IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 152 OF 2021

M/S REGIMANUEL GRAY (T) LTD. ..... APPELLANT

VERSUS

MRS. MWAJABU MRISHO KITUNDU & 99 OTHERS ..... RESPONDENTS

(Appeal from the Ruling and Order of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mziray, J.)

dated the 16th day of April, 2010
in
Land Case No. 76 of 2010
.....

RULING OF THE COURT

24th March & 31st May, 2023

NDIKA, J.A.:

The appellant, M/s. Regimanuel Gray (T) Ltd., challenges the ruling and order of the High Court of Tanzania, Land Division at Dar es Salaam (Mziray, J., as he then was) dated 16th April, 2015 in Land Case No. 76 of 2010.

How the appeal arises, we now tell. The first respondent, Mrs. Mwajabu Mrisho Kitundu, instituted Land Case No. 76 of 2010 in the aforesaid court against the appellant and the rest of the respondents for ownership and recovery of possession of a piece of land described as Farm

No. 690, situate at Mapinga, Bagamoyo District, Coast Region measuring 17.234 hectares. While the Director of Mapping and Survey – Ministry of Lands and Human Settlements Development, the Commissioner for Lands – Ministry of Lands and Human Settlements Development and the Attorney General (the second, third and fourth respondents herein respectively) were impleaded as the first, second and third defendants respectively, the appellant herein was cited as the fifth defendant. Apart from denying the first respondent's claim, the appellant counterclaimed against all the respondents for ownership and possession of property described as Farms Nos. 1929 and 1947 situate at Mapinga, Bagamoyo District, Coast Region. For their part, the second, third and fourth respondents also denied the first respondent's claim. So did John Shoo and Rose Shoo, the fifth and sixth respondents respectively, who were, correspondingly, the fourth and sixth defendants. It is also notable that while thirty-two other defendants, now respondents herein, vigorously denied the first respondent's claim as well as the appellant's counterclaim, the remaining sixty-two defendants, cited as respondents in this matter, lodged no defence.

Following the completion of the pleadings, the suit came up on 19th May, 2014 before Mwaimu, J. for the First Pre-Trial Conference in the presence of the parties and their respective counsel. The learned judge

issued a scheduling order by which the case was set down for mediation on 29th May, 2014 as well as the Final Pre-Trial Conference and hearing on 20th June, 2014. Subsequently, the matter came up for mediation on 29th May, 2014 as appointed but the appellant's counsel was absent. Having taken the view that the matter was not amenable to a mediated settlement, the mediator judge (Mziray, J., as he then was) recorded that mediation had failed, slated the case for the Final Pre-Trial Conference on 26th June, 2014 and ordered that absent parties be notified. It is certainly unclear whether the said schedule was made while the learned judge was aware of the earlier date fixed for the Final Pre-Trial Conference and hearing as per the scheduling order.

Thereafter, the suit came up before Mwaimu, J. on 20th June, 2014 for the Final Pre-Trial Conference and hearing. While Mr. Deogratias Mwarabu, learned advocate, appeared for the first respondent, Mr. Killey Mwitasi, learned Senior State Attorney represented the second, third and fourth respondents. The fifth and sixth respondents appeared through Mr. Adam A.E. Mwambene, learned counsel, whereas Mr. Michael T. Masaka, learned advocate, represented thirty-one respondents. The appellant's counsel, Mr. Deogratias J.L. Kiritta, was absent as were the rest of the respondents.

After the issues for trial had been framed, Mr. Masaka moved the court under Order IX, r.8 of the Civil Procedure Code (henceforth "the CPC") for dismissal of the counterclaim with costs for the appellant's non-appearance. The rest of the counsel present supported the prayer, which was accordingly granted, resulting in the dismissal of the counterclaim with costs. Furthermore, upon Mr. Mwarabu's prayer, the court ordered the trial to proceed *ex parte* against the appellant pursuant to Order IX, r.6 (1) (a) (i) of the CPC. As ordered, the trial commenced right away with the first respondent opening her case and giving her testimony. The hearing was then adjourned to a date to be determined in due course.

Subsequently, the appellant, through Mr. Kiritta, lodged a chamber application under Order IX, r.9 (1) and r.13 (1) of the CPC on 2nd July, 2014 moving the trial court to set aside the dismissal order as well as the order for *ex parte* hearing. The learned counsel sought to justify the application by stating in his supporting affidavit that he failed to appear in court on 20th June, 2014 on behalf of the appellant due to ill-health.

The adversary parties stoutly opposed the application through their respective counter affidavits and written submissions. In essence, apart from assailing the veracity of the hospital report annexed to the supporting

affidavit, the learned counsel for the parties wondered why neither a principal officer from the appellant company appeared nor a substitute advocate from Mr. Kiritta's law firm took over the conduct of the matter if Mr. Kiritta truly fell ill.

The trial court (Mziray, J. as he then was) was unimpressed, as hinted earlier. The learned judge concluded, on the facts before him, that the appellant had failed to make out sufficient case on the merits to justify the setting aside of the two orders.

At the hearing of the appeal, Messrs. Kiritta and Mwarabu appeared for the appellant and the first respondent respectively. While Mses. Grace Lupondo and Adelaida E. Masaua, learned State Attorneys, as well as Mr. Bryson Ngulo, also learned State Attorney, represented the second, third and fourth respondents, Mr. Mwambene stood for the fifth and sixth respondents. Mr. Samuel Shadrack Ntabaliba, learned counsel, conducted the matter for the rest of the respondents.

Ahead of the hearing of the appeal on the merits and with the leave of the Court, Ms. Lupondo demurred that the appeal, lodged on 10th May, 2021, was incompetent for want of leave to appeal.

Ms. Lupondo acknowledges, as a preface to her argument, that the right of appeal from any decision of the High Court sitting as a land court in exercise of its original jurisdiction is governed by section 47 (1) of the Land Disputes Courts Act, Cap. 216 (henceforth the "LDCA"). She rightly posits that originally the said provision expressly imposed the requirement of leave for an appeal from any decision of the High Court in the exercise of, *inter alia*, its original jurisdiction. For clarity we extract the said subsection hereunder:

> *"47.-(1) Any person who is aggrieved by the decision of the High Court in the exercise of its* ***original****, revisional or appellate jurisdiction, may with the leave from the High Court, appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act, 1979."* [Emphasis added]

The learned State Counsel is cognizant further that the above provision was amended by section 9 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2018 by deleting its original text and substituting for it a new script and adding immediately after it a new subsection (2) so that the two subsections now read as follows:

> ***"47****.-(1) A person who is aggrieved by the decision of the High Court in the exercise of its* ***original jurisdiction may appeal to the Court of Appeal***

in accordance with the provisions of the Appellate Jurisdiction Act.

(2) A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal.

(3) [Not applicable]"[Emphasis added]

Ms. Lupondo essentially submits that subsection (1) above must be read subject to the relevant provisions of the Appellate Jurisdiction Act, Cap. 141 (henceforth "the AJA") governing civil appeals to this Court. Elaborating, she contends that section 47 (1) is particularly subject to section 5 (1) (a) and (b) of the AJA, its net effect being that it allows automatic appeals either from **decrees** falling under section 5 (1) (a) or **orders** enumerated under section 5 (1) (b) (i) to (ix). Moreover, she fervently advances that section 47 (1) is also subject to section 5 (1) (c) of the AJA allowing appeals subject to leave being sought and obtained. On this basis, it is her contention that in the present case the impugned order is neither a decree nor an order automatically appealable under section 5 (1) (a) or (b) and therefore, it falls under section 5 (1) (c) of the AJA. Unquestionably, section 5 (1) (c) requires the leave of the High Court or of the Court of Appeal for any appeal *"against*

every other decree, order, judgment, decision or finding of the High Court" not falling under the purview of section 5 (1) (a) and (b) of the AJA.

In support of her submission, Ms. Lupondo refers to **Ex-Police No. 5812 PC Renatus Itanisa v. The Inspector General of Police & The Attorney General**, Civil Appeal No. 147 of 2018 (unreported) where the Court held that the appeal, which was against an order of the High Court dismissing the appellant's quest for extension of time to lodge an application to apply for leave to apply for prerogative orders, required leave to appeal in terms of section 5 (1) (c). Further reference is made to **Golden Palm Limited v. Cosmos Properties Limited**, Civil Appeal No. 561/01 of 2019 (unreported) for the proposition that an order refusing to set aside a dismissal of a suit under Order IX, rule 9 of the CPC is only appealable to this Court with leave pursuant to section 5 (1) (c) of the AJA.

Replying, Mr. Kiritta disagrees with his learned friend. As a prelude, he recalls that the appellant initially applied for leave to appeal in accordance with section 47 (1) of the LDCA before it was amended. Following the dismissal of the application by the High Court, the appellant lodged a second bite application, which was withdrawn after the amendment alluded to earlier was made. It is his submission that section 47 (1), as amended,

overrides section 5 (1) of the AJA and, therefore, all appeals from the decisions of the High Court sitting as a land court in exercise of its original jurisdiction lie without leave.

While Mr. Mwarabu did not address us on the issue, Messrs. Mwambene and Ntabaliba took turns submitting in support of Ms. Lupondo's standpoint. Besides, Mr. Ntabaliba added another dimension, arguing that following the refusal of leave to appeal by the High Court coupled with the withdrawal of the second bite application for leave, the amendment of the law was inconsequential. On that basis, he contends that the appeal is plainly incompetent.

We wish to begin our determination of the issue at hand by expressing our agreement with the learned counsel for the parties that originally section 47 (1) of the LDCA imposed the requirement for leave to appeal from any decision of the High Court sitting as a land court exercising original jurisdiction. What is at issue is the breadth of section 47 (1), as amended. It expressly provides that any person aggrieved by the decision of the High Court in the exercise of its original jurisdiction in land matters may appeal to this Court *"in accordance with the provisions of the Appellate Jurisdiction Act."* The immediate question is whether it creates an automatic right of

appeal from any decision of the High Court sitting as a land court of first instance as contended by Mr. Kiritta.

It is elementary that the meaning of a statutory provision must, in the first instance, be sought in the language in which the statute is framed, and if that is plain the function of the courts is to enforce it according to its terms. As observed by the learned authors, Sir Peter Benson Maxwell *et al*, in **Maxwell on the Interpretation of Statutes**, 12th Edition, London: Sweet and Maxwell Limited, 1969, at page 29, it is trite that:

> ***"Where the language is plain and admits of but one meaning the task of interpretation can hardly be said to arise.*** *Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be."* [Emphasis added]

In **Republic v. Mwesige Geofrey & Another**, Criminal Appeal No. 355 of 2014 (unreported), the Court took the same stance as it stated:

> ***"Indeed, it is axiomatic that when the words of a statute are unambiguous, 'judicial inquiry is complete'.*** *There is no need for interpolations,*

> *lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation.* ***This is because:- courts must presume that the legislature says in a statute what it means and means in a statute what it says there – Connecticut Nat'l Bank v. Germain****, 112 S. Ct. 1146, 1149 (1992)."*[Emphasis added]

On a plain and ordinary meaning of the words used, section 47 (1) of the AJA creates a right of appeal to this Court from any decision of the High Court sitting as a land court of first instance but that the said right must be exercised in a manner conforming with the provisions of the AJA. The phrase *"in accordance with the provisions of the Appellate Jurisdiction Act"* is not an empty shell; it qualifies the right of appeal so created under section 47 (1) in that its exercise must be compliant with the conditions and limitations set forth by the AJA. We, therefore, agree with Ms. Lupondo's submission that the right of appeal at issue is expressly subject to conformity with the relevant procedural requirements prescribed by the AJA.

Pertinent to our discussion is section 5 of the AJA, referred to by Ms. Lupondo in her submissions, which regulates civil appeals to this Court. For clarity, we excerpt its pertinent provisions as hereunder:

*"**5**.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*

(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;

(b) against the following orders of the High Court made under its original jurisdiction, that is to say—

(i) an order superseding an arbitration where the award has not been completed within the period allowed by the High Court;

(ii) an order on an award stated in the form of a special case;

(iii) an order modifying or correcting an award;

(iv) an order filing or refusing to file an agreement to refer to arbitration;

(v) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(vi) an order filing or refusing to file an award in an arbitration without the intervention of the High Court;

(vii) an order under section 95 of the Civil Procedure Code, which relates to the award of compensation where an arrest or a temporary injunction is granted;

(viii) an order under any of the provisions of the Civil procedure Code, imposing a fine or directing the arrest or detention, in civil prison, of any person, except where the arrest or detention is in execution of a decree;

(ix) any order specified in rule 1 of Order XLIII in the Civil Procedure Code or in any rule of the High Court amending, or in substitution for, the rule;

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

(2) Notwithstanding the provisions of subsection (1)-

(a) except with the leave of the High Court, no appeal shall lie against-

(i) any decree or order made by the consent of the parties; or

(ii) any decree or order as to costs only where the costs are in the discretion of the High Court;

(b) and (c) [Not applicable]

(d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit."

We are aware that the above provision has been extensively discussed by the Court in numerous decisions: see for instance, **Paul A. Kweka & Another v. Ngorika Bus Services and Transport Company Limited**, Civil Appeal No. 129 of 2002; **East Africa Development Bank v. Khalfan Transport Co. Limited**, Civil Appeal No. 68 of 2003; and **CRDB Bank Limited v. George Kilindu & Another**, Civil Appeal No. 137 of 2008 (all unreported).

Briefly, it is settled that while section 5 (1) (a) of the AJA creates an automatic right of appeal from **decrees** made by the High Court in a suit under the CPC, section 5 (1) (b) (i) to (ix) of the AJA provides for a similar right of appeal in respect of **orders** enumerated thereunder. On the other hand, leave of the High Court or of this Court is required in terms of section 5 (1) (c) of the AJA for any appeal *"against every other decree, order, judgment, decision or finding of the High Court."* Put differently, leave is required for any appeal from a decree or order not falling under the purview of section 5 (1) (a) and (b) of the AJA. The rationale for that requirement is

to filter underserving appeals thereby saving time and resources of the Court. Certainly, the mechanism ensures that it is only appeals raising points of sufficient legal significance or those with real prospect of success that will eventually reach the Court for consideration – see, for instance, **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported); and **Harban Haji Moshi and Another v. Omari Hilal Seif and Another** [2001] T.L.R. 409.

Consideration of the import of section 5 (2) (a) and (d) of the AJA is equally crucial. Paragraph (a) (i) and (ii) of subsection (2) unambiguously imposes the requirement of leave of the High Court for every appeal against any decree or order made by the consent of the parties or any decree or order as to costs if the costs are in the discretion of the High Court. Furthermore, at the heart of section 5 (2) (d) is a bar to any appeal or application for revision against or made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit. The bar averts the possibility of the parties and the Court being inundated with incessant appeals or revisions from preliminary or interlocutory decisions stalling effectual determination of the crux of their dispute – see **Mahendra Kumar Govindji Momani t/a Anchor Enterprises v. Tata Holdings**

(Tanzania) Ltd. & Another, Civil Application No. 50 of 2000; and **Karibu Textile Mills Ltd. v. New Mbeya Textile Mills & 3 Others**, Civil Application No. 22 of 2006 (both unreported).

Adverting to the construction of section 47 (1) of the LDCA read in accordance with the requirements and limitations set forth under section 5 of the AJA, we would agree with Ms. Lupondo that this scheme clearly allows **automatic appeals** only from **decrees** falling under section 5 (1) (a) and **orders** enumerated under section 5 (1) (b) (i) to (ix) of the AJA. It should be stressed, at this point, that every decree or order of the High Court sitting as a land court in exercise of its original jurisdiction is essentially a decree or order made under the CPC pursuant to section 51 (1) of the LDCA by which the CPC is applied to such proceedings.

Furthermore, we uphold Ms. Lupondo's submission that the right of appeal under section 47 (1) of the LDCA is restricted by section 5 (1) (c) of the AJA by permitting appeals subject to leave being sought and obtained in respect of decrees or orders not falling under the purview of section 5 (1) (a) and (b) of the AJA. Section 5 (1) (c) expressly requires leave of the High Court or of this Court for any appeal *"against every other decree, order, judgment, decision or finding of the High Court."*

In our respectful view, accepting Mr. Kiritta's submission that section 47 (1), as amended, overrides section 5 of the AJA, would amount to rewriting the law, inevitably resulting in alarming consequences. It will not only countermand the requirement for leave under section 5 (1) (c) but also nullify the prerequisite for obtaining leave under section 5 (2) (a) and negate the bar under section 5 (2) (d) against appeals or revisions over preliminary or interlocutory decisions or orders of the High Court. The amendment in issue was not intended to surpass the restrictions and limitations under section 5 of the AJA. It does not render every decision, decree or order of the High Court sitting as a land court of first instance automatically appealable or revisable. It was never intended to create a separate system for appeals on land matters by according them a preferential treatment vis-à-vis appeals from non-land matters.

With the above conclusion in mind, determining the final issue, whether the impugned order is appealable without leave, poses no difficulty. There cannot be any serious dispute that the refusal by the High Court under Order IX, r.9 (1) and r.13 (1) of the CPC to set aside the two orders is neither a decree appealable under section 5 (1) (a) nor is it one of the orders appealable under section 5 (1) (b) of the AJA. In our view, the questioned refusal by the High Court is only appealable to this Court with leave pursuant

to section 5 (1) (c) of the AJA – see, for instance, **Golden Palm Limited** (*supra*).

In conclusion, we sustain the preliminary objection and hold that the appeal is incompetent for want of leave. Consequently, we strike out the appeal. Given the circumstances of this matter, we make no order as to costs.

DATED at **DAR ES SALAAM** this 24th day of May, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 31st day of May, 2023 in the presence of Mr. Charles Leonard, learned counsel for the Appellant also holding brief for Mr. Deogratius Mwarabu, learned counsel for the 1st Respondent also holding brief for Mr. Adam Mwambene for the 5th and 6th Respondents and Mr. Samwe Ntabaliba, learned counsel for the 7th to 100 Respondents is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL