IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 137 OF 2016

MS JOHN ANAEL MAEDA
MS JUSTIN MAEDA } ..... **APPELLANTS**

VERSUS

MS JOHN ANAEL MONGI
MRS AICHI LEONARD MAEDA ..... **RESPONDENTS**

(Appeal from the decision of the High Court of Tanzania at Arusha)
(Sambo, J.)

dated the 11th day of May, 2012
in
Land Appeal No. 64 of 2010

RULING OF THE COURT

5th & 16th July, 2018

MWAMBEGELE, J.A.:

Against this appeal filed by the appellants MS John Anael Maeda and MS Justin Maeda the respondents MS John Anael Mongi (we wondered what the prefixes Ms. meant) and Mrs. Aichi Leonard Maeda, on 27.06.2018 filed a one-point preliminary objection to the effect that the appeal is incompetent for want of leave of the High Court to appeal to the Court of Appeal duly sought and granted after

lodging the notice of appeal contrary to Rule 46 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules").

It is the practice of this Court founded upon prudence that once a preliminary objection is raised, it will have to be determined first ahead of going into the merits of any matter. Thus, when the appeal was called on for hearing before us on 12.07.2018, we called upon the parties to address us on the preliminary objection. Both parties were represented. Mr. Elvaison Maro, learned counsel, appeared for the appellants and Mr. John Materu, also learned counsel, appeared for the respondents.

It was Mr. Materu who started the ball rolling. Arguing for the preliminary objection (the henceforth "PO") the learned counsel was very brief but to the point. He submitted that leave to appeal in this land-related appeal was missing on the record of appeal. He added that as the record of appeal bears out at p. 287 that, on 11.02.2005, the Court struck out Civil Appeal No. 66 of 2003 (henceforth "the previous appeal") which was previously filed before the present one. The previous appeal was struck out for the reason that it was

incompetent. After the previous appeal was struck out, the appellants went to the High Court where they sought and obtained extension of time to file Notice of Appeal. They did not apply for extension of time to file an application for leave to appeal to the Court.

The learned counsel went on to submit that having been given extension of time to lodge the Notice of Appeal, the appellants filed the Notice of Appeal on 29.07.2015 as evident at pp. 331-2 of the record of appeal. Mr. Materu went on to argue that after that, this being a land matter, the appellants ought to have applied for extension of time to file an application for leave to appeal to the Court. Failure to do that offended section 47 (1) of the Land Disputes Courts Act, Cap. 216 of the Revised Edition, 2002 (henceforth "Cap. 216") as well as Rule 46 (1) of the Rules.

The learned counsel went on to submit that with the striking of the previous appeal, all the documents in that record of appeal, including the Notice of Appeal and leave to appeal, died along with the death of the previous appeal. Thus, the appellants ought to have started the process afresh by applying for extension of time to file a

fresh Notice of Appeal as he did as well as extension of time to file an application for a fresh leave to appeal to this Court. The learned counsel referred us to our order in **John Materu and Anor v. Martin Massai**, Civil Appeal No. 52 of 2015 (unreported) on which he made heavy reliance to buttress the point that once an appeal is struck out, all the documents in the flanking record of appeal die with it. The facts and circumstances in that case fall in all fours with the present, he submitted.

On being prompted by the Court on whether, assuming the leave to appeal to this Court survived after the striking out the previous appeal, it was not invalid, he submitted that that leave was obtained under wrong provisions.

On the basis of the foregoing reasons, Mr. Materu argued that the present appeal is therefore incompetent; it should be struck out with costs.

Mr. Maro for the appellants started his onslaught by stating that Rule 46 (1) of the Rules is permissive; it is not mandatory. He

submitted that the appellants got leave to appeal to the Court in respect of the previous appeal as appearing at p. 216 of the record of appeal and a drawn order thereof as appearing at p. 224. That order, he argued, is still valid to date as it has neither been varied nor set aside. That order and its ruling, he argued, are perpetual until quashed, varied or set aside. Mr. Maro disagreed with Mr. Materu that the order of 11.02.2015 striking out the previous appeal killed even the leave to appeal. That is a Ruling of the court, he stressed; it cannot be nullified that way; by simply striking out the previous appeal. There ought to have been a specific order of the Court setting it aside along with the order striking out the previous appeal. Short of that, he argued, the order of the court remains in force. Mr. Maro thus beckoned upon us to depart from our decision in the **John Materu** case (supra). The learned counsel did not cite any authority to bolster his arguments but simply intimated to the Court that he has prosecuted cases of that nature more than once. On his prayer to depart from our previous decisions, Mr. Maro referred us to the provisions of Rule 106 (3) of the Rules and the cases of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] TLR 288, **Halsbury's**

Laws of England at p. 273 on the Effect and Variation of Judgments and Orders, **Republic v. Mahmoud Mohamed** [1973] LRT n. 79 (a decision of the High Court) and **Universal Petroleum Services Ltd v. BP Tanzania Ltd**, Civil Application No. 50 of 2006 (unreported), at p.12 of the typed judgment.

In all the above decisions, he submitted, the Court and the High Court held that a court order can only be undone unless set aside, amended, varied or quashed. The learned counsel added that had the appellants opted to seek another leave to cater for the present appeal, they would have stumbled upon the doctrine of *Res Judicata* or the principle of *functus officio*. The High Court, he argued, cannot re-sit to entertain a matter it had already decided upon as per the doctrine of the *Res Judicata* and the Principle of *functus officio*.

On whether or not the application for leave to appeal to this Court was brought under correct provisions, Mr. Maro stated that it was proper. He, however, having been told that there was a plethora of authorities that hold the contrary, the learned counsel was frank

enough, as true officer of the court, to say that he stood to be guided.

Finally, the learned counsel asked the Court to make a specific order in respect of leave to appeal when we strike out appeals on incompetency, for an order of the court survives until quashed, varied or set aside.

For the foregoing reasons, Mr. Maro prayed that the preliminary objection be overruled with costs.

In a short rejoinder, Mr. Materu submitted that Rule 46 (1) is quite specific that leave should be sought and obtained after a Notice of Appeal is lodged. He argued that the decisions in which Mr. Maro said he prosecuted after the previous appeals were struck out might have been prior to the enactment of Rule 46 (1) in 2009. He added that it was not healthy for the Court to create conflicting decisions deliberately. On the application of Rule 106 (3) of the Rules to depart from our previous decisions, Mr. Materu submitted that the rule speaks

about written submissions and therefore it was not applicable in the present situation.

We have considered the rival arguments for both sides. Indeed, as we pointed out during the hearing that the law on the point is settled and that Mr. Maro would require the labours of Sisyphus (we have borrowed the adage from Samatta, J., as he then was, in **Musa Mwalugala v. Ndeshe Hota** [1998] TLR 1; in a judgment His Lordship rendered on 05.09.1979) to persuade us to depart from the position we have already declared as settled. Even after the warning, Mr. Maro had the temerity to argue that we depart from our previous decisions. It was after we retreated to compose the Ruling when we realized that Mr. Maro's propositions were not wholly without hope.

As we had intimated to Mr. Maro that in addition to the authority heavily relied upon by Mr. Materu; the **John Materu** case (supra), there is a string of cases that hold the same; the territory is not virgin. We find it apt to demonstrate to Mr. Maro that the area has been traversed by the Court before and the position has already been declared as settled. The immediate case that comes to our minds is

National Microfinance Bank PLC v. Oddo Odilo Mbunda, Civil Appeal No 91 of 2016 (unreported). The relevant material facts obtaining in that appeal fall in all fours with the material facts in present appeal. In that case, an initial appeal was struck out and the appellants brought an appeal without seeking a fresh leave by seeking an extension of time to obtain a fresh leave to appeal to us. We relied on our previous decision of **Azaram Mohamed Dadi v. Abilah Mohamed Babu**, Civil Appeal No. 74 of 2016 (unreported) to observe that:

> *"... once an appeal is struck out, the incorporated leave to appeal suffers the same consequences."*

That was not the first time we made that stance. In **Dhow Mercantile (EA) Ltd & 2 Others v. Registrar of Companies 4 Others**, Civil Appeal No. 56 f 2005 (unreported), for instance, we observed that the law on the point was settled. We stated:

> *"... it is also to be observed that **it is now settled that after an appeal has been***

> ***struck out upon the ground that it is incompetent, there is nothing as it were, saved wlth regard to the appeal*** *including the notice of appeal. That is, the order striking out the appeal also had the effect of striking out the notice of appeal as well. Where, as happened in this case, after striking out the notice of appeal, it is left open for the appellant to reinstitute the appeal if it is so desired, it is expected that due compliance with the requirement of the rules would be observed. In this case the appellants were expected to apply for extension of time in which to file the notice of appeal. This was not done."* [Emphasis supplied].

At this juncture we find it irresistible quote what we said in **Oddo Odilo Mbunda** (supra):

> *"The Court has stated in a number of cases that once an appeal is struck out, the incorporated leave to appeal suffers the same consequences ..."*

And we went on to quote an excerpt from **Azaram Mohamed Davi** (supra) in which, like in the present case, an appeal was struck out by the Court and thereafter went back to the High Court where he applied for and was granted an extension of time to file a Notice of Appeal. He did not apply for a new leave to appeal to the Court but used the same leave in the subsequent appeal. The excerpt in **Azaram Mohamed Davi** (supra) reproduced in **Oddo Odilo Mbunda** (supra), we think, merits recitation here:

> *"Unfortunately, the appellant did not similarly seek any extension of time within which to file an application for leave to appeal to the Court, nor could he properly have sought any leave to appeal under section 47 (1) of the Land Disputes Courts Act without the former. The leave to appeal that was once upon a time granted by the High Court, on 3/4/2011, no longer survived the striking out of his two incompetent appeals to the Court respectively on 5/06/2013 and 3/12/2014. He was required to re-seek leave to appeal thereafter for the proper institution of this appeal, which*

inadvertently he did not. He missed a mandatory step in the land appeal process to the Court. It is fatal to the appeal."

And to clinch it all, and as we articulated in **Oddo Odilo Mbunda** (supra), Mr. Maro's propositions can also not sail through given the provisions of Rule 46 (1) of the Rules. For easy reference, we reproduce the sub rule as under:

> *"(1)* ***where an application*** *for a certificate or* ***for leave is necessary, it shall be made after the notice of appeal is lodged****".* [Emphasis ours].

Mr. Maro's proposition stumbles on this hurdle as well. His proposition to use leave in respect of the previous appeal is like putting the cart before the horse. Given the foregoing provision, which speaks loudly and clearly, a notice of appeal precedes an application for leave.

In the light of the above discussion, as we endorse as good the principles enunciated in **Abualy Alibhai Azizi**, **Mahmoud Mohamed**

(the decision of the High Court) and **Universal Petroleum Services** (supra) as well as in **Halsbury's Laws of England** at p. 273 on the Effect and Variation of Judgments and Orders, we are afraid, for the reasons stated, the same are not applicable in a situation like the present case. As already stated, once an appeal is struck out, all the record of appeal dies with it. Thus once an appellant in a struck out appeal lodges an application for enlargement of time to file an application for a fresh leave to appeal to the Court, the court cannot correctly say that the doctrine of *Res Judicata* applies. Neither can it correctly say it is *functus officio*.

In view of the above, having applied and obtained leave to file the Notice of Appeal out of time, it was incumbent upon the appellants to apply for enlargement of time to file an application for leave to appeal to this Court as well. That was not done and upon a line of authorizes referred to above, the appeal before us is but incompetent. We therefore decline the invitation by Mr. Maro to depart from the already settled position a shown hereinabove.

We wish to underline at this juncture that the authorities referred to by Mr. Maro in which the Court departed from its previous decisions, dealt with or envisaged situations in which there were two or more conflicting decisions of the Court. This is not the position here. As it seemed clear at the hearing that this was the position, and as it was clear that Mr. Maro wanted us to swim his current and create a conflicting decision as raw material for a full bench like was the case in the authorities he referred to, we cannot be detained by this issue. We only wish to add, as correctly submitted by Mr. Materu, that course will not create a healthy environment. The unfortunate circumstances of conflicting decisions in the cases he made reference to, we are certain, did not come deliberately but, rather, by accident. If anything, we do not consider as healthy to create conflicting decisions amidst the doctrine of precedent and *stare decisis* as Mr. Maro would want us to.

The foregoing disposes of the matter. We would have rested in peace and ended up there if it were not for another pertinent matter which arose in the course of hearing and which, for completeness, we

wish to address. This is the issue whether the leave under discussion was or was not valid. As we pointed out at the hearing and as conceded by Mr. Materu as well as Mr. Maro who requested the Court to guide him, the application from which the leave under discussion stemmed was made under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (the AJA) read together with Rule 45 (a) of the Rules. Upon a string of authorities of the Court, it is now settled that in land matters, an application for leave to appeal to this Court must be made under section 47 (1) of Cap. 216 – see: **Mabao Ying v. Mbeya City Council**, Civil Appeal No. 97 of 2013, **Dero Investments Limited v. Heykel Berete**, Civil Appeal No. 92 of 2004, **Hassani A. Shawa & another v. Jackson Ndesingo & 2 others**, Civil Appeal No. 77 of 2015, **The Registered Trustees of Ansaar Muslim Youth Centre V. Mohamed A. Singo**, Civil Appeal No. 178 of 2016 and **Idd Miraji Mrisho (Administrator of the Estate of Mwanahamis Ramadhani Abdallah, Deceased) and another v. Godfrey Bagenda**, Civil Application No. 17 of 2015 (all unreported), to mention but a few. In all those cases we took the view that in

application for leave to appeal to the Court in land matters, the enabling provision is section 47 (1) of Cap. 216 and not section 5 (1) (c) of the AJA. We added that if a wrong enabling provision is cited and the High Court grants leave, there will be no valid appeal before the Court and we will accordingly strike it out.

We think the foregoing sufficiently guides Mr. Maro in the predicament he was.

The above said, we wish to recap that we accede to Mr. Materu's views that after Civil Appeal No. 66 of 2003 was struck out, the requisite leave to appeal to the Court was, by necessary implication, struck out as well. After the appellants sought and obtained extension of time to file the Notice of Appeal out of time, it was incumbent upon them to also seek and obtain a new leave to appeal to the Court by applying for extension of time to lodge an application in its respect. That course would have complied with the provisions of Rule 46 (1) of the Rules. That having not been done, we find and hold that the present appeal was filed without the necessary leave to appeal to the

Court. Without the requisite leave, the present appeal is rendered incompetent.

In the final analysis, we sustain the preliminary objection and strike out the incompetent appeal with costs to the respondents.

It is so ordered.

DATED at **ARUSHA** this 14th day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL