IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MUSSA, J.A., WAMBALI, J.A., And KOROSSO, J.A.)

CIVIL APPEAL NO. 173 OF 2016

FINCA TANZANIA LTD ..... APPELLANT

VERSUS

WILDMAN MASIKA AND 11 OTHERS ..... RESPONDENTS

(Appeal from the decision of the High Court of Tanzania (Labour Division) at Iringa)

(Mashaka, J.)

Dated the 11th day of April, 2016
In
Labour Revision No. 66 of 2015

RULING OF THE COURT

7th & 16th May, 2019

WAMBALI, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Labour Division) in Labour Revision No. 66 of 2015, in which the appellant's appeal against the dismissal of the revision, which the appellant lodged to challenge the decision of the Commission for Mediation and Arbitration (CMA) in favour of the respondents.

It is noteworthy that on 22nd May, 2018, the respondents lodged in Court the notice of preliminary objection against the appeal on the following points:-

(a) *That the Memorandum of Appeal is bad in law, as it does not mention or disclose some names of the Respondents contrary to Rule 93(3) and Form F of the Tanzania Court of Appeal Rules, GN No. 368 of 2009.*

(b) *That the Exhibits put in evidence are not endorsed contrary to Rule 96(1) (f) read together with Rule 96(2) of the Tanzania Court of Appeal Rules, G.N. 368 of 2009.*

In view of the requirement that preliminary objections must be disposed before hearing the appeal, we heard counsels for the parties and reserved our ruling for determining the fate of the objections. It is important, however, to state that before we commenced the hearing, the counsel for the respondents, Mr. Daniel Ngudungi learned advocate who held brief of Mr. Julius Kalolo - Bundala, also learned advocate, with instructions to submit in support of the preliminary objections, prayed to

the Court to add one point of objection on the competence of the notice of appeal. The objection is to the effect that according to the notice of appeal, the appellant appeals to the ***"High Court of Appeal of Tanzania"*** which does not exist. Mr. Yussuf Hassan Shekh, learned advocate, who appeared for the appellant had no objection, and we therefore granted the requisite leave for that point to be included among the points of objections.

Submitting on the preliminary objections, Mr. Ngudungi essentially adopted the respondent's written submission which was lodged earlier on in support of the first and second points of preliminary objections and explained briefly on some important matters. He made oral arguments in respect of the third point of preliminary objection which was not included in the list earlier.

With regard to the first point, it was the argument of Mr. Ngudungi that apart from the appellant showing the name of one of the respondent as Wildman Masika, the other names of the respondents are not shown as they are simply referred to as ***"11 others"***. He therefore submitted

that, it is difficult to know the identity of 11 others. He argued further that failure to name the other respondents is contrary to the requirement of Rule 93(3) and Form F of the Tanzania Court of Appeal Rules, 2009 (the Rules) and the consequence is for the appeal to be struck out with costs. To support his contention, Mr. Ngudungi referred us to a number of decisions of this Court, specifically in **Hsu Chin & 36 Others v. The Republic**, Criminal Appeal No. 345 of 2009; **Petromark Africa Limited and Others v. Exim Bank (T) Limited**, Civil Appeal No. 58 of 2012 and **Nyakila and Another v. Shanti Shah and 2 Others**, Civil Appeal No. 87 of 2012 (all unreported). He emphasised that in all these decisions the Court stressed that names of the parties must be listed and went further and struck out the respective appeals. He thus urged us to uphold the objection and strike out the appeal on this point.

Concerning the failure of the appellant to ensure that the record of appeal contain endorsed documents which were admitted at the trial, as required by Rule 96(1) (f) and (2) of the Rules, Mr. Ngudungi argued that there is no dispute that all the documentary evidence in the record of appeal are not endorsed and that the omission is not only improper, but

also fatal. To bolster his contention, he referred us to the decisions of the Court in **Ismail Rashid v. Mariam Msati**, Civil Appeal No. 7 of 2015, (unreported) and **Ahvi A. Saggaf v. Abed A. Algeredi** [1961] EA 767 especially pages 782 to 784. In the event, he similarly, prayed that the objection on this point be sustained.

Lastly, in respect of the defect in the notice of appeal, Mr. Ngudungi argued that the appeal is not properly before the Court as the intention of the appellant is to appeal to the **"High Court of Appeal of Tanzania"** which is not this Court. In his view, the defect is fatal as this Court has not been properly accessed and moved by the appellant.

He concluded that all points of preliminary objections be upheld and the appeal be struck out with costs.

In response to the first objection, Mr. Shekh stated that the reference to the identity of the parties in the appeal is consistent with how they were indicated at the trial in the CMA and on revision in the High Court and therefore it was not possible to change. He further argued that the decisions of the Court referred by Mr. Ngudungi are

distinguishable with the circumstances of this appeal in which the issue of identity concerns the respondents while in the former the focus was on the identity of the appellants. However, he submitted that the anomaly can be cured by amendment under Rule 111 of the Rules. To support his contention he referred us to the decision of this Court in **Lugano S. Kalomba and 22 others v. The Permanent Secretary, Ministry of Education Vocational Training and the Honourable Attorney General,** Civil Appeal No. 78 of 2008 (unreported).

With respect to the non-endorsement of the documents Mr. Shekh was firm that as the proceedings and decision which led to the revision in the High Court and the appeal to this Court emanated from the CMA, the requirement for endorsement of the documents is not tenable. His firm position is that the proceedings in the CMA is regulated by the Labour Institution (Mediation and Arbitration Guidelines) GN. No. 67 of 2007, (Mediation and Arbitration Guidelines Rules) and not the provisions of Order XIII Rule 4(1) of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC), which were a subject of the decisions of the Court referred above. He emphasized that the CPC only applies to the proceedings in labour

matters where there is a lacuna which is not a case in the present appeal. He accordingly urged us to overrule the objection on this point.

Lastly, while he acknowledged the defect in the notice of appeal for making reference to the Court as the **"High Court of Appeal of Tanzania,"** Mr. Shekh was of the opinion that the same is curable by amendment under Rule 111 of the Rules. In his view, the defect was caused by a typographical error and therefore, it can be remedied by amendment as the rest of the documents in the record of appeal in respect of the appeal, including the Memorandum of Appeal, and the Record of Appeal, refer to the Court of Appeal of Tanzania. In the circumstances, he implored us to overrule the preliminary objections with costs and order the appeal to be heard on merits.

In rejoinder, Mr. Ngudungi reiterated his submission he made earlier and emphasized that the defects pointed out are substantive to the competence of the appeal. He finally prayed that the objections be sustained with costs.

On our part, having heard the submissions of the counsel for both sides, we are of the opinion that, the first objection on the failure to list the names of parties is merited. In the light of the referred decisions of this Court, it is a settled position that representative suits/appeals are not applicable in the Court of Appeal. Thus, all parties to an appeal must be identified by their respective names. We think that this applies irrespective of whether the relevant parties are the appellants or respondents.

With respect to the second point of objection, we entirely agree with Mr. Shekh that as the proceedings which has lead to the appeal originated from the proceedings in the CMA where the applicable procedure is born out of the Mediation and Arbitration Guidelines Rules, where there is no laid down procedure on how the tendered and admitted documents should be treated by the Arbitrator, the procedure stipulated under Order XIII Rule 4(1) cannot apply automatically.

We subscribe to this view because Rule 19 of the Mediation and Arbitration Guidelines Rules provides as follows on the power of Arbitrator:

"19(1) An Arbitrator has the power to determine how arbitration should be conducted.

(2) The powers of the Arbitrator include to-

(a) administer an oath or accept an affirmation from any person called to give evidence;

(b) Summon a person for questioning, attending a hearing, and order the person to produce a book, document or object relevant to the dispute, if that person's attendance may assist in resolving the dispute".

It is apparent from the quoted provisions that the Arbitrator has the power to regulate and determine the practice and procedure of how arbitration should be conducted, including, in our view, how to handle the documents tendered by parties during arbitration. There is nothing in the Mediation and Arbitration Guidelines Rules which calls for the strict application of Order XIII Rule 4(1) of the CPC in the Arbitration proceeding before the CMA. Moreover, the Rules do not provide for any resort to the CPC where there is a lacuna in the procedure to be applicable in the CMA. Besides, to urge for the application of the CPC

strictly where there is a lacuna in the Mediation and Arbitration Guidelines Rules during arbitration process is, in our view, to defeat the very purpose of the said Rules which aim to make the procedure as simple as possible to attain substantive justice to the parties in view of the nature of the proceedings. It is in this regard that the Arbitrator has been given wide powers to determine how arbitration should be conducted under Rule 19(1) of the Mediation and Arbitration Guidelines Rules. It is further observed that under Rule 18(5) of the Mediation and Arbitration Guidelines Rules, no appeal shall be against an Arbitrator's award, but an application can be made to the Court (Labour Division) to set aside the award on the basis of irregularities in the arbitrator's proceedings as provided under Rule 18 (6) of the Mediation and Arbitration Guidelines Rules. In the result, we do not think this point of objection is tenable. We overrule it.

Lastly, there is no dispute as submitted by Mr. Ngudungi and conceded by Mr. Shekh that the notice of appeal indicates that the appellant intends to appeal to the **"High Court of Appeal of Tanzania."** We have taken note of the submission of Mr. Shekh that this

is a mere typographical error which can be corrected by effecting amendment to the notice of appeal to remove the word **"High"** and remain with the words **"Court of Appeal of Tanzania."**

On our part, we agree that the error is necessarily due to a typographical error which can be rectified by effecting amendment to the notice of appeal under Rule 111 of the Rules. We say so because apart from that error in the body of the notice of appeal, the rest of the document, including the title of the notice of appeal, which indicates that the desire is to appeal to the Court of Appeal of Tanzania. Moreover, the notice of appeal has been preferred under Rule 83(1) of the Rules. This presupposes that the intention of the appellant is to access the Court of Appeal.

Having made the above observations in respect of the first and third preliminary objections, we now turn to consider the fate of the appeal in view of the defects pointed out.

The crucial issue that calls for our determination is whether the defect can be cured. In this regard, we think that as the requirement is

only consistent with the application of the Rules, the defect can be cured by amending the respective documents pertaining to the Court of Appeal under Rules 111 of the Rules. This is in line with the decision of the Court in **Zakaria Kamwela & 126 Others v. Attorney General,** Civil Appeal No. 3 of 2012 (unreported) which was followed in **Lugano S. Kalomba & 22 Others** (supra).

Nevertheless, we acknowledge and take note of other decisions of the Court in **Andrew Mseul, Jane Tibiluka, Muhamud Mohamed, Filemon Felix Mungi, Chongera Alphonce and Kashamba Kamukoto v. The National Ranching Company Ltd and the Attorney General,** Civil Appeal No. 205 of 2016,(unreported); **Minister of Labour and Youth Development and Another v. Gaspar Swai and 67 Others** [2003] TLR 239; **Kantibhai Patel v. Dahyabhai Mistry** [2003] TLR 437 and **Hamisi Kaka and 78 Others v. The TRC,** Civil Appeal No. 3 of 2012 (unreported). But, we think that every appeal must be decided based on its own merit as the desired amendments cannot be in respect of all the documents in the record of appeal including those that emanated from the proceedings of the CMA and the

High Court. The amendments are supposed to be in respect to the relevant documents prepared for the purposes of lodging the record of appeal in compliance with the Rules. We think amendments can be amenable than striking out the appeal.

We have no doubt that Rule 111 of the Rules allows the Court at any time to allow amendments of the notice of appeal or notice of cross-appeal or memorandum of appeal, as the case may be, or any other part of the record on such terms as it thinks fit. In this regard, we are settled that any desired amendment must be for the purpose of enabling the Court to determine the real question in controversy between parties. In allowing amendments, the Court aims to do justice to the parties. Thus, in order to adhere to this quest for justice, the Court must always look at the circumstances of each particular appeal, and exercise its discretion guided by certain factors; including, the need for amendments, the nature and extent of the amendments, the party's conduct, whether the hearing has commenced, the risk of the requested amendment (whether the appeal may be derailed from its normal route),

the prejudice if any to the other party, and the type of amendments sought.

Therefore, in exercising its discretion the Court is required to strike a balance between the conflicting considerations. Thus, the Court will allow amendments to the requisite documents in the record of appeal where the desired outcome is for the purpose of determining the appeal substantively. This will be done so where the Court believes that the desired amendments will not adversely affect the opposing party or hinder the overall process of the appeal. Moreover, the Court will exercise its discretion on an appeal to appeal basis, carefully considering the factors stated above in order to strike appropriate balance between the parties in a way that will best serve the interest of justice.

In the present appeal, we are of the settled view that, in view of the nature and the extent of the intended amendment which simply aim to include the names of 11 other respondents and removing the word **"High"** in the notice of appeal will not introduce anything new to the determination of the appeal. We are firm that, if we order amendments to the said documents, the respondents, who are also anxiously waiting

to know their rights if the appeal is heard, will not be prejudiced in any way as they would wish their fate to be determined substantively and conclusively. We are further settled that the desired amendments will not put in danger the interests of the respondents, but will facilitate speedy hearing of the appeal to determine the real controversy between the parties.

In the result, while we acknowledge the existence of defects with respect to the identity of the 11 other respondents and the inclusion of the word **"High"** in the notice of appeal, we do not think that the defects have to result in the striking out of the appeal.

In the circumstances of the dispute between the parties which involve labour matters and the need to ensure that justice is met by resolving the dispute conclusively, we order that the respective documents be amended to cure the defects under Rule 111 of the Rules. We accordingly, order that the amendments be effected within fourteen (14) days from the date of delivery of this ruling and the same be lodged in Court as required to facilitate the hearing of the appeal on merits.

We further order that costs should abide the outcome of the appeal. Meanwhile, we adjourn the appeal to next sessions of the Court on a date to be fixed by the Registrar.

DATED at **IRINGA** this 16th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL