

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

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 141 OF 2019

REGINALD M. MORENJE APPELLANT

VERSUS

WARDA MOHAMED RESPONDENT

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

(Rumanyika, J.)

Dated the 27th day of December, 2018

in

Civil Appeal No. 93 of 2016

RULING OF THE COURT

23rd & 25th February, 2022

WAMBALI, J.A.:

The respondent, Warda Mohamed sued the appellant, Reginald M. Morenje at the District Court of Nyamagana at Mwanza in Civil Case No. 63 of 2015 seeking a declaration that the contract of sale of the motor vehicle with registration No. T. 666 ATU had been breached due to the mechanical defects which were not disclosed to the buyer by the seller before conclusion of the contract.

The appellant strongly refuted the claim by lodging the written statement of defence and a counterclaim as per the record of appeal.

As it were, the District Court heard evidence of the parties and in the end, it entered judgment in favour of the respondent.

It is noteworthy that the appellant's desire to contest the trial court decision ended in vain as Civil Appeal No. 93 of 2016 which he lodged before the High Court of Tanzania at Mwanza was dismissed by Rumanyika, J. with cost, hence this second appeal to the Court.

The appellant's dissatisfaction is vividly demonstrated by three grounds of appeal contained in the memorandum of appeal. However, for the reason which shall come to light shortly, we do not intend to reproduce the respective grounds of appeal herein.

The appeal was initially called on for hearing on 22nd February, 2022 in the presence of the appellant in person, unrepresented and Mr. Joseph Mugabe Stephens, learned advocate for the respondent.

At the very outset, before we commenced the hearing of the appeal, Mr. Stephens sought leave of the Court to raise a preliminary

point of law on the competence of the appeal. After we heard the appellant concerning the request, we granted Mr. Stephens the requisite leave to address the Court on a point of law.

The learned counsel submitted that having gone through the record of appeal there is no indication that the appellant sought leave of the High Court or this Court before he lodged the instant appeal. He explained that since this is a second appeal, it is the requirement under section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 RE 2019 (the AJA) for the appellant to seek and obtain leave, more so as the judgment of the High Court, the subject of the instant appeal, emanated from the decision of the District Court of Nyamagana.

In the circumstances, Mr. Stephens submitted that as there is no leave of the High Court or this Court that was sought and obtained by the appellant, the appeal is incompetent. He concluded his submission by urging the Court to strike out the appeal with costs.

When we granted the opportunity to the appellant to respond on the raised point of law, he sought a short adjournment to enable him to

seek legal advice from a lawyer who has been assisting him since the case started at the trial court. As the counsel for the respondent had no objection to the request and considering his right to have legal opinion on the issue which was raised in court, we adjourned the hearing of the preliminary point of law to 23rd February, 2022.

Noteworthy, at the resumed hearing on 23rd February, 2022, the appellant informed the Court that considering the advice he got from his lawyer, he concedes to the preliminary point of law as he did not seek and obtain leave before he lodged the appeal. He therefore left it upon the Court to decide on the fate of the appeal, but prayed that costs should not be awarded to the respondent.

On his part Mr. Stephens reiterated his earlier prayer that the appeal be struck out with cost for being incompetent.

Having heard the counsel for the respondent and the appellant, there is no doubt that the instant appeal is incompetent for being lodged without obtaining leave of the High Court or this Court. As this is a second appeal from the High Court in its appellate jurisdiction, the

provision of Section 5 (1) (c) of the AJA applies. Therefore the appellant was required to apply for leave of the High Court or this Court if it is refused, before lodging the appeal. Section 5 (1)(c) states:-

'5(1) In civil proceedings, except where any other written law provides otherwise, an appeal shall lie to the Court of Appeal-

(c) with leave of the High Court or Court of Appeal, against every other decree, order, judgement, decision or finding of the High Court'.

On the other hand, Rule 45 (a) of the Rules provides that:-

"45(a) Notwithstanding the provision of Rule 46 (1), where an appeal lies with the leave of the High Court, application for leave may be made informally when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision; or ..."

Indeed, Rule 46 (1) stipulates that:-

"46(1) where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged."

Guided by the above referred provisions of the law, and considering the concession of the appellant that he did not apply for leave to appeal before he lodged the appeal, we entertain no doubt that the provision of section 5(1) (c) of the AJA was contravened.

It follows that the instant appeal is incompetent. We, therefore, sustain the point of objection raised by the respondent.

It is settled law that where an appeal is incompetent for failure of the appellant to obtain leave, the consequence which should follow is to strike it out. For this stance, see the decision of the Court in **Ghati Methusela v. Matiko Marwa Maliba**, Civil Application No. 6 of 2006 and **Boniface Anyisile Mwabukusi v. Atupele Fredy Mwakibete and Two others**, Civil Appeal No. 46 of 2021 (both unreported), among others.

In the result, we strike out the appeal for being incompetent. However, considering the circumstances of the appeal and the fact that until the appeal was called on for hearing, the respondent had not lodged any document in the record of the appeal pertaining to the

appeal, we are settled that the interest of justice requires that parties should bear own costs. We so order.

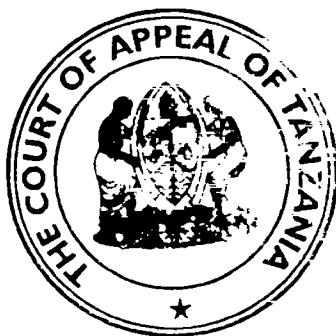
DATED at **MWANZA** this 25th day of February, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 25th day of February, 2022 in the presence of the appellant in person and Mr. Idrissa Juma holding brief for Mr. Joseph Mugabe, learned counsel for the respondent is hereby certified as a true copy of original.




G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL