IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 100 OF 2020

EXIM BANK TANZANIA LIMITED...APPELLANT

VERSUS

NATIONAL FURNISHERS LIMITED......................................RESPONDENT

(Appeal from the ruling and drawn order of the High Court of Tanzania, Land Division at Dar es Salaam)

(Opiyo, J.)

dated the 29th day of November 2019

in

Miscellaneous Land Application No. 1130 OF 2017

....

JUDGMENT OF THE COURT

20th March & 24th April, 2023

KIHWELO, J.A.:

Central to the matter before us is the competence of the instant appeal which seeks to challenge the decision of the High Court of Tanzania Land Division (the High Court) in Misc. Land Application No. 1130 of 2017 in which the High Court (Opiyo, J.) dismissed the application which was predicated on section 38 (1) and (2) of the Civil Procedure Code [Cap 33 R.E. 2002]. In the impugned application the appellant wanted the High Court to pronounce itself among other things, that the disbursement of

25% of the sale deposit, accruing from the sale auction in execution of the decree in Land Case No. 210 of 2015 (the suit) to the respondent and others was illegal, and an order directing the respondent and any other beneficiary from the said disbursement to repay/deposit the said amount into the Judiciary's account.

In order to appreciate the sequence of events leading to this appeal, it is instructive to recapitulate albeit briefly, facts as they appear from the record; On 17th July, 2015 the respondent lodged the suit at the High Court seeking to challenge the recovery process of the asset finance facility which was effected through auction of the mortgaged properties instead of appointing a Receiver/Manager as required by the law governing mortgage. It however, occurred that, the suit was settled amicably whereby a consent judgment and decree was entered to the tune of United States Dollars One Million Nine Hundred Ninety-Five Thousand Four Hundred Seventy-Five and Eighty-Eight (USD. 1,995,475.88) only.

However, the respondent did not honour the terms of the deed of settlement and the decree, as a result of which the appellant executed the decree through sale of the respondent's two landed properties located at Msasani Pensular in Kinondoni at Dar es Salaam. The respondent, with leave of the High Court participated in the auction and emerged the highest bidder and subsequently deposited into the Judiciary's account 25% of the purchase price.

Later on, surprisingly and for an obscure cause, the appellant came to learn that, the 25% of the purchase price deposited into the Judiciary's account had already been disbursed as follows: the respondent TZS. 1,621,297,900.00 one Joshua E. Mwaituka trading as Rhino Auction Mart TZS. 414,515,850.00 and Jehangir Abdulrasool TZS. 200,000,000.00 It is on that account that the appellant lodged the instant appeal.

At the hearing before this Court, Mr. Elisa Abel Msuya together with Ms. Regina Kiumba learned counsel appeared for the appellant, whereas the respondent had the services of Mr. Dickson Venance Mtogesewa assisted by Mr. Tazan Keneth Mwaiteleke, learned counsel.

Before hearing of the appeal could commence in earnest, Mr. Mtogesewa, learned counsel, sought to argue a preliminary objection a notice of which was earlier lodged on 15th March, 2023 in terms of rule 107 of the Tanzania Court of Appeal Rules, 2009 (the Rules) to the effect that the appeal before us was incompetent. However, Mr. Mtogesewa, opted to abandon the other grounds and argued only one ground which is indicated above.

However, as it is a customary practice of this Court that where there is a notice of preliminary of objection raised in an appeal or application, the Court hears the preliminary objection first before allowing the appeal or application to be heard on merit. Hence, we allowed the preliminary objection to be argued first, before the hearing of the appeal on merit.

Briefly stated, ground two of the preliminary objection, is to the effect that, the appeal is incompetent for being instituted prior to seeking and obtaining leave. Mr. Mtogesewa argued briefly that, the appellant did not seek and obtain leave to appeal to the Court contrary to the mandatory requirement of the law and cited section 5 (1) (c) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the Act). He therefore, prayed that the appeal before us should be struck out with costs.

At the very outset, Mr. Msuya conceded to the preliminary point of objection raised by the respondent in that the appellant did not seek and obtain leave to appeal to the Court. However, he earnestly implored us not to strike out the appeal on account of the glaring illegality. In further elaboration Mr. Msuya contended that, the High Court while declaring that it was not competent to determine the appeal before it, it went ahead to dismiss the appeal instead of striking it out. He thus, beseeched us in terms of section 4 (2) of the Act to rectify the anomaly. He further argued that, he had no qualms if the respondent would be awarded costs for the appearance on the day of hearing of the preliminary objection. In support of his submission and upon our prompting Mr. Msuya referred us to our earlier unreported decisions in **Tanzania Heart Institute v. The Board of Trustees of NSSF**, Civil Application No. 109 of 2008, **Chama cha Walimu Tanzania v. The Attorney General**, Civil Application No. 151 of 2008 and **Typhone Elias @ Ryphone Elias and Another v. Majaliwa Daudi Mayaya**, Civil Appeal No. 186 of 2017.

Upon our further prompting, Mr. Msuya contended that, sparing a rather incompetent appeal should be sparingly done. However, he went on to submit that, failure to correct the glaring illegality occasioned by the High Court at this stage will create unnecessary inconveniences and occasion injustice to the appellant who will have no way out to challenge the impugned decision until the same is rectified.

On the adversary, Mr. Mtogesewa, appreciated the gross concession by Mr. Msuya in that the appeal before us was incompetent for failure to seek and obtain leave and that the only appropriate remedy is for the Court to strike it out. He opposed the suggestion by Mr. Msuya that the Court should cloth itself with revisional powers under section 4(2) of the Act in order to address the alleged illegality for the reasons that no sufficient exceptional circumstances were explained by the appellant. He further argued that, the remedy available to the appellant is review before the High Court and not revision before this Court and finally Mr. Mtogesewa submitted that, costs should follow the event.

In rejoinder submission, Mr. Msuya was fairly brief. He contended that having moved the Court to cloth itself with revisional powers as the appellant has done in the instant appeal, it suffices to show that there is glaring illegality and this Court being the highest in the judicial hierarchy and a fountain of justice, it cannot keep a blind eye to an apparent illegality. He rounded off his submission by reiterating his quest for the Court to invoke its revisional powers and reverse the dismissal of the impugned application with striking out.

From the submissions of the learned trained minds, it is crystal clear that it is not in dispute that the appeal before us is incompetent because the appellant did not seek and obtain leave to appeal to the Court contrary to the mandatory requirement of section 5 (1) (c) of the Act. There is a considerable body of case law to the effect that failure to seek and obtain leave makes the appeal incompetent and therefore, not worth of consideration. See, for instance the case of **Enock M. Chacha v. Manager NBC Tarime** [1995] T.L.R. 270, **Tanzania Breweries Limited v. Leo Kobelo**, Civil Appeal No. 17 of 2016 and **Hussein Shabenga Jumanne S. Makanyaga and 6 Others v. Tanzania Ports Authority**, Civil Appeal No. 39 of 2009 (both unreported) in which the

Court underscored that, the matter which does not fall under any of the categories provided for under section 5 (1) (a) and (b) of the Act, requires leave to be applied under section 5 (1) (c) of that Act and that, lack of leave makes the hands of the Court tied to entertain it.

It is instructive to interject a remark, by way of a postscript that, whether a legal point challenging the competence of an appeal or application is raised by a party by way of a preliminary objection, or by the court *suo motto*, the effect is the same to make the matter before the court incompetent and the weight to be attached is equally the same.

Ordinarily, having ruled out that the appeal is incompetent, it would automatically follow that the appeal before us is to be struck out. However, we feel constrained not to strike it out this appeal for the reasons to be assigned shortly. We have done so in order to remain seized with the High Court record and so be able to intervene and remedy the situation. The path we have opted to sail is not novel as we have exercised these powers in the past in a number of occasions. See, for instance the case of **Chama cha Walimu Tanzania** (supra), **Tanzania Heart Institute** (supra), **Mathias Eusebi Soka v. The Registered Trustees of Mama Clementina Foundation & Two Others**, Civil Appeal No. 40 of 2001 and **Typhone Elias @ Ryphone Elias** (supra). In all the above cases we found the applications or appeals like in the instant appeal incompetent but we could not proceed to strike it out, instead, we exercised the revisional jurisdiction of the Court to rectify the shortcoming in the rather incompetent proceedings and decision of the High Court.

Time and again we have emphasised that, the power to exercise revisional jurisdiction in a situation like the one obtained in the instant appeal has to be sparingly exercised but there cannot be laid any hard and fast rules but each case has to be decided according to its peculiar circumstances. See, for instance, the case of **Shaban Fundi v. Leonard Clement**, Civil Appeal No. 38 of 2011 (unreported). In the case of **Mathias Eusebi Soka** (supra) the Court struck out the notice of appeal against the National Insurance Corporation of Tanzania, a Specified Public Corporation which had been sued without prior leave of the High Court in terms of section 9 of the Bankruptcy Ordinance. After striking out the notice, the Court invoked its revisional powers under section 4 (2) of the Act, to quash the proceedings in the High Court and set aside all the orders therein. Similarly, in the case of **Chama cha Walimu Tanzania** (supra) where the Court was faced with an incompetent application did not strike it out but considering the circumstances prevailing, it invoked its revisional powers to quash the proceedings and set aside orders therein.

Now turning to the matter before us. As submitted by Mr. Msuya, the illegality complained of and which is the subject of discussion in the instant appeal resulted from the decision of the High Court Judge who having found that the route taken by the appellant to lodge the impugned application was not a proper forum as the High Court was not competent to determine it, went ahead to dismiss the application with costs instead of striking it out.

We therefore, find considerable merit in Mr. Msuya's proposition in regards to the erroneous decision which was made by the High Court Judge having found that the High Court was not competent to determine it, she ought to have struck it out instead of dismissing it with costs. That was a glaring anomaly as Mr. Msuya put it although we don't agree with him that what was done by the High Court Judge was an illegality because the High Court Judge had powers to issue any of those orders but the only anomaly is that she erroneously dismissed the application which was not heard and determined on merit.

It is convenient here to point out that, the distinction between dismissal and striking out was lucidly elaborated in the erstwhile East African Court of Appeal decision in the case of **Ngoni Matengo Co-Operative Marketing Union Ltd v. Alimahomed Osman** [1959] E.A. 577 in which the court clarified that an order of dismissal implies that a competent appeal has been disposed of while an order for striking out an appeal implies that there was no proper appeal capable of being disposed of.

Guided by our previous unreported cases referred to above, we are settled in our mind that for the interests of justice, the Court has a duty to address a vivid error and that, it cannot justifiably close its eyes therefor. Given the prevailing circumstances of the instant appeal, we are further settled in our mind that, tackling the question complained of at this early opportunity will vouch unnecessary further delays, and save the parties from unnecessary potential and inescapable expenses.

In the event, as the dismissal order of 29th November, 2019 was erroneously issued, we are satisfied that in the interest of justice, it should not be left to stand. Accordingly, we invoke our revisional powers under section 4(2) of the Act on the basis of which we set aside the dismissal order and in in lieu therefore substitute it with an order striking out the application.

As regards costs, this should not belabor us much. In common law legal system costs in relation to civil litigation must follow the event, that is to say a successful party is entitled to costs of the case. However, given the circumstances of this matter where the error was occasioned by the High Court, we order that each party should bear own costs.

DATED at **DAR ES SALAAM** this 20th day of April, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of April, 2023 in the presence of Mr. Tazan Mwaiteleke, learned counsel for the respondent and also holding brief of Mr. Gabriel Mnyele, learned counsel for the appellant, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL