

**IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR**

**(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)**

**CRIMINAL APPEAL NO. 476 OF 2017**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT**

**VERSUS**

**SAID SALEH ALI ..... RESPONDENT**

**(Appeal from the Order of the High Court of Zanzibar at Vuga)**

**(Rabia, J.)**

**Dated the 29<sup>th</sup> day of September, 2017  
in  
Criminal Application No. 38 of 2017**

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**JUDGMENT OF THE COURT**

4<sup>th</sup> December & 13<sup>th</sup> December 2018

**MKUYE, JA.:**

Before the High Court of Zanzibar at Vuga, Said Saleh Ali (now respondent), Ali Kassim Ahmed and Muhsin Ali Suleiman were each arraigned for an offence of misappropriation of property and revenue contrary to section 42 (1)(a) and 61 of the Zanzibar Anti – Corruption and Economic Crimes Act, (No. 1 of 2012) of the Laws of Zanzibar. They were each charged on a separate count. The particulars of the

offence against each accused were similar to the effect that between May 2017 and June 2017 on unspecified time, at Donge Chechele within the North District "B" North Region of Unguja, did fraudulently acquire sand by using a counterfeit of the Peoples' Bank of Zanzibar pay in slip.

On 19/9/2017, the respondent (former 1<sup>st</sup> accused), through the services of Mr. Rajab Abdalla Rajab, learned advocate filed to the High Court, under a certificate of urgency, an application against the Director of Public Prosecutions (the DPP), Ali Kassim Ahmed (2<sup>nd</sup> accused) and Muhsin Ali Suleiman (3<sup>rd</sup> accused) seeking for orders as follows:-

*(a) That, this Honorable court be pleased to order that the trucks used to carry sands (sic) bearing Plat (sic) No. Z. 267 HG (Scania) having Chasis No. XLED 6X40004501350, Z. 256 HN (Scania), Z. 129 GD (Fuso) having Chasis No. 04427540 be restored and handed over to the applicant.*

*(b) Any other order (s) which this Honourable court deems just and reasonable to the applicant.*

The application was supported by an affidavit of Said Saleh Ali, the applicant. On 27/9/2017, the 1<sup>st</sup> respondent (DPP) filed an affidavit in reply together with a notice of preliminary objection to the effect that the applicant's purported application was unconstitutional and in contradiction with the statutory provisions of the law. When the matter was called on for hearing on 29/9/2017 before Rabia J., after having heard the arguments from both sides for and against hearing both the preliminary objection and application together, she made the following order:

**Order:**

1. *The matter will be disposed by **Written Submission which will include both the point raised and the application** and this is due to my busy schedule.*
2. *Filing of **submission on Preliminary Objection** to be done on 2<sup>nd</sup> October, 2017 at 08:0030 am.*
3. *Filing of **submission and reply to argument raised in relation to Preliminary Objection** be filed on 4<sup>th</sup> October, 2017.*

4. ***Rejoinder (Preliminary Objection) and reply to submission*** to be filed on 6<sup>th</sup> October, 2017.
5. ***Rejoinder on submission*** on 9<sup>th</sup> October, 2017.
6. ***Ruling*** on 13<sup>th</sup> October, 2017.

***Sgd: Rabia H. Mohamed***

***Judge***

***29/09/2017."***

[Emphasis added]

On the same date, on 29/09/2017 the DPP lodged a notice of appeal to the Court of Appeal. On 30/10/2017 she lodged a memorandum of appeal with only one point of grievance that:-

*"The learnt (sic) Justice erred in law for failure to give the appellant an opportunity to submit the contents of his preliminary objection."*

When the appeal was called on for hearing, the appellant was represented by Mr. Khamis Juma Khamis assisted by Mr. Hassan Ali Mohamed and Ms. Asia Ibrahim Mohamed all learned State Attorneys, whereas the respondent enjoyed the services of Mr. Rajab Abdalla Rajab learned counsel.

From the outset the Court *suo motu* required the parties from either side to address it as to whether the appellant had shown in the

notice of appeal the nature of finding, order, etc sought to be appealed against, in view of the fact that the appellant indicated "that the appeal is against the ruling only."

Mr. Khamis was quite convinced that the notice of appeal was in order. According to him, the decision is in the order of the trial judge dated 22/9/2017 ordering the parties to file written submissions. As to the sole ground of appeal that they were denied an opportunity to be heard, he vehemently contended that it was unusual for the case or application to be heard before the hearing and determination of the preliminary objection. While relying on the case of **Thabit Ramadhani Maziku & Kisuku Salum Kaptula v. Amina Khamis Tyela & Mrajis wa Nyaraka Zanzibar**, Civil Appeal No. 98 of 2011 (unreported), he submitted that it was not proper for the trial judge to order both the preliminary objection and the application to be argued/heard together. He added that, failure to give the appellant an opportunity to be heard contravened the provisions of Article 13(6)(a) of the Constitution of United Republic of Tanzania, Cap. 2, RE 2002( Constitution of the United Republic) and Article 12(6)(a) of the Zanzibar Constitution, 1984. He thus, urged

the Court to invoke Rule 38 of Tanzania Court of Appeal Rules, 2009 (the Rules) and remit the matter to the High Court with an order for another judge to hear the matter accordingly.

On the other hand, in relation to the issue raised by the Court Mr. Rajab argued that the nature of appeal was shown at page 26 of the record of appeal without more.

As regards the ground of appeal, he contended that the appellant was given an opportunity to be heard by way of written submissions. He pointed out that by ordering written submissions on both the preliminary objection and the application, the trial judge could determine the matter on the basis of the preliminary objection and strike out the application if the preliminary objection is found meritorious, or proceed to determine the application on merit if the preliminary objection is not sustained. He further pointed out that it has been now a practice of the Court for preliminary objection to be heard together with an application, appeal or even the suit. He added that in this matter the trial judge had even stated the reason for ordering written submissions, due to her busy schedule. In the

circumstances, he implored the Court to dismiss the appeal for want of merit.

The issues for determination by the Court are **one**, whether the notice of appeal was in compliance with the Rules. **Two**, whether the appellant was denied the right to be heard on the point of preliminary objection.

With regard to the first issue regarding the propriety of the notice of appeal, we have found it prudent to reproduce the said notice of appeal as follows:

***IN THE COURT OF APPEAL OF TANZANIA***  
***AT ZANZIBAR***  
***IN THE MATTER OF INTENDED CRIMINAL***  
***APPEAL***  
***APPEAL NO. .... OF 2017***  
***BETWEEN***  
***DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT***  
***AND***  
***SAID SALEH ALI ..... RESPONDENT***  
***(Appeal from the ruling of the High Court of***  
***Zanzibar at Vuga (Ms Justice Rabia H.***  
***Mohamed). Dated 29<sup>th</sup> September, 2017 in***

***the Criminal Application No. 38 of 2017  
originated from Criminal Case  
No. 15 of 2017)***

**NOTICE OF APPEAL**

***[Made under Rule 68 of the Tanzania Court  
of Appeal Rules, 2009]***

***TAKE NOTICE***, that the Director of Public Prosecutions, Zanzibar appeals to the Court of Appeal of Tanzania against the decision of the Honourable Ms. Justice Rabia H. Mohamed given at Vuga on the 29 day of September, 2017 whereby the applicant was denied an opportunity to be heard in the matter raised prior to the hearing of the application of the said respondent. This appeal is against **ruling** only.

