

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MASSATI, J.A., MWARIJA, J.A., And MUGASHA, J.A.)**

**CIVIL APPEAL NO. 79 OF 2013**

**MUSHUTI FOOD SUPPLY LTD.....APPELLANT**

**VERSUS**

**1. CRDB BANK LTD  
2. KIMBEMBE AUCTION MART  
3. ZULFIKAR ESMAIL NANJI** } ..... **RESPONDENT**

**(Appeal from the Ruling and Drawn Order of the High Court of  
Tanzania (Land Division) at Dar es Salaam)**

**(Ngwala, J.)**

**Dated the 17<sup>th</sup> day of July, 2009**

**In**

**Land Case No. 5 of 2008**

-----

**RULING OF THE COURT**

4<sup>th</sup> March, & 4<sup>th</sup> April, 2016

**MWARIJA, J.A.:**

This appeal arises from the decision of the High Court of Tanzania (Land Division) in Land Case No. 5 of 2008. The dispute which gave rise to the appeal arose from a contract of Mortgage. The appellant borrowed an amount of Tshs. 80,000,000/= from the 1<sup>st</sup> respondent and as a security for the loan, the appellant mortgaged his house situated on Plot No. 123, Block "T" Kenyatta Road, Mwanza (hereinafter the property).

The property was later sold by the 2<sup>nd</sup> respondent through an auction to the 3<sup>rd</sup> respondent. The sale was conducted on the instruction of the 1<sup>st</sup> respondent exercising its right of sale under the mortgage. He did so on the ground that the appellant had failed to repay the loan.

Dissatisfied with the 1<sup>st</sup> respondent's act of selling the property, the appellant filed the case which gave rise to this appeal. The case was filed in the High Court (Land Division) at Bukoba. It was however heard and determined by the High Court (Land Division), Dar es Salaam. In that case, the appellant claimed for *inter alia*, declaratory orders; firstly that the sale was irregular and Secondly, that the price of the property was undervalued. The appellant prayed that the sale be nullified.

The respondents disputed the claims. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did, in addition raise preliminary objections. In one of the grounds of the preliminary objections, they contended that the suit was ***res judicata***. That ground was upheld by the learned High Court judge (Ngwala, J.) who thereupon dismissed the suit with costs. The appellant was aggrieved, hence this appeal. In its memorandum of appeal, the appellant preferred

two grounds. It essentially challenges the finding of the learned judge, that the suit was *res judicata*.

In response to the memorandum of appeal, the 1<sup>st</sup> and 3<sup>rd</sup> respondents filed notices of preliminary objections. By a notice filed on 3/3/2016, the learned counsel for the 1<sup>st</sup> respondent raised the following points:

- "1. *The appeal is incompetent for lack of valid leave to appeal to the Court of Appeal.*
2. *The Appeal is time barred as the certificate of delay was issued under wrong or inapplicable provision of the law."*

On his part, the learned counsel for the 3<sup>rd</sup> respondent raised the following point through his notice of preliminary objection filed on 26/3/2015.

*" The appeal is incompetent having been filed out of the 60 days notice thus contravening mandatory provisions [of] rule 90(1) of the Tanzania Court of Appeal Rules, 2009."*

When the appeal was called on for hearing on 4/3/2016, the appellant was represented by Mr. Richard Rweyongeza, learned counsel. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were advocated for by Mr. Hassan Daimu, learned counsel while the 3<sup>rd</sup> respondent had the services of Mr. Constantine Mutalemwa, learned counsel.

Before we proceeded to hear the preliminary objections, we wanted to ascertain whether or not it was proper for the High Court (Land Division) to hear and determine the case at the Dar es Salaam Registry. We raised that issue because, after having gone through the record, we failed to find any order which transferred the proceedings from the High Court (Land Division), Bukoba registry where it was originally filed.

Mr. Rweyongeza conceded that in the absence of an order transferring the case to the High Court, (Land Division), Dar es Salaam Registry, the proceedings were irregular. He urged us to exercise the powers of revision vested on the Court by S.4 (3) of the Appellate Jurisdiction Act [Cap. 141 RE.2002] (the AJA) and revise the proceedings.

Messrs Daimu and Mutalemwa, learned Advocates agreed with the submission made by Mr. Rweyongeza.

We agree with the learned counsel for the parties that in the absence of an order transferring the case from Bukoba High Court Registry, Land Division to Dar es Salaam Registry the proceedings were improperly conducted. The power of transferring proceedings from one Registry of the High Court to the other is provided for under rule 7 (4) of the High Court Registries Rules, G.N. No. 164 of 1971 as amended from time to time (the High Court Registries Rules). The provision States as follows:-

*"The court may at any time on application or of its own motion transfer any proceedings from one Registry to another and any proceedings so transferred, and all documents shall be filed accordingly."*

From the wording of this rule, proceedings may be transferred either after the Court has been moved through an application or on its own motion. In any case, since it is the **Court** which has been empowered to make a transfer, in our considered view, the process must be a judicial

process and therefore, the transfer must be made through a Court order and after hearing the parties. Since in the present case the proceedings were conducted in the High Court (Land Division) at Dar es Salaam without an order transferring the case thereto, the conduct of the proceedings breached the provisions of sub rule (4) of rule 7 of the High Court Registries Rules. The omission did therefore vitiate the proceedings.

This finding would have sufficed to dispose of the appeal. We however find it pertinent to observe yet another defect which has been occasioned as a result of non-compliance with rule 7(4) of the High Court Registries Rules. In the Notice of Appeal, the appellant has cited the decision intended to be appealed against as follows:-

*"Appeal from the Ruling of the High Court of Tanzania (Land Division) at Dar es salaam (Hon. Justice Ngwala, J) dated the 17<sup>th</sup> day of July, 2009 in Land Case No. 5 of 2008."*

As stated above, Land Case No. 5 of 2008 was filed in High Court (Land Division) at Bukoba. The Notice of Appeal does not, for this reason,

reflect the correct case number because that number was not assigned by the High Court (Land Division) at Dar es Salaam. In the case of **M/S Benandys Company Ltd v. Balози Abubakar Ibrahim & Anr.**, Consolidated Civil Application No. 1 & 2 of 2012 (unreported), this Court sated as follows on the effect of the provisions of rule 7 (4) of the High Court Registries Rules:-

*"In our view the effect of the sub rule is that, once case is transferred to another Registry, it changes its identity. That is why it is prescribed that henceforth all documents relating to the transferred case had to be filed accordingly."*

In that case, which was originally filed in the High Court (Land Division) at Dar es Salaam as Land Case No. 184 of 2005, was transferred to Moshi High Court Registry and assigned a new number, Land Case No. 4 of 2010. In the notice of appeal, the appellant indicated that he was appealing against Land Case No. 184 of 2005 instead of Land Case No. 4 of 2010 which was the proper identity of the case after it had been

transferred to Moshi High Court Registry. The Court found the defect to be fatal because:

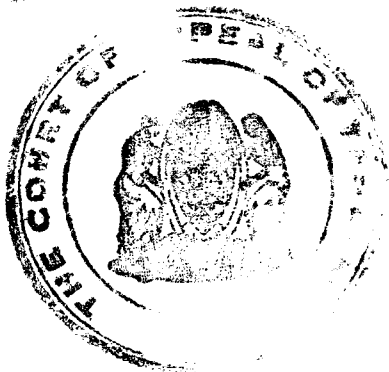
*"...by citing Land case No. 184 of 2005 of Moshi Registry without reference to its number the Notice of Appeal was referring to a different case. This case had already acquired a new identify as Moshi High Court Land Case No. 4 of 2010. It is, in our view, a breach of Rule 83 of the Rules, because the Notice of Appeal did not identify the decision against which it is intended to appeal. Consequently the notice of appeal is invalid."*

We would, in a similar vein, have found the appeal incompetent because the Notice of Appeal indicates that the appellant intends to appeal against the decision of the High Court (Land Division) at Dar es Salaam in Land Case No. 5 of 2008. That is not the correct position because the case retained the identification number of the High Court, (Land Division) at Bukoba.



That said and done, since the omission to transfer the case vitiated the proceedings conducted at the Dar es Salaam Registry of the High Court, (Land Division), we hereby exercise the powers of revision conferred on the Court by S. 4 (3) of the AJA and hereby quash and set aside both the proceedings and ruling of Ngwala, J. The record shall be returned to the High Court (Land Division), Bukoba for the case to proceed from the stage where it ended. Each party shall bear its own costs.

**DATED at DAR ES SALAAM** this 29<sup>th</sup> day of March, 2016.



S. A. MASSATI  
**JUSTICE OF APPEAL**

A. G. MWARUJA  
**JUSTICE OF APPEAL**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

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

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza'.

J. R. KAHYOZA  
**REGISTRAR**  
**COURT OF APPEAL**