

IN HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA

DC. CIVIL APPEAL NO.5 OF 2021

(Originating from Liwale District Court at Liwale in Civil Case No.2 of 2016)

CHAMA CHA MAZAO CHA MKATA AMCOS.....1ST APPELLANT
HAMISI HEMED BUNGARA.....2ND APPELLANT
MOHAMEDI SAID KIBUNGI.....3RD APPELLANT
MBARAKA HEMED PANGE.....4TH APPELLANT
MARIAM NGAOGOLA.....5TH APPELLANT
RAJABU NGOMAMBO.....6TH APPELLANT

VERSUS

ZUBERI MCHUNGULIKE MHINDI.....RESPONDENT

RULING

Date of Last Order: 28/4/2022

Date of Ruling: 14/7/2022

LALTAIKA, J.:

The first appellant herein **CHAMA CHA MAZAO CHA MKATA AMCOS**, is an Agricultural Marketing Co-operatives whose leaders are Hamisi Hemed Bungara (second appellant), Mohamed Said Kibungi (third appellant), Mbaraka Hemed Pange (fourth appellant), Mariam Ngaogola (fifth appellant) and Rajabu Ngomambo (sixth appellant). The appellants are appealing against **DC. Civil Case No.2 of 2016** tried and decided

by the District Court of Liwale. The second to sixth appellants filed their memorandum of appeal containing two grounds of appeal. The respondent, on the other hand, resisted the appeal as he filed his petition of appeal on 22/9/2021. Moreover, on 4/3/2021 the respondent filed a notice of preliminary objection. The notice comprised a total of four preliminary points of law which are **one**, the appeal is time barred. **Two**, the appeal was improperly filed in the District Court of Liwale at Liwale. **Three**, the appeal contravenes the requirement of Order XXXIX Rule 1 of the Civil Procedure Code, [Cap.33 R.E. 2019] for failure to attach copies of the judgment and decree of the trial court. **Four**, the appeal is bad in law for violating the requirement of Order IX Rule 9 of the Civil Procedure Code, [Cap.33 R.E. 2019].

The background of this matter is considered imperative and is as follows: the respondent sued the first appellant for the claim off Tshs. 7,000,000/= (seven million) against the first appellant being a loan taken by the first appellant. This amount of money was claimed by the respondent vide Civil Case No.2 of 2016. Upon completion of the trial, on 30/5/2016 the trial court pronounced judgment in favour of the respondent and required the first appellant to pay the respondent the amount he claimed (i.e. TZS 7,000,000/=), general damages of 5% of

7,000,000/= per each month from the date the sum became due to the date of judgment. It also ordered costs of the suits to the respondent.

Moreover, on 12/7/2016 the respondent (decree holder) filed a Miscellaneous Application No.1 of 2016 where he prayed for execution of decree, where he prayed for an order of attachment of the vehicle and godown of the first appellant (judgment debtor). On 7.3.2018 the trial court granted the order prayed by the respondent. The order went further by directing the appointed court broker to attach a godwon and vehicle with registration No. T993 BPZ the properties of the first appellant.

It seems the applicant encountered a hinderance of attaching those properties owned by the first appellant. In that regard, he lodged an application registered by the trial as Misc. Civil Application No.9 of 2020 where he prayed the trial court to order the second to sixth appellants to facilitate the execution of the decree in favour of the respondent through the property belonged to the first appellant. The trial court granted the application and gave the second to sixth appellants thirty (30) days from the date of that ruling which was delivered on 27/1/2021. The ruling went further and it stated that upon failure the respondent was allowed to execute the decree by attaching the properties which belonged to the second to sixth appellants.

On 28/4 2022 this appeal came for hearing of the raised preliminary objections on point of law. The appellants were represented by Mr. Stephen Lékey who was assisted by Ms. Lightness Kikao, learned advocates. The respondent, on the other hand, was represented by Ms. Acrala Blanket, learned Counsel. Both learned advocates opted for oral submissions which they both complied with.

Ms. Blanket commenced her submission on the first point of preliminary objection. She submitted that the records show that the appeal originates from Civil Case No 2 of 2016 from Liwale District Court, however, the learned counsel contended, this appeal was filed on 25/2/2021. Ms. Blanket stressed that the judgement of the case from which the appeal originates was delivered on 30/5/2016. Furthermore, she argued that it is trite law that one must appeal within 90 days from the day the judgment was delivered.