*The address of service of the appellant is:*

***THE DIRECTOR OF PUBLIC PROSECUTIONS,  
OFFICE OF THE DIRECTOR OF PUBLIC  
PROSECUTIONS,  
P.O.BOX 1327,  
MIEMBENI  
ZANZIBAR.***



*Dated this 29 day of September, 2017.*

*.....(Sgd).....*  
**KHAMIS J. KHAMIS**  
**STATE ATTORNEY – FOR THE APPELLANT.**

Regarding this issue, our starting point would be Rule 68 (2) of the Rules which states as follows:-

*"(2) Every notice of appeal shall state briefly, the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal, and shall contain a full and sufficient address at which any notices or other documents connected with the appeal may be served on the appellant or his advocate and, subject to Rule 17, shall be signed by the appellant or his advocate."*

In the case of **Julius Mgawo v. Republic**, Criminal Appeal No. 341 of 2014 (unreported), the Court emphasized the requirements under the above Rule which are to be shown in the notice of appeal as follows:-

*"(1) NA*

*(2) NA*

*(3) Should state briefly the nature of the acquittal, conviction, sentence, **order** or finding against which it is desired to be appealed against."*

[Emphasis added]

Similar stance was taken in the case of **John Petro v. Republic**, Criminal Appeal No. 130 of 2010 (unreported) where the Court stated as follows:

*"Upon a plethora of decisions by the Court it is now settled that it is a mandatory requirement for the notice of appeal to state the nature of conviction, sentence, **order** or finding of the High Court against which it is desired to appeal. Failure to do so renders the appeal incompetent."*

[Emphasis added].

In this matter, the notice of appeal we have quoted earlier on, shows that the appellant gives notice of his intention to appeal to the Court of Appeal against the **ruling only**. In particular, the complaint is that the appellant was denied the opportunity to be heard on the point of preliminary objection raised prior to the hearing of the

application of the respondent. However, our thorough scrutiny of the record of appeal has revealed that there was no ruling given by the trial judge. At most, there is an Order dated 29/9/2017 which we have also quoted earlier on, in which the trial judge ordered both the parties to file their written submissions on both the preliminary objection and application within a prescribed schedule and the date for the ruling thereof was set to be on 13<sup>th</sup> October 2017. Since the issue of hearing or non hearing was on the order issued on 29/9/2017, it was not proper for the appellant to indicate that her appeal was against the ruling only because there was no ruling which was delivered until to date.

As already pointed out above, among the requirements of the notice is to indicate the nature of acquittal, conviction, sentence, order or finding of the High Court sought to be appealed against. The appellant indicated to appeal against the ruling. We are increasingly of the opinion that, failure by the appellant to indicate that his appeal was against an order and referring to a ruling which does not exist, was a defect which renders the notice of appeal defective. And, since in terms of Rule 68(1) of the Rules, it is the

notice of appeal which institutes the appeal, then it also renders the appeal defective liable to be struck out.

Ordinarily, after having found that the notice of appeal is defective we would have disposed of the matter on the basis of this point and end here. However, with wake of the overriding objective introduced by section 3A of the Appellate Jurisdiction Act, Cap 141 RE 2002 as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act 2018, (Act No. 8 of 2018) which is geared towards facilitating the just, expeditious, proportionate and affordable resolution of all matters and the circumstances of the case, we have found it prudent to deal with the ground of appeal which hinge on the issue whether the appellant was denied the right to be heard.

Mr. Kassim has complained that the appellant's right to be heard on the preliminary objection he had raised earlier on was curtailed and that there was a breach of the principle of natural justice and denial of their fundamental rights. While relying on the case of **Thabit Ramadhani Maziku** (supra), he was of the view

that it was ridiculous for the application to be heard before that application.

There is no doubt that the right to be heard is among a fundamental principles enshrined under Article 13(6)(a) of the Constitution of the United Republic which is in *pari materia* with Article 12(6)(a) of the Zanzibar Constitution.

Article 13(6)(a) of the Constitution of the United Republic in relation to this right provides:

*"(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."*

Yet, Article 12(6)(a) of the Zanzibar Constitution also provides as follows:

*"(a). Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahkama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa*

*na haki ya kupewa fursa ya kusikilizwa  
na pia haki ya kukata rufaa au ya kupata  
kitulizo kinginecho cha kisheria kutokana  
na maamuzi ya Mahkama au chombo  
hicho kinginecho kinachohusika.”*

The right to be heard was over-emphasized in the case of **Mbeya Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma** Civil Appeal No. 45 of 2000 (unreported) where the Court stated:

*"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard amongst the attributes of equality before the law."*

Also, in the case of **Abbas Sherally & Another v. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported), this Court had this to say:

*"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in*

*numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice”.*

In the matter at hand, in the Order we have quoted above the trial judge had indicated to have a busy schedule and ordered the parties to file their respective written submissions both on the preliminary objection and application. She did not end there but she prescribed the schedule to which each party was to file written submissions for preliminary objection and the application itself. The schedule began by the respondent who was required to file her written submission on the preliminary objection by 2<sup>nd</sup> October, 2017 at 08.30 a.m. It was followed by the applicant who was to file the submission on the application and the reply to the arguments raised on preliminary objection by 4<sup>th</sup> October, 2017. Thereafter the respondent was to file the rejoinder on written submission on preliminary objection and reply to written submission on application by the applicant by 6<sup>th</sup> October, 2017; then the applicant was to file

the rejoinder on submission on the application on 9<sup>th</sup> October 2017; and she lastly set the date of ruling on 13<sup>th</sup> October 2017.

We are aware that in the case of **Thabit Ramadhani Maziku** (supra) which was relied by Mr.Khamis, the Court held that it was imperative for the preliminary objection not only to be heard, but also to be determined fully by the trial court before continuation of the trial of the main suit. Much as it might be distinguishable because in that case the preliminary objection was raised on a suit unlike in the instant case where it was against the application, there are other decisions some of which are recently decided in which the Court took the approach of hearing and determining both the preliminary objections raised together with the main appeal.

The Court took this approach in the case of **Elfazi Nyatega and 3 Others v. Caspian Mining**, Civil Application No. 44/08/2017 (unreported), whereby in order to expedite the determination, heard both the preliminary objection and the application with an undertaking to incorporate the ruling in the decision of the main application in case the preliminary objection fails and if the objection



succeeded, then the ruling thereon would have to dispose of the whole matter.

Likewise, in the case of **CRDB Bank Limited v. Issack B. Mwamasika and 2 Others**, Civil Appeal No. 139 of 2017 (unreported), the Court took a similar approach. The Court speaking through His Lordship the Chief Justice stated as follows:

*"We took the three sets of preliminary objections together with the substantive appeal, cross appeal and grounds seeking the affirmation of the decision of the trial court. We directed the learned advocates for the parties to first address us on the points of objection. And as is the established practice of the Court, if we sustain any of the preliminary objection, the appeal will be struck out. If, on the other hand, the appeal survives the objections, the Court shall proceed to determine the substantive merits of the grounds of appeal, grounds of cross appeal and grounds seeking to affirm the decision of the trial court.- (See also **Millicom (Tanzania) N.V v. James Alan Russel Bell**, Civil Revision No. 3 of 2017)"*

In those cases, none complained that his right to be heard on preliminary objection was curtailed. On our part, we subscribe to those cases.

After having anxiously scrutinized the contentious order, we are satisfied that the trial judge was very clear in her order. She ordered written submissions to be made on both the preliminary objection and the application. She was very particular in her Order in the sense that she ordered written submissions to be made on the preliminary objection first with its clear schedule of filing them. She did the same on the written submissions for the application in the same Order. Definitely, as was rightly submitted by Mr. Rajab, she intended to make decisions on both the preliminary objection and the application itself depending on the outcome of the preliminary objection.

Before we conclude our decision, we think, it is worthy note that arguing on application/appeal by way of written submissions is synonymous with presenting oral submissions before the Court. Thus, if a party fails to file his/her submission on a scheduled date it is

equated as if he/she has failed to appear on a hearing date with a consequence of dismissing the matter before the court.

In the event, we agree with Mr. Rajab that the appellant was given an opportunity to be heard but unfortunately she rushed to file this appeal even before the ruling was handed down.

Hence, we find the appeal to be devoid of merit. We accordingly dismiss it in its entirety.

It is so ordered.

**DATED at ZANZIBAR** this 12<sup>th</sup> day of December, 2018.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

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



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**