IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CIVIL APPLICATION NO. 425.03 OF 2017

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

CHIKU FAIZI ..... APPLICANT

VERSUS

ZUBERI MAKITA ..... RESPONDENT

(Application for Revision of Order and Proceedings from the Order of the High Court of Tanzania at Dodoma)

(Hon. Mansoor, J.)

Dated the 22nd day of May, 2017
in
Civil Application No. 38 of 2016

RULING OF THE COURT

9th & 13th July, 2018

MUSSA, J.A.:

The applicant and the respondent were, respectively, wife and husband up until the 1st of November, 2000 when their marriage was annulled by the Primary Court of Makole.

A good deal later, more precisely, on the 10th February, 2011 the applicant instituted Civil Case No. 2 of 2011, against the respondent, in the Dodoma Urban Primary Court through which she sought to be awarded maintenance from her ex-husband. The quest was successful and, on the

14th February, 2011 the applicant was awarded maintenance to the tune of Shs.60,000/= per month.

Discontented by the grant, the respondent instituted Civil Appeal No. 39 of 2011 seeking to impugn the verdict of the Primary Court. His bid bore fruits much as on the 23rd January, 2012 the District Court allowed the appeal, *inter alia,* on account that the suit for maintenance was, after all, time barred. In fine, the verdict of the Primary Court was overturned.

Dissatisfied, it was, then, the applicant's turn to lock horns with the decision of the first appellate court. Thus, in response, she preferred an appeal to the High Court which was captioned: "**PRM (PC) CIVIL CASE APPEAL NO. 5 OF 2013**." Upon presentation on the 11th April, 2012 the appeal was duly admitted by the Judge in-charge (Shangali, J.).

A little later, on the 31st May, 2012 the appeal under reference was transferred by the Judge in Charge to be heard and determined by the Honorable R. I. Rutatinisibwa, Principal Resident Magistrate with extended Jurisdiction. As it turned out, the transfer instrument was purportedly taken out in terms of the provisions of section 45(2) and (3) of the Magistrates' Courts Act, chapter 11 of the Revised Laws (the MCA).

It is noteworthy that although the appeal was puportedly transferred to the Court of Resident Magistrate at Dodoma, in the wake of the transfer, the learned Principal Resident Magistrate did not sit in that Court as directed by the Judge in-charge. In contrast, Mr. Rutatinisibwa sat, heard and determined the appeal in the referred record of the High Court. At the height of the hearing, the learned Principal Resident Magistrate found no cause to fault the decision of the District Court and, on the 21st September, 2012 the appeal was, accordingly, dismissed for want of merits.

Still discontented, the applicant was minded to prefer an appeal to this Court and so, on the 19th April, 2013, she seemingly prepared a Notice of Appeal which, apparently, upon second thoughts, she did not formally lodge the same. Instead, on that same date, she instituted Miscellaneous Civil Application No. 25 "A" of 2013 which sought the following orders:-

> *"1. That this court grants her extension of time to appeal;*
>
> *2. Costs; and*
>
> *3. any other orders and reliefs that this court deems fit and fair to grant."*

Rather strangely, the application was predicated under Rule 8 of the defunct Tanzania Court of Appeal Rules, 1979 and section 68(e) of the Civil Procedure Code, Chapter 33 of the Revised Laws. But, as it were, the Court did not venture into the question as to the whether or not the application was properly before it; rather, having heard the parties from either side, the High Court (Mohamed, J.) found merits in the application and, accordingly, on the 17th March, 2016 it was ordered thus:-

> *"....I grant her prayer for extension of time to file her appeal. I shall make no order as to costs as the appellant (sic) is destitute and is unrepresented. She is to file her appeal within 14 days from today's date."*

We should suppose that what was contemplated here was an extension of time to file a Notice of Appeal belatedly and not, as seems to be the misconception, an extension to file the appeal itself. It is, to us, incomprehensible for a party in the applicant's shoes to be allowed to file the appeal without first obtaining a leave to appeal as well as a certification on a point of law. Nonetheless, for reasons which will shortly become apparent, we need not belabor on the proprieties of the High Court order.

Indeed, the applicant did not file any appeal in obedience to the March 17th order of the High Court. Instead and, apparently, in an effort to regularize the matter, a good deal later, on the 7th September, 2016 she instituted another Miscellaneous Civil Application No. 38 of 2016 seeking the following orders:-

> *"1. This Honourable High Court is pleased to grant an extension of time to file an application for leave to appeal in the Court of Appeal of Tanzania.*
>
> *2. Costs be provided for.*
>
> *3. Any other order (s) and relief (s) that this Honourable Court shall deem fit and fair to grant."*

When the application was placed before Mansoor, J. for hearing on the 22nd May, 2017 the learned Judge could not help a prompt decision:

> ***"ORDER.*** *The parties are unrepresented and appear not to be clear of what they are applying before the court. I noted that, this court in an Application, titled Misc. Civil Application No. 25 "A" of 2013 Hon. Judge A. Mohamed had already given her leave to appeal to the Court of Appeal within 14 days from 17/3/2016. Instead of filing the appeal, the Applicant had on 7th September, 2016 filed an application for extension of time to file an*

application for leave to Appeal to the Court of Appeal. This is a repetition as the same application was already determined by this court, ad Ruling was delivered on 17/05/2016, but the Applicant failed to file Appeal within the time granted by the court.

Thus, this application is dismissed for being res-judicata.

No costs.

L. Mansoor
JUDGE
22/5/2017."

The applicant was unamused by the order and, presently, she seeks to move the Court in revision to vacate the same. The application before us is by way of a Notice of Motion which has been taken out under the provisions of Rule 65(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as well as Section 4(2) and (3) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (AJA). The Notice of Motion is supported by an affidavit duly affirmed by the applicant in which she challenges the stance taken by the High Court to the effect that Misc. Civil Application No. 38 of 2016 was *re-judicata*.

At the hearing before us, the applicant entered appearance in person, unrepresented. The respondent was absent and could not be

served on account of the fact that his present whereabouts are unknown. In the circumstances, we ordered that the application proceeds in his absence in terms of Rule 4(2) of the Rules. On her part, the applicant adopted the Notice of Motion and her supporting affidavit without more.

We are, however, constrained, for the moment, to address a more serious illegality which we think goes to the root of the entire respective proceedings of the High Court.

As we have already intimated, upon admission, the appeal giving rise to the application at hand was purportedly transferred to be heard by the referred Principal Resident Magistrate. We have throughout used the word *"purportedly"* with design much as upon a plethora of decisions it is now settled that section 45(2) of the MCA does not extend to appeals originating from Primary Courts. Such was, for instance, the position expressed in, at least, three unreported decisions –viz – Criminal Appeal No. 113 of 2006 – **Zakaria Magamba vs. The Republic;** Criminal Appeal No. 47 of 2010 – **Mussa Ally Onyango vs. The Republic;** and Criminal Appeal No. 129 of 2012 – **Rashidi Mtemi vs. The Republic.**

Furthermore, as we have also intimated upon, the Principal Resident Magistrate who is not a judge presided over a High Court record and determined the appeal in that capacity. Again, upon numerous decisions, this Court has held that where a Magistrate purports to sit in the High Court to hear a transferred High Court appeal, the proceedings and decision will be nullified for want of jurisdiction (see for instance, the decisions in **Samwel Nikolai v. The Republic,** Criminal Appeal No. 59 of 2001; **Manoma Malolela v. The Republic,** Criminal Appeal No. 180 of 2003; **Martin Muyape v. The Republic,** Criminal Appeal No. 137 of 2003 and **Masire Tarisi and 3 Others v. The Republic,** Criminal Appeal No. 63 of 2003 (all unreported).

To say the least, to the extent that the appeal giving rise to the application at hand originated from a Primary Court, the same was improperly transferred to be heard and determined by a Magistrate with extended jurisdiction. Correspondingly, it was also wrong for the Magistrate to sit and determine the matter in the High Court.

In the wake of such jurisdictional illegalities we are constrained to invoke our revisional jurisdiction under section 4(3) of AJA and nullify the

entire proceedings presided over by Rutatinisibwa, PRM; Mohamed, J. and Mansoor, J. Having done so the application at hand is left with no legs to stand on round is, accordingly, struck out. The result would be to push the matter under our consideration as far back as where it was immediately after the applicant's appeal was dismissed by the District Court of Dodoma. From there, the applicant may wish to re-institute her appeal against the dismissal order subject to limitation. We give no order as to costs. Order accordingly.

DATED at **DODOMA** this 12th day of July, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
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