IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., KOROSSO, J.A. And KITUSI, J.A.)

CIVIL APPLICATION NO. 234/17 OF 2017

MODEST JOSEPH TEMBA.....APPLICANT

VERSUS

1. **NASRI DAUDI MBURA**
2. **MASHAKA HAMISI SEREKA**
3. **CHAUSIKU HAMISI SEREKA**
4. **KASAMA HAMISI SEREKA**
5. **TABU HAMISI SEREKA**
6. **NSABI JUMA HAMISI SEREKA**
7. **HAMISI MUSSA HAMISI SEREKA**
8. **HAMISI HAJI HAMISI SEREKA**
9. **HUSSEIN MOHAMED**
10. **DOTTO MTUNDA**

.....RESPONDENTS

(An Application arising out of Court dismissal order of Civil Appeal No. 141/01 of 2016 against the decision of the High Court (Land Division) in Land Case No. 144 of 2007)

(Juma, Ag, CJ.)

dated the 21 April, 2017
in
Civil Appeal No. 141 of 2016

RULING OF THE COURT

3rd & 12th May, 2021

MUGASHA, J.A.:

The applicant seeks to move the Court to set aside its dismissal order dated 21/4/2017 and substitute it with an order for striking out Civil Appeal No. 141/01 of 2016 in order to allow the applicant to re-

institute the appeal. The application is by Notice of Motion predicated under Rule 4 (2) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which stipulates as follows:

"Where it is necessary to make an order for the purposes of: -

(a) dealing with any matter for which no provision is made by these Rules or any other written law;

(b) better meeting the ends of justice;

(c) not applicable

the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other orders which it considers necessary..."

The application is accompanied by the affidavit sworn by **DANIEL HAULE NGUDUNGI** who was the applicant's counsel until his discharge by the Court on 19/10/2020 after he had sought to be relieved of the conduct of the matter on ground that he had no instructions. The grounds upon which the application is sought are as hereunder reproduced:

1. *The dismissal order was inadvertently issued by this Court because the appeal being incompetent there was nothing before the Court for being dismissed at all and even [being] withdrawn by the appellant,*
2. *The applicant has moved the Court to withdraw the appeal with a view of re-instituting the same in a proper forum because the trial High Court had extracted a defective decree containing names of persons who were not parties to the suit and had omitted the defendants' names in the main suit.*
3. *The applicant's move to withdraw the appeal was aimed at saving the courts' and parties time to dispose the filed appeal on ground that what was before the court in that appeal was incompetent eligible of being struck out and deserved no dismissal order save for costs which the court is vested with discretion to grant or refuse given the circumstances.*

The application is opposed by the respondents through their joint affidavit in reply. On 3/7/2017, the applicant filed written submissions

containing arguments in support of the application whereas on 2/8/2017 the respondents filed joint reply written submissions.

At the hearing of the application, the applicant appeared in person, unrepresented whereas the respondents had the services of Mr. Froldius Mutungi, learned counsel. In the written submissions, it was contended that after the applicant realized that the extracted decree accompanying the appeal contained names other than those of the defendants, he instructed his advocate Mr. Thomas Eustace Rwebangira to file a notice to withdraw the appeal. Mr. Rwebangira obliged and filed the respective notice on 10/4/2017 and the Court dismissed the appeal on 28/4/2017. On this, it was the applicant's complaint that since the appeal was not competent, the dismissal order was unwarranted as it had the effect of determining the merits of the appeal. He argued this to be inadvertent because an incompetent appeal can only be struck out.

It was further argued that, since the withdrawal notice was lodged under Rule 102 (1) of the Rules, it was not amenable to dismissal because it would have been struck out in the course of hearing in order to save cost and time of the Court and the parties. As such, the applicant

reiterated that, in the event the appeal in question was incompetent, it was inadvertently dismissed instead of being struck out. To support the propositions, the applicant referred us to the cases of **HARUNA MPANGAOS AND 902 OTHERS VS TANZANIA PORTLAND CEMENT COMPANY LIMITED**, Civil Appeal No. 10 of 2007 (unreported), **FORTUNATUS MASHA VS WILLIAM SHIJA AND ANOTHER** [1997] TLR 41, **JUMA KATALE VS K.G KARMALI** [1983] TLR n.50, **TANZANITE ONE MINING LIMITED VS MYSARA SAID AND ANOTHER,** Civil Application No. 298 of 2011 (unreported) and **HAMIS SHABANI VS DAVID RWEYEMAMU**, Criminal Appeal No. 298 of 2011 (unreported). Ultimately, the applicant urged the Court to set aside the dismissal order and substitute for it with the striking out the appeal.

On the other hand, Mr. Mutungi adopted the written submissions in reply. In opposition of the application, he submitted against the application arguing that the dismissal order was justified because it was the applicant who moved the Court to do so without furnishing the consent of the parties. In this regard, Mr. Mutungi argued that cases cited by the applicant are distinguishable with the circumstances obtaining in the present matter. On this account, he reiterated that the

dismissal of the appeal was justified and it was not inadvertent as viewed by the applicant.

In rejoinder the applicant had nothing to add and urged the Court to consider his written submissions.

After careful consideration of the submissions of learned counsel, the point for determination is the propriety or otherwise of the dismissal of the appeal and whether it deserves to be set aside. While the applicant argues that the dismissal order was inadvertent as the appeal ought to have been struck out, the respondents supported the stance taken by the Court in dismissing the appeal.

