

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

HC. CIVIL APPEAL NO. 39/2016

(Arising from Civil Case No. 18/2014 of Bukoba RM's Court).

VALERIAN C. MLAY ----- APPELLANT

VERSUS

NATHAN ALEX (ADVOCATE) ----- RESPONDENT

RULING

30/5/2018 & 10/8/2018

Kairo, J.

When replying to the petition of appeal filed by the Appellant, the Respondent raised three points of Preliminary objection couched as hereunder;

- i. This purported appeal is incurably defective and bad in law for being filed in a wrong and non existing court.

- ii. The purported appeal was drawn by incompetent person contrary to section 43 and 44 of the Advocates Act Cap 341 RE 2002.
- iii. The purported appeal is incurably defective for failure to attach a proper judgment and decree of which the appeal is arising from

He thus prayed this court to dismiss the appeal with cost.

Both parties are represented by Advocates whereby the Appellant is being represented by the Learned Counsel Lucy Nambuo from Comfort Attorneys' while the Respondent is enjoying the services of the Learned Counsel Zeddy Ally. The matter was ordered to be disposed of by way of written submissions. I will address the raised P.Os in seriatim.

In the first PO, Advocate Zeddy Ally contented that the appeal is incurably defective and bad in law for being filed in a wrong and non existing court. He submitted that Order XXXIX R 3 of the Civil Procedure Code Cap 33 RE 2002 requires an appeal originating from the RM's court to be filed to the High Court of the United Republic of Tanzania. He went on that under section 3 of Cap 33 (supra) the court is defined to mean the High Court of the United Republic as established under Article 108 (1) of the United Republic of Tanzania, Cap 2 RE 2002. However the appeal is coached as follows: "*In the High Court of Bukoba At Bukoba*"; He argued

Advocate Zeddy Ally further argued that there is no such court as "*the High Court of Bukoba*" according to the above cited provisions adding that the appeal intended to be filed in the High Court of Bukoba is misconceived and

bad in law. He cited the case of *Lukilile M.A. vrs Ladha Industries Ltd; Civil Appeal No. 278/2004; High Court Dar es salaam (unreported)* which was made available to the court to bolster his argument. In the cited case, the matter was titled “*In the District Court of Dar es salaam At Kisutu*” and the court made a finding that the case ought to have been rejected as was improperly before the court as there was no such a court in this country.

Advocate Zeddy Ally concluded by praying the court to struck out the appeal with cost as the same is incurably defective.

In reply, the Advocate for the Appellant started by drawing the attention of this court to Article 107 A (2) (e) of the Constitution; Cap 2 (supra) which imposes an obligation to the courts to dispense justice without being tied up with undue technical provisions which may obstruct justice. In insisting of the said requirement, Advocate Nambuo cited a string of cases as follows;

Judge in charge High Court Arusha vrs NIN Munuo Nguni; Civil Appeal No. 45/1998; Jeremiah Mtobesya vrs AG: Misc. Civil Cause No. 29/201; Stanbic Bank Tanzania Ltd vrs Kagera Sugar Ltd: Civil Application No. 57/2007 CAT Dar es salaam (unreported); DT Dobie (T) Ltd vrs Phantom Modern Transport (1985) Ltd: Civil Application No. 145/2001 CAT (unreported); General Marketing Co. Ltd vrs A.A Sharif (1980) TLR 61 and Rawal vrs Mombasa Hardware (1968) EA 393. She argued that all of the above cited cases underline the principle that rules of procedures are hand maids of justice thus they should facilitate rather than impede decisions on substantive

issues. She went on that the pointed out errors are only clerical which can be amended as do not go to the root of the case. To further fortify her argument, she referred this court to the case of *Emirates Airline vrs Hamidu Mvungi; Commercial case No. 26/2011* wherein the court when determining similar situation stated;

“the error in not citing the court properly in my view and as rightly submitted by the Plaintiff’s Counsel is merely procedural, as such it does not go to the root of the matter and therefore can be amended by the court exercising its discretionary powers under section 97 of Cap 33 (supra) as it was correctly observed by Lord Bowen in *Cooper vrs Smith 1984.26 CH.D 700 at page 710 -711 wherein it was stated.*

“courts do not exist for the sake of discipline but for the sake of deciding mistake in controversy”. In my view, the amendment will not occasion any injustice on the part of the Defendant who in my view will not be affected by the intimation of the case of the other side, as such the purpose of the amendment is to enable this court to determine what is really at issue between the parties”.

In his rejoinder, Advocate Zeddy Ally contended that Advocate Nambuo conceded to improper citation of the court which initiated the appeal. He argued that though the Advocate termed the fault as clerical but the same cannot be cured by way of amendment under section 97 of the CPC (supra). He added that order XXXIX R 3 of the CPC (supra) is very categorical that the

appeal from RM's court has to be filed at the High Court of the United Republic of Tanzania and not "*High Court of Bukoba*". He also argued that section 97 of the CPC (*supra*) is applicable only where there is a suit before the court and not appeal as in the case at hand, thus concluded that the case of *Emirates Airline (supra)* is distinguishable.

Having gone through the faulted appeal and the rival arguments with regards to the P.O, it is crystal clear that the cited name of the court is not correct, the fact which was not disputed either by the Appellant's advocate. To be precise, there is nothing like the "*High Court of Bukoba*" rather Bukoba is among the registries of the High Court of the United Republic of Tanzania. Advocate Nambuo has argued that the mistake is a "*clerical*" one which doesn't go to the root of the matter as an amendment can be effected. She thus pleaded with the court to disregard what she called procedural error in favor of justice dispensation. However on his part Advocate Zeddy Ally dismissed the arguments insisting that the failure to cite the name of the court properly is an incurable defect which cannot be cured by an amendment.

I have gone through the cases cited by the counsels to back up their arguments. In my candid view, I agree that the pointed out mistake is a clerical error thus not of substance. But I should point out that, the same shows lack of keenness. All the same I am of the view that the error could be corrected through an amendment.

Advocate Zeddy Ally has argued that section 97 of the CPC (*supra*) allows amendment in a suit and not in an appeal and thus distinguishes the case of *Emirates Airline (supra)* and the one at hand. Nevertheless this court has unlimited powers to make orders as it may deem necessary to meet the ends of justice under section 95 of the CPC. In my judicial interpretation such powers include an order to correct the pointed out defect in this appeal. However this court will not order the amendment for the reason I will give out shortly.

In the second limb of the P.O, Advocate Zeddy Ally contended that the purported appeal was drawn by an incompetent person. He told the court that, the appeal is shown to have been drawn by Comfort Attorney's which he argued to be contrary to sections 43 and 44 of the Advocates Act Cap 341 RE 2002. He went on arguing that essentially all legal documents must be drawn and filed by an advocate and not a legal firm to which the advocate belongs. To buttress his argument, he cited the case of *Kabasa Investment Co. Ltd 3 Others vrs World Vision Tanzania: Misc. Civil Application No. 24/2016 at page 5* where it was observed.

“ In terms of sections 2,6,8, of the Advocates Act, a law firm is not an advocate and therefore it ought not draw a legal document that is supposed to be drawn by an advocate. Rather, a legal document is supposed to be drawn by an advocate recognized by the Advocate Act as an Advocate]”.

He concluded by praying the court to struck out the memorandum of appeal for want of competency as the same was drawn and filed by a law firm instead of an advocate.

As a reply, Advocate Nambuo cited the case of *The National Hosing Corporation and 2 Others vs Jing Lang Li: Misc. Land Application No 102/2014 High Court Dar es salaam (unreported)* wherein my Learned sister Madame Judge De – Mello cautioned the Advocates therein from abhorring habit of raising P.Os which at the end of the day confuses issues and delay cases determination. The Advocate further argued that the P.O doesn't qualify to be so categorized as per *Mukisa Biscuits manufacturing Co. Ltd vrs West End Distributors Ltd [1969] E.A* which gives guidance on what qualifies to be termed as P.O. She added that the case of *Ernest Karata and Others vr AG Civil Revision No. 10/2010 CAT DSM* has listed a number of points of objections worth court's consideration.

In his rejoinder Advocate Zeddy Ally dismissed Advocate Nambuo's reply arguing that the submission did not legally answer the P.O despite contending that the P.O has the intention of wasting precious time of the court.

It is a requirement of the law as per section 43 and 44 of Cap 341 that a document should bear the name of the person who prepared and endorsed it. Looking at the petition of appeal filed, the same was drawn and filed by

Comfort Attorneys and further there is a signature appended. Section 44 (2) of Cap 341 states as follows:

“It shall not be lawful for any registering authority to accept or recognize any instrument unless it purports to bear the name of the person who prepare it endorsed thereon. (emphasis mine).

I understand that a law firm is a legal personality. However the same can not endorse any instrument or document by itself except through its officers who are advocates. Thus in my view it doesn't fall within the purview of section 44 (2) of Cap 341.

Further to that Cap 341 defined a term Advocate to mean any person whose name is duly entered as an advocate upon the Roll. (Section 2). It is further provided in section 6 of the Act that the Registrar is the one responsible to keep the roll of the advocates. On top of that a person who fulfils the conditions stipulated in section 8 may apply to the chief Justice to be admitted as an advocate. Looking at the above cited sections (2,6&8), needless to say that a legal personality cannot conduct the above. It goes therefore, a law firm which is a legal personality doesn't fall within the purview or meaning of section 43 and 44 of Cap 341 (supra).

I further got fortification on this stance in the case of **Omar Ali Omar vrs Registrar of Titles: Misc. Land Application No. 90/2014 High Court Land Division Dar es salaam (unreported)** quoted with approval the case of **Lucas**

A. Nzungula Civil Appeal No 66/2008 High Court Labour Division Dar es salaam (unreported) wherein the court observed and I wish to quote;

“the submissions by the respondents were filed by C and M Advocate Now C and M Advocates is not an Advocate in terms of section 2, 6, and 8 of the Advocates Act (Cap 341 RE 2002). C and M Advocates cannot therefore file a document. The document must be by an individual Advocate having the conduct of the matter “for and on behalf of C and M Advocates”.

According to the above quoted case a law firm is not an advocate, as such cannot draw or file or endorse a legal document.

In the matter at hand, the appeal was drawn and filed by Comfort Attorney (Advocates). Applying the cited case to the facts at hand, it goes that the firm cannot draw or file the said appeal as it purported to do. The omission to indicate the person who drew and endorsed the appeal has the effect of making it incompetent as correctly argued by Advocate Zeddy Ally for the Respondent. Advocate Nambuo has argued that the P.O doesn't meet the test enunciated in the case of *Mukisa Biscuits (supra)*. With due respect, I don't subscribe to the said argument. The reason is not farfetched. The law is settled that remedy for an incompetent appeal is to be struck out which means the matter is disposed of.

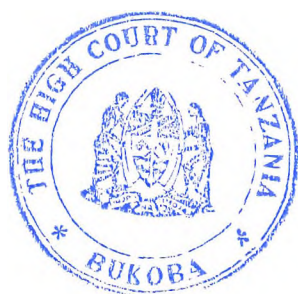
Again Advocate Nambuo argued that the raised P.O confuses issues and time wasting thus contrary to timely dispensation of justice. Suffice to state

that much as the cases are needed to be determined expeditiously but the same should not be done at the expense of legal requirements; otherwise, the same justice we seek to preserve will be defeated.

As I earlier stated that though I found the first P.O to be unsustainable, but the failure to indicate the name of the person who drew the document and endorse it accordingly as per section 43 and 44 of Cap 341 has made the court to decline to order the amendment of the appeal. Instead the same is to be struck out as I will order shortly, so that the pointed out defects can be corrected and appeal re-filed should the Appellant still wish to pursue it. In that respect therefore I see no reasons of determining the last P.O as I have no proceedings before me that would form the basis of discussing the 3rd P.O. I am thus constrained from making any observation on it.

The Appeal is hereby struck out with cost for want of competence.

It is so ordered.



L.G. Kaifo
Judge

At Bukoba

10/8/2018.