

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT ZANZIBAR**

**(CORAM: MWANGESI, J.A., KOROSSO, J.A., And LEVIRA, J.A.)**

**CIVIL APPEAL NO. 226 OF 2020**

**PALUMBO REEF LIMITED ..... APPELLANT**  
**VERSUS**

**JAMBO RAFIKI BUNGALOW ..... RESPONDENT**  
**(Appeal from the decision of the High Court of Zanzibar**  
**at Vuga)**

**(Mahmoud, J.)**

**Dated the 26<sup>th</sup> day of July, 2017**  
**in**  
**Civil Appeal No. 40 of 2016**

.....

**RULING OF THE COURT**

7<sup>th</sup> & 14<sup>th</sup> December, 2020

**KOROSSO, J.A.:**

The appellant, Palumbo Reef Limited was the defendant in Civil Case No. 52 of 2012 filed by the respondent (then the plaintiff) at the Land Tribunal of Zanzibar Vuga Majestic, with claims that the appellant was a trespasser in a plot of land situated at Uroa, Central District, Zanzibar (the suit land) which had been illegally transferred to two of its Directors. The Land Tribunal decided in favour of the respondent.

Aggrieved by the decision of the Land Tribunal, the appellant's appeal to the High Court of Zanzibar at Vuga in Civil Appeal No. 40 of 2016 was unsuccessful, hence the current appeal to this Court. The

appeal is premised on four (4) grounds found in the Memorandum of Appeal that state as follows: -

- 1. That, the learned trial Judge did err in law by upholding the decision of the Land Tribunal of Zanzibar dated 25<sup>th</sup> November, 2015 which emanating (sic) from trial conducted without fully involving assessors.*
- 2. That, the learned trial Judge did err in law by upholding the decision of the Land Tribunal of Zanzibar of assuming the jurisdiction and proceed to nullify or rather revoke the Lease Agreement granted by the Government on 10<sup>th</sup> day of May, 2012 while in fact it has no such jurisdiction.*
- 3. That, the learned trial Judge did err in law by upholding the decision of the Land Tribunal of Zanzibar which relied upon the appellant's Written Statement of Defence of Civil Case No. 6 of 2012 involving the appellant and one Collin Duchi which has neither been tendered nor admitted before the Land Tribunal as an exhibit.*
- 4. That, the learned trial Judge did err in law by upholding the decision of the Land Tribunal of Zanzibar of nullifying the Lease Agreement granted by the Government on 10<sup>th</sup> day of May, 2012 without legal base and affording parties right to be heard.*

On the day this appeal was called for hearing Mr. Rajabu Abdallah, learned Advocate appeared for the appellant. Whereas, the respondent was represented by Mr. Haji Suleiman Tetere and Mr. Salum Bushir Khamisi, both learned Advocates.

The appeal was confronted with preliminary objections, where the respondent challenged the competence of the appeal in terms of Rule 107 (1) of the Court of Appeal Rules, 2009 (as amended) (the Rules). The Notice of Preliminary objections with two points, one of which was in alternative to the other was filed on the 29<sup>th</sup> June, 2020. These points were supplemented by two other points of objection filed on the 4<sup>th</sup> December, 2020 in the Supplementary Notice of Preliminary objection with two more grounds. The preliminary objection points read as follows:

*1. The purported appeal is incompetent for failure to accompany valid leave to appeal to this Court contrary to section 5 (1) of the Appellate Jurisdiction Act, Cap 141 of Laws of Tanzania on the following grounds as paraphrased:*

*a. The chamber summons for application for leave to appeal found at page 169 of the record of appeal is against the decision of High Court delivered 7<sup>th</sup> August, 2017 in Civil Appeal No. 40 of 2016, while the decision desired to be*

*appealed against was delivered on the 26 July, 2017 in Civil Appeal No. 40 of 2016.*

- b. Paragraph 5 of affidavit in support of the chamber summon for leave to Appeal found at page 171 of the record is against the decision delivered on 7<sup>th</sup> August, 2017 in Civil Appeal No. 40 of 2016 while the decision sought to be appealed from is delivered on 26<sup>th</sup> July, 2017 in Civil Appeal No. 40 of 2017.*
- c. The Ruling and Drawn Order found at page 178-181 of the record is also against the decision of High Court delivered on 7<sup>th</sup> August, 2017 in Civil Appeal No. 40 of 2016 while the decision desired to be appealed from is delivered on 26<sup>th</sup> July, 2017 in Civil Appeal No. 40 of 2016.*

*Alternatively,*

- 2. The appeal is defective and incompetent at law for want of a notice of intention to appeal due to following grounds: -*
  - a. Chamber summons for extension of time to lodge notice of appeal is out of time found at page 185 of the record arising from Civil Case No. 40 of 2016 while the supporting affidavit found at page 187 arises from Civil Appeal No. 40 of 2016.*
- 3. The appellant's appeal is incompetent as the copy of memorandum of appeal is defective for being referred to the appeal arising from*

*decision given on 26<sup>th</sup> July, 2017 in Civil Case No. 40 of 2016 while the decision desired to be appealed against arises from Civil Appeal No 40 of 2016 thus offending the provision of Rule 93(1) and (3) of Tanzania Court of Appeal Rules, 2009 as amended.*

4. *The purported appeal is incompetent for being accompanied by two Decrees in appeal with two different versions hence complicating the entire appeal as it is not known which Decree is being appealed from and thus offending the provision of Rule 96(2)(e) of Tanzania Court of Appeal Rules, 2009 as amended.*

As it is the common practice of this Court, preliminary objection raised are disposed of first before venturing into the main appeal. In consequence thereof, the learned counsel for the respondent and appellant were invited to address us on the same.

In amplifying the points raised as preliminary objections, Mr. Salum Bushir Khamisi commenced his submissions arguing on the first point of objection found in the notice of preliminary objection filed on the 29<sup>th</sup> June, 2020 that challenges the competence of the appeal, and contended that the appeal lacks a valid leave to appeal to this Court.

The learned counsel argued that by virtue of section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 RE 2002 (the AJA) and Rule 96(2)(a) of the Rules, an appeal from the subordinate court to this Court has to

have leave to appeal. He reasoned that in effect the leave to appeal granted by the Ruling of the High Court dated 6<sup>th</sup> March, 2018 found at page 178 and 179 of the record of appeal and the commensurate drawn order found at page 181 of the record of appeal, was in respect of the High Court decision on appeal dated 7<sup>th</sup> August, 2017 and not the decision being appealed against which was dated 26<sup>th</sup> July, 2017.

The learned counsel emphasized further that, another issue for consideration should be the different dates of the High Court decision as referred in the two Decrees in Appeal found in the record of appeal, both purporting to be drawn from the impugned Judgment (see pages 158 and 199 of the record of appeal). The counsel argued that whereas the first Decree on Appeal at page 158 of the record of appeal outlines the date of Judgment to be 26<sup>th</sup> July, 2017 the second Decree on Appeal at page 199 of the record of appeal refers to a Judgment dated 26<sup>th</sup> July, 2018 while the said Decrees in Appeal stating to relate to Civil Appeal No. 40 of 2016 that arises from Civil Case No. 52 of 2012.

The counsel maintained that the anomalies highlighted above are further amplified by the fact that the chamber summons and supporting affidavit which grounded the relevant hearing on application for leave to appeal and the relevant Ruling thereof, as can be found at pages 169 and 173 of the record of appeal are also tainted with incongruities. He

referred the Court to the chamber summon that grounded the application for leave to appeal referred to the decision dated 7<sup>th</sup> August, 2017 as found in item 1 of the chamber summons and this was also found in paragraph 5 of the affidavit supporting the chamber summons.

The learned counsel thus argued that the fact that the referred to decision the one dated 7<sup>th</sup> August, 2017 is not the one being challenged in the appeal under scrutiny, that is, the decision of the High Court (Mahmoud, J.) of 26<sup>th</sup> July, 2017, then undoubtedly, it renders there being no valid leave to appeal related to the challenged decision in the appeal before the Court. He asserted that the leave to appeal being a requisite requirement for appeal before this Court, when it arises from the Land Tribunal of Zanzibar by virtue of Section 5(1)(c) of AJA, then the fact that there is no valid leave to appeal, it renders the current appeal to be incompetent.

Another point of objection raised by Mr. Khamisi was to challenge the competency of the appeal on claims that the memorandum of appeal filed is defective for erroneously stating that the appeal arises from the decision given on 26<sup>th</sup> July, 2017 in Civil Case No. 40 of 2016 while the decision desired to be appealed against emanates from Civil Appeal No. 40 of 2016. He argued that this glitch offends the provision of Rule 93(1) and (3) of the Rules as amended and is thus in

contravention of the law. The counsel also maintained that these anomalies cannot be cured by invoking the principle of overriding objective which aims at facilitating substantive justice, since leave to appeal is a fundamental requirement for one to appeal to this Court where it originates from subordinate courts. He thus prayed that the appeal be found incompetent and struck out with costs.

On the part of the appellant with regard to the first point and all the points of objection raised, although he started by objecting to the points of objection raised, in the midst of his submissions he changed course and stated that upon further reflection, the respondent was conceding to all the points of objection raised by the learned counsel for the appellant. He conceded to all the anomalies shown but differed from the appellant's counsel on the way forward proposed. He prayed that the appellant be allowed to rectify the anomalies discerned and file supplementary record, and the Court should not order for costs since they have readily conceded to the preliminary objection points raised.

In rejoinder, the respondent's counsel had nothing further to state, except to reiterate their prayer that the appeal be struck out with costs and the appellant should go and seek for a proper leave to appeal.

Having heard the rival submissions before us on the points of objection raised, and understanding that the case subject to the current



appeal originated from the Land Tribunal of Zanzibar, it is unquestionable that, since the decision of the High Court giving rise to the current appeal was in the exercise of its appellate jurisdiction, thus by virtue of the provisions of section 5(1) (c) of AJA, leave to appeal to this Court is a requisite requirement. The said provision states: -

*"(1) in civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*

*(c) 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".*

This being the position, and in view of the provision of Rule 96(2) (a) of the Rules which requires that for purposes of any appeal from the High Court in its appellate Jurisdiction, the record of appeal to contain documents relating to the proceedings and also have the order giving leave to appeal if any in line with subrule (1) of Rule 96 of the Rules and thus, making it an essential requirement to have a valid leave to appeal where it is required. Therefore, before us for determination is mainly whether or not there was a proper leave to appeal to this Court.

In the appeal before us, there is a Ruling found at pages 179 of the record of appeal with an order granting leave to appeal to the Court

of appeal for the decision of the High Court of Zanzibar delivered on the 7<sup>th</sup> August, 2017. We reproduce the relevant segment of the Ruling, which reads:

*"Aggrieved by the judgment the applicant appealed to the High Court whereby with the leave of the Court, the appeal was heard by way of written submissions and the High Court on **7<sup>th</sup> day of August 2017** delivered in favour of the respondent" [Emphasis is ours].*

After this observation, at the end of the Ruling the High Court further stated:

*"...In view of the foregoing therefore, this is a fit case to be forwarded to the Court of Appeal for determination on those points of law. The application is hereby granted".*

Noteworthy, is that this Ruling was grounded on chamber summons filed by the respondent (the applicant then), found at page 169 of the record of appeal, where the reliefs sought are:

*"a) That, this Honourable court be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the decision of the High Court at Vuga (Hon. Fatma Hamid Mahmoud, J) delivered on 7th August, 2017 in Civil Appeal No. 40 of 2016..."*

As it can be discerned from the above excerpt, again the date of the impugned judgment is said to be 7<sup>th</sup> August, 2017. The same is reflected in the affidavit supporting the chamber summons sworn by Rajabu Abdalla Rajabu where he avers in paragraph 5 that:

*"That, being aggrieved by the decision of the High Court of Zanzibar delivered on 7<sup>th</sup> August, 2017, the appellant...."*

Therefore, undoubtedly, from the above excerpts from relevant documents which led to the granting of the order for leave to appeal and the granted leave in effect related to Civil Appeal No. 40 of 2016 delivered on the 7<sup>th</sup> August, 2017. While this was not the case as discerned from the record of appeal, since the impugned Judgment was in fact delivered on the 26<sup>th</sup> July, 2017 as found on page 165 of the record of appeal. Consequently, from this, we are satisfied with the uncontested assertion by the learned counsel for the respondent that the leave to appeal to this Court is fatally defective and thus incompetent. In the premises the first point of objection is sustained.

We are of firm view that having considered the above point of objection, we find no further need to consider the other points of preliminary objection raised as this is sufficient to dispose of the whole matter. This is because having found that the attached leave to appeal to this Court is incompetent, it renders the appeal before us to be

incompetent. Thus, in the absence of a proper leave to appeal, it means the appellant failed to comply with an essential requirement provided by the law and is therefore fatal.

On the way forward, careful consideration has been made towards the prayer by the counsel for the appellant to be given time to file supplementary record as a way to facilitate substantive justice in this case, but we wish to point out that the position in this appeal is that there is no valid leave to appeal to this Court, a requisite requirement. This means there is lack of an essential document to fulfill an essential step in the appeal process to this Court for the case subject of the current appeal (See **Azaram Mohamed Dadi vs Abilah Mfaume**, Civil Appeal No. 74 of 2016 (unreported)). It is important to note that though we agree that under Rule 111 of the Rules, the Court has powers to allow amendments of important documents such as the notice of appeal, memorandum of appeal or any other part of the record of appeal, but it should be made clear that, amendment does not extend to adding documents. One cannot amend what does not exist, which is the position in this case having found that there is no proper leave to appeal to this Court (See **Amran Mohamed Talib and 2 Others vs Jamal Abdallah Suleiman**, Civil Appeal No. 18 of 2015 (unreported)).

For the foregoing reasons, having found the appeal incompetent, and the consequences thereto being well settled, under the circumstances, this incompetent appeal cannot be adjourned as sought by the counsel for the appellant, the remedy available is to strike out the appeal as we stated in **Ghati Methusela vs Matiko Marwa Mariba**, Civil Application No. 6 of 2006 (unreported). In the end, the appeal is struck out with costs.

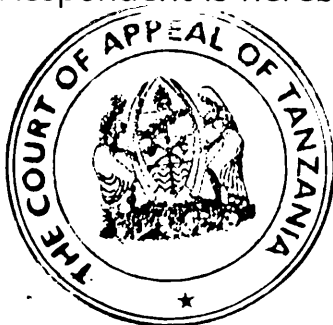
**DATED** at **ZANZIBAR** this 12<sup>th</sup> day of December, 2020.

S. S. MWANGESI  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The Ruling delivered this 14<sup>th</sup> day of December, 2020 in the presence of Mr. Rajabu Abdallah Rajabu, learned counsel for the Appellant and Mr. Haji Suleiman Tetere, learned counsel for the Respondent is hereby certified as a true copy of the original.



  
H. P. NDESAMBURO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**