IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 210 OF 2020

THE REGISTERED TRUSTEES OF
KANISA LA PENTEKOSTE MBEYA .....APPELLANT

VERSUS

1. LAMSON SIKAZWE
2. ANDONDILE MWAKANYAMALE
3. ISAACK MPAGAMA
4. NSANGARUFU SHABANI
5. AMBINDWILE KAMAGE } **..... RESPONDENTS**

(Appeal from the decision of the High Court of Tanzania at Mbeya)
(Levira, J.)
dated the 5th day of December, 2018
in
Misc. Civil Application No. 37 of 2017

JUDGMENT OF THE COURT

26th November & 2nd .December , 2021

MWANDAMBO, J.A.:

The issue involved in this appeal is narrow but not necessarily less involving. It relates to the propriety of the order of the High Court sitting at Mbeya dismissing the appellant's application in Misc. Civil Application No. 37 of 2017 for being unprocedural and a nullity.

The tale behind the appeal goes thus: the Registered Trustees of Kanisa la Pentekoste Mbeya, the appellant, found itself in a dispute in relation to the validity of the respondents as its trustees.

Finding itself in that quandary, the appellant opted to seek an opinion of the High Court in pursuance of section 26 of the Trustees Incorporation Act [Cap. 318 R. E. 2002] (the Act). This it did by way of Misc. Civil Application No. 6 of 2017, henceforth, the former application. On 19/09/2017, the High Court (Levira, J. as she then was) sustained a preliminary objection raised by the respondents contending that the founding affidavit was defective because one of the trustees had not signed it rendering that application incompetent. Consequently, the learned judge struck out that application having been satisfied that it was incompetent.

Since she was dissatisfied, the appellant sought to challenge the ruling striking its application by way of an appeal. Accordingly, it lodged a notice of appeal on 02/10/2017.

There is no dispute that challenging the ruling was one of the options available to the appellant. The other one, the former application having been struck out was to file a fresh application before the same court. With some ingenuity, the appellant sought to pursue both options. It thus filed Misc. Civil Application No. 37 of 2017 on 02/10/2017, the same date it lodged the notice of appeal from the ruling in the former application. On 05/12/2018, the High Court heard arguments from the learned advocates on the

competence of the subsequent application by reason of the applicant (now appellant) citing a wrong title of the High Court. It was contended by the respondents' learned advocates that since the application was exactly the same as the former which had been struck out for being incompetent against which a notice of appeal had been lodged, the subsequent application could not stand. The respondents' learned advocate urged the High Court to dismiss the application. At the end of the day, whilst overruling the objection premised on the wrong title of the court, the learned judge, on her own motion, found the application unprocedural and a nullity because the applicant had already commenced appeal process against a ruling which had struck out the application a replica of the current application. In consequence, the High Court dismissed the application and hence the instant appeal.

The memorandum of appeal contains two but related grounds of appeal. Ground one faults the High Court for dismissing the application for being unprocedural whereas that application had no fatal defect. In ground two, the High Court is faulted for dismissing the application on the ground that the appellant had already commenced an appellate process against the order striking out the former application.

Before us in this appeal, Mr. Francis Stolla, learned advocate represented the appellant as he did in the High Court. At the hearing of the appeal, Mr. Stolla adopted the written submissions he had lodged earlier on and urged the Court to allow the appeal with costs on the basis of the submissions without more. On the other hand, Mr. Ladislaus Rwekaza and Ms. Julliana Marunda, learned advocates represented the respondents. They also had lodged written submissions in reply which they stood by during the hearing with a few aspects for clarification by oral submissions through Ms. Marunda.

Mr. Stolla split his submissions into several issues in both grounds of appeal. However, the substance of his submissions focused on three main aspects. **One,** Misc. Civil Application No. 37 of 2017 filed simultaneously with a notice of appeal from the former application did not affect the jurisdiction of the High Court neither was it unprocedural and so it was wrong for the High Court to find it a nullity. **Two,** Misc. Civil Application No. 37 of 2017 filed in the High Court was distinct from the challenge against the ruling striking out the former application before the Court of Appeal. **Three,** it was not open to the High Court to dismiss the application rather to halt the proceedings pending final and conclusive determination of the

intended appeal from the decision in the former application. For this proposition, Mr. Stolla sought reliance from our previous decisions in **Arcado Ntagazwa v. Buyogera Bunyambo** [1997] T.L.R 242, **Serenity on the Lake Ltd v. Dorcus Martin Nyanda,** Civil Revision No. 1 of 2019 and **Tanzania Electric Supply Company Ltd v. Dowans Holding S. A. (Costa Rica) & Another,** Civil Application No. 142 of 2012 (both unreported). Mr. Stolla wound up his submissions by urging the Court to allow the appeal with costs and order the restoration of the application.

For their part, the learned advocates for the respondents resisted the appeal. Not unsurprisingly, they supported the ruling of the High Court. Essentially, the learned advocates contended that it was improper and unprocedural for the appellant to pursue both matter at the same time; an appeal from the ruling in the former application and pursue an application identical in form, substance and the reliefs sought with the former application subject of the intended appeal. The learned advocates, branded the appellant as a forum shopper and attacked her for riding two horses at the same time. It was contended by the learned advocate that the circumstances in the appeal did not warrant halting the proceedings in Misc. Civil application No. 37 of 2017 rather to dismiss the

application as correctly done by the High Court. They distinguished the cases relied upon by the appellant's advocate as irrelevant in the circumstances of the instant appeal. They thus invited the Court to dismiss the appeal with costs. Even though we heard oral submissions from Ms. Juliana Marunda and Mr. Rwekaza, learned advocates, they were essentially a repeat of the written submissions already in the record.

With the foregoing, we shall now proceed with our discussion on the merits or otherwise of the appeal.

For a start, we wish to make it clear that Mr. Stolla conceded that the appellant is riding two horses at the same time. That notwithstanding, the learned advocate was emphatic that it was improper for the High Court to dismiss the application for being unprocedural and a nullity. With respect, as the learned advocate has conceded, we do not think riding two horses at the same time in the circumstances of the instant appeal was free from procedural impropriety as the learned judge lamented. As rightly submitted by the learned advocates for the respondents, riding two horses at the same time was an ingenuity and tantamount to forum shopping. We cannot agree with them more that the act of the appellant's appeal against the ruling in the former application had all elements

geared towards using the subsequent application as a shield so much so that should the appeal in the Court of Appeal fail, then they would resort to that application.

Having held that the filing of the subsequent application was unwarranted, the next question for our determination is whether the learned judge was correct in holding as she did that the application was a nullity and ultimately dismissing it. We respectfully agree with Mr. Stolla that the High Court did not lack jurisdiction in the subsequent application.

In our view, that court was not *functus officio* to determine that application it being distinct from the former application which had already been struck out. The only problem was that having lodged a notice of appeal against the ruling striking out that application, the appellant opted to pursue both remedies to challenge the correctness of the ruling parallel with filing a proper application following the impugned ruling in the former application. Mr. Stolla is right in submitting that dismissal was not appropriate because the High Court did not determine the application on merit. Indeed, having found that the application was a nullity, the effect of it was that it had never existed in the first place and so there was nothing before the High Court capable of being dismissed. With

respect, guided by **Ngoni- Matengo Co-operative Marketing Union Limited v. Ali Mohamed Osman** [1959] E.A 577, the appropriate order ought to have been to strike out the application instead of dismissing it.

However, Mr. Stolla would have us hold that even that order would not be appropriate rather halting the hearing of that application seeking refuge from **Arcado Ntagazwa** *et al* (supra). With respect, although Mr. Rwekaza did not elaborate, the cases cited by Mr. Stolla are all distinguishable. This is because halting the proceedings after a party has lodged a notice of appeal before the Court of Appeal presupposes that the notice of appeal arises from the same proceedings. As Mr. Stolla would appreciate, that was not the case. The appellant was riding two horses in a similar cause but in distinct proceedings involving two applications. Indeed, this was a clear case of abuse of court process frowned upon by this Court in **East African Development Bank v. Blue Line Enterprises Ltd,** Civil Appeal No. 101 of 2009 (unreported). We should let the excerpt in that case speak for itself as below :

> " *There is another aspect of the matter before us which we think we should address. Prof. Fimbo contended that what happened in this case was an abuse of court*

process. ...Although Prof. Fimbo did not elaborate on the point, we are nonetheless satisfied that there was an abuse of court process in the following sense. As already stated, the appellant filed an application for extension of time to file a petition for an order to set aside the award. Instead of pursuing this application, the appellant sought to withdraw it on 14/9/2006 before Mandia, J. Having done so, the appellant went to the same court and filed the petition to set aside the award which was eventually dismissed by Mandia, J. on 22/6/2007 for being time barred. After the dismissal the appellant went back to the same court (Sheikh, J.) and filed an application for extension of time similar to the one which was earlier marked withdrawn! Surely, by the above sequence of events the appellant exhibited what we may safely term as "forum shopping". This was, no doubt, an abuse of court process" [at pages 14 and 15]

The above is more or less similar to what transpired in the instant appeal. Although the learned judge referred the matter as unprocedural, we are satisfied that it was, for all intents and purposes forum shopping no less than an abuse of court process. In

our view, since riding two horses at the same time was an abuse of the court process, the High Court was enjoined to prevent it under section 95 of the Civil Procedure Code [Cap 33 R.E. 2002- now R.E 2019]. The appropriate order was to strike out the application instead of dismissing it. In the premises, we substitute the order dismissing the application with one striking it out.

In the event, save for the above variation, we find the appeal destitute of merit and dismiss it with costs.

DATED at **MBEYA** this 1st day of December, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2021 in the presence of the Ms. Juliana Marunda hold brief for Francis K. Stolla, learned counsel for the Appellant and Ms. Juliana Marunda, learned counsel for the Respondents is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL