IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: RAMADHANI, C.J., MSOFFE, J.A., And MBAROUK, J.A.)

CIVIL APPEAL NO. 18 OF 2008

ABDALLAH HASSAN ..... APPELLANT
VERSUS
VODACOM (T) ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Tanga)

(Shayo, J.)

dated the 8th day of November, 2007
in
Civil Case No. 5 of 2004

JUDGMENT OF THE COURT

10 July & 28 August 2009

MSOFFE, J.A.:

In Civil Case No. 5 of 2004 of the High Court at Tanga the appellant sued the respondent Company (hereinafter the Company) in a claim of Shs. 450,000,000/= and Shs. 150,000/= being damages for trespass to land and mesne profits, respectively. In answer to a preliminary objection taken at the instance of Mr. Gasper Nyika, learned advocate for the Company, the High Court (Shayo, J.) opined

and held that the High Court had no jurisdiction to deal with the matter. The learned judge reasoned, *inter alia,* as follows:-

> *I fully agree with Mr. Nyika, learned counsel for the defendant that since Act No. 2/2002 came into operation on 1st October, 2003 – GN. 223/2003 the jurisdiction of other/ordinary courts on any matter concerning land ceased from that date. That being the case the present suit was filed on 30/7/2004 when already the structure of courts vested with exclusive jurisdiction had, by law, started to operate as from 1st October, 2003.*

Having ruled so, the learned judge went on to dismiss the suit with costs.

Aggrieved, the appellant has preferred this appeal. At the hearing of the appeal, he appeared in person, unrepresented. The Company had the services of Mr. Nyika, learned advocate.

The complaint in the first ground of appeal is that the judge erred "by creating a *res judicata* status of the suit on a preliminary objection." In essence, the appellant is of the view that by dismissing the suit the judge created a *res judicata* situation in that it was no longer open to him to file a fresh suit in the appropriate forum as he would be caught up by the plea of *res judicata.* Although, the appellant being a layman, did not say so in so many words, his view is that the judge ought to have struck out the suit instead of dismissing it. In response, Mr. Nyika readily conceded to the complaint in this ground.

With respect, we are in agreement with both the appellant and Mr. Nyika on their concurrent view in respect of the complaint in the above ground of appeal. Dismissing the suit, as happened in the case, presupposes that the suit was competent in the first place and was heard on its own merits. As it is, the suit being incompetent, the judge did not determine it on merit. Therefore, instead of dismissing the suit he ought to have struck it out.

With respect, we wish to state by way of emphasis that there is a distinction between striking out and dismissing a suit, an appeal or an application, as the case may be. In the case of **Ngoni-Matengo Cooperative Marketing Union Ltd. V Alimahomed Osman** (1959) EA 577 the appeal was incompetent for lack of the necessary decree. The Court observed at page 580 thereof thus:-

> *.....This Court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this Court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it;* ***for the latter phrase implies that a competent appeal has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of .....***
>
> (Emphasis supplied)

In similar vein, this Court (Lubuva, J.A.) in **Thomas Kirumbuyo and Another v Tanzania Telecommunications Co. Ltd.,** Civil

Application No. 1 of 2005 (unreported) underscored the above point when he stated as follows:-

> *From the outset, and without prejudice, it is to be observed that the learned judge having upheld the preliminary objection that the application was hopelessly out of time, and therefore incompetent, should have proceeded to strike it out. Dismissing the application as happened in this case, presupposes that the application was competent and that it was heard on merits.*

This brings us to the second ground of appeal. The complaint here is that the judge ought not to have made an order for costs against the appellant "without giving due consideration all the circumstances of the case, more particularly as the registering authority did not assist the lay Appellant". With respect, this ground need not detain us. Having made an order "dismissing" the suit it was to be expected that an order for costs be made because in terms of **Section 30** of the **Civil Procedure Code,** costs usually follow the event. So, this ground has no merit.

In the third ground of appeal the judge is faulted "by not permitting the Appellant to file his suit afresh with Court Fees waived". With respect, we find no need of addressing the complaint in this ground because it is not based or borne out on any finding of the judge.

In the end, we allow the appeal on the first ground but dismiss it on the second ground. We quash the order dismissing the suit and we order that the suit is struck out. Since, we have allowed the appeal partly we are of the view that this is a fit case in which each party should bear its own costs; and we so order accordingly.

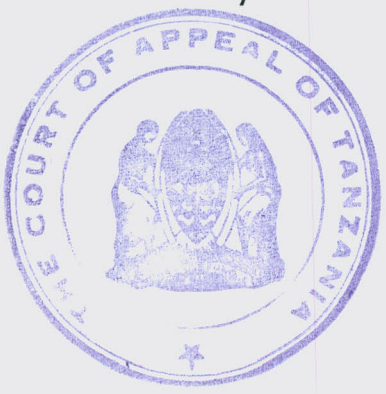
DATED at DAR ES SALAAM this 29th day of July, 2009.

A.S.L. RAMADHANI
CHIEF JUSTICE

J.H. MSOFFE
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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



(J.S. MGETTA)
DEPUTY REGISTRAR