

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MJASIRI, J.A., MMILLA, J.A., AND LILA, J.A.)

CIVIL APPEAL NO. 91 OF 2016

NATIONAL MICROFINANCE PLC APPELLANT

VERSUS

ODDO ODILO MBUNDA RESPONDENT

(Appeal from the decision of High Court of Tanzania at Songea)

(Fikirini, J.)

dated the 3rd day of April, 2014

in

Misc. Civil Application No. 9 of 2013

.....

RULING OF THE COURT

11th & 13th October, 2017

MMILLA, JA.:

The appellant, National Microfinance Bank PLC, instituted an appeal in the Court seeking to challenge the decision of the High Court in Misc. Civil Application No. 9 of 2013 (P. S. Fikirini, J). In that case, the High Court declined to grant the appellant leave to appeal.

The background facts of the matter were briefly that the respondent, Oddo Odilo Mbunda, instituted a civil suit in the District Court of Ruvuma at Songea against the appellant, claiming special damages of T.shs. 33,863,000/= after the latter wrongly instructed Yono Auction Mart to sell

the former's house to one Elswida Mbunda. The trial Court decided in favour of the respondent. The appellant was aggrieved, he unsuccessfully appealed to the High Court of Tanzania at Songea. Still aggrieved, the appellant instituted a second appeal to this Court after he had properly acquired leave to appeal. However, the appeal was struck out on 30.7.2016 by the Court upon noticing that the same was lodged out of time. The appellant went back to the High Court where he appropriately applied and was granted extension of time to lodge a proper notice of appeal to this Court. Consequently, the present appeal was lodged.

However, the appellant did not apply for fresh leave to appeal. Instead, he opted to incorporate in the record of appeal the leave he had obtained earlier on. As a result, the respondent lodged a notice of a preliminary objection on a point of law that the appeal is incompetent for want of a proper leave to appeal. That preliminary objection is the subject of this ruling.

Before us, the appellant was represented by Mr. Simon Mwakolo, learned advocate, while the respondent enjoyed the services of Mr. Frank Ngafumika, learned advocate.

Mr. Ngafumika's submission was brief and direct to the point. He contended that because the first appeal by the appellant was struck out by the Court, the leave to appeal also collapsed. Thus, he maintained, the appellant ought to have applied for a fresh leave to appeal as he did in respect of the notice of appeal. Since he did not do so, Mr. Ngafumika went on to submit, the present appeal is incompetent for want of a proper leave to appeal as per section 5 (1) (c) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA).

On his part, Mr. Mwakolo submitted that since Rule 83 (1) of the Court of Appeal of Tanzania, 2009 (the Rules) requires the notice of appeal to be filed within 30 days, and Rule 45 (a) of the Rules requires application for leave to be made within 14 days from the day of the decision, that implies, he argued, that leave may be granted even before lodging of the notice of appeal. He contended that since he had already been granted leave to appeal before his first appeal was struck out by the Court, there was no need, he contended, for him to re-apply for the same after his appeal was struck out. He insisted that it is only the notice of appeal that suffers after the striking out of the appeal. He therefore asked the Court to dismiss the preliminary objection.

In a short rejoinder, Mr. Ngafumika reiterated that the appellant's leave to appeal was similarly affected after the appeal was struck out by the Court. As such, he went on to state, the appellant had no option but to re-apply for a fresh leave to appeal.

We have carefully considered the rival submissions by counsel for the parties; we think that we should be guided by the relevant provisions of the Rules on the point, as well as case law.

To begin with, while we appreciate that the appellant had his appeal struck out by the Court on 30.7.2016 after it was found to be out of time; and that the appellant attached to the present appeal leave to appeal which was obtained and incorporated in the appeal which was previously struck out; the immediate issue is whether the said leave to appeal survived after the striking out of that appeal. We hurry to say that the answer is in the negative. We will give reasons.

The matter raised here is not a virgin area. The Court has stated in a number of cases that once an appeal is struck out, the incorporated leave to appeal suffers the same consequences - See for instance the case of

Azaram Mohamed Dadi v. Abilah Mfaume Civil Appeal No. 74 of 2016
CAT (unreported).

In that case, after the appellant's appeal was struck out by the Court, he applied for extension of time to lodge a fresh notice of appeal to the Court. The High Court granted the application and he consequently lodged a fresh appeal. However, he did not apply for a fresh leave to appeal and instead, he used the former one which was incorporated in the appeal which was struck out. The Court stated that:-

"Unfortunately, the appellant did not similarly seek any extension of time within which to file an application for leave to appeal to the Court, nor could he properly have sought any leave to appeal under section 47(1) of the Land Disputes Courts Act without the former. The leave to appeal that was once upon a time granted by the High Court, on 3/4/2011, no longer survived the striking out of his two incompetent appeals to the Court, respectively on 5/06/2013 and 3/12/2014. He was required to re-seek leave to appeal thereafter for the proper institution of this appeal, which inadvertently he did not. He missed a mandatory step in the land appeal process to the Court. It is fatal to the appeal"

In the present matter, we find, guided by the above quoted case, that the appellant's leave to appeal did not survive the striking out of the appeal. Thus, the appellant wrongly incorporated the same in his fresh record of appeal.

It is also significant to revisit the provision of Rule 46 (1) of the Rules which dictates that an application for leave should be made afresh after the notice of appeal is lodged. That Rule state that:-

*"where an application for a certificate or **for leave** is necessary, **it shall be made after the notice of appeal is lodged.**"* [Emphasis added]

This provision hits the last nail to the coffin that, just like a fresh notice of appeal, a fresh leave to appeal is necessary where the appeal may have been struck out for being incompetent – See also the case of **Pamela P. Bikatumba v. The Director ABB Tanalec Ltd.**, Civil Appeal No. 4 of 2015, CAT (unreported) where the Court stated that:-

"As is plainly obvious, in the situation at hand, the appellant obtained the leave first and then lodged the Notice of Appeal which was, as

the popular saying goes, tantamount to "placing the cart before the horse."

In doing so, we venture to observe, she contravened the provisions of Rule 46 (1) of the Rules and thereby rendering incompetent the entire proceedings which purported to grant her leave to appeal to this Court."

In the present matter, given the absence of leave, we are constrained to up-hold the preliminary objection raised by the respondent. Consequently, we hold that the appeal is incompetent. Accordingly, we strike it out with costs on the appellant.

DATED at **IRINGA** this 12th day of October, 2017.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL