

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CIVIL APPEAL NO. 158 OF 2016

AMOS HITLER KEMANO.....APPELLANT

VERSUS

BARRICK GOLD MINE.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Mwanza)**

(Gwae, J.)

**dated the 28th day of January, 2016
in
Land Case No. 3 of 2013**

RULING OF THE COURT

25th June & 2nd July, 2018

MUGASHA, J.A.:

In the High Court, Mwanza Registry, the appellant sued the respondent claiming payment of fair and prompt compensation over his land situated in Nyamwaga village in the Hamlet of Ntarachagini in Tarime District, Mara region. The land in question was acquired by the respondent for the purposes of mining activities. The appellant's claims were specifically in respect of the two houses and a toilet; several crops; costs incurred for renting a house; loss of

income; disturbance and general damages for psychological and mental torture.

The suit was confronted with a preliminary objection to the effect that, it was time barred having been filed more than one year from the date when the cause of action arose. In a Ruling handed down on 28/1/2016, the trial court sustained the preliminary objection and dismissed the suit. On the date of dismissal, the appellant's counsel informally sought and was granted leave to appeal to the Court. Subsequently, on 4/2/2016, the appellant lodged a notice of appeal to the Court and later filed the present appeal.

The appeal faced a hurdle of Preliminary Objections on the following points contained in the notice filed on 19.6.2018 by the respondent's counsel as follows:

- "1. *The appeal is incompetent and therefore it should be struck out as the leave to appeal was given before the appellant had filed the Notice of Appeal.*
2. *The appeal is incompetent and therefore it should be struck out as the record of appeal is not properly arranged and it is incomplete contrary to the*

requirements of Rule 96(1) (a), 96 (1) (d) and 96 (1) (h) of the Court of Appeal Rules.”

At the hearing, the appellant was represented by Mr. Mashaka Fadhili Tuguta, learned counsel, whereas the respondent had the services of Mr. Silwani Galati Mwantembe, learned counsel.

In addressing the first point of objection, Mr. Mwantembe submitted that, the appeal is not competent because it is accompanied by leave to appeal to the Court which was sought and obtained on 28/1/2016 before the filing of notice of appeal on 4/2/2016. As such, he argued, the appellant had violated Rule 46(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), which mandatorily requires the filing of the notice of appeal to precede an application for leave to appeal. To back up his proposition, he referred us to the case of the **MUSSA ALLY HAMIDI VS. JUMA MCHUNDA AND CONRDAD ALEX**, Civil Application No. 1 “B” of 2005 (unreported) arguing that, the non compliance with rule 46 (1) of the Rules renders the appeal not competent. The learned counsel also added that, the appeal before the Court as well suffers incompetency on account of its leave not

having been properly obtained as it was informally sought instead of being pursued by way of a formal application. On account of the two pointed out anomalies, he urged us to find the appeal not competent and proceed to strike it out with costs.

On being probed by the Court as to the completeness or otherwise of the record of appeal which is in relation to the second point of preliminary objection, Mr. Mwantembe opted to abandon the respective point of objection following a brief dialogue with the Court.

On the other hand, Mr. Tuguta, learned counsel for the appellant resisted the Preliminary Objection arguing that the appeal is properly before the Court. He submitted that, much as leave to appeal in land matters is a creature of section 47(1) of the Land Disputes Courts Act CAP. 216 R.E. 2002 (**LDCA**), the modality of pursuing it is regulated by rule 45(a) of the Rules which allows informal application of such leave. In this regard, the learned counsel contended that, the informal seeking and obtaining of the leave to appeal technically waived the requirement of prior filing of the notice of appeal. He thus urged us to consider as crucial the

issue as to whether or otherwise the present appeal was preceded by leave as required by section 47 (1) of **LDCA**.

Moreover, Mr. Tuguta was of the view that, in the event leave was informally sought, Rule 46(1) of the Rules does not come into play because it is relevant where leave to appeal is formally sought. He thus, implored us to ignore the case of **MUSSA ALLY HAMIDI** (supra) arguing that what was in controversy therein was the notice of appeal which was filed beyond 14 days which is not the case in the present matter. Mr. Tuguta concluded by urging us to find the present appeal competent since leave was properly sought and obtained under the circumstances not necessitating the prior filing of the notice of appeal.

In rejoinder Mr. Mwantembe submitted that, in land disputes leave to appeal to the Court is governed by section 47(1) of **LDCA** and as such, the option of seeking leave informally under Rule 45(a) of the Rules does not exist. Therefore, he asserted that, the appellant ought to have made a formal application to seek and obtain requisite leave to appeal. In this regard, he urged us to consider the validity of the improperly granted leave in determining the propriety or otherwise of the appeal. He also reiterated his

earlier submission on the appellant's non compliance with Rule 46(1) of the Rules arguing that the case he cited is applicable to the matter at hand.

After a careful consideration of the counsel arguments for and against the preliminary points of objection, the point for determination is whether the present appeal is competent.

Since in the appeal of this nature leave to appeal is a prerequisite, Rule 46 (1) gives a strict direction on order of the respective application and notice of appeal as follows:

*"Where an application for a certificate or **for leave is necessary, it shall be made after the notice of appeal is lodged**".*

[Emphasis supplied].

The bolded expression clearly fortifies the event of filing a Notice of Appeal ahead of the application. (See **AWINIEL MTUI AND ANOTHER VS LILIAN MAMUYA AND ANOTHER**, Civil Application No. 19 of 2014 (unreported).

According to section 47 (3) of **LDCA**, the procedure to appeal to the Court is governed by the Court of Appeal Rules which brings

into picture the application of Rule 46 (1) of the Rules which mandatorily requires leave to appeal to be preceded by a notice of appeal. The requirement was not waived by the informally sought leave which was in our considered view inappropriate as we shall point out in due course. Therefore, in the present matter, leave to appeal was improperly sought by the appellant before initially filing the notice of appeal which is in violation of Rule 46 (1) of the Rules and the first ground of the preliminary objection is merited.

In the premises, we agree with Mr. Mwantembe that, the case of **MUSSA ALLY HAMIDI** (supra) though it never dealt with a land related matter, it is applicable in the present situation. We say so because the Court in the said case addressed the validity of leave sought by way of second bite while the notice of appeal was not in existence. The Court concluded that the application for leave was not sustainable in law. This was the position under the Rule 76(4) of the Old Rules which is currently Rule 46 (1) of the Rules which in our considered view, cuts across all civil and land related matters in the process of pursuing appeals to the Court which entails the order of applications for leave and the notices of appeal.

In addressing the second limb of the preliminary objection, both counsel were in agreement that, leave to appeal in land disputes, is regulated by section 47(1) of the **LDCA** which mandates the High Court with exclusive jurisdiction to grant requisite leave. However, they locked horns on the application of rule 45 (a) of the Rules on the modality of seeking leave to appeal.

Since the **LDCA** is a legislation which introduced a mechanism of adjudicating Land disputes and the appeal process to the Court, section 48 (2) of **LDCA** stipulates as follows:-

"The Appellate Jurisdiction Act shall apply to proceedings in the Court of Appeal under this section."

Under the **AJA**, section 5 (1) (c) categorically provides:

*"In civil proceedings, **except where any other written law** for the time being in force provides otherwise, an appeal shall be to the Court...with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court".*

The bolded expression embraces the application of other legislation including the **LDCA** which regulates the modality of seeking leave to appeal in the High Court before appealing to the Court whereby section 47 (1) of the **LDCA** states as follows:

*"Any person who is aggrieved by the decision of the High Court in the exercise of its original, revisional or appellate jurisdiction, **may with the leave from the High Court** appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act."*

[Emphasis supplied]

The Emphasis supplied is indicative of the High Court having exclusive jurisdiction in entertaining applications for leave to appeal to the Court in land related disputes.

We now turn to address the question as to whether Rule 45 (a) of the Rules can be invoked to seek informal leave to appeal to the Court against the decision of a land dispute. Our answer is in the negative because: Rule 45(a) is not applicable since it regulates the manner of seeking leave before the High Court in the first instance on matters stated in section 5(1)(c) of **AJA**. This does not

cover leave to appeal in land matters as they are governed by section 47(1) of LDCA which vest in the High Court exclusive jurisdiction on the leave subject and there is no remedy be it under Rule 45 (a) of the Rules or under section 5(1) (c) of AJA. (See **FELISTA JOHN MWENDA VS. ELIZABETH LYIMO**, Civil Application No. 9 of 2016 and **ELIZABETH LOSUJAKI VS AGNESS LOSUJAKI AND ANOTHER**, Civil Appeal No.99 of 2016 (both unreported).

In a nutshell therefore, matters of seeking leave to appeal to the Court against land related disputes, section 47(1) of **LDCA** oust the application of Rule 45 (a) of the Rules and section 5 (1) (c) of **AJA**. Having stated the clear position of the law, the next question for determination is whether leave to appeal to the Court was properly sought and obtained.

As reflected at page 12 of the record of appeal, on 28/1/2016 the appellant's counsel made an informal application for leave to appeal citing section 47 (1) of **LDCA** and Rule 45 (a) of the Rules. At page 13 of the record of appeal the judge observed as follows: -

"An appeal is a constitutional right provided for an aggrieved party of a decision of court or tribunal, as the case may be, since the leave sought by the

plaintiff's counsel and since the prayer is grantable by virtue of section 47 (1) of the Land Disputes Courts Act. Cap 216, R.E. 2002 read together with Rule (sic) 5 (1) (a) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002."

Then, the judge proceeded to grant leave as prayed. With respect, we found this to be improper. We say so because our careful reading of section 47 (1) of the **LDCA**, does not suggest an option of seeking informal leave to appeal to the Court. Besides, the plain wording of the section 47 (1) of the **LDCA** is not subjected to Rule 45 (a) of the Rules. At this juncture we reiterate what we said in the case of **REPUBLIC VS. MWESIGE GEOFFREY AND ANOTHER**, Criminal Appeal No. 355 of 2014 (unreported) which extensively discussed the familiar canon of statutory construction of plain language having said as follows:

"Indeed it is axiomatic that when the words of a statute are unambiguous, "judicial inquiry is complete". There is no need for interpolations,This is because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there!"

Since it is settled that, in land matters leave to appeal to the Court is exclusively regulated by section 47 (1) of the **LDCA**, we do

not agree with Mr. Tuguta's suggestion on reliance of Rule 45 (a) of the Rules as that would stretch to interpolations of what is not envisaged under section 47 (1) of the **LDCA**.

In view of what we have endeavoured to explain, we are satisfied that, it was an incurable omission for the appellant before lodging a Notice of Appeal to seek leave to appeal which was improperly obtained. The said anomalies render the appeal incompetent and we accordingly strike it out with costs.

DATED at MWANZA this 29th day of June, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL