IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MMILLA, J.A., And MZIRAY, J.A.)

CIVIL APPLICATION NO. 247 OF 2015

NBC LIMITED ..... APPLICANT

VERSUS

KALOKOLA MUZZAMMIL t/a KOLA HOTEL ..... RESPONDENT

(Application from the Judgment of the High Court of Tanzania

(Commercial Division) at Dar es Salaam)

(Kalegeya, J.)

Dated the 21st day of October, 2009

In

Commercial Case No. 117 of 2001

RULING OF THE COURT

17th February & 17th March, 2017

MMILLA, JA.:

The applicant, NBC Limited, is seeking for an order of this Court to amend the notice of appeal by removing the name of Mruma, J, and substituting the same with the name of L.B. Kalegeya, J. The application is by notice of motion made under Rule 111 of the Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit sworn by Mr. Gasper Nyika who is the appellant's advocate.

The sole ground under the notice of motion is that the appellant mistakenly recorded in the notice of appeal the name of Mruma, J who pronounced the judgment complained of instead of the name of Hon. L. B. Kalegeya, J who prepared the said judgment.

On the other hand however, the respondent filed a notice of preliminary objection which raised seven (7) obscure and/or incomprehensive grounds. However, the said seven grounds may properly be bridged into three complaints as follows:-

1. That the notice of motion is defective as it offends Rule 48 (1) (2) of the Rules.
2. That the notice of appeal was not served to the respondent as required by the Rules.
3. That the application is misconceived as it ought to have been put before the Registrar as required by Rule 14 (5) of the Rules.

When the matter was before us for hearing, we opted to hear the parties on both aspects; the preliminary objection and the merits of the application. The applicant enjoyed the services of Mr. Gaspar Nyika, learned advocate, while the respondent appeared in person and unrepresented.

Submitting on the preliminary objection, the respondent contended that he was not served with the notice of appeal as required by law.

On another point, the respondent submitted that the applicant's notice of motion is defective because it does not conform to the format provided under the Rules. He submitted therefore that the present application is incompetent.

Finally, the respondent submitted that the applicant had an opportunity to present his application before the Registrar as contemplated by Rule 14 (5) of the Rules, but he did not. While stressing that it was a misconception to have it placed before the Court, the applicant asked the Court to strike out the application.

On his part, Mr. Nyika submitted that that service was made to the applicant's then advocate, one Mr. Mafuru. Even, Mr. Nyika submitted, if at all the respondent was not served with the notice of appeal as he alleges, he ought to have filed an application under Rule 89 (2) of the Rules asking the Court to strike out the notice of appeal. He countered that such a complaint does not amount to a preliminary objection.

On whether or not the notice of motion complied with the requirements set by the Rules, Mr. Nyika contended that the notice of

motion is properly before the Court, and that it complied with the requirements set out by the Rules. He contended similarly, in our view properly so, that although the affidavit refers to "Civil Appeal", that does not prejudice the respondent in anyway because the error does not go to the root of the matter. He urged the Court to hold this ground baseless.

Regarding the ground that the applicant ought to have presented the prayers for amendment before the Registrar, while admitting that they did not do so, Mr. Nyika submitted that it is pointless because the law does not bar them from filing the same before the Court as they did. He asked the Court to dismiss the preliminary objection and hear the application on merits.

In a brief rejoinder, the respondent insisted that he was not served with the notice of appeal as stated by the applicant. He reiterated his prayer for the Court to uphold the preliminary objection and strike out the appeal.

We have closely evaluated the rival submissions by the parties in this regard. We hasten to say that the ground touching on service of the notice of appeal is not a ground for preliminary objection on account that its resolve requires ascertainment of the said service. As such, it is not a pure

point of law. This position was stressed in the case of **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd** [1969] E.A. 696. The Court said in that case that a preliminary objection must raise pure points of law on the assumption that the facts are not in dispute and no exercise of judicial discretion is involved. It emphasized that:-

> *".....a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued, as a preliminary point may dispose of the suit...It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

See also the case of **Godfrey Hosea Ayo v. Christopher Michael Gee & Others,** Civil Appeal No. 48 of 2014, CAT (unreported).

In view of what we have just said, this ground is devoid of merit, and we dismiss it.

There is also the complaint that the applicant ought to have placed the prayers for amendment before the Registrar. This is a point of law but it is baseless because there is no rule prohibiting such an application to be

entertained by the Court. To the contrary, Rule 111 of the Rules cited by Mr. Nyika deals with amendments of documents. In the premises, this ground too is baseless and we accordingly dismiss it.

The remaining ground challenges that the notice of motion does not conform to the directions set out by the Rules. He cited Rule 48 (2) of the Rules.

Although the respondent did not elaborate what problem he found on the notice of motion, we nevertheless rush to state that this point too is baseless because Rule 48 (2) of the Rules requires the notice of motion to be substantially in the Form A in the First Schedule to these Rules, and that it must be signed by or on behalf of the applicant. We entertain no doubt that the present notice of motion has substantially complied with this requirement. Consequently, we find nothing wrong with the notice of motion. As such, we dismiss this ground too.

That said and done, we dismiss the respondent's preliminary objection. That gives the Court the opportunity to deal with the application on its merit.

As regards the main application, Mr. Nyika prayed the Court to adopt his affidavit in support of the application and the written submission. He

submitted that he had nothing to add and urged the Court to allow the application.

On the other hand, the respondent stated that he was not served with the notice of appeal which is the subject matter of the application. He also submitted that the applicant has not assigned good reasons for the Court to allow his application. He asked the Court to dismiss the application with costs.

In a brief rejoinder, Mr. Nyika insisted that the notice of appeal was timely served to the applicant's then advocate. In the circumstances, he submitted, his allegation on the aspect of service is unfounded. Besides, Mr. Nyika submitted, the respondent will not be prejudiced if the Court allowing the prayer for amendment. He relied on the cases of **Waijee's Uganda Ltd v. Ramjii Punjabhai Bugerere Tea Estates Ltd** (1971) E.A. 188, **Eastern Bakery v. Castelino** (1958) E.A. 461, and **George M. Shambwe v. Attorney General & Another** [1996] T.L.R. 334. He pressed the Court grant the application.

We have considered the parties' written submissions and their respective oral submissions.

As already pointed out, Mr. Nyika explained how the mix up came about. He submitted that after lodging the notice of appeal he discovered that he wrongly put the name of Hon. Mruma, J who pronounced the decision instead of the name of Hon. Kalegeya, J who composed the said decision. He contended that Rule 111 of the Rules provides the remedy to such an error, which is why he filed the present application seeking the order of the Court for amendment of the applicant's notice of appeal.

It is true that the notice of appeal indicates that the decision complained of was composed by Hon. Mruma, J. However, the truth is that Hon. Mruma, J did not compose that decision but rather he only pronounced it. That decision was composed by Hon. Kalegeya, J,. Rule 83 (6) of the Rules requires a notice of appeal to be substantially in Form D of the Rules. Rule 83 (6) of the Rules provides that:-

> *"A notice of appeal shall be substantially in the Form D in the First Schedule to these Rules and shall be signed by or on behalf of the appellant."*

As indicated in the said Form D, the notice of appeal requires, among other things, to include the name of the Judge who composed the decision intended to be appealed against. Since Mruma, J was not the one who

composed the decision which is the subject of the intended appeal, there is no doubt that the notice of appeal under scrutiny is defective.

As already stated, Mr. Nyika resorted to Rule 111 of the Rules which deals with amendment of document. That Rule provides that:-

> *"The Court may at any time allow amendment of any notice of appeal or notice of cross-appeal or memorandum of appeal, as the case may be, or any other part of the record of appeal, on such terms as it thinks fit."*

This explains why Mr. Nyika anchored his client's application on this Rule.

We are sensitive however, to the fact that in order for the Court to allow such an amendment, it must be satisfied that no injustice will be caused to the other party. There are a string of authorities to that effect, including those of **Waijee's Uganda Ltd v. Ramjii Punjabhai Bugerere Tea Estates Ltd**, **Eastern Bakery v. Castelino**, **George M. Shambwe v. Attorney General & Another** (supra), as well as **K.S.F. Kisombe v. Tanzania Harbours Authority & Others**, Civil Application No. 12 of 2007, CAT (unreported), among others. In the case of **George M. Shambwe,** the Court held that:-

"The principles upon which amendments to pleadings should be made needed to be reaffirmed: Amendments sought before the hearing should be freely allowed if they could be made without injustice to the other side and there was no injustice if the other side could be compensated by costs."

As already pointed out, since Mr. Nyika gave plausible explanation leading to the confusion, and because we are satisfied that no injustice will be occasioned to the other party, the Court allows the application.

We think it is also requisite to restate the general principle that procedural irregularities should not be allowed to vitiate proceedings if no injustice will be occasioned to the parties – See the cases of **Cooper Motors Corporation (T) Ltd. v. A.I.C.C.** [1991] TLR 165 and **Attorney General v. N.I.N. Munuo Ng'uni,** Civil Appeal No. 45 of 1998, CAT (unreported). In that case, the Court stated that:-

"Then we agree with the respondent that rules should not be used to thwart justice. In fact a prominent judge in this jurisdiction, the late Biron, J., said in ***General Marketing Co. Ltd. v. A. A. Shariff*** *[1980] T.L.R. 61 at 65 that rules of procedures are handmaids of justice and should not be used to defeat justice."*

We rush to articulate that the above expression represents the correct position of the law, and we associate ourselves with it.

In the premises, for reasons we have given, we allow the application. The applicant is given seven days from the date of this ruling within which to amend the notice of appeal.

DATED at **DAR ES SALAAM** this 8th day of March, 2017.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL