IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., GALEBA, J.A. And FIKIRINI, J.A.)

CIVIL APPLICATION NO. 453/01 OF 2019

ISAACK WILFRED KASANGA.....APPLICANT

VERSUS

STANDARD CHARTERED BANK TANZANIA LIMITED.....RESPONDENT

(Application for an order to strike out the notice of appeal lodged on 2/5/2013 against the Ruling of the High Court of Tanzania at Dar es Salaam)

(Msuya, J.)

dated the 25th day of April, 2013
in
Miscellaneous Civil Cause No. 1 of 2011
.....

RULING OF THE COURT

28th March, & 22nd April, 2022

FIKIRINI, J.A.:

The respondent, Standard Chartered Bank Tanzania Limited moved the High Court for orders of *certiorari* in Miscellaneous Civil Cause No. 1 of 2011, in which the Attorney General and the present applicant were the 1st and 2nd respondents respectively.

Before the hearing of the application would commence before the High Court, the Attorney General raised a notice of a preliminary objection that the application was time barred. The High Court sustained the

preliminary point of objection and dismissed the application on 25th April 2013.

Aggrieved, the respondent lodged a notice of appeal on 2nd May 2013 which was served upon the respondents on 3rd May 2013. It seems the respondent took no further steps to lodge the intended appeal, and hence the applicant filed the present application preferred under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

On 28th March 2022, the application came on for hearing. Ms. Stella Simkoko learned advocate appeared for the applicant whereas Mr. Anthony Mseke assisted by Mr. Shepo Magirari both learned advocates appeared for the respondent.

At the beginning of the hearing, Mr. Mseke rose and raised a preliminary objection. He stated that whereas the notice of appeal had Isaack Wilfred Kasanga and the Attorney General as respondents, the application before us had only the name of the respondent Isaack Wilfred Kasanga. He further stated that since the Attorney General took an active part in the proceedings before the High Court, including the filing of submissions and entering appearance, and his name appearing in the notice of appeal, was, therefore, a necessary party and ought to have featured in

the present application. He extended his argument by saying that not including the Attorney General as a party in the motion, makes the application before us have a different set of parties from the one indicated in the notice of appeal.

Mr. Mseke wondered what could be the reason which made the applicant leave out the Attorney General who was a party before the High Court and who was included in the notice of appeal. Discouraging the course taken by the applicant, he contended that the applicant cannot be allowed to dismantle proceedings by choosing who to implead and who to omit. According to him, the application was improperly before the Court, and urged us to strike it out.

On her part, Ms. Simkoko learned advocate, submitted that the Attorney General was not a party in Trade Inquiry No. 13 of 2008 at the defunct Industrial Court of Tanzania. He was, however, made a party in Miscellaneous Civil Cause No. 1 of 2011. In furtherance of her submission, Ms. Simkoko urged us to disregard the preliminary objection raised arguing that the omission was not fatal and Mr. Mseke has not highlighted a provision on the law breached. She further submitted that under the provisions of rule 89 (2) of the Rules, any respondent could apply for

striking out a notice of appeal, the applicant's move was thus correct, she insisted.

On joining the Attorney General, while admitting that it was important to do so when the matter is against the government, but argued in the present situation that was not necessary as the Attorney General would not be prejudiced by the omission, as the application under rule 89 (2) of the Rules was simply requesting the Court to strike out the notice of appeal, with no negative impact or unfavorable outcome to the Attorney General.

Extending her submission, Ms. Simkoko urged us to dismiss the preliminary objection and proceed to hear the application under rule 4(2) (a) and (b) of the Rules and rely on the Oxygen Principle as provided under sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA). In addition, she invited us to rely on section 18 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 R. E. 2002 (the Act), which provides for matters that may proceed in the absence of the Attorney General as a party.

In rejoinder, Mr. Mseke opposed Ms. Simkoko's submission, arguing that she failed to give reasons as to why the Attorney General was left out in the present application, while he was a party in the matter subject of the

appeal which propelled the present application. Mr. Mseke contended that since one of the parties is a Government entity, the Attorney General must be made a party regardless of whether he was going to benefit or not.

Canvassing on the dictates of rule 89 (2), Mr. Mseke admitted that any respondent can move the Court to strike out a notice of appeal lodged, he nonetheless refuted that being an opportunity for choosing who to implead and who to leave out. Maintaining the importance of the Attorney General to be joined as a party in the present application, he stated that the Attorney General was not any party but a party in the proceedings before the High Court.

Countering the submission on the application of rule 4 (2) (a) and (b) of the Rules, he contended that the provision is not there to serve party's discretion but to be invoked by the Court upon reasons that the process has been abused. Since the Court has not been told why the Attorney General was left out, Ms. Simkoko cannot invite the Court to invoke the provision as well as employ the Oxygen Principle in the circumstances, citing the case of **Martin D. Kumalija & 117 Others v. Iron and Steel Ltd,** Civil Application No. 70/18 of 2018 (unreported) to support his submission.

Finally, he reiterated as earlier that the application is not properly before the Court for omitting the Attorney General's name.

Probed by us on which rule has been breached, Mr. Mseke argued that the absence of an express provision, cannot be taken for granted. Also, the law does not allow a party to pick and choose who should be a party or not in the proceedings, previously enlisting the parties as it was in the present case. He emphasized maintaining the parties as they appear in the proceedings before this application was lodged regardless of the non-existent express provision.

We have carefully considered the oral submissions by learned advocates for the parties on the preliminary objection raised by Mr. Mseke. In determining the merit of the point raised we find it pertinent to first examine what is provided under rule 89 (2) of the Rules. For ease of reference the rule is provided below:

> "*Subject to the provisions of subrule (1),* ***any other person on whom a notice of appeal was served or ought to have been served may at any time,*** *either before or after institution of the appeal, apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal*

lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time." [Emphasis added]

What can be gathered from rule 89 (2) of the Rules is that it can be implored by (i) any person upon whom the notice of appeal was served or (ii) by any other person who should have been served. Our scrutiny of the record before us indicates that the Attorney General who featured as the 1st respondent in the impugned decision was served with a notice of appeal lodged by the respondent through Arbogast Mseke Advocates on 3rd May 2013. The Attorney General and the present applicant were the respondents before the High Court in Miscellaneous Civil Cause No. 1 of 2011, meaning the same parties ought to have appeared in the application preferred unless there were convincing reasons advanced, in this instance, there were none as to why the Attorney General's name is omitted.

The arguments by Ms. Simkoko that since the provision provides for any of the parties to bring such an application, it was thus correct for her to bring the application without citing the Attorney General as a party, is flawed. This is because the formulation that any party can apply for a notice of appeal to be struck out, does not mean a party can also be omitted in the process, out of choice.

In another endeavor to do away with not including the Attorney General's name in the application, Ms. Simkoko referred us to section 18 (2) of the Act. We have reviewed the provision which we find apt to reproduce below:

> *"18 (2) In any proceedings involving the interpretation of the Constitution with regard to the basic freedoms, rights and duties specified in Part III of Chapter I of the Constitution, no hearing shall be commenced or continued unless the Attorney-General or his representative designated by him for that purpose is summoned to appear as a party to those proceedings;* ***save that if the Attorney-General or his designated representative does not appear before the Court on the date specified in the summons, the court may direct that the hearing be commenced or continued, as the case may be, ex parte.***"[Emphasis added]

Our reading of the provision did not give us the vibe implied by Ms. Simkoko. Our interpretation of the provision is that it refers to the summoning of the Attorney General who is already a party to the proceedings, meaning entering appearance and participating in the proceedings involving interpretation of the Constitution as regards, basic

rights, duties, and freedoms under Part III of Chapter I of the Constitution. The provision does not say anything about the omission of the Attorney General's name as a party. The provision cited in our view does not support Ms. Simkoko's position. We are thus in agreement with Mr. Mseke that the provision does not fit the scenario. The provision. in our opinion was quoted out of context.

Similarly, her assertion that the outcome of the decision would not adversely impact the Attorney General instead will be favourable, even though there is some truth, still, in our view, we find the conclusion could be misleading. This is because parties are not joined or omitted based on whether the decision might be or might not be favourable to them, but for the reason that they were a party in the previous proceedings and even in the notice of appeal. In the present case, it is not disputed that the Attorney General was a party in the proceedings before the High Court representing the government, it is, therefore, crucial for his name to appear. And our reasons for saying so are: **one**, though the outcome would not have adversely affected the Attorney General, as a matter of principle, we find it important for his name to appear as it did in the previous proceedings before the High Court, in which the Attorney General

participated fully. Even the preliminary objection resulting in the dismissal of the application before the High Court was raised by his office. This name should not have been omitted without any credible explanation.

Two, court records are considered authentic and should not be easily questioned. We are of the stance that this should always be the position, that parties in the proceedings should at any given time appear as they did in the previous proceedings unless there is a reason for not observing that. We are in that respect, guided by our decision in **Hellena Adam Elisha @ Hellen Silas Masui v. Yahaya Shabani & Another,** Civil Application No. 118/01 of 2019 (unreported), in which the case of **Halfani Sudi v. Abieza Chichili** [1998] T.L.R. 527, was cited. In that decision, the issue was that the names which were appearing in the notice of appeal were different from those appearing in the application to strike out the notice of appeal. The Court in its decision underscored the significance of the authenticity and accuracy of the court record, which in our considered opinion includes a citation of parties' names as they appear in the proceedings.

Three, for the avoidance of a multiplicity of endless cases, it is practical to maintain the parties, and once there is an issue, that issue is dealt with at once rather than separately, simply because one party's name

was omitted while they had a right to be heard. Inspired by the decision of this Court in an almost similar situation, in the case of **TPB Bank Plc (Successor in Title of Tanzania Postal Bank) v. Rehema Alatunyamadza & 2 Others**, Civil Appeal No. 155 of 2017 (unreported), when discussing whether a party can be joined at an appeal stage, which although not an issue at hand, but the parity of reasoning speaks volume when the Court said:

> *"It is our considered opinion that justice demands that Viovena be served with a notice of appeal and joined as a party to this appeal. This is because the orders sought by the appellant in this appeal will legally affect Viovena and* ***it is also desirable for the avoidance of a multiplicity of endless cases.***" [Emphasis added]

We are thus in agreement with Mr. Mseke that parties cannot be allowed to dismantle the proceedings by choosing who to implead and who not to join. Even though we admit as pointed out earlier on in this decision, from the nature of the application before us the Attorney General would neither be adversely affected nor prejudiced, nevertheless, as a matter of principle and consistency in how the proceedings should reflect, citing all the parties involved must be observed.

Having considered thoroughly the circumstance of the application before us and despite our concurrence with Mr. Mseke's position, we find it proper to go a step further and consider what is it that justice demands. The dispensation of justice demands the courts to administer substantive justice and that matters are disposed of expeditiously and not be encumbered unduly by technicalities. We find the same is demanded in the present application. By striking out the notice of motion, the applicant has still room to come back after effecting corrections by inserting the Attorney General's name, that being the proper procedure. However, in the circumstances of this application, common sense and justice demand that instead of striking out the notice of motion as desired by Mr. Mseke, to meet the ends of justice, we find it apposite to invoke the powers bestowed on us under rule 4 (2) (b) of the Rules and the overriding objective as per section 3A (1) (2) of the AJA and order the applicant to amend the notice of motion to reflect the Attorney General's name as a party to the notice of motion since he was a party in proceedings before the High Court and was duly served with a notice of appeal, subject of the present notice of motion.

The applicant is to amend the notice of motion in thirty (30) days from the date of this ruling to reflect the Attorney General's name, lodge it and serve all the parties involved. The preliminary point of objection succeeds to the above extent with no order as to costs.

It is so ordered.

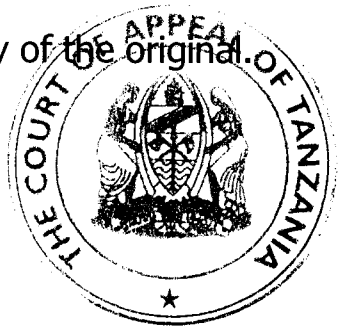
DATED at **DAR ES SALAAM** this 20th day of April, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of April, 2022 in the presence of Ms. Stella Simkoko, learned counsel for the Applicant, and Mr. Elipidius Philemon, learned counsel for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL