IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., KIMARO, J.A. And MBAROUK, J.A.)

CIVIL APPEAL NO 107 OF 2008

WILFRED MUGANYIZI RWAKATARE.....APPELLANT

VERSUS

1. HAMIS SUED KAGASHEKI
2. HON. THE ATTORNEY GENERAL.....RESPONDENTS

(Appeal from the Judgment and decree of the High Court of Tanzania at Bukoba)

(Lila, J.)

dated the 21st day of December, 2007
in
Misc. Civil Cause No. 8 of 2005

RULING OF THE COURT

9 February 6 March, 2009

MUNUO, J.A.:

During the Parliamentary Elections in 2005, the present appellant, Mr. Wilfred Muganyizi Rwakatare, contested the Bukoba Urban District Constituency under the sponsorship of CUF. The first respondent, Mr. Hamisi Sued Kagasheki contested the same seat under the sponsorship of CCM. The latter won the elections. Dissatisfied, the appellant instituted an Election Petition,

Miscellaneous Civil Case No. 8 of 2005 in the High Court of Tanzania at Bukoba Urban District. The said Election Petition was unsuccessful. Hence the present appeal.

In this appeal, Mr. Rweyongeza and Mr. Taslima, learned advocates, represented the appellant. Mr. Malongo, learned advocate, appeared for the 1st respondent, Mr. Hamisi Sued Kagasheki. The 2nd respondent, Hon. Attorney General, was represented by Mr. Chidowu, learned Principal State Attorney.

Mr. Malongo filed a Notice of Preliminary objection under the provisions of Rule 100 of the Tanzania Court of Appeal Rules, Cap 141 Subsidiary R.E. 2002, contending that the appeal is incompetent on 3 grounds namely that –

1. *The Affidavit of Wilbert Maziku in respect of service is incurably defective as it offends the mandatory provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap 12 R.E. 2002.*

2. *The appellant did not serve the Notice of Appeal on the 1st Respondent contrary to Rule 77 (1) of the Tanzania Court of Appeal Rules, Cap 141 Sub. R.E. 2002.*

3. *In the alternative, the Notice of Appeal was not served within the prescribed statutory period and thus offending the mandatory provisions of Rule 77 (1) of the Tanzania Court of Appeal Rules, Cap 141 Sub. R.E. 2002.*

The respondent's counsel abandoned ground 4 of the preliminary objections.

Counsel for the 1st respondent contended that the affidavit of service annexed to the Notice of Appeal is null and void under the provisions of Rule 89 (1) (b) of the Court Rules, Cap 141 Sub. R.E. 2002. The said affidavit, he further contended, is incurably defective as it offends the mandatory provisions of section 8 of the Notaries Public and Commissioner for Oaths Act, Cap. 12 R.E. 2002 which state, verbatim:

> *8. Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.*

The affidavit of service at Page 969 of the record, counsel for respondent argued, does not conform with the above provisions of Cap 12 because the jurat does not show the place of attestation. The rubber stamp and signature are not part of the jurat, Mr. Malongo further contended. He cited the case of **Zuberi Mussa versus Shinyanga Town Council, Civil Application No. 100 of 2004,** Court of Appeal of Tanzania (unreported) at Page 12-13 wherein the Court considered a similar preliminary objection and observed, inter-alia:

> *In **D. B. Shapriya and Company Ltd. versus Bish International B. V., Civil Application No. 53 of 2002 (unreported)** a ground of preliminary*

objection identical with the one under scrutiny was raised. The Court was of a firm conclusion that the need to show in the jurat the place where the oath was taken was indispensable, and this cannot be substituted by the name of the place in the advocates rubber stamp. After all such rubber stamp is never part of the jurat of attestation.

The Court further observed that –

In similar vein the Court resolutely so held in the case of ***Theobald Kainami versus The G. M. K. C. U (1990) Ltd. (CA) B. K. Civil Application No. 3 of 2002 (unreported)*** *wherein the Court held that –*

.....the courts in this country do not have the kind of Leeway the courts in England have. The requirement in this country that the place where the oath is made or affidavit taken has to be shown in the jurat of attestation

> *is statutory and must be complied with.*

All in all, Mr. Malongo contended that the defective affidavit of service of the Notice of Appeal on the 1st Respondent contravenes the provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 R.E. 2002 thence rendering the affidavit of service of the notice of appeal incompetent so it should be struck out. Striking out the affidavit of service from the record of appeal, counsel for the 1st respondent maintained, renders the record of appeal incompetent under Rule 89 (1) (b) of the Court Rules, Cap. 141 Subs. R.E. 2002.

Rule 89 (1) (b) of the Court Rules, Cap. 141 Subs. R.E. 2002 provides for the record of appeal by stating, and we quote:

> *89 (1)For the purpose of an appeal from the High Court in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3) countain copies of the following documents –*

> *(a) an index of all documents in the record.....*
>
> *(b) a statement showing the address for service of the appellants and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by Rule 79, his last known address and proof of service on him of the notice of appeal.*

It is the contention of counsel for the 1st Respondent that the Notice of Appeal was not served on the 1st Respondent. The omission to serve the 1st Respondent with the Notice of Appeal as is mandatory under Rule 77 (1) of the Court Rules, Cap. 141 Subs. R.E. 2002, renders the appeal incompetent so it should be struck out with costs. On this, he cited the cases of **D. P. Valambhia versus Transport Equipment Ltd. (1992) TLR 246** in which the Court held, among other things, that –

> *.....Failure by the respondents to serve a copy of the notice of appeal on the*

> *applicant through negligence and or inaction is failure to take an essential step in the proceedings as required by Rule 77 (1).*

Similar holdings were made in the cases of **Salim Sunderji versus Capital Development (1993) TLR 224; Ernest Joseph versus Damian Ulaya, Civil Application No. 50 of 1999 (CA) at Arusha (unreported);** and **Festo Kabakama versus Joseph Tigusane, Civil Appeal No. 66 of 1999, (CA) at Mwanza (unreported)**.

Hence for not complying with the provisions of Rule 77 (1) of the Court Rules, Cap. 141 Subs. R.E. 2002, counsel for the 1st Respondent prayed that the incompetent appeal be struck out with costs.

In the alternative, in the event the Court finds that the 1st Respondent was duly served with the Notice of Appeal, counsel for the appellant contended that the Notice of Appeal was served on the 1st Respondent out of time in contravention of the provisions of Rule 77 (1) of the Court Rules, Cap. 141 so the appeal is incompetent. He

observed that as reflected on Page 967 of the record, the Notice of Appeal was filed on the 27th December, 2007 during the court vacation which ended on the 31st January, 2008. The period of limitation started running on the 1st January, 2008 so the Notice of Appeal had to be served by the 7th February, 2008, counsel for the 1st Respondent urged. By the 8th February, 2008, the 7 days period for serving the Respondents had expired, he maintained. Thence, on the alternative ground, the appeal would still be incompetent so it should be struck out with costs.

Mr. Rweyongeza, learned counsel for the appellant conceded that the principles in the cases cited by counsel for the 1st Respondent were correct but those cases are not applicable to the present appeal. He submitted that the issue of service of the Notice of Appeal is *res judicata* for it was finally determined, in Civil Application No. 2 of 2008 between the same parties wherein it was held that the Respondents were served on the 8th February, 2008 within time. There was no reference from the decision of the single judge, so the issue of limitation is *res judicata*, counsel for the appellant contended.

Urging the Court to strike out the alternative ground of the preliminary objection, counsel for the appellant contended that the 1st Respondent should not be allowed to blow cold and hot simultaneously. On this, counsel for the appellant referred us to Bindra on Pleadings and Practice, Chapter 1 at Page 20 wherein the learned author states:

> *Lord Kenyon's trite saying that a man shall not be permitted to "blow hot and cold" is based on the elementary rule of logic which finds expression in the well known maxim: "Alegans contraria non est audiendus" meaning "He is not be heard who alleges things contradictory to each other.....*

It is the view of Mr. Rweyongeza that once the 1st Respondent alleges he was not served with the Notice of Appeal, he is estopped from pleading in the alternative, that if he was served, then such service was time barred. The issue of limitation, counsel for the appellant insisted, is *res judicata* for it was settled in Civil Application

No. 2 of 2008 the ruling of which the respondents preferred no appeal.

On the objection relating to the alleged defective affidavit of service of the Notice of Appeal on the 1st Respondent, counsel for the appellant correctly observed in our view, that the affidavit complained of is a mere format for service of summons. The form was designed by the learned Chief Justice. It is not an affidavit as stipulated under Order XIX of the Civil Procedure Act, Cap. 33 R.E. 2002. Under the circumstances we find no merit in ground 1 of the preliminary objection.

The next issue is whether the Notice of Appeal was served on the 1st Respondent, and if he was served, was such service within the seven days statutory period stipulated under Rule 77 (1) of the Tanzania Court of Appeal Rules, Cap. 141 Subs. R.E. 2002?

The record of appeal speaks for itself. Page 968 shows that the Notice of Appeal was only served on the 2nd Respondent, the Attorney General. Whoever accepted service at the Attorney General

Chambers; rubber stamped and signed the Notice of Appeal to acknowledge service of the Notice of Appeal.

There is no indication by signature, rubber stamp or whatever, to prove that the 1st Respondent ever received the Notice of Appeal. We are of the firm view that if the 1st Respondent had been duly served with the Notice of Appeal in person, or through his advocate, whoever received the Notice of Appeal would have signed and such signature would be apparent to prove service just as was the case with the Attorney General. On this, we are fortified by Page 971 of the record of appeal on which either respondent accepted service of the letter to the District Registrar applying for copies of proceedings, judgment and decree for appeal purposes.

We wish to point out that **Miscellaneous Civil Application No. 2 of 2008** before Kalegeya, J.A. was an application for extension of time. In that regard, the second preliminary objection is not res judicata because the single judge considered not the service of the Notice of Appeal, but the question of limitation period for instituting the appeal. For that reason Miscellaneous Civil Application

No. 2 of 2008 is distinguishable from the preliminary objection on service of Notice of Appeal on the 1st Respondent.

As the Notice of Appeal was not served on the 1st Respondent, the appeal is incompetent for non-compliance with the provisions of Rule 77 (1) of the Tanzania Court of Appeal Rules, Cap 141 Subs. R.E. 2002. We therefore uphold the second preliminary objection. In the result we strike out the incompetent appeal with costs. We certify the costs for two counsel.

DATED at DAR ES SALAAM this 2nd day of March, 2009.

E. N. MUNUO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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

(J. MGETTA)
DEPUTY REGISTRAR