

IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC CIVIL CASE NO. 11 OF 2019

(Arising from Commercial Case No. 16 of 2018 of
the District Court of Nzega, G.N. Barthy, RM)

SUSAN SAMSON NAKEMBETWAAPPELLANT

VERSUS

IMPERIUM INSURANCE BROKERS CO. LTD.....1ST RESPONDENT

RESOLUTION INSURANCE CO. LTD.....2ND RESPONDENT

RULING

Date of Submissions: 18/11/2020

Date of Delivery: 18/11/2020

AMOUR S. KHAMIS, J.

Aggrieved by Judgment of the District Court of Nzega in Commercial Case No. 16 of 2018, Susan Samson Nakembetwa lodged the present appeal on two grounds, namely:

1. That the trial Court erred in law and fact by reaching a decision without making proper assessment and evaluation of evidence

adduced before it which could assist the Court to reach into justice.

2. That the trial Court erred in law and facts by reaching a decision without assigning plausible reasons.

The appeal was confronted with a notice of preliminary objection from the first respondent, Imperium Insurance Brokers Co. Ltd, to the effect that:

- i) *That the appeal has not adhered to the High Court (Commercial Division) Procedure Rules, 2012.*
- ii) *That there is no notice of appeal filed as the mandatory provisions of Rule 69 (2) of the High Court (Commercial Division) – Procedure Rules, 2012.*
- iii) *That the Memorandum of Appeal does not state in brief the substance of the Judgment appealed against and particulars of point of law or facts contrary to the High Court (Commercial Division) Procedure Rules, 2012.*
- iv) *That the appellant has not adhered to Rule 70 (4) of the High Court (Commercial Division) Procedure Rules, 2012 to serve the respondents all documents filed in the notice of appeal.*

When the appeal was set for hearing, Mr. Godwell Lawrence, learned advocate, held brief of Mr. Musa Chemu, advocate for the appellant, with instructions to proceed.

Mr. Erick Mwanri, learned advocate for the first respondent also held brief of Mr. Said Nyamambura, advocate for the second respondent with a mandate to proceed.

Mr. Godwell Lawrence readily conceded to the preliminary objections raised and prayed for leave to withdraw the appeal with permission to refile afresh.

In response, Mr. Erick Mwanri prayed for an order to strike out the appeal with costs.

The issue is whether upon conceding to the preliminary objections raised the appellant is authorised to withdraw an appeal with leave to refile.

It is trite law that when a preliminary objection is on record, the opposite party cannot do acts translated to circumvent its effects (see **M/S FIDA HUSSEIN & CO. LTD V THA, CIVIL APPEAL NO. 60 OF 1999** (CAT – Unreported)).



A similar stance was made by the Court of Appeal in **KANTIBHAI M. PATEL V DAHYABHAI F. MISTRY, CIVIL APPEAL NO. 58 OF 1997** (unreported) wherein it was held that:

“The Court has held on a number of occasions that once an objection is taken to the competence of the appeal, it would be contrary to the law to entertain a prayer the effect of which is to defeat the objection. . . .”

Since the appellant in this matter conceded to the objections, a prayer to withdraw the appeal is tantamount to bypassing those objections, hence rejected.

In the circumstances, the preliminary objections raised by the first respondent are sustained and the appeal is struck out with costs.



It is so ordered.

AMOUR S. KHAMIS
JUDGE
18/11/2020

ORDER:

Ruling delivered in Chambers in presence of Mr. Godwell Lawrence, learned advocate for the appellant and Mr. Erick Mwanri, learned advocate for the first and second respondents. Right of Appeal explained.

AMOUR S. KHAMIS
JUDGE
18/11/2020