As for the present appeal, the learned Counsel argued that it was filed 5 years later. To that end, she opined that it is time barred as per The Law of Limitations Act, [Cap. 89 R.E. 2019]. Ms. Blanket stressed that she referred to this law because the parent act does not provide the time for filing of an appeal originating from the District Court. The learned Counsel submitted further that the appeal is time barred and opined that the appellants were supposed to have filed an application for extension of

time to lodge an appeal. To fortify her argument, Ms. Blanket referred this court to the decision of the Court of Appeal in **Njake Enterprises Ltd. vs Blue Rock Ltd and Another**, Civil Appeal No. 69 of 2017 CAT, Arusha. She also cited section 3 of the Law of Limitations Act contending that the same has provided for remedies for filing an appeal out of time. The learned advocate argued that the appeal is time barred and therefore subject to be dismissed.

On the second point of preliminary objection, Ms. Blanket submitted that the appeal was improperly filed at the District Court of Liwale. She stressed that the law is clear that all appeals originating from the District Court must be filed and entertained by the High Court and not otherwise. To substantiate her argument, she cited section 43(3) of the Magistrates Court Act. In addition, the learned advocate submitted that the court records shows that the appeal was filed at the District Court of Liwale and not in the High Court.

Regarding the third point of preliminary objection the learned Counsel argued that the appeal has contravened Order XXXIX Rule 1 of the Civil Procedure Code. In view of that point of objection, Ms. Blanket insisted that the records of the court show that the appellant filed a memorandum of appeal without attaching a decree which is contrary to the requirements of the law. Cementing her argument, she cited the case of **MIC Tanzania Ltd v. Hamisi Mwinyijuma and 2 Others**, Civil Appeal No. 14 of 2016 CAT Dar es Salaam from page 7-11 where the Court of Appeal struck out the appeal as it contravened Order XXXIX Rule 1(1) and (2) of the CPC.

Ms. Blanket finalized her submission in chief on the fourth point of preliminary objection by arguing that the appeal is bad in law for violating the requirements of Order IX Rule 9 of the CPC. She stressed that the procedure for obtaining remedies available once an ex-parte judgement has been entered against the defendant, is that the aggrieved party need to deploy an application for setting aside that particular exparte judgment. The learned advocate went further and argued that the memorandum filed by the appellants contain one ground regarding exparte judgment delivered on 30/5/2016. Thus, she submitted that since then, the appellants made no application to set aside the ex parte judgment. Ms. Blanket stressed that appellants have now come to appeal against it while time barred. To that end, she prayed for the dismissal of the entire appeal with costs.

In response, Mr. Lekey started his submission by submitting that the preliminary objections on points of law raised by the respondent are misconceived and should be dismissed with costs. He further stressed that the memorandum of appeal, as it is shown in the second page of the same, was prepared and filed by the appellants themselves. He went further and submitted that they were instructed later while they had already filed it. The learned Counsel argued that the errors made by the applicants were minor clerical errors. The learned advocate maintained that if one reads through the memorandum of appeal, it shows that they [appellants] are appealing against two different cases. The first is the main case which can be seen when they show an entry "Originating from Civil Case No 2 of 2016" which could also be gleaned from the first ground of appeal together with "Relief (b)" of the reliefs they have sought.

As to the second case, Mr. Lekey argued that the appellants are appealing against the ruling delivered on 27.1.2021 by Hon. E. Philly, RM. He stressed that their intention is signified by what they wrote after the heading *Appellants' Memorandum of Appeal* and is supported by the relief (a) requesting the decision of 27th January 2021 be quashed. In view of that submission the learned counsel insisted that it should be noted that the judgment was already delivered. To that end, he argued that as they had prayed earlier, the appellants had mixed two appeals in the same document. In the line of that submission Mr. Lekey prayed this court to ignore the appeal of the main case that is **Civil Case No 2 of 2016** and remain with the appeal on **Misc. Civil Application No. 9 of 2020** whose ruling was delivered on the 27th January 2021.

The learned advocate argued further that should this court accept to ignore the main case, then, the first, third and fourth preliminary objections become baseless. Mr. Lekey took another view and argued that **Article 107(2)(e) of the Constitution of the United Republic of Tanzania** as amended from time to time as well as Section 3A of the Civil Procedure Code, [Cap. 33 R.E. 2019] direct the courts in Tanzania to give effects to the Overriding Objective in order to ensure expeditious, proportionate and affordable resolutions of Civil Disputes.

The learned Counsel submitted emphatically that in general, the preliminary objections lacked merit because: the ruling subject to this appeal was delivered on 21/1/2021 and the appeal was filed on 25/2/2021 which is about 33 days after the ruling.

Responding to the fourth ground, Mr. Lekey submitted that the ruling was not made ex-parte because all parties had entered appearance.

He went further and submitted that nevertheless, the learned counsel for the respondent had not challenged anyhow, the ruling which is the subject of the appeal before this court and instead she chose to stick to Civil Case No. 2 of 2016.

Replying to the second preliminary objection, the learned counsel argued that his counterpart Ms. Blanket had cited Section 43(3) of the Magistrates Court Act, [Cap. 11 RE 2019] while the [proper] construction of the cited section does not tally with the ground of preliminary objection. He went on and submitted that the section is on the power of the High Court to hear and determine appeals, references and revisions from the District Courts. Mr. Lekey stressed that in any case the section is not on filing.

It is Mr. Lekey's submission that since the only thing that Ms. Blanket disputes is the stamp of the District Court of Liwale, the stamp so affixed is that of a court and there was no way the appellants could exercise any control over it. The learned Counsel went further and argued that if this matter was to be dismissed because of carrying another court's stamp, the same would be tantamount to punishing the appellants for a mistake that was occasioned by the court. To fortify his argument, the learned counsel referred this court to the case of **Mount Meru Flowers Tanzania Ltd v. Box Board Tanzania Ltd**, Civil Case No 260 of 2018 CAT, Arusha 2021 TZCA 6 at page 10 where it was stated that "Parties should not be punished for errors committed by the courts." To that end, the learned advocate prayed that this court dismisses all points of the preliminary objection with costs.

In rejoinder, Ms. Blanket argued that the senior counsel's submission that the errors occasioned in the memorandum of appeal are minor and are caused by appellants' ignorance of law had no merit because it is a legal presumption that everyone knows the law and the procedure thereof. The learned Counsel stressed that the errors are not minor because they touched upon the root of the appeal. It is Ms. Blanket's submission further that the appellants had joined two appeals two different cases as pinpointed by their learned counsel which makes it difficult for this court to know which appeal the appellants wants to be determined.

Rejoining on the overriding objective principles as per Section 3A of the CPC Ms. Blanket strongly argued that on this matter the overriding objectives cannot apply because the errors occasioned are too big and even if the memorandum of appeal was amended the appeal would still be wrong. The learned counsel submitted further that even if this court ignored the appeal as requested, the one remaining would still be problematic because it was not lodged properly. She also referred to **Njake's** case (supra) particularly at page 11 where the Court stated that "The Overriding Objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case." To that end, she prayed this court to disregard the prayer to ignore the appeal originating from Civil Case No. 2 of 2016.

Having dispassionately considered the learned counsel's opposing submissions on the preliminary objection, the issue here is whether the said preliminary objection has merit.

As for the first point of the preliminary objection, there is no doubt that the memorandum of appeal found in this court's file has been registered with DC Civil Appeal No.5 of 2021. The records also show that it originates from Civil Case No.2 of 2016 from Liwale District Court. In line with this statistical information, there is no doubt, further, that the appeal which is before this court for determination is from the Civil Case No.2 of 2016. I have made a thorough scrutiny of the memorandum of appeal and find that nowhere does it bear the case number of the particular matter allegedly heard and determined by Hon. E. Philly, RM. My findings are also to the effect that the appellant's first ground encompasses the Civil Case No.2 of 2016 whereas ground two features a matter decided on 27/1/2021 by Hon. A Philly, RM. It is equally true that even the reliefs claimed prove that the appellants intentionally brought this appeal to challenge two decisions of Civil Case No.2 of 2016 and that which delivered on 27/1/2021.

Needless to say that based on the above, I fully subscribe to what Ms. Blanket submitted that the appeal before this court is on Civil Case No.2 of 2016 which was decided on 30.5.2016 but the appellants filed their appeal 25.2. 2021. In the line of those facts it is apparent that the appeal before this court was filed out of time since it took more than four years for the appellants to bring their appeal before this court. Worse still, the appellants have filed this appeal without first seeking for the extension of time. To this end, pursuant to section 3(1)(b) of the Law of Limitation Act, I uphold the first preliminary objection and since the preliminary objection has been upheld the remedy available is to dismiss the appeal for being time barred. For record purposes, I will go ahead and analyze

the rest of the points of the preliminary objection even though the first one has, more or less, indicated the decision I am going to make.

Regarding the second preliminary objection, it is also true that the present appeal was improperly filed. The proper registry for the matter originating from the District Court or Courts of Resident Magistrate is the sub registry of the High Court of Tanzania and not any District Court. The current matter was filed at the District Court of Liwale as envisaged by exchequer receipt No.24664993 and the stamp of Liwale District Court. It is therefore, undisputed that the appeal was improperly filed hence it tantamount to have no appeal at all in this registry.

With regards to applicability of section 43(3) of MCA as cited by Ms. Blanket and responded to by Mr. Lekey, it is instructive to note that this provision of the law provides that all appeals, references, revisions and similar proceedings from, or in respect of, any proceedings of a civil nature in a district court or a court of a resident magistrate which are authorized by law shall lie to and be heard by the High Court. In that regard, there is no doubt that Ms. Blanket was trying to emphasize her position that the filing of the memorandum of appeal in the District Court of Liwale connotes that it lied and expected to be heard by the District Court of Liwale and not this court.

In the light of that observation, I subscribed to Ms. Blanket's submission that given the unique circumstances surrounding this particular case, the overriding objective principle cannot apply. See **Njake Enterprises Ltd. vs Blue Rock Ltd and Another**, (supra)

The third preliminary objection does not require wastage of the precious time of this court. I am inclined to accede to what the learned

counsel for the respondent submitted that the appeal has contravened Order XXXIX Rule 1 of the CPC. For clarity it is important to reproduce the provision of the law being referred by the respondent's counsel. Order XXXIX Rule 1 of CPC reads: -

"Every appeal shall be preferred in the form of a Memorandum signed by the appellant or his Advocate and presented to the High Court hereinafter in this Order referred to as the Court or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the court dispensed therewith) of the judgement on which it is founded." (the underlined is my emphasis).

Likewise, on the fourth preliminary objection, I will not labour much on the same because my perusal of the records has revealed that the original matter was heard ex-parte thus the appellants had the duty to set aside the ex-parte judgment that is Civil Case No.2 of 2016. The procedure taken by the appellants of appealing against Civil Case No.2 of 2016 was not proper and by so doing they have contravened Order IX Rule 9 of the CPC. In that regard I uphold this preliminary objection by the respondent.

Before I pen off, I am inclined to provide a line or two on costs. Although both counsels have prayed for costs in their favour (in the event that the ruling happens to be on their side) I have given some thought on this. Mr. Lekey has repeatedly prayed for this court to show mercy to his clients whom he has described as vulnerable to technicalities of the law due to their lack of awareness on both substantive and procedural aspects of our law.

Even though I am alive to the fact that ignorance of the law is not an excuse as alluded to by Ms. Blanket, this court is called upon to administer justice without overt inclination to technicalities. It is also duty bound to ensure that the most essential procedural aspects of our laws are adhered to, so as to ensure coherence and predictability. Striking the right balance is a continuous struggle. To encourage the applicants to continue seeking their rights in the courts of law albeit in a proper channel, I will not order costs.

To that end and for the stated reasons, I uphold all the preliminary objections and hereby dismiss the appeal without costs. Each party to bear their own costs.



Court:

E.I. LALTAIKA

A handwritten signature in black ink, appearing to read "E.I. Laltaika".

**JUDGE
14.7.2022**

This Ruling is delivered under my hand and the seal of this Court on this 9th day of June, 2022 in the presence of Mr. Stephen Lekey, learned Counsel for the appellants and Ms. Acrala Blanket, the learned Advocate for respondent.



E. I. LALTAIKA

A handwritten signature in black ink, appearing to read "E.I. Laltaika".

**JUDGE
14.7.2022**