IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CIVIL APPEAL NO. 70 OF 2011

EUSTACE KUBALYENDA ..... APPELLANT
VERSUS
VENANCIA DAUD ..... RESPONDENT

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

(Lyimo, J.)

dated the 8th day of October, 2010
in
(PC) Civil Application No. 10 of 2010

RULING OF THE COURT

24 & 29 May, 2012

RUTAKANGWA, J.A.:

The Constitution of the United Republic of Tanzania, 1977 aside, the only and most comprehensive single statute conferring appellate jurisdiction on this Court, is the Appellate Jurisdiction Act, Cap. 141, R.E. 2002 (the Act). Furthermore, it is in section 5 of the Act where we find the right of appeal to this Court by a person aggrieved by a decision of the High Court of Tanzania in the exercise of its various jurisdictions.

Section 5 of the Act reads, in full as follows:-

"5 – (1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal –

(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;

(b) against the following orders of the High Court made under its original jurisdiction, that is to say -

(i) an order superseding an arbitration where the award has not been completed within the period allowed by the High Court;

(ii) an order on an award stated in the form of a special case;

(iii) an order modifying or correcting an award;

(iv) an order filing or refusing to file an agreement to refer to arbitration;

(v) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(vi) an order filing or refusing to file an award in an arbitration without the intervention of the High Court;

(vii) an order under section 95 of the Civil Procedure Code, which relates to the award of compensation where an arrest or a temporary injunction is granted;

(viii) an order under any of the provisions of the Civil Procedure Code, imposing a fine or directing the arrest or detention, in civil prison, of any person, except where the arrest or detention is in execution of a decree;

(ix) any order specified in rule 1 of Order XLIII in the Civil Procedure Code, or in any rule of the High Court amending or in substitution for, the rule;

(c) with the leave of the High Court or the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.

(2) Notwithstanding the provisions of subsection (1) -

(a) except with the leave of the High Court, no appeal shall lie against –

(i) any decree or order made by the consent of the parties or

(ii) any decree or order as to costs only where the costs are in the discretion of the High Court.

(b) except with the leave of the Court of Appeal, a party who does not appeal against a preliminary decree shall not dispute its correctness in an appeal against the final decree.

(c) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order;

(d) No appeal shall lie against any preliminary or interlocutory decision or order of the

> Commercial Division of the High Court unless such decision or order has the effect of finally determining the suit."

It is patently clear, therefore, from the provisions of section 5, that this Court and the High Court have concurrent jurisdiction in granting leave to appeal to the Court, to any aggrieved person. **But it is the High Court only which has been granted exclusive jurisdiction to certify** to this Court that a point or points of law is or are involved in the impugned decision or order in respect of proceedings falling under Head (c) of Part III of the Magistrates' Courts Act, Cap. 11 R.E. 2002 (the MCA). The said provisions of the MCA deal with the appellate and revisional jurisdiction of the High Court in matters originating from primary courts.

In this appeal the appellant was aggrieved by the decision of the High Court, sitting at Bukoba, in the exercise of its revisional jurisdiction, in Civil Revision No. 2 of 2007 which emanated from Kayanga District Court Civil Appeal No. 40 of 1997. The appellant, as a consequence, lodged High Court (PC) Civil Application No. 10 of

2008 in the High Court under s. 5 (2) (c) of the Act, seeking a certificate on a point of law. The High Court (Lyimo, J.) dismissed the application with costs on 8th October, 2010. Dissatisfied with the dismissal of his application, the appellant lodged this appeal.

Through Mr. Mathias Rweyemamu, learned advocate, the appellant lodged a memorandum of appeal containing two grounds of appeal in the alternative. The two grounds go as follows:-

> "1. That the High Court Judge grossly erred in law for refusing to issue a certificate of point of law where there were triable legal issues.
>
> In alternative
>
> 2. That the judge of the High Court failed to certify serious point of law that the trial court grossly erred in law to act without jurisdiction and to permit power of attorney to testify (sic)."

It was proposed, therefore, to ask the Court to allow the "appeal by nullification of all proceedings from the trial court with costs (sic)".

When this appeal came up for hearing on 24th May, 2012, the appellant was represented by Mr. Rweyemamu. For the respondent, who has passed away, was Mr. Yusufu Rajabu, the son and legal representative of the deceased (original respondent). Mr. Yusufu was formally joined as a party in this appeal under Rule 105 of the Tanzania Court of Appeal rules, 2009 (the Rules). He is, accordingly, the respondent in this appeal.

Before the appeal was heard on merit, the Court, on its own motion, wanted, first, to ascertain from the parties on whether or not there was a competent appeal before it worth considering and determining.

The question whether the appellant has a right of appeal against the dismissal order of Lyimo, J., was first posed to Mr. Rweyemamu. Very confidently, he responded in the affirmative. Asked to supply us with any authority to support his affirmative answer, he referred us to an observation by the Court in the case of **Omari Yusufu v. Mwajuma Yusufu and Another** [1983] TLR 29

at page 31 paras A – B. In that case, the Court had thus said in passing:-

> "It may very well be that where, as here, the High Court refuses to grant a certificate that a point of law is involved, the matter may probably be brought before the Court of Appeal by way of appeal against the order refusing to grant such application, but we are of the settled view that the matter could not be brought here by way of application of further application."

We have also read the judgment of the Court in Civil Appeal No. 43 of 1992 between **Hassan s/o Hamisi and Saida Rumanyika** (unreported) referred to us by Mr. Rweyemamu. Mr. Rweyemamu is relying on the observation by the Court, after it had directed itself on the provisions of s.5 (2) (c) of the Act. The Court observed:-

> *"It is crystal clear from the wording of the section that the question whether or not a point of law is involved in the decision or order sought to be appealed against is the responsibility of the High Court. The* ***Court of Appeal has no jurisdiction to certify a point of law to itself.*** *If the appellant was aggrieved by the order of Sekule, J., as indeed he was, the only course for him to take was to appeal against the order." [Emphasis is ours.]*

In the above cited case, the appellant had been the losing party from the Primary Court to the High Court. His application for "leave to appeal" to the Court was refused by Sekule, J., as he found no "point of law involved "in the impugned decision. Undaunted, he tried a second bite in this Court. A single judge of the Court (Ramadhani, J.A., as he then was) granted him "leave to appeal", hence the said appeal. In the course of discussing the competence of the appeal, the Court made the above reproduced observation, which was obviously an **obiter dictum** and not its holding in the appeal. The appeal was struck out on account of incompetence as

the learned single judge had no jurisdiction to entertain the application before him."

Mr. Rweyemamu, with transparent honesty, stated that those were the Court's observations which led him "to believe that the appellant had a right of appeal." He, therefore, pressed us to hold that the appeal before the Court is competent and should be heard and determined on merit.

On his part, the respondent being a lay person, urged us to decide the legal issue in accordance with the dictates of the governing laws.

In disposing of this legal issue, we have found it appropriate to begin with this simple but pertinent assertion. If the appellant has any right of appeal against the impugned High Court order, that right should reside in no other law but in section 5 of the Act. At least, Mr. Rweyemamu has referred us to no other source, be it statutory or case law. We have found the cases cited to us of no assistance to

his cause at all. Those were side comments by the Court and not it's holdings.

If that right were to be found in section 5 of the Act, then the only remotely relevant provisions in our considered opinion, would be subsection (1) (c) or subsection 2 (c) and no other. Assuming without deciding that we are correct, then the absence of an order of the High Court or this Court granting the appellant leave to appeal or an order of the High Court, only, certifying that a point of law is involved in the decision or order, would have rendered this purported appeal incompetent. The same would, of necessity, have been struck out.

The above assumption notwithstanding, we are settled in our minds that the challenged High Court order is not one of the orders contemplated under either of the two provisions of section 5. This is primarily because subsection (1) does not extend to proceedings which emanate from primary courts and fall under Part III of the MCA. There is no dispute here that the proceedings under scrutiny

fell under Part III of the MCA. This leaves us with only subsection 2 (c).

As we have tried to demonstrate above, the legislature in its abiding wisdom found it prudent to grant an intending appellant aggrieved by the decision of the High Court in the exercise of its original jurisdiction, an automatic right of appeal, that being a first appeal (see s. 5 (1) (a) and (b)). In respect of other decisions of the High Court, a circumscribed right of appeal was granted – (s. 5 (1) (c)). One has to come to this Court after obtaining leave of the High Court or if such leave to appeal is refused by the High Court, the aggrieved party is allowed a second bite in this Court. If the Court refuses to grant leave, that is the end of the matter.

However, when it comes to the granting of a certificate on a point of law for a third appeal, the legislature made it the exclusive preserve of the High Court. On this there is no concurrent jurisdiction and accordingly no room for a second bite. The legislature, therefore, wanted the refusal order of the High Court to

be final. Under the scheme of the Act, this Court has no jurisdiction to grant a certificate on a point of law or to compel or direct the High Court to do so. This stance was taken by the Court in Civil Application No. 1 of 1986 between **Haruni Chacha and Mugabe Gikaro**. It was held therein that rejection by the High Court of an application under section 5 (2) (c) of the Act is final and no appeal against it lies to this Court. We subscribe fully to that holding.

As a right to appeal is a creature of a statute, in our respectful opinion, it cannot be convincingly argued here that the Court's earlier quoted remarks were intended to confer a right of appeal to any party aggrieved by the High Court's order refusing to grant a certificate on a point of law. For what purpose will the Court entertain such an appeal when, admittedly, it has no jurisdiction to certify a point of law to itself?" We therefore hold that the appellant has no right of appeal and this appeal is found to be misconceived and incompetent.

Having reached a conclusive decision that this purported appeal is incompetent, we hereby strike it out with costs.

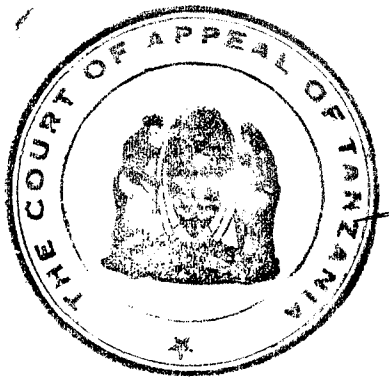
DATED at MWANZA this 28th day of May, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR