IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO 93 OF 2009

JUSTIN JOEL K. MOSHI .....APPLICANT

VERSUS

CMC LAND ROVER (T) LTD .....RESPONDENT

(Application for Extension of Time within which to file Application for Leave to Appeal out of time from decision of the High Court of Tanzania at Dar es Salaam)

(Shangwa , J.)

dated 27th April, 2007
in
Civil Appeal No. 105 of 2005

.....

RULING OF THE COURT

3rd & 17th May, 2013

ORIYO, J.A.:

The applicant, Justin Joel K. Moshi, was aggrieved by a decision of the High Court sitting at Dar es Salaam on 27/4/2007, (Shangwa, J.), in Civil Appeal Number 105 of 2005. He made an application to the High Court for leave to appeal to this Court. The application was supported by the applicant's own affidavit.

On 12/3/2009, the High Court, (Nyerere, J.) dismissed the application for want of merit. Still dissatisfied, the applicant, after lodging the prerequisite Notice of Appeal, has come to the Court by way of a Notice of Motion, lodged on 26/8/2009, seeking the following orders:-

> " *(a) That the Honourable Court may be pleased to grant to the Applicant extension of time to apply to the Court for leave to appeal out of time to the Court of Appeal of Tanzania, from the judgment and decree in appeal of the High Court of Tanzania dated 27th day of April, 2007 in Civil Appeal No. 105 of 2005.*
>
> *(b) Subject to (a) above, this Honourable Court may be pleased to grant to the applicant leave to prefer an appeal out of time, from the judgment and decree in appeal, of the High Court of Tanzania at Dar es Salaam (Hon. Shangwa, J.) dated 27th day of April, 2007, in Civil Appeal No. 105 of 2005.*
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> *On the grounds that the Applicant's first application for leave to appeal made to the High Court, was refused by the High Court of Tanzania at Dar es Salaam before the Honourable A. Nyerere, J. on the 12th day of March, 2009 and further, that despite the applicant having applied in time to be supplied with certified copy of the order*

refusing leave, such copy of the order was supplied to the applicant on the 21st day of August 2009 after fourteen days from the date of refusal had long elapsed."

The Notice of Motion was accompanied by a supporting affidavit deponed to by the applicant, in terms of Rule 46 (1) of the Court of Appeal Rules, 1979.

At the hearing of the application, the applicant was unrepresented, and he fended for himself. Being a layman, he did not have much to say except for a prayer that his application for leave to appeal to the Court out of time be granted for the reasons stated in his affidavit.

Mr. Paschal Kamara, learned counsel who appeared for the respondent, vigorously opposed the application. He contended that as long as the application did not raise the issue of the apparent illegality in the High Court (Nyerere, J.) proceedings, the application lacked merit. He did not elaborate. He prayed for its dismissal.

In view of the position held by Mr. Kamara, learned advocate, we took time to peruse the High Court proceedings before Nyerere, J. and the following came to light.

The application in the High Court was for leave to appeal to this Court against the decision of the High Court, (Shangwa, J.). At the outset the learned Judge (Nyerere, J.), correctly, in our view, framed the issue before the High Court, thus:-

> *"The issue before me is whether there are triable issues calls (sic) for determination and consideration by the Court of Appeal."*

Immediately thereafter the learned Judge stated the following:-

> *"It is very unfortunate that this Court when looking at the Applicant's Affidavit in support of this application the Court discovered some incurable defects with the said affidavit...."*

She went on to mention some of the incurable defects noted in the affidavit including a defective jurat of the affidavit and that some of the

paragraphs contained arguments, prayers, conclusions, etc, which is contrary to the relevant laws.

Having stated the above, the High Court made the following conclusion:-

> *"With the above observation this court is justified to struck (sic) out the application for leave to appeal to the Court of Appeal because the affidavit supporting the application is incurably defective ...."*

However, in conclusion, the High Court made the following decision:-

> *"The application in general lacks merits as there are no triable issues stated which call for consideration and determination of the Court of Appeal. I therefore dismiss the application."*

We have been compelled to reproduce the extracts above in "extenso", from the High Court proceedings, which dismissed the applicant's application for leave to appeal to this Court, for a better appreciation of what is at stake in the application before us.

According to the record, there is no gainsaying that the learned High Court Judge had been moved by a defective affidavit which was incompetent to support the application for leave to appeal to the Court. Therefore, the High Court was not properly moved. The learned Judge was enjoined by law to strike out the applicant's application as incompetent, but did not do so. The learned High Court judge erred in not striking out the incompetent application supported by a defective affidavit. And further, the learned High Court judge erred in proceeding to dismiss the application for want of merit, without having heard the parties and/or discussed the merits of the application itself. In so doing, the learned judge denied the applicant his right to make a fresh application in the High Court.

Having given the matter serious consideration, we are constrained to state that since the application before the High Court was incompetent, the proceedings and the decision thereon were a nullity. As for the remedy available in the circumstances, fortunately we are not treading on virgin ground. In similar circumstances, in the case of **Chama cha Walimu Tanzania Vs The Attorney General,** Civil Application No. 151of 2008 (unreported), the Court stated:-

" It goes without saying, therefore, that the learned trial judge had been wrongly moved and erred in law in entertaining and determining Application no 19 of 2008 which was not competently before him. Since the proceedings were a nullity, even the order made therein including the court's ruling and final order were a nullity."

See also **Tanzania Heart Institute vs The Board of Trustees of the National Social Security Fund,** Civil Application No. 109 of 2008 (unreported).

In **Chama cha Walimu Tanzania** (supra) the Court made the following observation:-

"As the learned trial judge was enjoined by law to strike out the respondent's incompetent application and did not do so, it now falls within our jurisdiction to do what he failed to do. This will not be the first time the Court is doing so. It has thus intervened in the past ."

Now, in identical circumstances, we are enjoined to do what the learned High Court judge failed to do in this case. We invoke the Court's

powers under section 4 (3) of the Appellate Jurisdiction Act, Cap 141, R.E 2002 as we hereby do, to revise the incompetent proceedings before Nyerere, J. Accordingly, we quash and set aside the proceedings, decisions and any other orders made therein.

The application before us for leave to appeal to the Court was lodged on 26/8/2009, in terms of Rules 43(b) and 44 of the Court of Appeal Rules, 1979. Rule 43 stated:-

> *"In Civil matters-*
>
> *(a) – N/A*
>
> *(b) where an appeal lies with the leave of the Court, an application for leave shall be made in the manner prescribed in Rules 46 and 47 within fourteen days of the decision against which it is desired to appeal or,* ***where application for leave has been made to the High Court and refused, within fourteen days of that refusal."***
>
> *(Emphasis is ours)*

Rule 44 provided the following:-

"Whenever application may be made either to the Court or to the High Court, ***it shall in the first instance be made to the High Court,****..."(Emphasis is ours)*

In view of what is stated in the above rules, this application was intended to come to this Court for a "second bite" as it were, only after it was refused by the High Court. We have demonstrated above that the order of the High Court which dismissed the application was done in error and the same has been quashed and set aside. That being the position, then, this application is therefore erroneously before the Court. It is not yet ripe for a "second bite" in this Court. The application for a "second bite" before the Court is premature and therefore incompetent. It is therefore struck out.

This state of affairs places the applicant at liberty, subject to the law of limitation, to return to the High Court to start the process afresh.

In the circumstances unveiled above, we order that each party bears own costs.

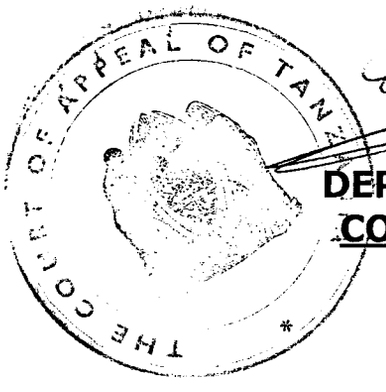
DATED at **DAR ES SALAAM** this 10th day of May, 2013

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

M. S. MBAROUK
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
COURT OF APPEAL