IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MMILLA, J.A. And NDIKA, J.A.)

CRIMINAL APPLICATION NO. 59/19 OF 2017

JAMES BURCHARD RUGEMALIRA ..... APPLICANT (2ND ACCUSED)

VERSUS

1. THE REPUBLIC ..... RESPONDENT (PROSECUTOR)
2. MR. HARBINDER SINGH SETHI..... NECESSARY PARTY (1ST ACCUSED)

(Application from the Decision of the High Court of the United Republic of Tanzania (Corruption and Economic Crimes Division)

(Matogolo, J.)

dated the 30th day of August, 2017
in
Misc. Economic Cause No. 21 of 2017
.....

RULING OF THE COURT

5th March & 10th April, 2018

LUANDA, J.A.:

The above named applicant, who is currently a remand prisoner, is provisionally charged with several economic counts in the Resident Magistrate's Court of Dar Es Salaam at Kisutu vide Economic Case No. 27 of 2017 pending committal proceedings for trial before the High Court of Tanzania (Corruption and Economic Crimes Division) henceforth the

Economic Court. While in prison, he unsuccessfully filed an application in the Economic Court for bail pending trial. Aggrieved, he has filed an appeal in this Court vide Criminal Appeal No. 391 of 2017 to challenge the decision of the Economic Court which is still pending in this Court. Meanwhile, he has also filed this application seeking for the release of himself and Mr. Harbinder Singh Sethi, whom he referred to as "the necessary party" pending determination of that appeal as well as for amending notice of appeal and memorandum of appeal.

The application is made by way of Notice of Motion supported by an affidavit of the applicant. The application has being taken out under a good many Rules of the Tanzania Court of Appeal Rules, 2009 (the Rules) as well as S. 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA). We shall cite all the Rules referred above at a later stage in this ruling.

Some few days before the application for bail pending appeal came for hearing, the Republic/respondent raised a preliminary objection on a point of law to the following effect:-

"That, the application before the Court is incurable (sic) defective for non-complying with the law".

In accordance with a well established practice, once a preliminary point of law is raised, the Court is duty bound to entertain it first and make a decision thereon before proceeding to hear the substantive matter. We heard the objection, hence this ruling.

In this matter, the Republic/respondent was led by Dr. Zainabu Mango, learned Principal State Attorney, assisted by Mr. Peter Maugo, Mr. Tumaini Kweka both learned Principal State Attorneys, and Ms Elizabeth Mkunda, learned State Attorney.

On the other hand, Ms Magdalena Rwebangira and Mr. Paskal Kamala, learned counsel rose and informed the Court that they represented the applicant; whereas Mr. Melkizedeck Lutema and Mr. Alex Balomi, learned advocates appeared for "the necessary party".

Having heard the respondent, their main concern is that the application for bail pending the hearing of the appeal is incompetent for

non-citation of the proper provisions of law. Elaborating on the point, Dr. Mango and Mr. Kweka said the applicant cited a number of provisions of law which are irrelevant or inapplicable and which do not confer jurisdiction to the Court to entertain the application. They said, for example, Rule 111 of the Rules empowers the Court to amend the record of appeal pertaining to civil matters only and not to matters of criminal nature as this one. Also, S. 4 (2) of the AJA is for revision which is not what the applicant is seeking; Rule 11 (2) (c) of the Rules is similarly not applicable in the circumstances of this case in so far as no sentence has been handed down. They were also concerned that a number of applications were lumped together which is not proper since it is not clear what exactly the applicant is seeking.

As regards Rule 4 (2) (a) of the Rules, they said it is not applicable either. They cited the decision of the Court in **Joseph Ntogwisango & Another vs The Principal Secretary Ministry of Finance and Another**, Civil Application No. 109 of 2002 (unreported), where the Court emphasized the requirement of citing a specific provisions of law under

which the Court derives jurisdiction to hear and determine the application. They prayed that the application be strike out.

To our astonishment, the applicant rose and told the Court that he will make a reply himself instead of his advocates. In his reply, the applicant first said that in terms of S. 4 (2) of the AJA the Court has jurisdiction to entertain the matter.

We wish to point out right away that S. 4 (2) of the AJA provides for revisional powers of the Court in the course of hearing an appeal. Since this is not an appeal, the section is not applicable. The section reads as follows:-

> *S. 4 (2) For all purposes of and incidental to the hearing and* ***determination of any appeal*** *in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power,*

authority and jurisdiction vested in the ***court from which the appeal is brought.*** [Emphasis Ours].

As to the preliminary point raised under Rule 4 (2) (a) of the Rules, the applicant said they did not elaborate the ground of the objection they intended to raise. He was wondering if the Republic was accommodated to raise the preliminary point of objection under Rule 4 (2) (a) of the Rules, he should also be taken to have properly moved the Court for the application for bail pending hearing of his appeal under the same provision otherwise the Court would be seen to apply double standards.

As regards the case of **Joseph** cited supra, he said that it is not applicable because that was a civil case whereas the present one is criminal.

Again we wish to point out that what is distilled from a case, be it civil or criminal, is the principle; which in legal parlance is called *ratio decidendi*. In **Joseph case** the matter was an application for leave to amend the memorandum of appeal which was made under wrong provision of law. The application was struck out for citing wrong provision

of the law. The principle here is that wrong citation of the law will render any matter before the Court incompetent as it is taken that the Court has not been properly moved. So, though the principle arose from civil matter, it is applicable in criminal matters as well. The applicant wound up by asking the court to overrule the preliminary objection.

The Republic had no rejoinder.

Before we proceed further, we would like to say that Mr. Lutema intended to present his side on behalf of his client in connection with the point of objection raised. However, the so called "the necessary party" was dragged in Court, so to speak, by the applicant and joined in this application. It is no wonder that he did not file any document in this Court pertaining to this application under discussion. In the eyes of the law his legal status is questionable. In actual fact the concept of "necessary party" in criminal matter is quite a new phenomenon in our jurisdiction. The concept of "necessary party" is applicable in civil matters and is provided for under Order 1, Rule 14 of the Civil Procedure Code, Cap 33 R.E. 2002 which is being referred to as "the third party". There is no such similar provision in the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). In

the circumstances, we did not find it proper to allow Mr. Lutema to address the Court at least at this stage of hearing of the preliminary objection.

Back to the track. On careful reading the application, basically the applicant is seeking for the release of himself and "the necessary party" on bail pending hearing of the appeal as reflected in the heading of the notice of motion which reads as follows:-

> *"Application for release of the Applicant (2nd Accused) and the Necessary Party (1st Accused) on Bail in Economic Case No. 27 of 2017 at the Kisutu Resident Magistrate's Court Dar es Saiaam pending determination of the Criminal Appeal against the Republic (Respondent) in the Decision of the High Court of the United Republic of Tanzania the Corruption and Economic Crimes Division at Dar es Salaam (Hon. F. N. Matogolo, J.) dated 30th August, 2017 in Misc. Economic Cause No. 21 of 2017".*

As already pointed out, the applicant cited a number of the Rules namely Rule 2, 4 (1), 4 (2) (a), 4 (2) (b), 4 (2) (c), 11 (2) (a), 11 (2) (d) (iii), 14 (1) (2), 30 (1), 38, 48 (1), 48 (3) (a) (b), 49 (1), 50, 68, 69 (2) and (1) as well as S. 4 (2) of the AJA as the enabling provisions. The respondent/Republic filed a preliminary objection contended that the application is incurably defective for non-complying with the law. It is during the hearing of the preliminary objection where it was clarified that the Court was not properly moved and further that there are omnibus applications which were lumped together. The applicant countered the point of objection raised by first saying that it was not clear at all. Indeed we hasten to point out however, that the point of objection as reproduced above without more is not clear. The respondent has not stated the proper provision of law which the applicant ought to have cited, hence their assertion that the application is incurably defective. It should be remembered that a notice of objection is always intended to let the adversary party know a point of law raised so that when it comes up for hearing he should be aware in advance what the nature of the point of

objection raised is all about and this will enable him to prepare himself for a reply thereof, if any.

At the time when the objection was raised i.e. 28/2/2018 the Rules had already been amended vide GN 362 published on 22/9/2017. One of the Rules which was amended is Rule 107 which deals with notices of objection in civil matters. Now it requires, *inter alia*, the notice of objection to provide with such particulars so as to enable the adversary party as well as the Court understand the nature and scope of the point of objection raised. The Rule reads as follows:-

> *107 (1) A respondent intending to rely upon a preliminary objection to the hearing of the* ***appeal or application shall give the appellant or applicant*** *three clear days notice thereof before hearing,* ***setting out the grounds of objection such as the specific law, principle or decision relied upon****, and shall file five such copies of the notice with the Registrar within the same time*

and copies of the law or decision, as the case may be, shall be attached to the notice.

(2) *A respondent shall not rely upon a preliminary objection unless such objection consists of a point of law which, if argued and sustained, may dispose of the appeal or application.*

(3) ***A respondent raising a preliminary objection shall provide such necessary particulars to enable the Court and the other party to grasp the nature and scope of such objection.*** [Emphasis supplied].

Since the reason behind this requirement is to do away with suprises to the Court as well as the adversary party and thus promoting a fair hearing, we find the said Rule to be relevant and should equally apply to criminal matters. We agree with the applicant that the preliminary objection raised lacked necessary particulars to enable the Court and the applicant to grasp its nature and scope.

As regards citing irrelevant or inapplicable provisions of law as contended by the respondent, we find some truth on it. Indeed there are a number of Rules which are not relevant to the application as correctly stated by Dr. Mango like Rules 11 on suspension of sentence; Rule 111 amendment of document in civil matters. Some, however, like Rules 14, 30, 38 and 48 to mention just a few are directory in nature. They do not confer jurisdiction to the Court to hear and determine the matter under discussion. It is our considered view that we can ignore all those irrelevant and inapplicable Rules as well as S. 4 (2) of the AJA as we hereby do. However, we think that Rule 4 (2) of the Rules may stand as we venture to illustrate hereunder.

It is not in dispute that an application of this nature for bail of an accused person, a remandee, pending hearing of an appeal is neither covered by the Rules nor any written law. So, Rule 4 (2) (a) of the Rules which deals with matter for which no provision is made in the Rules or other written law should come into play to fill in the *lacuna* otherwise the applicant will have no access to the Court for redress. As to the question

of joining "the necessary party", the amendment of the notice of appeal as well as the memorandum of appeal are matters which will be sorted out in the main application.

For reasons we have assigned above, we hold that the preliminary objection is devoid of merit and we accordingly overruled it.

Order accordingly.

DATED at **DAR ES SALAAM** this 29th day of March, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL