

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A. MJASIRI, J.A., And KAIJAGE, J.A.)

CIVIL APPEAL NO. 124 OF 2014

1. SHEIKH ISSA SEIF GULU |
2. SHEIKH KHALIFA HAMISI | APPELLANTS

VERSUS

1. RAJABU MANGARA MTORO
2. IDD ABDALLAH CHAUREMBO
3. ATHUMANI SALUM FUNDI
4. HASHIM SAID MAHIMBWA
5. RAMADHANI ABDULRAHMAN MGUMBA
6. SHEIKH DIWAN SEFU
7. IDD SELEMANI
8. UWESU KIBOSHA
9. ABDALLAH JUMA SELEMANI
10. ABDALLAH SHOMARI MAZONGERA
11. SALUM ABDALLAH PAZI | RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mandia, J. as he then was)

Dated 1st day of December, 2006

In

Civil Case No. 3 of 2004

JUDGMENT OF THE COURT

15th April, & 5th May, 2016

KAIJAGE, J.A.:

The respondents were successful litigants in Civil Case No. 3 of 2004 instituted by the appellants in the High Court of Tanzania at Dar es Salaam. The appellants were aggrieved by the judgment and decree of the said trial

High Court (Mandia, J.) dated 1/12/2006. Realising that they were late in lodging the requisite notice of appeal, the appellants applied for and obtained an order of the High Court (Nyerere, J.) dated 8/7/2010 extending time within which to lodge the notice of appeal out of the time prescribed under Rule 83 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Pursuant to the said extension order, the appellants lodged the notice of appeal on 16/7/2010.

Discerned from the Ruling of the trial High Court appearing at page 110 of the record, is the fact that the appellants' application for extension of time within which to lodge the notice of appeal out of time was by way of a Chamber Summons brought under "*Section 14 of the Law of Limitation Act, 1971, section 95 of the Civil Procedure Code 1966 (the CPC) and Rule 44 of the Tanzania Court of Appeal Rules, 1979*".

When the appeal was called on for hearing, we raised, *suo motu*, a legal issue upon which we asked the parties to give their respective comments. The issue touched on the competence or otherwise of the present appeal, the trial High Court (Nyerere, J.) having been wrongly moved under inapplicable enabling provisions of law to issue, as she did, an order

extending time within which to lodge the notice of appeal out of time. The appropriate enabling provision of law for such applications when filed in the High Court is section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA).

The two appellants appeared in person before us, fending for themselves. Being lay persons, they made no significant response to the legal issue we raised. They simply left the matter in the hands of the Court to decide. On the other hand, Mr. Melchisedeck Lutema, learned advocate who appeared for the respondents made a brief but focused submission.

Addressing the issue we raised, Mr. Lutema conceded that the application upon which the appellants were granted extension of time within which to lodge the notice of appeal out of time was incompetent on account of the same having been brought under wrong and inapplicable enabling provisions of law. He further asserted that the notice of appeal appearing at page 118 of the record is invalid, it having been lodged pursuant to an order of the High Court arising from an incompetent application. An invalid notice of appeal lodged by the appellants on 16/7/2010 has rendered the present

appeal incompetent, he said. Finally, Mr. Lutema urged us to strike out the present appeal with costs.

For our part, we are, with respect, in full agreement with Mr. Lutema. There is no gain saying here that the application which the appellants filed in the High Court for extension of time within which to lodge the notice of appeal out of time cited wrong and inapplicable enabling provisions of the law alluded to hereinabove. The stance taken by this Court has always been that it is necessary to cite, in the notice of motion/chamber summons, relevant provisions from which the court derives the power to hear and determine the matter brought before it. (See; for instance, **THE NATIONAL BANK OF COMMERCE V's SADRUADHIN MEGHJI**; Civil Application No. 20 of 1997 unreported, **CHINA HANAN INTERNATIONAL CO-OPERATION GROUP V's SALVAND K. A. RWE GASIRA**, Civil Reference No. 22 of 2005 unreported and **ABDALLAH NDOPE AND OTHERS V's N.H.C**; Civil Application No. 21 of 2006 (all unreported).

On the basis of the aforestated list of authorities and as correctly submitted by Mr. Lutema, the wrong and inapplicable provisions of the Law of Limitation Act, section 95 of the CPC and Rule 44 of the Rules did not

confer upon the High Court the necessary jurisdiction to hear and determine the application for extension of time within which to lodge the notice of appeal out of time. As we hinted earlier, the relevant enabling provision which ought to have been cited by the appellants in the Chamber Summons is section 11 (1) of the AJA which provides:-

*"S.11 (1) Subject to subsection (2), **the High Court** or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend the time for giving notice of intention to appeal from a judgment of the High Court** or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, **notwithstanding that the time for giving the notice or making the application has already expired.**"*

[Emphasis is ours].

Consistent with the foregoing brief discussion, this Court in **ANTHONY TESHA AND ANITA TESHA**; Civil Appeal No. 10 of 2003 (unreported) made the following pertinent observation:-

"This Court has said a number of times that wrong citation of an enabling provision of law or non-citation renders an application incompetent."

Reverting to the matter at hand, and on the authority of **Teshas' case** (supra), we are settled in our minds that the purported application filed by the appellants in the High Court for extension of time in which to lodge the notice of appeal out of time was undoubtedly incompetent. It follows, therefore, that no valid order extending time in which to file the notice of appeal out of time could have been issued by the High Court upon an incompetent application. We thus hold that the entire proceedings relative to the incompetent application and the resultant order extending time within which to lodge the notice of appeal out of time were a nullity. In the exercise of our revisional powers under section 4 (2) of the AJA we hereby quash the said null proceedings of the High Court and set aside its resultant order granting the appellants the extension of time.

The proceedings relating to the application in question having been nullified for being incompetent, there is, therefore, no valid notice of appeal which the appellants could have incorporated in the record of appeal in terms of Rule 96 (1) (j) of the Rules. In the same vein, we find that the said invalid notice of appeal has rendered the present appeal incompetent.

Accordingly, the appeal is hereby struck out. The effect of this order is to place the appellants in a position of one who has never made any application under s. 11 (1) of the AJA. Since the point subject of this decision was raised by the Court *suo motu*, there will be no order as to costs.

DATED at **DAR ES SALAAM** this 28th day of April, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL