IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A, And FIKIRINI, J.A.)

CIVIL APPEAL NO. 376 OF 2022

MOHAMED ISSA MTALAMILE.....1st APPELLANT

RAMADHANI SALUM NYONI.....2nd APPELLANT

KAPINGA MOHAMED SALEHE.....3rd APPELLANT

BONI HASSAN KAMA.....4th APPELLANT

(For and on Behalf of Other 144 Appellants)

VERSUS

TANGA CITY COUNCIL.....1st RESPONDENT

TANGA CEMENT COMPANY LTD.....2nd RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, at Tanga)

(Benhajj, J.)

dated the 15th day of December, 2017

in

Land Case No. 19 of 2015

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RULING OF THE COURT

3rd May & 6th June, 2023

FIKIRINI, J.A.:

In the High Court of Tanzania sitting at Tanga, through a representative suit, the appellants unsuccessfully sued the respondents

over ownership of a piece of land measuring 371 hectares, situated at the then Pande B Village, Tanga Municipal Council. Aggrieved with the High Court decision dated 15th December, 2015, the appellants preferred the present appeal raising two grounds of complaint against that decision.

On the date fixed for the hearing of the appeal and before we commenced, we invited counsel to address us on the propriety of the notice of appeal, which indicates that the four appellants mentioned on the said notice of appeal were representing the other 144 appellants (representative appeal).

Addressing the Court Mr. Juma Nassoro, learned advocate, representing the appellants, admitted that representative appeals are not tenable in the Court of Appeal and hence moved the Court in terms of rule 111 of the Tanzania Court of Appeal Rules, 2009 (the Rules) to be allowed to amend the notice and memorandum of appeal. Bolstering his submission, he referred us to the case of **Finca Tanzania Ltd v. Wildman Masika and 11 Others**, Civil Appeal No. 173 of 2016 (unreported), in which faced with the same predicament the Court granted the application under rule 111 of the Rules and allowed the appellant to

make the amendments. Mr. Nassoro also invited us to consider the application taking into account the overriding principle in the interest of justice.

The prayer was vehemently opposed by the first respondent, who was represented by Mr. Edwin Webiro, Mr. Urso Luoga and Ms. Luciana Kikala, all learned State Attorneys, although it was Mr. Webiro who addressed us. Likewise, Mr. Ruben Robert learned advocate appearing for the second respondent objected to the prayer.

Mr. Webiro contended that the appeal was incompetent as the defect conceded to by the appellants' counsel was incurable. Consequently, prayed for the appeal to be struck out.

Supporting Mr. Webiro's submission, that the appeal is incompetent and the defect incurable, Mr. Robert urged us to struck out the appeal, arguing that the Oxygen Principle cannot be relied on in every situation. He went on to state that this was not the first time this appeal was faced with issues of almost the same nature hence discouraging the grant of the application for amendment. Touching on the cited case, he argued that the **Finca** case is distinguishable. On page 12 of the decision, the Court

underscored its aim of observing justice. It, however, specifically stated that each case should be determined on its own merits, including considering the party's conduct and prejudice to the other party.

Mr. Robert pointed out the difference between the **Finca** case and the present appeal, contending that the former was a labour matter which is not the case in the present appeal. He further explained that the second respondent was highly prejudiced and impacted by the appellants' now and then applications. He thus objected to the grant of the application.

In rejoinder, Mr. Nassoro maintained that the appellants' prayers for amendment of documents are allowed under rule 111 of the Rules, dismissing the apprehension that the respondents will be prejudiced.

Admitting to the existence of a similar issue previously in this appeal, Mr. Nassoro contended that it had nothing to do with the appellants' conduct. What happened was that the appeal was declared time-barred because no service was effected to one of the respondents, as required by rule 90 (3) of the Rules. Therefore, it cannot be said that was the appellants' conduct, warranting to be the basis of declining the present application for amendment in terms of rule 111 of the Rules. Maintaining

his reliance on **Finca's** case, which Mr. Robert distinguished, Mr. Nassoro rejoined that it was not necessary to distinguish the cases. Instead, the focus should be on the parties before the Court. Or else, the appellants will be necessitated to start all over if this appeal is struck out. Discounting other issues raised as premature, he prayed for the grant of the prayer in the interest of justice.

This is not the first time this Court has faced such an issue. Despite traversing the terrain before, the Court has no definite stance. In considering whether the defect requiring amendment under rule 111 of the Rules, is curable or not, the Court has been considering the application based on the material facts placed before it, the peculiar circumstances of each case, the nature of the amendment intended and the extent, and in some cases whether the issue was exposed through a Notice of Preliminary Objection (PO) or raised *suo motu* by the Court. See, **Ludger Nyoni & 360 Others v. The National Housing Corporation**, Civil Appeal No. 68 of 2008, **Hsu Chin & 36 Others v. The Republic**, Criminal Appeal No. 345 of 2009 and **Andrew Mseul & 5 Others v. The National Ranching Company Ltd & Another**, Civil Appeal No. 205 of 2016 (all unreported).

For instance, in **Hsu** (supra) and **Lugano Kalomba & 22 Others v. The Permanent Secretary, Ministry of Education and Vocational Training & Another**, Civil Appeal No. 78 of 2008 (unreported), the Court raised the issue *suo motu*, while in **Andrew Mseul** (supra) the adverse party raised the issue through a PO. The Court declined to invoke rule 111 of the Rules and allow the amendment. It considered permitting the invitation would be pre-empting the PO, which in the Court's opinion, would have been prejudicial to the respondents.

The Notice of Appeal in the present appeal was lodged on 11th July, 2022 and the Memorandum of Appeal followed on 22nd July, 2022. In both documents, besides the names of the four (4) appellants, the remaining one hundred and forty four (144) appellants' names have not been listed. They have, instead, been referred to as "*For and on behalf of others 144 appellants*." This is where the problem lies. While we appreciate that there could be a joint notice of appeal, we do not condone and consider it wrong for the parties to be generally described as "*and others*" as it appears in the present appeal. And this stems from the settled position that representative suits or appeals are not applicable in the Court of Appeal.

The condition is that in all notices and memoranda of appeal, the names of all the appellants or respondents should be listed.

The rationale behind our stance has been well illustrated in **Hsu**'s case (supra). In considering the situation, the Court asked itself the following: who are those referred as "*others*," and how would the Court know if all those identified as "others" were equally interested in appealing the decision. Resolving its quest, the Court maintained that all parties to an appeal, be it appellants or respondents, should be mentioned or identified by their names in the notice of appeal. Even though the decision originated from a criminal appeal, we think the principle applies similarly in civil appeal notices and memoranda of appeal.

We have dispassionately considered that parties come to Court to have their controversies resolved. And this can only happen if they are afforded that opportunity without the impediment of technicalities. Sometimes the amendments sought are necessary such that declining a party such chance is more detrimental and could lead to injustice. More so, striking out the appeal does not bar a party from coming back, which would not have solved the problem once and for all.

Weighing on the circumstances of the appeal before the Court, and relying on our previous decision in **Finca Tanzania Ltd** (supra), we find it more fitting to allow the application rather than striking out the appeal. With the striking out, the appeal will entail the appellants to start all over. Conversely, the respondents will not be spared being part of that process when the appellants come back in pursuit of their appeal. And this will undoubtedly prolong the determination of the controversy to its finality once and for all. In the instant appeal, almost one hundred and forty-eight (148) appellants are involved and the disputed suit land measures about 371 hectares. To let this matter linger in suspense without resolving it to its finality, will not, in our view, reflect well on the Court and its bestowed duty of dispensing justice. We take into account the fact that there is an opportunity to remedy and do the needful.

The nature of the amendment sought entails listing the names of all the appellants in the notice and memorandum of appeal, and we do not think it will be prejudicial to the other parties. We say this mindful of the respondents' complaint that this is not the first time the issue has arisen in this appeal. We agree that the issue has arisen before, but this time it is the Court that raised this one.

In view of the above and in the interest of justice, we order the amendment of the intended documents in terms of Rule 111 of the Rules. The amendment should be made within thirty (30) days from the date of delivery of this order.

DATED at **DAR ES SALAAM** this 5th day of June, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 6th day of June, 2023 in the presence of Mr. Ruben Robert, learned counsel for the 2nd Respondent, also holding brief of Mr. Juma Nassoro, learned counsel for the Appellant and Mr. Rashid Mohamed, learned State Attorney for the 1st Respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL