

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL No. 39 OF 2019

(Originating from the Resident Magistrate Court of Dar es salaam at Kisutu
in Civil Case No. 36 of 2016)

AMINI NDAMA MZIRAY.....APPELANT

Versus

CAPT. MILITON LUSAJO LAZARO.....RESPONDENT

RULING

25th October - – 19TH December, 2019

J. A. DE-MELLO J;

The Respondent has raised two limbs of **Preliminary points objections**, towards the Appellant's Memorandum of Appeal, that;

- 1. The Appeal contravenes the mandatory provisions of Order XXXIX, Rule 1 (2) of the Civil Procedure Code Cap. 33 R.E 2002**
- 2. The names of the Parties appeared in the Memorandum of Appeal are different from the those appeared on the Judgment and Decree.**

Written submissions was prayed for and, duly granted with **Counsel Adrian Mhina**, one who raised the objections fending for the Respondent whereas; the Appellant is in care of **Joseph Ndazi**, learned Advocate. On the **1st limb**, **Counsel Mhina** submitted that, **Order XXXIX Rule 1(2)** of the **Civil Procedure Code Cap. 33** has been violated as it reads; **"The Memorandum of Appeal shall set forth, concisely and, under distinct heads the grounds of objection to the decree appealed from without any argument or narrative ;and such rounds shall be numbered consecutively"**

He derived the definition of the term **argument** from the **Black's Law Dictionary, Revised Fourth Edition of 1968** to mean;

"An effort to establish belief by way of reasoning".

From the above, he is of a firm view that the **1st ground of Appeal**, is settled as the **Memorandum of Appeal** contains both arguments and narrations. He further stated that, on that ground the appellant tried to establish a belief by way of reasoning an argument and narration through the wordings; **"appellant had a legal duty to report on the respondent's misdeeds in the course of conduct of his duties at ATCL"**, **"the allege defamatory statement subject to suit were a result of third party circulation by person other than the appellant"**, let alone what **grounds 3, 4, and 5** of the Memorandum of Appeal, similarly are argumentative and, narrative. To buttress his argument, he referred to **section 53 (2) of Cap 1 R.E 2002** re affirming that non compliance of the **Order XXXIX Rule 1 (2)** (supra) renders the

Appeal fatal. Short of specifying the point of law which is alleged to have been wrongfully decided and, the nature of an order which it is proposed to ask the Court to grant, Counsel insisted on failure on the part of the Appellant. With regards to the second limb of objection, **Counsel Mhina** submitted that the Parties names appearing on the **Memorandum** reflecting **Amini Ndama Mziray vs. Capt.Milton Lusajo Lazaro** are different from the **Judgment** and, **Decree** of the Trial Court, reading **Milton Lusajo Lazaro vs. Amini Dama Mziray**. The **Title Captain** for the Respondent appearing in this Appeal,together with the names above will issue a Decree on Appeal as per **Order XXXIX Rule 35** of the **CPC** binding Parties at the Trial Court with no person addressed the name **CaptMilton Lusajo Lazaro**. Accordingly, the defect similarly renders the Appeal incompetent, therefore it should be **Struck Out** with costs.

Countering the **1st point of objection**, **Counsel Ndazi** and based on principle laid down in the case of **Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors Ltd. (1969) E.A 696** at page **700** not to conform to pure point of law.

The Court in this case stated that;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion. The improper raising of points by way of preliminary objections does nothing but

unnecessary increase costs, and on occasion confuses issues .this improper practice should stop”.

These two objections don't fit in the test enumerated in the above case, and have no effect of determining this Appeal to its finality, he observes. Further, he submitted that, it is a trite law the Preliminary Objection must be firmly grounded in law either in a statutory provision or case law, in which the second objection failed to observe this rule. That as opposed, the 1st ground of appeal put a concise statement which shows the Court and the parties;

- 1. What is being appealed against and;**
- 2. Why it is being appealed against.**

It was his view that, the combination of the two is what makes the grounds of Appeal and, has exceeded nothing, but the Court finds fault in this, it can easily be corrected by way of amendment, by invoking **Order XXXIX Rule 3 (1)** of the **CPC**. Arguing on the second ground of appeal, Counsel for the Appellant reiterated that it similarly has no merit, it being unfounded in any law. To buttress his argument he cited the case of **James Burchad Rugemalila & Another vs. Republic Criminal App. No. 59/2019 of 2017**. However while this is his assertion at some point the Appellant admits that, there is a mis-naming of the Respondent, though he is attempting to please himself that, the defect if not fatal as it does not affects the rights of the parties and which can be easily be corrected. He cited the case of **CRDB Bank LTD vs. Isack B. Mwamasika, Registered Trustee of Dar Es Salaam International**

School Trust Fund And EDBP & GD Constructions Co. Ltd Civil Appeal No. 139 Of 2017, Court Of Appeal Of Tanzania at Dar Es Salaam, where the Court ruled on the naming of the 3rd Respondent, inadvertently by use of initials **DG** instead of **GD**, to neither occasion any confusion as to the identity of the **3rd Respondent**, nor injustices to any party. He cited **section 73** of the **CPC. Cap. 33 R.E 2002** to put emphasis over this, but again and, in the event the Court finds fault in the names, it has powers to remove, add , and correct names of the parties in Court proceedings as per **Order I Rule 9** and, **10 (1) (2)** of the **Civil Procedure Code Cap. 33**. In fine, he prayed for this Court to invoke its powers under the **Overriding objective Principle** brought in by the newly enacted amendment in **section 3A** of the **CPC**, by affording the matter justice in its substantive nature on its merits.

Rejoining, Counsel for the Respondent cited the case of **National Insurance Corporation (T) & Another vs. Shengena Limited, Civil Application No. 20 2007**, in which the Court of Appeal held that **"Preliminary Objections are those which its proof cannot subjected by other material facts"**. He also shared the case of **Cotwu T Ottu Union& Another vs. Hon. Iddi Simba Minister of Industries & Trade & Others TLR [2002]** that, a **Preliminary Objection** should raise a pure point of law which is based on ascertained facts, not on fact which has not been ascertained and if sustained, a preliminary objection should be capable of disposing the case.

I appreciate for the research that which both Counsels have put into this, with each attempting to prove the other wrong over the two objections.

Determining the **1st point of objection**, we all are in agreement to have been drawn from **Order XXXIX Rule 1 (2)** of the **CPC**. Looking at the grounds of Appeal, I can not but agree that, the grounds of appeal contains both arguments and narrative, with a view of sharing stories and justifying their existence. Cognizant of the fact, Counsel for the Appellants is asking the Court to remedy the situation by invoking **Order XXXIX Rule 3 of the CPC**. This is improper, as the prayer can not at this juncture pre-empt, by ordering the amendment of the grounds in the Memorandum of Appeal. Similar situation was held in the case of **Julius P.K Nkonya vs. William Michel Kudoja, Criminal Appeal No. 395 of 2013 (Unreported)**, with approval of the case of **Jaluma General Supplies Ltd. vs. Stanbick Bank, Civil Appeal No. 34 of 2010 [Unreported]**, holding that the Application for Leave to Amend the Memorandum of Appeal could rightly be prayed for, prior to objection is taken. By now the objection has taken time up, and since the provision of this law is couched on mandatory terms, its non-compliance is fatal and cannot be covered by the **Overriding Objective Principle of section 3A of the CPC** as prayed by the Counsel for the Appellant. The same was observed in the case of **Morondosi Village Council & Others vs Tanzania Breweries Ltd. & Others, Civil appeal No. 66 of 2017 (Unreported)**.

In the above case, the Court of Appeal at **pages 14- 15** stated that;

“regarding the objective principle, we are of the considered view that ,the same cannot be applied blindly against the mandatory provision of the procedural law which goes to the foundation of the case”.

Being bound by the above position of the Court of Appeal, I find that the 1st point of objection with merit, as it is sustained. Not all matters can be rescued by the amendment

With regard to different names that the second point of objection has raised, much as it is grounded from facts, it is even ascertained from the very **Title of the Memorandum of Appeal** which named the respondent as **Capt. Milton Lusajo Lazaro** instead of **Milton Lusajo Lazaro**, as it appears in the impugned Judgment and, Decree from the Trial Court. Borrowing from the rule enumerated in the cases of **COTWO T OTTU Union & Another vs. Hon. Iddi Simba Minister of Industries & Trade & Others TLR [2002]** cited above, I'm settled that, there is merit too in the **2nd Preliminary Objection** and hence with legal spine. Legally the two names **Capt. Mlton Lusajo Lazaro** and **Mlton Lusajo Lazaro** by mere reading refers to two different people as was observed by the High Court Of Uganda in the case of **Akera J. Okello vs. Akello HC Civil Division 2015 page 74** whose findings is persuasive to our jurisdiction. In **Akeras's case** (supra) the **High Court of Uganda** at page 2 held that;

"Akera J Okella Okella and Akela Charles are two different people."

The shortfall of naming the Parties to the proceeding is fatal as may have prejudicial consequences on the course conducting the proceedings and executing the outcome of the proceedings such as decrees.

The Court further held that;

"Failure to name the correct Defendant may have prejudicial consequence especially when it comes to visiting locus giving evidence and execution"

Further and, states that;

"There is no way the warrant in the names of Akera J. Okella can be execute against Akera Charles for these two are different person."

Section 73 of the **CPC** one that, Counsel for the Applicant side is irrelevant and in applicable in the present case, as it refers to restriction on reversion and modification of decrees for errors or irregularity not affecting the merits or jurisdiction of the Court. I hereby wish to quote for quick of reference and, comparison as hereunder;

73. No decree shall be reversed or substantially varied ,nor shall any case be remanded ,on appeal , on account of any misjoinder of parties or causes of action or any error ,defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court ."

In the present case issue is not errors or irregularity in the Decree, but is on the Memorandum of Appeal.

Let me remind while cautioning Counsel of their duty towards the Court being Officers of the Court, that of assisting the Court in arriving to a just decision. It is not true that, in the case of **CRDB Bank Ltd. vs Isack B. Mwamasika, Registered Trustee of Dar Es Salaam International**

School Trust Fund And EDBP & GD Constructions Co. Ltd Civil Appeal No. 139 Of 2017, the **Court Of Appeal Of Tanzania At Dare S Salaam** overruled out that, misnaming of the **3rd Respondent** as **DG** instead of **GD** to have no merit as the wrong naming of the 3rd Respondent appearing in the Memorandum of Appeal was inadvertently used of initials **DG** instead of **GD** did not occasion any confusion as to the case. I have perused the above cited case and ascertain while satisfied that nothing like that is in what was submitted by the leaned Counsel. Even the Preliminary objections raised in the above case are quite different from the present case. Therefore it cannot be applicable to redress the **2nd objection**.

Having said so, the two **Preliminary Objections** are hereby sustained and the Memorandum of Appeal is **Struck Out** as opposed to **Dismissal** for being incompetent and, with costs.

It is so ordered.


J. A DE-MELLO

JUDGE

19/12/2019