and 6 of the C.P.C. It is further stipulated in

rule 7 that the decree shall bear the date of the day on which the judgment was pronounced and shall be signed by a judge or magistrate. The C.P.C. also contains provisions on how a decree or order of the Court shall be executed. The Act does not contain any of these provisions. In their absence it is impossible to imagine how a court can effectively make orders to enable a successful litigant to secure the full enjoyment of his basic rights, freedoms and duties and/or how the successful litigant under the Act can recover his costs. The matter is aggravated by the fact that the rules envisaged under section 15 of the Act which are supposed to supply the real flesh to the bare rudimentary procedure outlined in the Act are yet to be promulgated.

Fortunately, counsel for the appellant appear to accept that although the Act was meant to be self-sufficient, in the event a lacuna appears courts can resort to the C.P.C. We are satisfied that in the absence of the rules, the Act is yet to be fully self sufficient. There is, therefore, a clear lacuna. In our considered opinion this lacuna can only be filled by the C.P.C. as Mr. Mwaimu wisely intimated. We accordingly hold that in the absence of the rules, the provisions of the C.P.C. in so far as they are consistent with the Act,

apply to proceedings under the Act. The second issue is accordingly resolved in the affirmative.

In the light of the answers given to the first two issues, the third issue should not detain us unnecessarily. There is no dispute on the fact that the drawn order in the record of appeal bears a date different from that of the judgment. The bone of contention is whether it should be treated as a decree for the purposes of invoking Order XX, rule 7.

We have already held that the proceedings in the High Court was a suit. We have held that the provisions of the C.P.C. until now govern such proceedings. Under the prevailing law, at the conclusion of the case, a judgment was pronounced and on such judgment a decree ought to have followed.

We have carefully studied the judgment of the High Court and the impugned drawn order. We are satisfied that the said order has all the assential attributes of a decree as defined in section 3 of the C.P.C. and clearly elaborated on in the HOTEL TRAVETINE LIMITED case. It shows that the High Court adjudicated the contested suit. It gave its decision which clearly expressed the rights of the parties on

each issue and conclusively determined those rights. It has now become ***functus officio*** on those issues.

We are, therefore, of the firm view that the impugned drawn order is indeed a decree. The third issue is answered affirmatively.

Having held that the challenged drawn order is a decree, we proceed further to hold that it ought then to have conformed with the mandatory requirements of Order XX rule 7 of the C.P.C. One such requirement is that such a decree shall bear the date of the day when the judgment was pronounced. It is now settled law that if a decree is not so dated it is incurably defective. See, for instance:-

(i) MKAMA PASTORY V TANZANIA REVENUE AUTHORITY, Civil Appeal No. 95 of 1995 (unreported) and

(ii) UNIAFRICA Ltd V. EXIM BANK (T) LTD (supra).

When it is said that a decree is incurably defective, it means that it is irremediably lacking in legal sufficiency. In short, it is as good as if it never existed at all. This clear stance of the law notwithstanding, it was suggested by Mr. Mwaimu that since the preliminary objection was premised upon a mere technicality, the

Court should overrule it and proceed to determine the appeal having regard to the clear provisions of article 107A (2) (e) of the Constitution and the persuasive decision of FAMFA Oil Ltd case (supra).

In the FAMFA Oil Ltd case it was held, and we accept that holding, that justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasion no miscarriage of justice. Explicit in this holding, it will be realized, is the recognition that not all "procedural technical irregularities" can be ignored. Some can be. Others, such as those irregularities which go to the root of the matter, cannot be ignored. At any rate, as we have already sufficiently demonstrated above, here we are not dealing with a mere technical procedural irregularity. The law, that is rule 89 (1) of the Rules, specifically requires that a record of appeal shall incorporate a copy of a valid decree or order appealed from. Where it is not so incorporated, there is no appeal at all. But, as this Court succinctly stated in FORTUNATUS MASHA VS WILLIAM SHIJA AND ANOTHER [1997] T.L.R 91, it can only be said that efforts were made to bring an appeal into existence.

This position has recently been restated with the same emphasis by this Court in HOTEL TRAVETRINE LTD (supra), ROBERT EDWARD HAWKINS & ANOTHER V. PARTICE P. MWAIGOMOLE, Civil Application No. 109 of 2007 and HARUNA MPANGAOS & 902 OTHERS V. TANZANIA PORTLAND CEMENT CO. LTD, Civil Appeal No. 10 of 2007 (all unreported), among other cases. So, however persuasive the FAMFA Oil Ltd case might be on issue relating to technical procedural irregulaties which do not go to the root of the matter, it is our settled opinion that it has no relevance in this particular case where no element of technicality is involved. Furthermore, we cannot safely invoke the provisions of rule 3(2) (b) of the Rules to flout the clear mandatory provisions of the law, as rightly submitted by Mr. Rweyongeza.

We are also mindful of the impassioned plea by Mr. Mwaimu urging us to invoke article 107A(2) (e) of the Constitution and overlook this fundamental defect. The said article 107 A (2) (e) provides as follows:-

> *"(2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa* ***kuzingatia sheria,*** *mahakama zitafuata kanuni zifuatazo, yaani:*

*(e) kutenda haki **bila kufungwa kupita kiasi** na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka".* [Emphasis is ours].

Freely translated in English, it would read thus:

*"(2) In the determination of civil and criminal matters according to law, the courts shall have regard to the following principles, that is to say- (e) administering justice **without being constrained unduly** by technical requirements which are capable of preventing justice from being done".*

Fortunately, such a plea has been raised before in this Court under identical and/or related circumstances. It was, for instance, put forward in the following cases:-

(i) CHINA HENAN INTERNATIONAL COOPERATION GROUP V. SALVAND K.A. RWEGASIRA, Civil Reference No. 22 of 2005 [unreported];

(ii) ZUBERI MUSSA V. SHINYANGA TOWN COUNCIL, Civil Application No. 100 of 2004; and

(iii) AMI (TANZANIA) LTD V. OTTU (Supra).

In Ami (TANZANIA) LTD V. OTTU, this Court lucidly held as follows:-

> *"The complaint herein is that the appeal is incompetent because of a defective decree in the manner explained earlier on in this ruling. Article 107A(2) (e) of the Constitution does not in anyway command that procedural rules should be done away with in order to advance substantial justice. Each case will be considered on its own peculiar facts and circumstances ..... A decree is a vital document in an appeal in terms of Rules 89 (2) (v) of the Court Rules, for without a decree, there is no appeal. Such non –compliance is fundamental and goes to the root of the mater and in our humble view, Article 107A(2) (e) cannot resurrect a non existent appeal".*

In our humble view the above holding adequately answers the plea of Mr. Mwaimu. So far, we are not aware of any constitutional or statutory directive to the effect that appeals from suits instituted under s. 4 of the Act should be treated differently. The short and logical answer to the appellant, therefore, is that there is no appeal before us which can be saved by article 107A (2) (e) of the Constitution. The best we can say, out of deference to him, is that he made some visible efforts to bring one into existence but failed. The door is still open to him to bring one so long as he is ready to comply with all the mandatory requirements of the law.

In fine, we uphold the respondent on the preliminary objection and strike out the appeal with costs.

DATED at DAR ES SALAAM this 9th day of May, 2008.

J.A. MROSO

JUSTICE OF APPEAL

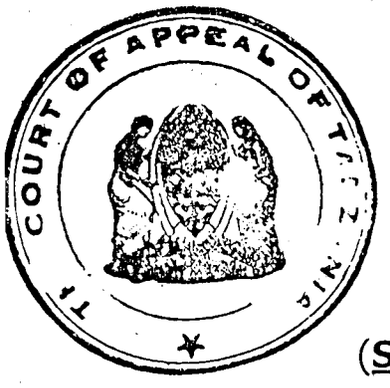
E.M.K. RUTAKANGWA

JUSTICE OF APPEAL

E.A. KILEO

JUSTICE OF APPEAL

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



F.L.K. WAMBALI

(SENIOR DEPUTY REGISTRAR)