Although this application has been brought under among others, Rule 4 (2) of the Rules which connotes that there is no provision under the Rules to deal with the subject under scrutiny, unfortunately that is not the case because the circumstances and conditions on withdrawal of appeals are governed by Rule 102 of the Rules. Before the amendments to the Rules vide G.N 362 of 22/9/2017 Rule 102 stipulated as follows:

> *"102.-(1) An appellant may at any time after instituting his appeal and before the appeal is called on for hearing lodge in the appropriate registry a written*

notice that he does not intend further to prosecute the appeal and upon receiving such notice the Registrar or deputy registrar shall strike out the Notice of Appeal.

(2) The appellant shall, before or within seven days after lodging the notice of withdrawal, serve copies of it on each respondent who has complied with the requirements of Rule 86.

(3) If all the parties to the appeal consent to the withdrawal of the appeal, the appellant may lodge in the appropriate registry the document or documents signifying the consent of the parties and thereupon the appeal shall be struck out of the list of pending appeals.

(4) If all the parties to the appeal do not consent to the withdrawal of the appeal, the appeal shall stand dismissed with costs, except as against any party who has consented, unless the Court, on the application of the appellant, orders otherwise; and any such application shall be made within fourteen days after the lodging of the notice of withdrawal."

In the premises, since the present application was filed before the coming into force of the current Rules, the applicant ought to have moved this Court under Rule 102 of the Rules instead of Rule 4 (2) of the Rules.

At the outset, we found it pertinent to address the applicant's complaint that since the appeal was accompanied by a defective decree,

it was incompetent and ought to have been struck out instead of being dismissed. Apart from this being a misconceived applicant's speculation, it is our considered view that when the withdrawal notice was filed the propriety or otherwise of the appeal was yet to be determined. In this regard, it follows that all the cases cited by the applicant are not applicable in the present matter. We are fortified in that account because the circumstances surrounding those cases which were struck out on account of being incompetent are entirely different from the matter at hand. Besides, none of those cases found its way in Court pursuant to the filing of the notice to withdraw an appeal.

It was also the applicant's complaint that, having filed the withdrawal notice, the same should have been attended by the Court at the hearing and consequently it ought to have been marked it withdrawn. We disagree and shall state our reasons. It is our considered view that, since the applicant had filed a withdrawal notice, this was an express indication that he no longer wished to prosecute the appeal. Therefore, cause listing the appeal in question would be contrary to the spirit behind Rule 102(1) of the Rules, which was emphasized in the case of **OLAM UGANDA LIMITED Suing through its ATTORNEY YOUTH**

SHIPPING COMPANY LIMITED VS TANZANIA HARBOURS AUTHORITY, Civil Appeal No. 57 of 2002 (unreported), where the Court said:

> *"In our considered view the rationale behind rule 95 (now rule 102 of the Rules, 2009 is to rid the Court registry of duly lodged appeals which the appellants no longer intend to prosecute before they are cause listed so that other worthy matters could take their place...."*

It was also the applicant's argument that following the notice to withdraw the appeal, the respective appeal ought to have been struck out. We discerned this to be the applicant's plea that the withdrawal notice ought to have been attended under rule 102 (3) (now sub rule (4). We found this wanting because the applicant never filed any document signifying the consent of the parties to the withdrawal and as such, he fell short of meeting the prescribed pre-condition to warrant the striking out of the appeal from the list of pending appeals.

Yet, it is also glaring that in this matter the applicant's notice to withdraw the appeal was not accompanied by the consent of the parties as required under sub rule (4) which is the current sub rule (5). The said

rule stipulates in clear terms that, if all the parties to the appeal do not consent to the withdrawal of the appeal the same shall stand dismissed with costs, except as against any party who has consented, unless the Court on the application of the appellant, orders otherwise. This is what justifiably prompted the Acting Chief Justice as he then was, to order as hereunder:

> "JUMA, *Ag. CJ*
>
> *Upon a written Notice of withdrawal of Civil Appeal No. 141 of 2016 lodged on 13rd April, 2017 by Mr. Thomas Eustace Rwebangira, counsel for the applicant and having no consent by the counsel for the respondent, Civil Appeal No, 141 of 2016 is hereby dismissed with costs under Rule 102 (4) of the Court of Appeal Rules, 2009.*
>
> ***DATED** at **DAR-ES-SALAAM** this 21st day of April, 2017*
>
> *I.H JUMA*
>
> ***Ag. CHIEF JUSTICE***

In view of what we have endeavoured to discuss we are satisfied that the dismissal was justified as it was done in accordance with the dictates of the law. In that regard and in view of what we have earlier demonstrated, we do not agree with the applicant that dismissal of Civil

Appeal No, 141 of 2016 was inadvertent. Without prejudice to the aforesaid, we wish to observe that setting aside of a dismissal order is a remedy available in review section 4 (4) of the Appellate Jurisdiction Act, Cap 141 RE. 2019 and Rule 66 of the Rules. Finally, we agree with Mr. Mutungi that this application is without merit and it is hereby dismissed with costs.

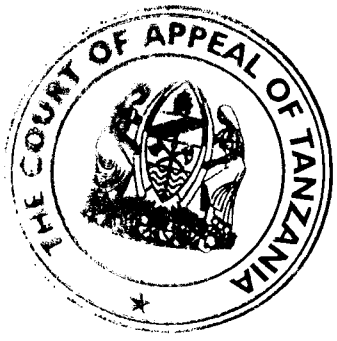
DATED at **DAR-ES-SALAAM** this 10th day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Ruling delivered on this 12th day of May, 2021 in the absence of the applicant and presence of Mr. Froldius Mutungi & Miss Prisca Nchimbi, learned, counsel for the respondents, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL