IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, C.J., MMILLA, J.A. And LEVIRA, J.A.)

CIVIL APPEAL NO. 232 OF 2017

1. THE MANAGING DIRECTOR KENYA COMMERCIAL BANK (T) LIMITED .....
2. ALBERT ODONGO ..... **APPELLANTS**

VERSUS

SHADRACK J. NDEGE ..... RESPONDENT

(Appeal from the Judgment and Decree of High Court of Tanzania at Mwanza)

(Hon. Mackanja, J.)

dated the 15th day of October, 2008
in
HC. Civil Appeal No. 20 of 2008

JUDGMENT OF THE COURT

27th March, & 11th May, 2020

JUMA, C.J.:

This second appeal traces its origin to a judgment that was delivered twelve years ago on 25th March 2008 by the Resident Magistrate's Court of Mwanza (E.G. Rujwahuka—RM). After hearing the suit, the trial court awarded the respondent SHADRACK J. NDEGE Tshs. 80,000,000/= as general damages against the two appellants, THE MANAGING DIRECTOR KENYA COMMERCIAL BANK (T) LTD and ALBERT ODONGO.

The respondent was initially employed by the Kenya Commercial Bank Tanzania Ltd (the Bank) at its Mwanza branch. In February 2005 he was transferred to Arusha to become section head of the Arusha branch of the Bank. To facilitate his relocation to Arusha, the Bank through its Relationship Manager (the second respondent) contracted M/S Riziki K. Mbise to transport his personal effects to Arusha at consideration of Tshs. 1,400,000/=. In his suit, the respondent had complained that later on, the Bank not only repudiated its contract with M/S Riziki Mbise, but directed the respondent to recover the transportation money which the Bank had paid to the transporter.

The respondent took strong exception to a letter dated 01/03/2005 from the second appellant, which claimed that the respondent had fraudulently claimed money from the Bank. These words, the respondent complained, were not only defamatory, but also imputed that he had committed a criminal offence.

In their joint statement of defence, the appellants asked the trial court to dismiss the suit. They contended that the respondent was asked to refund the transportation money because he did not in fact transport his personal effects as agreed, but had instead used the money. The appellants insisted

that their letter, which prompted the respondent to file his suit, was published without malice or ill will. It was merely urging the respondent to refund back the Bank's money.

The appellants were dissatisfied by the decision of the trial Resident Magistrate's Court of Mwanza and lodged their grievances by way of first appeal to the High Court at Mwanza. Mackanja, J. did not go into the merits of their appeal which they had argued by way of written submissions. He struck it out with costs. The appellants were further aggrieved, hence this second appeal.

On 12/10/2017, which was well before the Registrar had set the date for hearing of this second appeal, Mr. Deya Paul Outa, learned counsel for the respondent, filed a Notice of Preliminary Objection. The objection contends that the decision of the High Court to strike out their first appeal, is not an appealable decision to this Court. As a result, this second appeal is not competently before us and we should strike it out with costs.

When the opposing parties appeared before us for hearing on 27/03/2020, Mr. Libent Rwazo, learned counsel represented the appellants; while the learned counsel Mr. Outa represented the respondent. We directed learned counsel for the parties to canvass the preliminary objection first and

To cement this line of argument that since the High Court did not hear any appeal, but had struck out what the appellants had purported to be an appeal, the learned counsel referred us to our decision in **EAST AFRICAN DEVELOPMENT BANK V. KHALFAN TRANSPORT CO. LTD**, CIVIL APPEAL NO. 68 OF 2003 (unreported). This case had restated a common knowledge that a right of appeal, in our legal system is a creature of statute, and courts cannot arrogate to themselves the appellate jurisdiction they do not have.

Mr. Outa further referred to another decision of the Court, and that of Court of Appeal for Eastern Africa to highlight how "dismissal" and "striking out" carry different consequences. Our decision in **HASHIM MADONGO, CHARLES LEOLE & DAMAS KAGERE VS. MINISTER FOR INDUSTRY AND TRADE, ATTORNEY GENERAL & DAR ES SALAAM REGIONAL TRADING CO. LTD**, CIVIL APPEAL NO. 27 OF 2003 (unreported) which quoted from **NGONI MATENGO COOPERATIVE MARKETING UNION LTD VS ALIMA MOHAMED OSMAN** (1959) EA 77 at page 580 emphasized that:

> *"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and*

not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; ***for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used..."*** *(Emphasis supplied).*

Mr. Outa argued that because the appellants' purported first appeal was not a proper appeal, and was as a result struck out, there was no judgment which completely disposed of the first appeal on merits, and to that extent the High Court is still seized of the matter. He urged us to look at the consequences of striking out instead of what is titled as a Judgment. He urged us to sustain the objection with costs.

When we prodded him whether we can seize revision jurisdiction to address any illegality in the decision of the High Court, Mr. Outa pushed back arguing that once there is a preliminary objection over a matter, this Court cannot preempt that objection by assuming revisional jurisdiction. For support he referred us to the case of **GOODHOPE HANCE MKARO V. TPB BANK PLC AND ANOTHER**, CIVIL APPEAL NO. 171 OF 2017 (unreported)

where this Court had said that it cannot exercise its revisional jurisdiction and rectify patent illegalities because that recourse would preempt or circumvent preliminary objection.

In his replying submissions, Mr. Rwazo, learned counsel for the appellant was not in any doubt that the decision of Mackanja, J. was a Judgment from which a Decree in Appeal was prepared. He asked us to look at the decision of the High Court appearing from pages 247 to 253 of the record of appeal which is deliberately as the "JUDGMENT", and page 254 is where there is a document titled "DECREE IN APPEAL." The learned counsel submitted that in so far as the appellants are concerned, the record of appeal before this Court carries a proper Judgment and Decree of the High Court making this second appeal competent.

He submitted that after the first appellate Judge had condemned the appellants without giving them a chance to be heard, he prepared his decision which he titled as "Judgment" and from which a "Decree" was prepared. That decision was as a result tainted with illegality. He argued that this Court has always said that where there is illegality, its eyes will always be open to cure that illegality.

Mr. Rwazo submitted that all the authorities which the learned counsel for the respondent had cited, including **GOODHOPE HANCE MKARO V. TPB BANK PLC AND ANOTHER** (supra); do not support the preliminary objection and are all distinguishable. He argued that as long as the record of appeal contains a judgment and a decree the appellants are appealing against, this Court should not accept the assumption that the appeal is against a Ruling and an Order. Learned counsel for the appellants concluded by urging us to find the preliminary objection to be misconceived and should be dismissed with costs.

After hearing the parties' submissions, it seems clear to us that from established precedents since the decision of the Court of Appeal for Eastern Africa in **MUKISA BISCUIT MANUFACTURING COMPANY LTD. V. WEST END DISTRIBUTORS LTD** [1969] E.A. 696, are unanimous that a valid preliminary objection is that which is predicated on pure point of law:

> *"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.* ***Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound***

by the contract giving rise to the suit to refer the dispute to arbitration". [Emphasis added].

The underlined excerpt above from **MUKISA BISCUIT MANUFACTURING COMPANY LTD** (supra) shows that this decision did not provide an exhaustive list of circumstances where pure points of law may arise. This decision listed the objection to the jurisdiction of the court or objection based on a plea of limitation, as examples of when pure points of law is evident. As we stated in **AYUBU BENDERA AND 10 OTHERS VS. A.I.C.C. ARUSHA,** AR. CIVIL APPLICATION NO. 9 OF 2014 (unreported), after embracing the parameters laid down in **MUKISA BISCUIT MANUFACTURING COMPANY**, what courts in Tanzania have done over the following years,is to expound and add new examples based on those parameters.

As pure point of law, Mr. Outa raised a jurisdictional issue contending that since the decision of the first appellate High Court subject of this second appeal ended by being struck out, that decision is not appealable to this Court. He explained that the appeal could not stand before the High Court because of lack of a valid decree. He expounded that although the first appellate Judge titled his decision as "Judgment" and extracted a "Decree in

Appeal" there from; that decision is not a "judgment" that is appealable against in this Court. The learned counsel for the respondent submitted that if we look underneath the Judgment, and delve into the substance of that decision of the High Court, we will find that it was not a Judgment at all.

On our part, we do not think we can extend the examples of pure point of law to discover what lies deep into the substance of the decision of the Judge so as to bring out what Mr. Outa considers to be pure point of law. The learned Judge has clearly indicated in bold letters that his decision was a Judgment. On second appeal we shall take it that he knew that he was writing a Judgment of the first appellate court from which a Decree in Appeal was extracted.

In any case, this second appeal before us will provide all the parties concerned the opportunity to address the ground of appeal contesting the finding of the first appellate Judge on the validity of the decree accompanying the memorandum of appeal that was presented to the High Court. This avenue of second appeal will provide all the parties concerned with the best opportunity to interrogate the legality of that decision.

We are not in any doubt that the preliminary objection does not raise any pure point of law which is capable of disposing of this appeal without hearing the grounds of appeal on merit.

In dismissing the respondent's preliminary objection, we are mindful of the warning issued in **Mukisa Biscuits case** (supra) about the dangers of preliminary objections being misused to occasion delays and add to costs. At page 701 Sir Charles New bold, JA warned:

> *".... The improper raising of points by way of preliminary objection does nothing but to unnecessarily increase costs and on occasion, to confuse the issues. This improper practice should stop."*

In the upshot, we find that the Notice of Preliminary Objection which was filed by the Respondent does not raise pure point of law. For this reason, it is dismissed with costs being in the cause.

With the preliminary point of objection out of our way, the two learned Counsel were next heard, and relied on their written submissions and oral arguments.

Mr. Rwazo, the learned counsel for the appellants, informed us that in their written submissions, the appellants had abandoned their fifth ground of

appeal and modified their sixth ground. He submitted on the following five grounds:

1. The Honourable High Court Judge erred in law for condemning the Appellants without giving them a chance to defend themselves against the allegation of doctoring the decree.
2. The Honourable High Court Judge finding that the decree was doctored is not supported by evidence.
3. The Honourable High Court Judge erred in law and in fact in holding that the Memorandum of Appeal was not accompanied by a copy of decree.
4. The Honourable High Court Judge erred in law and fact in not determining the grounds of appeal.
5. The Honourable High Court Judge erred in law in dating the judgment before the said judgment was pronounced.

Mr. Rwazo highlighted the way the appellants were denied of their right to be heard, which goes to the root and affects the legality of the entire decision of the first appellate High Court. Firstly, he invited us to determine whether it was legally right for the High Court to condemn the

appellants without giving them a chance to defend themselves over allegation of doctoring the decree. Secondly, he urged us to determine whether the finding made by the High Court that the decree was doctored was supported by evidence. Thirdly, whether it was legally correct for the High Court to hold that the memorandum of appeal which the appellants presented before the High Court was not accompanied by a copy of decree. Fourthly, whether the High Court was supposed to determine the grounds of appeal. Fifthly, whether it was legally correct for the High Court to date the judgment before the said judgment was pronounced.

Expounding on the grounds of appeal, Mr. Rwazo faulted the way the learned first appellate Judge raised the question that the decree accompanying the memorandum of appeal was doctored on his own volition while composing his decision. This failure to invite the submissions of the parties in the question the Judge raised alone, he added, was legally wrong. To support his argument, he referred us to several authorities where the Court determined that it was legally wrong for the High Court to raise matters which led to the striking out of appeal without giving a chance to the parties to address the court on the matters in question. These authorities are— **TRUCK FREIGHT (T) LIMITED VS. CRDB BANK**

LIMITED, CIVIL APPLICATION NO. 157 OF 2007 and **VIP ENGINEERING MARKETING LIMITED & TWO OTHERS VS. CITIBANK TANZANIA LIMITED,** CONSOLIDATED CIVIL REFERENCES NOS. 6,7 & 8 OF 2006 (both unreported).

He submitted that in an application for review in **TRUCK FREIGHT (T) LIMITED VS. CRDB BANK LIMITED** (supra), this Court had allowed a ground of review on legality of Mapigano, J.'s order which the Court had taken up while writing its judgment and without hearing the parties. Mr. Rwazo referred us to page 5 of this decision where, after vacating its judgment, the Court went on to hear the grounds of appeal against the decision of trial judge (Mandia, J.) who had failed to address himself on issues which parties had framed. In its decision, the Court directed the trial judge:

> *"[to] either decide the issues which were framed and agreed upon by the parties or, if he is of the firm opinion that the issue of the governing law on execution of warrant is crucially important for the just*

determination of the suit, then he should reopen the hearing and let both learned counsel address him."

In urging us to hold that the appellants were condemned without being heard, Mr. Rwazo also referred us to page 20 of the decision of the case of **VIP ENGINEERING MARKETING LIMITED & TWO OTHERS**(supra) where this Court reiterated a well-established law that a party must always be heard first before the court issues an adverse order against that party.

In his brief reply, Mr. Outa the learned Counsel for the respondent, opposed the appeal and addressed the grounds of appeal generally. He submitted that the appellants' main complaint is to the effect that the first appellate Judge failed to address and reach a decision on the grounds which they had earlier presented before the High Court. He also understands that the appellants are questioning the first appellate Judge for making his decision on a new ground which was not argued by the parties.

Despite his understanding of the appellants' complaints, Mr. Outa supported the decision reached by the first appellate Judge. He submitted that as long as the appellants' appeal before the High Court was not accompanied with a valid decree as certified under Order XX Rule 20 of the

Civil Procedure Code, Cap. 33; their appeal was invalid before the court. He submitted that because the photocopy of the decree was invalid, it made the entire first appeal incompetent. Therefore, he added, there was no appeal so to speak before the High Court.

In so far as Mr. Outa was concerned, without a competent appeal before him, the High Court Judge had no jurisdiction to hear, not only the appeal, but also the grounds of appeal which the appellants had presented. Mr. Outa concluded by emphasizing that the High Court should not have been expected to determine an appeal that was a nullity from its initiation. He urged us to dismiss this appeal with costs.

After hearing the submissions, both learned Counsel did not dispute the fact that in his decision, Mackanja, J. did not deal with any grounds of appeal. Neither did the first appellate Judge exercise his duty as the first appellate court to re-evaluate the evidence that had earlier been presented in the trial court both on points of law and facts in order to arrive at hisown findings and conclusions.

Instead, after receiving written submissions, and while composing his decision, the learned first appellate Judge raised the jurisdictional issue on the validity of the copy of the decree which had accompanied the

memorandum of appeal. Alone, and without the presence of the parties to the appeal, he explains how he scrutinized that the copy of decree, over and over again and concluded that it had been altered, making it invalid. Before he struck out the appellants' first appeal, the learned Judge observed:

> *"In the instant appeal the memorandum of appeal is not accompanied by a copy of the decree; it is a photocopy of the decree. And the photo-copy is not certified to be a true copy of the original document which was signed by the trial magistrate. I have examined that document over and over again and I strongly feel that it is a doctored document for several reasons. Firstly, the words "Dated 25th day of March 2008" appear to have been printed from a computer which is different from the one which printed the main text. Secondly, the rubber stamp which is on that document visibly differs in form and quality from the one that was impressed on the original extract of the decree which I have marked as "CR". For, whereas the rubber stamp on the decree which was signed by the learned trial magistrate is round, the one on the document that accompanies the memorandum of appeal is oval in shape. Thirdly, instead of the rubber stamp impression being superimposed on the text of the document, the figure "2008" appears to have been typed on top of the rubber stamp impression.*
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> *I am satisfied, from the foregoing observations, that the uncertified decree was not stamped nor was it dated when it was*

supplied by the trial court. In that context the dating and the rubber stamping were made to cure an invalid decree."

In his decision to strike out the appeal, the learned first appellate Judge confirmed that he alone, had raised the issue of doctored decree and its adverse effect on the validity of the appeal. Neither parties were heard on that new jurisdictional issue which had come up while he was composing his decision. He stated:

"Now Mr. Malongo, learned counsel for the appellants and Mr. Outa, learned counsel for the respondent, did not argue matters which I have considered. In a matter which is obviously fatally defective the court will act suo motu if learned counsel who had ample opportunity to argue it did not do so."

In the excerpt above, the first appellate Judge does not deny that the parties to the appeal were not heard on the jurisdictional issue which he raised while composing his judgment. Clearly, the learned first appellate Judge was running against the tide of settled jurisprudence, which prohibits courts from raising jurisdictional issues while composing their judgment

without so much as giving the parties the opportunity to be heard on the issues.

Jurisprudence is settled that the right to be heard is much more than a statutory right. It has become a fundamental constitutional right under Article 13(6) (a) of the Constitution, 1977 (as amended): See—**MBEYA-RUKWA AUTOPARTS AND TRANSPORT LTD V. JESTINA GEORGE MWAKYOMA** [2003] T.L.R. 251; **MIRE ARTAN ISMAIL & ZAINABU MZEE VS. SOFIA NJATI,** CIVIL APPEAL NO. 75 OF 2008 (Unreported) and **WEGESA JOSEPH M. NYAMAISA VS. CHACHA MUHOGO**, CIVIL APPEAL NO. 161 OF 2016 (unreported).

While dealing with an appeal from the District Land and Housing Tribunal, the High Court in **WEGESA JOSEPH M. NYAMAISA VS. CHACHA MUHOGO** (supra) had in eerily similar fashion, did not go as far as considering the three grounds of appeal before it. According to the first appellate Judge, while composing the judgment, the High Court had discovered what it described as *"a serious legal issue which was not a subject matter before the trial and first appellate courts".* It was also while the learned first appellate Judge was composing the judgment when that court also raised and determined *suo motu,* the issue of the pecuniary

jurisdiction of the trial District Land and Housing Tribunal. On second appeal, this Court had to restate the settled law on the right to be heard:

> *"On our part, we need not belabour the point that it is unacceptable in law for the learned first appellate Judge to raise the two salient jurisdictional issues while composing the judgment without giving the parties the opportunity to be heard on the issues. Decisions of this Court which the learned counsel for the appellant cited, go out to show that the jurisprudence is well settled on the matter, so much so, in* ***MBEYA-RUKWA AUTOPARTS AND TRANSPORT LTD V. JESTINA GEORGE MWAKYOMA*** *[2003] T.L.R. 251 the Court restated that in Tanzania:*
>
> > *".... natural justice is not merely a principle of the common law, it has become a fundamental constitutional right Article 13(6) (a) includes the right to be heard among the attributes of equality before the law."*

In the upshot of our finding that both the appellants' and respondent's right to be heard have been violated; and the violation being incompatible with constitutional right under Article 13(6) (a) of the Constitution, the entire

proceedings and the judgment of the High Court in Civil Appeal No. 20 of 2008 are quashed, and we hereby declare the same a nullity.

We direct that the HC Civil Appeal No. 20 of 2008 be heard afresh as soon as practicable by another Judge. Otherwise this appeal is allowed with costs.

DATED at **MWANZA** this 15th day of April, 2020.

I. H. JUMA
CHIEF JUSTICE

B. M. MMILLA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 11th May, 2020 in the presence of Mr. Libent Rwazo, learned Counsel for the Appellants and Mr. Deya Paul Outa, learned Counsel for the Respondent is hereby certified as a true copy of the original.

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DEPUTY REGISTRAR
COURT OF APPEAL