THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA
CIVIL APPEAL NO. 10 OF 2020.
(From Civil Case No. 1 of 2019, in the District Court of Ileje, at Itumba).

EDITHA BENYA SIGAR..... .....APPLICANT

VERSUS

1. ALEX MYOVELA.....1ST RESPONDENT
2. CHINA GEO ENGENEERING.....2ND RESPONDENT

RULING

08/07 & 08/10/2020.

UTAMWA, J:

This is a ruling on a preliminary objection (PO) raised by the respondents **ALEX MYOVELA and CHINA GEO ENGENEERING** aganinst an appeal lodged by the appellant, EDITHA BENYA SIGAR. The appellant in the appeal challenges the order dated 12th February, 2020 (the impugned order) of the District Court of Ileje, at Itumba (the District Court) in Civil Case No. 1 of 2019 (the original case).

In the original case, the appellant sued the two respondents before the District Court for some monetary claims with various interests. The record shows that, at the request of the appellant herself (as the plaintiff), the District Court, through the impugned order, withdrew the suit under Order XXIII rule 1 and 2 of the Civil Procedure Code, Cap. 33 R. E. 2019 (henceforth the CPC) and ordered the appellant to pay costs. The appellant was aggrieved, hence this appeal.

The appeal is based on the following three grounds:

1. That, the Honourable District Court erred in law and in fact by making the order of withdrawing the matter under the provisions of the law contrary to the appellant's prayer.
2. That, the Honourable District Court erred in law and in fact by granting the orders not prayed in court.
3. That, the Honourable District Court erred in law and in fact for not being impartial, and by entertaining the matter with bias.

Owing to these grounds of appeal, the appellant urged this court to set aside the impugned order with costs and allow the appellant to re-file the suit.

The respondents, did not only object the appeal at hand, but they also filed a notice of the PO with two limbs, namely:

i. That, the appeal is incompetent for being filed in the District Court of Ileje District and by way of a petition of appeal contrary to the law governing appeals originating from a District Court.
ii. That, the order appealed against is not appealable.

The appellant did not concede to the PO. The said PO before this court, was argued by way of written submissions. The respondents were represented by Mr. Barak Mbwilo, learned counsel. The appellant appeared sole without any representation.

Regarding the first limb of the PO the learned counsel for the respondents argued that, Order XXXIX rule 1 of the CPC requires appeals

against decrees passed by a District Court exercising its original jurisdiction to be by way of memorandum of appeal and to be presented before the High Court (this court). Appeals against orders of the District Court follow the same procedure as guided under Order XL rule 2 of the CPC. However, in the case at hand, the appellant lodged the appeal before the District Court in the form of a petition of appeal. She however, paid the filing fees in this court. This was, according to the learned counsel for the respondents, a serious irregularity in filing the appeal at hand.

As to the second limb of the PO, the learned counsel for the respondents contended that, appeals from orders made by a District Court are governed by section 70, 74 and Order XL of the CPC. Nonetheless, the impugned order at issue is not among the orders that can be appealed against under these provisions of the law. The order was also a result of the appellant's own request. It follows thus, that, permitting her to appeal against it will prejudice the respondents and prolong litigations.

It was further the contention by the learned counsel for the respondents that, an appellate jurisdiction of a court is created by a statute and there is no inherent appellate jurisdiction. He supported his contention by the case of **Attorney General v. Shah (19710) EA 50.** He added that, a right to appeal is also a statutory creation, there is thus, no automatic right to appeal. He cemented this argument by a decision of the Court of Appeal of Tanzania (the CAT) in **Paul A. Kwaka and another v. Ngorika Bus Services and another, Civil Appeal No. 129 of f2002, CAT at Arusha** (unreported).

The learned counsel for the respondents thus, urged this court to strike out the appeal for the reasons adduced above.

In her replying submissions, the appellant contended generally that, the appeal was lodged in this court where the filing fees were paid. However, a Registry Officer in the District Court mistakenly stamped the petition of appeal with the stamp of the District Court. She added that, Order XXXIX rule 3 (1) of the CPC, guides that, where a memorandum of appeal is not drafted in accordance to the law, it may be rejected or returned to the appellant for amendments. These provisions may thus, cure the minor defects raised in the PO. Section 97 of the CPC also permits amendment of pleadings. Such clerical errors can thus, be cured by the court as guided in the case of **Jewels 7 Antiques (T) Limited v. National Shipping Agencies Co. Ltd [1994] TLR 107.** She also reminded the court to avoid due consideration of procedural technicalities as guided under article 107A (2)(e) of the Constitution of the United Republic of Tanzania, 1977.

The appellant further argued that, her intention before the trial court was not to withdraw the suit altogether, but to drop the services of her counsel so that she could file the suit afresh and conduct it herself. The District Court thus, erroneously withdrew the suit. She further challenged the second limb of the PO on the grounds that, it needs proof by evidence during the trial. It cannot thus, be a proper ground of the PO as per the guidance in the famous case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA. 696**.

I have considered the record, the arguments by the parties and the law. I will thus, test one limb of the PO after another. Regarding the first limb of the PO the issue is *whether the appeal was filed according to the law.* In my view, according to the petition of appeal, the same was presented in the District Court because it bears the stamp of the District Court. The appellant also cements this fact by arguing that a Registry Officer in the District Court mistakenly stamped the petition of appeal with that stamp. In my view, such registry officer could not have accessed the petition of appeal had it not been for the appellant's act of presenting it there.

In my further view, the procedure adopted by the appellant in filing this appeal was odd. She could not present it in the District Court and pay the requisite filing fees in this court. Only petitions of appeal to this court against decisions made by a District Court exercising appellate or revisional jurisdiction regarding matters originating in primary courts are filed before the District Court; see section 25 (3) of the Magistrates Court Act, Cap. 11 R. E. 2019. A decision or order made by a District Court exercising its original jurisdiction (as opposed to its appellate or revisional jurisdiction) can be challenged on appeal (if it is appealable in law) by presenting a memorandum of appeal directly to this court. This is in accordance with the guidance under Order XXXIX rule 1 and Order XL rule 2 of the CPC as rightly argued by the learned counsel for the respondents. I thus, answer the issue posed above negatively that, *the appeal was not filed according to the law.*

The irregularity under discussion was in my view, fatal to the appeal. One cannot present a document in one court and pay filing fees in a higher court unless the law provides so, which is not the case in the matter at hand. In fact, I would not have minded much on the document of appeal being titled "petition of appeal" instead of "memorandum of appeal." This would be so because, the difference between the two documents is merely technical and minor. This view is based on the fact that, practically the two essentially mean the same thing and serve the same objective of challenging a decision of a court before a superior court. However, the fact that the appellant presented the petition of appeal in the District Court and paid the necessary filing fees in this court is an intolerable irregularity as I have demonstrated above. If this trend is condoned by courts of law, the same may lead to an eminent danger. There will be no uniformity, consistence and predictability of the law in our jurisdiction. Confusions and chaos will prevail in our courts of law. Ultimately, injustice will triumph. I consequently uphold the first limb of the PO.

Regarding the second limb of the PO, the issue is *whether the impugned order is appealable in law.* Before I test this issue, I must make a finding on the argument by the appellant that the second limb of the PO needs evidence, hence unfit as a PO by virtue of the **Mukisa Biscuits case** (supra). In my concerted opinion, this view was based on a misconception of law by the appellant herself. Probably, this was due to the fact that she is an unrepresented laywoman. The arguments by the learned counsel for the respondents were based on the law, the pleadings (petition of appeal at issue) and the record of the proceedings of the

District Court. There is thus, no need for further evidence in determining the issue posed above.

I will now proceed to examine the issue. In my view, the arguments by the learned counsel for the respondents are supported by law. A right of appeal is in fact, a statutory right. A person intending to appeal against any decision of a court must follow the tune of the statute giving him/her the right to appeal. In the case at hand, I agree with the learned counsel for the respondents that, the order for withdrawal of a suit is not appealable by virtue of the laws he cited. It is more so considering the fact that the impugned order was made at the request of the appellant herself. According to the record, her request was in fact made when the trial had commenced and she had testified before the District Court. The reasons for the withdrawal were that, she had no witness to support the case. Her advocate had induced her to buy some witnesses, but she did not accept the inducement.

In my further view, the appellant cannot denounce her own request for withdrawing the suit by filing this appeal. The record of the District Court cannot be impeached by her mere augments that the court made an order against her request. The law is trite that, court records are presumed to be serious and genuine documents that cannot be easily impeached unless there is evidence to the contrary; see **Halfani Sudi v. Abieza Chichili, [1998] TLR. 527**. However, there is no scintilla of evidence in the matter at hand, to challenge the record of the trial tribunal, save for the mere arguments by the appellant, which do not amount to any evidence in law.

In my further view, this appeal is an afterthought which cannot help the appellant. She cannot appeal against an order that was in his own favour. It follows thus, that, entertaining this appeal will amount to an abuse of court process which this court cannot do. It is our law that, litigations must come to an end. They should not be filed, withdrawn and revived without any good cause. Litigations in fact, involve costs and wastage of time. A party who has a genuine claim cannot be expected to use the court in a way that implies that he/she is uncertain with the claim. I thus, agree with the learned counsel for the respondents that, if this court entertains the appeal at hand, the same may prejudice the respondents and prolong the litigation needlessly.

Certainly, for the reasons shown above, I do not agree with the appellant that, the irregularities complained of by the respondents' counsel are negligible and can be cured by amendments. I cannot imagine how one can cure an erroneously filed appeal or rectify an appeal against a non-appealable order by mere amendments of a petition of appeal. Her contention was thus, a result of another misconception of the law. Her argument that the abnormalities are technical that can be made good by considering article 107A (2) (e) of the Constitution is thus, also not tenable.

Owing to the reasons shown above, I answer the issue posed above in relation to the second limb of the PO negatively that, the impugned order is not appealable in law. I thus, uphold this ground of the PO.

Before I conclude, I find it necessary to also make same remarks regarding both limbs of the PO. Indeed, I am also live of the emphasis brought into our law by the principle of overriding objective. The principle

essentially requires courts to deal with cases justly, to have regard to substantive justice and avoid overreliance on procedural technicalities; see the decision by the CAT in the case of **Yakobo Magoiga Giche re v. Peninah usuph, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania (CAT), at Mwanza** (unreported). Nonetheless, this principle does not create a shelter for each and every breach of the law on procedure. This is the envisaging that was recently underlined by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure.

It follows thus, that, the appellant in the case at hand, cannot hide herself under the umbrella of the principle of overriding objective for her violation of the procedure as demonstrated above. It is more so considering the fact that, I have classified her appeal as an abuse of court process.

Having observed as above, I find this appeal incompetent and I strike it out. The appellant shall pay costs. This is because costs follow event in law. It is so ordered.

THE HIGH COURT OF TANZANIA

J.H.K. Utamwa
Judge
08/10/2020

08/10/2020.
CORAM; Hon. JHK. Utamwa, J.
Appellant: Present.
Respondents: absent.

BC; Mr. Patrick, RMA.

Court: Ruling delivered in the presence of the appellant in court this 8th October, 2020. Respondents be notified of the ruling.

JHK. UTAMWA.
JUDGE

08/10/2020.