IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MUGASHA, J.A. And MZIRAY, J.A.)

CIVIL APPEAL NO. 24 OF 2015

MOHAMED ENTERPRISES TANZANIA LIMITED ..... APPELLANT

VERSUS

1. THE CHIEF HARBOUR MASTER
2. THE TANZANIA PORTS AUTHORITY **..... RESPONDENTS**

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

(Kaduri, J.)

dated the 13th day of September, 2013

in

Civil Case No. 213 of 2011

JUDGMENT OF THE COURT

23rd August & 26th October, 2018

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Dar es Salaam (Kaduri, J.) in Civil Case No. 213 of 2011. In that case, the appellant, Mohamed Enterprises Tanzania Limited, sued the respondents, the Chief Harbour Master and the Tanzania Ports Authority (the 1st and 2nd respondents respectively) claiming for a sum of USD 2,400,000.00 being a loss allegedly suffered by the appellant as a result of having failed to execute the decree of the High Court issued in Civil Case No. 8 of 2004 due to the 1st respondent's unlawful act.

The facts which gave rise to the decree, the subject matter of Civil Case No. 213 of 2011 and consequently, this appeal, can be briefly stated as follows: The appellant had instituted a suit, Civil Case No. 8 of 2004 in the High Court of Tanzania at Dar es Salaam against the following persons; Thanh Hoa Limited Co, Pham Van Tu, Vosa Shipping Agents, Le Van Hai, Lee Shipping Agencies Pte Limited (LSA), Simon Lee, Segar Shipping Sdn Berhad, Hing Sie Tiing, Chiong Jong Ting, Ting Sie Ting, Wong Ling Ting and the Government of Vietnam (the 1st – 12th defendants respectively). The suit was founded on contract. The appellant claimed for USD 1,750,000.00 allegedly had and received by the 1st defendant on account of the sale of 6,000 metric tones of white long grain rice. The appellant claimed also for USD 24,000.00 as compensation for loss of rice flour whitening machine alleged to have been occasioned to it by the defendants.

While the suit was pending, the appellant successfully applied for an order of attachment before judgment, of the 12th defendant's Motor Vessel named Gan Gio IMO, No. 813154 Ex Sea Maid (hereinafter "the Vessel") which was moored at the Dar es Salaam Port. The order was served upon among others, the 1st respondent.

From the record, subsequent to the attachment order, the suit proceeded *ex-parte* and at the end, judgment was entered for the appellant. Having obtained a decree, the appellant sought to execute it and thus filed execution proceedings in the High Court. While in the process however, the appellant learnt that the Vessel had been released and the same had left the court's jurisdiction.

The 1st respondent's act of releasing the Vessel without a release order from the Court prompted the appellant to institute contempt proceedings against the defendants/judgment debtors and the present respondents. On 26/9/2005, after hearing the application, the High Court, Kalegeya, J. (as he then was), found the 1st respondent guilty of the offence of contempt of Court. He was convicted and sentenced to pay a fine of TZS 100,000.00 or one month imprisonment.

Aggrieved, the respondents intended to appeal to this Court. They lodged a notice of appeal on 27/9/2005, a day after the decision of the High Court.

As stated above, following the release of the Vessel, the appellant instituted Civil Case No. 213 of 2011 claiming compensation for loss arising from its failure to execute the decree passed in Civil Case No. 8 of 2004. The suit did not however, proceed to hearing. It was disposed

of on the preliminary objection raised by the respondents in their joint written statement of defence. The objection, which was upheld by the High Court, was to the effect that the suit was time barred.

In upholding the preliminary objection, the learned judge found that, since the suit was founded on tort, by instituting it on 20/12/2011 while the cause of action accrued on 26/9/2010 (the date of the 1st respondent's conviction), the same was time barred. He found that, the suit was filed after expiry of the period of three years prescribed under the Schedule to the Law of Limitation Act [Cap. 89 R.E. 2002] (the Law of Limitation) for a suit founded on tort.

In opposing the preliminary objection, the appellant contended that the suit was not time barred because of existence of the notice of appeal. It was argued that, because the appellant intended to challenge the 1st respondent's conviction, the period of limitation stopped from running because the High Court ceased to have jurisdiction over the proceeding. The learned judge declined to agree with that proposition. He relied on the cases of **Mohsin Taki Abdallah v. Tariq Mirza & 4 Others.,** Civil Application No. 100 of 1999 (unreported) and **Acro Helicopter (T) Ltd. v. F.N. Jensen** [1990] TLR 142. Upon consideration of these authorities, he found that the notice of appeal

was ineffective because the respondent did not take essential steps to institute the intended appeal within the prescribed time. He found also that, even if the notice would have been intact because there is no Court order marking it withdrawn, the High Court would not have jurisdiction to hear the suit because the appeal process had been commenced in the Court of Appeal. Despite that view, the learned judge decided that the suit was filed out of time. He however proceeded to strike out the suit instead of dismissing it as required by S. 3(1) of the Law of Limitation Act.

The appellant was aggrieved by the decision of the High Court hence this appeal which is based on two grounds:-

"*1. That the learned Judge erred in law and in fact in failing to hold that time stopped running against the Appellant upon the filing of the notice of appeal and that the Plaintiff could not have a cause of action over matters that were removed to the Court of Appeal.*

2. That the learned Judge erred in law and in fact in holding that in the absence of an application for leave to appeal to the Court of Appeal the

Notice of Appeal was automatically rendered ineffective."

At the hearing of the appeal, the appellant was represented by Dr. Masumbuko Lamwai, learned counsel while the respondents were represented by Mr. Elisa Msuya, learned counsel. The learned advocates for the parties had, prior to the hearing date, filed their respective written submissions in compliance with Rule 106 (1) and (8) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

When the appeal was called on for hearing, Mr. Msuya informed the Court that after having read several decisions of the Court on the effect of a notice of appeal filed in this Court against the proceeding of the High Court, he decided to change his position thereby refraining from opposing the appeal. He agreed with the submission made by the learned counsel for the appellant that, after lodgment of the notice of appeal against the decision of the High Court in Civil Case No. 8 of 2004 in which the cause of action in Civil Case No. 213 of 2011 is founded, the limitation period stopped from running.

He went on to submit that, although under Rule 91 (a) of the Rules, where the person who has lodged a notice of appeal fails to take

essential steps to institute the intended appeal, such notice is deemed to have been withdrawn, the notice does not become ineffective without an order of the Court marking it withdrawn. He cited the case of **East African Development Bank v. Blueline Enterprises Limited**, Civil Appeal No. 101 of 2009 (unreported) to bolster his argument.

On that stand, Mr. Msuya urged us to allow the appeal. He prayed however that, the respondents should not be condemned to costs on account that the appellant is to blame for instituting the suit while having knowledge that there was a notice of appeal against the decision on which the said suit is founded.

Dr. Lamwai welcomed the consession by the respondents' counsel that the High Court erred in deciding that the suit is time barred. Having briefly stated the background facts giving rise to the appeal, the appellant's counsel highlighted the arguments contained in his written submission. He stressed that the notice of appeal had the effect of stopping the period of limitation from running because, after that notice, the High Court ceased to have jurisdiction to entertain the suit.

In what we consider to be his alternative submission, the learned counsel reiterated the argument which he made in the High Court, that by operation of Rule 83 of the revoked Tanzania Court of Appeal Rules,

1979, which were applicable at the material time, (now Rule 90 of the Rules), the case was filed within time. He said in his oral submission that, the appellant has raised this fact in paragraph 10 of the plaint with the intention of invoking the provisions of section 21 (1) of the Law of Limitation Act.

As to costs, Dr. Lamwai opposed the submission that the appellant should not be awarded the same on account that it filed the suit pre-maturely. According to Dr. Lamwai, the respondents are the ones to blame because they raised a preliminary objection which they have now admitted to be lacking in merit. They blew hot in the High Court but later blew cold in this Court by supporting the appeal, Dr. Lamwai remarked.

Having considered the submissions of the learned counsel for the parties, we agree that the learned judge erred in holding that the suit was filed out of time. As argued by Dr. Lamwai in his written submission and conceded by Mr. Msuya, after institution of the notice of appeal in this Court against the ruling on which the appellant's claim is founded, the High Court ceased to have jurisdiction on that proceeding. In the case of **Matsushita Electric Co. Ltd v Charles George t/a C.G.**

Travers, Civil Application No. 71 of 2001 (unreported), the Court stated as follows:-

> *"Once a Notice of Appeal is filed under Rule 76 [now Rule 83 (1) of the Rules] then this Court is seized of the matter in exclusion of the High Court except for applications specifically provided for, such as leave to appeal or provision of a Certificate of law."*

In its decision, the High Court found that, despite the absence of a Court order marking the notice of appeal withdrawn, the notice ceased to have effect by virtue of the provisions of Rule 91 (a) of the Rules. He found therefore that the notice of appeal was not relevant in computation of the period of limitation. The learned judge was of the view that, since the respondents did not take essential steps after lodging the notice of appeal, the notice became ineffective. As stated above, he relied on *inter alia*, the case of **Mohsin Taki Abdallah** (supra). In that case, the Court observed that, where an essential step is not taken within the prescribed time, the notice is rendered meaningless.

With respect, the facts of that case are different. Unlike in this case, the Court was moved to strike out the notice of appeal after the

respondents' failure to take essential steps to institute the intended appeal. The observation made in that case referred to the reason upon which the application was granted. The Court did not decide that the notice had automatically ceased to have effect after the respondents' failure to take essential steps to institute the intended appeal. It is settled position that a notice of appeal ceases to have effect upon a Court order deeming it to have been withdrawn. See the cases of **East African Development Bank v. Blueline Enterprises Limited** (supra) cited by **Mr. Msuya** and **Williamson Diamond Limited v. Salvatory Syridion & Another**, TBR Civil Application No. 15 of 2015 (both unreported). In the latter case, the Court stated as follows:

> *"It seems to us that the purpose of Rule 91 (a) is to flush out such notices of appeal as have outlived their usefulness. That power is vested in the Court. We are further of the view that in exercising such power, the Court may do so* ***suo motu*** *(after giving notice to the parties) or it may be moved by any party who may or ought to have been served with a copy of the notice of appeal under Rule 84 (1) of the Rules."*

Similarly, in the former case, the Court stated clearly that unless there is a court order, the notice of appeal would not cease to have effect. It stated so in the following words:-

> *"Going by the practice of this Court a notice of appeal which is deemed to have been withdrawn under Rule 84 of the Court of Appeal Rules, 1979 (now Rule 91 (a) of the Rules) is usually followed by an order from the Court to that effect. Mr. Kesaria could not produce any such order. So in the absence of such an order or any order ... striking out the notice it follows that, as stated above, the notice is still intact."*

With regard to the case of **Aero Helicopter Limited v. F.N. Jensen** (supra) which was also relied upon by the learned judge, that case was restricted to the issue concerning the powers of the High Court to entertain an application for stay of execution after institution of a notice of appeal in respect of the decree sought to be stayed. The Court decided that issue as follows:-

> *"Once appeal proceedings to this Court have been commenced by filing notice of appeal, the High Court has no inherent jurisdiction under section 95 of the*

Civil Procedure Code to order a stay of execution pending appeal to this court."

From the authorities cited above, save for specified applications as stated in the **Aero Helicopter case** (supra), institution of a notice of appeal deprives the High Court of its power to entertain the proceeding giving rise to the notice of appeal. In our considered view, by parity of reasoning, although the suit, which is the subject matter of this appeal, is a different proceeding, since the cause of action is founded on the 1st respondent's conviction, determination of the intended appeal is essential for the purposes of accrual of a cause of action and existence of the suit. In the circumstances, we agree with Dr. Lamwai's submission that:-

"... the effect of the notice of appeal was to suspend the cause of action because whether the Respondents were guilty of contempt or not was a matter which was to be decided by the Court of Appeal."

Indeed, as submitted by the appellant's counsel, the learned judge ought to have found that the suit was filed pre-maturely. This is because the same was filed after the notice of appeal had been lodged.

On the basis of the above stated reasons, we hereby allow the appeal. As to costs, we have considered the factual background of the proceeding giving rise to the appeal and the rival arguments of the learned advocates on the roles of the parties in initiating the proceeding or causing the same to be protracted. On our part, we are constrained to hold that, in the particular circumstances of the case, each party is to blame. In the event, we order them to bear their own costs.

DATED at **DAR ES SALAAM** this 22nd day of October, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL