

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

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And KEREFU, J.A)

CIVIL APPEAL NO. 165 OF 2018

HAMIS PASCHALAPPELLANT

VERSUS

SISI KWA SISI PANEL BEATING AND ENTERPRISES LTD RESPONDENT

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

(Makaramba, J.)

dated the 6th day of October, 2017

in

Land Case No. 48 of 2012

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RULING OF THE COURT

11th & 17th December, 2020

MWARIJA, J. A.:

The respondent, Sisi kwa Sisi Panel Beating and Enterprises Ltd was the plaintiff in the High Court of Tanzania at Mwanza. It instituted Land Case No. 18 of 2012 against the appellant, Hamis Paschal and Mwanza City Council (the MCC) who is not a party to this appeal. The suit arose out a dispute involving a landed property, Plot No. 75 Block "R" with C.T. No. 033026/10 situated along Uhuru Street within the Municipality of Mwanza (the suit property). In the suit, the respondent

sought *inter alia*, a declaration that it was the lawful owner of the suit property and an injunctive order restraining the appellant and the MCC from any interference with the respondent's possession of the suit property.

The respondent's case was that the suit property was previously owned by one of its Directors, Bakari Omari Wema but later on, the said Director transferred it to the respondent on 15/12/2005 to set off the loss of TZS.15,000,000.00 which he had occasioned to the respondent company.

On his part, the appellant denied the claim. Together with his written statement of defence, he filed a counterclaim seeking among other things, to be declared the lawful owner of the suit property. He claimed that Bakari Omari Wema, whom he cited as the first defendant in the counterclaim and referred him as Mwasema Bakari Omari, could not own the suit property because the same was owned by the appellant after having purchased it in a public auction following the court's decision in Matrimonial cause No. 54 of 1994 (the matrimonial cause). He also cited the respondent as the second defendant. The appellant contended therefore that as a result, Bakari Omari Wema did not have a title to pass to the respondent. He contended that the auction was conducted

following the decision of the District Court of Nyamagana in the Matrimonial Cause in which the marriage between Bakari Omari and Zulfa Zubery was dissolved thus ordering division of matrimonial assets including the suit property.

At the hearing, the plaintiff relied on the evidence of Omari Mwinyidudu (PW1) who was until the material time, the Operations and Chief Executive Officer of the respondent. He tendered the original title deed No. 0333026/10 (exhibit P1) and official search (exhibit P2) confirming that the suit property was in the name of the respondent. The evidence was also given by Ayoub Rashid Kasuka who was the Land Officer at the MCC and Bakari Omari Wema as witnesses for defence in the counterclaim, (DW2 and DW3 respectively). It was DW2's testimony that according to MCC office records, the suit property was in the name of the respondent, the ownership having been transferred to it by DW3, who was the previous owner. DW3 supported the evidence of PW1 that being a lawful owner of the suit property, on 15/12/2005 he effected the transfer of his right of ownership to settle the loss of TZS.15,000,000.00 which he had occasioned to the respondent. He stated further that, he had never heard of any auction conducted on the suit property.

In his evidence, the appellant who testified as DW1, testified that he owned the suit property as from 26/11/1999 when he purchased it at a public auction. He said that he saw an advertisement on the notice board of Nyamagana District Court and on the date of the auction he participated and managed to buy the suit property at TZS.3,000,000.00. He went on to state that, later on 15/2/2000, he was issued with a valuation report (exhibit D2) by the District Administrative Secretary who also gave him the "Transfer under Power of Sale" document (exhibit D1) indicating that the suit property was transferred to him.

In its decision, the learned trial Judge was satisfied that the evidence tendered by the respondent including documentary evidence sufficiently proved that the suit property was lawfully owned by the respondent, the same having been transferred to it by DW3. He dismissed the appellant's contention in the counterclaim that he purchased the suit property at a public auction. The counterclaim was thus dismissed for want of merit.

The appellant was aggrieved by the decision of the High Court hence this appeal which is predicated on the following three grounds:-

" 1. The learned trial Judge erred both in law and facts when he determined the matter in favour of

the respondent without taking into account the previous two decisions of the High Court of Tanzania at Mwanza which in essence determined the matter in favour of the appellant and declared him as legal owner of the suit premises.

2. That [the learned trial Judge erred] in finding that there was no fraud involved when the 1st defendant in the Counterclaim, one Mwasema Bakari Omari alias Bakari Omari Wema transferred the suit premise to the respondent herein while he had no legal title to pass.

3. That [the learned trial judge erred] in failing to consider that the 1st defendant in the counter claim one Mwasema Bakari Omari alias Bakari Omari Wema misrepresented before the High Court the fact that he offered the suit premise to the respondent as a compensation for a debt in the year 1998 while the record shows that Plot No.75 Block "R" Uhuru Street was transferred to the respondent on the 15th day of December, 2005.

Upon being served with the record and memorandum of appeal, on 27/3/2020 through its learned counsel, the respondent raised a preliminary objection consisting of the following two grounds:-

"1. That the appeal is incompetent due to the appellant's failure to serve a person who seems to him to be directly affected by the appeal.

2. That as the certificate of delay is invalid, the appeal is out of time."

At the hearing of the appeal, the appellant was represented by Mr. Kassim Gilla, learned counsel while the respondent had the services of Mr. Salum Magongo, also learned counsel. Since, as stated above, the counsel for the respondent had raised a preliminary objection, as the rule of practice dictates, the same had to be heard first.

Submitting in support of the first ground of the preliminary objection, Mr. Magongo argued that, in terms of Rule 84(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the appellant had the duty of serving a copy of the notice of appeal on the persons who seemed to him that the appeal would directly affect them. According to the learned counsel, DW3 who was the first defendant in the counterclaim is one of the persons who ought to have been served with a copy of the notice of appeal.

Mr. Magongo argued further that the appellant did not only fail to serve a copy of the notice of appeal to the said person but did not

also include him in the memorandum of appeal. He stressed that the omission is fatal because, the said person was a party to the proceedings in the High Court and therefore, will be affected in the event the appeal succeeds.

In that regard, he referred the Court to the second and third grounds of appeal. He argued that, while in the second ground the appellant challenges the trial court's finding that the transfer of ownership of the suit property by DW3 to the respondent was done fraudulently, in the third ground, the appellant challenges the finding of the High Court that the title of the suit property was properly transferred by DW3 to the respondent. He argued therefore, that DW3 ought to have been served with a copy of the notice of appeal because if those grounds of appeal succeed, his interests will be affected.

Mr. Magongo went on to argue that, in any case, the appellant or his counsel did not have discretion to decide not to effect service of a copy of the notice in question, particularly so when that person was a party to the proceedings in the High Court. To bolster his argument, he cited the decision of the Court in the case of **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] T. L. R 437 and the decision of the Court

of Appeal of Kenya in the case of **Kiangoi v. Waruru and 2 Others**.
[2010] KLR 170.

Replying to the submission made by the respondent's counsel in support of the first ground of the preliminary objection, Mr. Gilla argued that service of the notice of appeal to DW3 was not necessary because it seemed to the appellant that the said person will not be affected if the appeal succeeds. With regard to the decision in the case of **Kantibhai M. Patel** (supra) cited by the respondent's counsel, Mr. Gilla urged us that, in determining this ground, we should be guided by the holdings Nos. (iv) and (viii) of that decision. He relied on the position stated in holding (iv) that, the persons to be served are those who took part in proceedings in the High Court and those who, though they did not take part, stand to be directly affected by the appeal. On holding No. (Viii), he relied on the stated position that the persons who took part in the proceedings in the High Court but who are not going to be directly affected by the appeal need not be served. It was Mr. Gilla's submission that DW3 was not a party to the proceedings in the High Court and therefore, was not served because he will not be affected by the appeal. He therefore prayed that the first ground of the preliminary objection be overruled.

Rule 84(1) of the Rules under which the counsel for the respondent has based the first ground of his preliminary objection provides as follows:-

" 84 – (1) An intended appellant shall, before or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex-parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court."

In the case at hand, there is no dispute that the appellant did not serve a copy of the notice of appeal to DW3. The learned counsel for the appellant submitted however, that the omission did not breach the provisions of the Rule which has been reproduced above, for two reasons; first that the said person was not a party to the proceedings in the High Court and secondly, that he will not be affected by the appeal.

In holdings No. (iv) and (viii) in the case of **Kantibhai case** relied upon by the appellant's counsel, the Court stated as follows:-

" (iv) what rule 77(1) means is that persons who should be served are those persons who took part in the proceedings in the High Court, and those who did not take part in the

proceedings but who stand to be directly affected by the appeal; besides, there may be persons who took part in the proceedings but who need not be served if they do not seem to be directly affected by the appeal.

(v) N/A

(vi) N/A

(vii) N/A

(viii) Where a person is shown to be directly affected by an appeal, there is no discretion but to serve that person with the Notice of Appeal and where, as in this case, that person took no part in the proceedings in the High Court, it is the Court of Appeal, rather than the appellant, which is vested with power to direct that service need not be effected on that person; rule 77(1) does not constitute the appellant to be a judge in his own cause."

The first limb of the argument by Mr. Gilla that DW3 was not a party to the proceedings in the High Court is, with due respect, plainly wrong. Although he was not a party to the suit between the respondent and the appellant, he was the first defendant in the counterclaim which

was heard and determined in the same proceedings. He was therefore, a party to the proceedings in the High Court.

Even if however, DW3 would not have been a party, it was not for the appellant to decide not to effect service on the ground that he was probably not to be affected by the appeal. As observed in holding No. (viii) in the **Kantibhai case**, it is the Court of Appeal which has the power to direct that service need not be effected on such a person. Despite the use of the words "*who seem to him to be directly affected by the appeal*", in Rule 84(1) of the Rules, the appellant did not have discretion to decide that DW3 will not be affected by the Appeal. When interpreting that expression, the Court in that case observed as follows at page 447.

"On the face of it, [service of a notice of appeal] seems to lie in the discretion of an intended appellant to decide which persons 'seem to him' to be directly affected by the appeal. However, it is long established in judicial interpretation that words and expressions which prima facie appear permissive may in certain circumstances assume an imperative character. The test is whether there is anything that makes it the duty of the person on whom the power is

conferred to this or that to exercise the power. When the power is coupled with duty it ceases to be discretionary and becomes imperative."

Having found that DW3 was a party to the proceedings in the High Court and since the appellant did not have discretion to decide not to effect service of the notice of appeal on account that DW3 will not be affected by the appeal, there is no gainsaying that the appellant breached the provisions of Rule 84(1) of the Rules, the effect of which is to render the appeal incompetent.

Next for our consideration is whether we should invoke the overriding objective principle so as to sustain the appeal. To answer the issue, we have taken into consideration the fact that compliance with the provisions of Rule 84(1) is mandatory. In the circumstance, the appeal cannot be salvaged by applying the oxygen principle. - See for example the cases of **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017, **Njake Enterprises Limited v. Blue Rock Limited**, Civil Application No. 69 of 2017 and **Erick Raymond Rowberg & 2 Others v. Elisa Marco & Another**, Civil Application No. 571/02 of 2017 (all unreported).

In the latter case, the respondent failed to write a letter requesting for certified copies of proceedings and judgment within time and serve a copy to the applicants. As a result, the applicants sought an order striking out the notice of appeal under Rule 89(2) of the Rules. To salvage the notice of appeal, the respondents prayed the Court to invoke the overriding objective principle with a view of granting them time to apply for extension of time to comply with that requirement.

Relying *inter alia* on the case of **Martin Kumalija & 117 Others v. Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (unreported), the Court held that the overriding objective principle could not be invoked to condone the inaction. In that case, the Court underscored the need to apply the overriding objective principle without offending mandatory provisions of the law. It observed as follows:-

"While this principle is a vehicle for attaining substantive justice, it will not help a party to circumvent the mandatory rules of the Court."

We wish to emphasize that, since in this case, by virtue of the provisions of Rule 84(1) of the Rules, compliance with the requirement of serving a notice of appeal has a timeline, in our considered view, the appeal cannot be salvaged by invocation of the oxygen principle. This is because the question of limitation is synonym with jurisdiction.

That said and done, we uphold the first ground of the preliminary objection. Since the finding on this ground suffices to dispose of the matter, the need for considering the second ground of the preliminary objection does not arise.

In the event, the appeal is hereby struck out with costs for being incompetent.

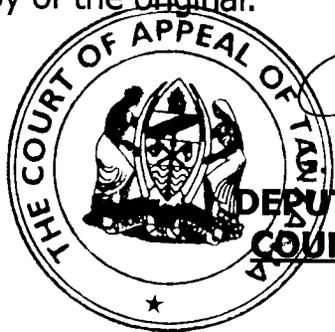
DATED at **MWANZA** this 17th day of December, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 17th day of December, 2020 in the presence of Mr. Kassim Gilla, learned counsel for the appellant and Mr. Emmanuel John, learned counsel for the respondent, is hereby certified as a true copy of the original.

The seal of the Court of Appeal of Tanzania is circular, featuring a central emblem with a shield and a scale of justice, surrounded by the text 'THE COURT OF APPEAL OF TANZANIA' and a star at the bottom.
H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL