

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CIVIL APPEAL NO. 249 OF 2022

HUMPHREY JOMO TUMBO.....APPELLANT

VERSUS

JANE ELIAS TUMBO RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Tabora]

(Bahati, J.)

dated the 9th day of October, 2020

in

Misc. Land Case Application No. 18 of 2019

.....

JUDGMENT OF THE COURT

25th September & 2nd October, 2023

KITUSI, J.A.:

The appellant was aggrieved by the ruling and order of the High Court in Miscellaneous Land Case Application No. 18 of 2019 and he duly lodged a notice of appeal in terms of rule 83(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Subsequently he applied for leave to appeal which was granted to him. He lodged a memorandum of appeal, consisting of three grounds of appeal mainly challenging the ruling of the learned judge that

determined the substantive application for extension of time refusing it in the course of dealing with points of preliminary objection.

The parties appeared before us to argue the appeal. The appellant was present but also represented by Mr. Samwel Lucas Ndanga, learned advocate, while the respondent appeared in person without legal representation. They had earlier filed written submissions for and against the appeal and generally stood by what is contained therein.

However, after hearing the parties we also suo motu, drew their attention to the ruling that granted the appellant leave to appeal to the Court and invited them to address us if S.B. Nsana Senior Resident Magistrate had powers under her extended jurisdiction to grant that leave as she did. Mr. Ndanga was quick to concede the anomaly and pointed out that looking at her ruling even the learned Senior Resident Magistrate with extended jurisdiction was disturbed by that question but had no other option than to proceed. The learned advocate submitted that the application was lodged by the appellant at the High Court so the wrong transfer to Hon. Nsana Senior Resident Magistrate with extended jurisdiction was of the court's own making and should not be blamed on the parties.

Mr. Ndanga invited us to cure the irregularity by invoking the overriding objective principle introduced through section 3A (1) & (2) of the Appellate Jurisdiction Act, Cap 141 (AJA).

On her part the respondent implored us to make consequential orders because she submitted, Mr. Ndanga, an advocate of long-standing ought to have known better, so he has no one to blame but himself.

There is no dispute that the order which the appeal seeks to challenge through this appeal does not fall within those which are appealable without leave in terms of section 5 of AJA. The appellant purported to obtain that leave but the question is whether the said leave granted by a Resident Magistrate with extended jurisdiction is valid and may be acted upon by the Court in determining an appeal from the High Court.

In the present case, the case had been dealt with by the High Court whose ruling was subject of the intended appeal. Case law is replete with decisions that where a matter has not been transferred to a Resident Magistrate with extended jurisdiction, as the present, such Resident Magistrate may not deal with it by way of say, extending time, for the matter to be heard by the High Court. Case of **Alonda Ekela v. Republic**, Criminal Appeal No. 1 of 2020 (unreported). Nor, can the reverse scenario be possible, that is a Resident Magistrate with extended jurisdiction dealing with

a matter which has been dealt with by the High Court Case of **Clemence Mpondelo & Another v. Republic**, Criminal Appeal Nos. 138 & 139 of 2011 (unreported). How in this case, the application came to be placed before the Senior Resident Magistrate with extended jurisdiction we know not, and even the said Magistrate herself had no idea. From the above, Hon. Nsana, with extended jurisdiction had no power to deal with and grant leave to appeal to us from a decision of the High Court.

Next for our consideration is whether the defect can be cured by applying the overriding objective principle, as suggested by Mr. Ndanga. With respect, that principle is not a cure for all ailments and must be invoked with a sense of reason, as we said in the case of **Njake Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017 (unreported). In this case the defect that we drew the parties' attention to is jurisdictional, therefore touching the very foundation of the case. Needless to say, the overriding objective principle is not meant to give legitimacy to proceedings conducted by a court or person without jurisdiction. For those reason, we decline Mr. Ndanga's invitation.

In our conclusion, since the issue of the competence of the appeal based on an invalid leave to appeal was raised by the Court, we invoke our revisional powers under section 4 (2) of the AJA, and hold this

appeal incompetent for having been lodged without a valid leave to do so.
Consequently, it is struck out with costs.

DATED at TABORA this 29th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 2nd day of October, 2023 in the presence Mr.
Samwel Lucas Ndanga, learned Counsel for the Appellant, the Respondent
in person is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL