IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 31 OF 2021

*(*Arising from the judgment and decree of the District Court of Kinondoni at Kinondoni in Civil Appeal No. 84 of 2021, by Hon. E.A. Mwakalinga SRM, originating from the decision of Magomeni Primary Court in Civil Case No. 46/2021.)

PROSHARE CAPITAL LIMITED.....1ST APPELLANT

KOTI BROTHERS COMPANY LTD.....2ND APPELLANT

VERSUS

FRED USWEGE GEORGE.....RESPONDENT

JUDGMENT

Date of last Order: 03/08/2022

Date of Ruling: 02/09/2022

E.E. KAKOLAKI J.

The appellant in this case is aggrieved with the decision of the District Court of Kinondoni sitting at Kinondoni in Civil Appeal No. 84 of 2021, which ordered that, that appellant should return the car with Reg. No. T. 681 DNC Mitsubishi Rosa to the respondent, and the respondent to pay back to the appellant Tsh.10,000,000 as agreed in the contract.

Gleaned from the record, respondent in this appeal entered into loan contract with the appellant where by respondent took a loan of Tsh.10,000,000/- payable in three (3) months which attracted interest rate of 45% which is equivalent to 15% interest per each month. The said loan was secured by the respondent's car with registration No. T.681 DNC make Mitsubishi Rosa.

It was their further term of agreement that, failure to pay the loan timely would attract penalty. It appears that, the respondent defaulted to honour the contract as agreed, the fact that prompted the appellant to confiscate his car with registration No T. 681 DNC, make Mitsubishi Rosa. Unpleased with that act, the respondent filed Civil Case No. 46 of 2021 before the Primary Court of Magomeni, claiming among other things that, the appellant attached his car without prior notice and in contravention of the law. After full trial, the Primary Court came to the finding that, the respondent had failed to prove his claim as the car was attached legally with required notice. Dissatisfied from that decision, respondent successful appealed to the District court of Kinondoni hence this appeal, in which the appellant is faulting the district court decision basing on three 3 grounds which for the purposes of this ruling reproducing them will be of no any use.

In the course of hearing of the appeal, Appellant was represented by Ms. Tatu Ally while the respondent enjoyed the services of Mr. Joseph M. Msengezi both Learned advocate as the appeal was disposed by way of written submission. Both parties adhered to the filling schedule orders though for the reasons to be apparent shortly, am not intending to reproduce their submission. In its preparation to compose Judgment, and upon perusal of lower court records this court discovered two glaring issues thus suo motu raised them; *one,* whether this appeal is properly before the court as its petition of appeal was filed directly to this court instead through the District Court. *Two*, whether the 2nd and 3rd grounds of appeal were properly addressed by the parties. To respond to those issues, parties were summoned and appeared on 26th August 2022, to address the court in respect of those issues. Ms. Pendo Charles appeared holding brief of Ms. Tatu Ally for the appellant with instruction to proceed while respondent enjoyed the services of Mr. Msengezi. It was Ms. Charles who took the floor first and prayed to submit on the first issue only as it was determining the fate of this appeal. It was her submission in concession that, the appeal is incompetent before the court for being filed directly in the High Court contrary to section 25 (3) of the Magistrates Courts [Cap 11 R.E 2019] which

provides that, all the appeals originating from the primary court in which the appellant seeks to appeal from the decision of the District Court to the High Court, must be instituted by filing the petition of appeal to the District Court or the Court of Resident Magistrate Court. She submitted that, following that defect the citation of the case changed from Pc. Civil Appeal to Civil Appeal probably on belief that it was originating from the District Court when exercising its original jurisdiction. She finally prayed the Court to strike out the appeal without costs as the issue was raised by the Court suo motu. While relying on the case of **Commissioner General Tanzania Revenue Authority Vs. JSC AUTOMREDMETZOLOTO (ARMZ)**, Consolidated Civil Appeal No. 78 & 79 of 2018 (CAT Unreported), Ms. Charles prayed the court to be pleased to apply the overriding principle and proceed to grant the appellant leave to refile.

In reply Mr. Msengezi submitted that, since appellant conceded to the issue raised by the court, she had to be condemned to pay costs to the respondent as the fact that this issue disposes of the appeal, does not relieve the appellant from paying the same. As regard to the second prayer of striking out the appeal with leave to refile, Mr. Msengezi with force argument attacked it submitted that, for that grave defect this appeal is to be

dismissed. Regarding the prayer for leave to refile, it was Mr Msengezi's submission that, the same cannot be entertained by this court as the appeal is incompetent before that court for contravening the provision of section 25 (3) of the MCA. He placed reliance in the case of **Michael Shilole vs Elizabeth S. Magera**, Pc. Civil Appeal No 69 of 2021 where this Court struck out the appeal without an order for refiling the same.

With regard to the application of overriding principle, he said, the same cannot be accommodated since, the same cannot be applied in contravention of the existing procedures regulating appeals originating from Primary Court. Regarding the cited case of the **Commissioner General,** Mr. Msengezi distinguished the same to the facts of this case as the same was concerned with the omitted copies of written submission in already existing appeal while in this case it was a total violation of the procedural law. He rested his submission by reiterating his prayer that, the appeal be dismissed as it was done in the case of **Isack Kahwa Vs. Bandora Salum**, Pc. Civil Appeal No 6 of 2020 (HC-unreported). In a short rejoinder Ms. Charles contended that, the remedy for a matter which is incompetent is to struck out the same and the court can order refiling if it is pleased. According to her, the order for refiling does not mean to invalidate the provisions of section 25 (3) of

MCA but to allow the party to do what he is required to do or ought to have done. She contended that, the overriding principle was meant to serve rectification of human error for furtherance of interest of justice. She finally requested the Court not to grant costs as the matter was not raised by the respondent but rather the Court suo motu.

It is true and I subscribe to Ms. Charles submissions that, as the law stands, appeals originating from the primary court in which the appellant seeks to appeal from the decision of the District Court to the High Court, must be instituted by filing the petition of appeal to the District Court. This mandatory requirement of the law is well provided under the provisions of section 25 (3) of the MCA. The said provision of the law reads:

> *25(3) Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought.*

That is the law, unless changed and the same is coached in mandatory terms thus should be applied and adhered to the letters. In the present appeal, having inquisitively perused the record and as rightly conceded by Ms. Charles, it is apparent that, the petition of appeal being sourced from the Primary Court via the District Court was filed directly to this Court, thus

infracted the above section. To that end, the appeal is incompetent as conceded by the appellant's counsel.

With regard to the invitation by Ms. Charles to invoke the Overriding principle to allow the appellant to refile the appeal, I hasten to say that, I am not prepared to accept that call for the reason that, Overriding principle is not meant to be applied blindly against violation of clear and mandatory provisions of the procedural law. While I am alive to the object of introduction of the said principle as to facilitate the just, expeditious, proportionate, and affordable resolution of disputes, I repeatedly hold that, the same was not meant be applied blindly to every matter as a vehicle aiding the party to evade the mandatory rules and procedures of the law. Thus the same cannot be used to offend the clear provision of the law. See the case **Njake Enterprises Limited Vs. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017. In that regard the case of **Commissioner General Tanzania Revenue Authority** (supra) is inapplicable under the circumstances of this case. It is well known principle of the law that, once the appeal or application or any matter is incompetent before the Court the only remedy is to strike it out, which position of the law also answers Mr. Msengezi's submission when prayed for dismissal of the

appeal instead of being struck out. This position of the law was well spelt in the case of **Mic Tanzania Limited Vs. Minister of Labour and Youth Development and Another**, Civil Appeal No. 103 of 2004 (CAT-unreported), where the Court held that:

> *"After all, it is now trite law once* ***an appeal or application is found to be incompetent, the only option is to strike it out*** *even if no body had been raised to it."*

Now, once the matter is strike out the Court ceases to have jurisdiction over the same or to re-entertain it unless a fresh application or suit is preferred by the applicant/plaintiff. To accommodate the applicant's prayer for the grant of leave to refile the appeal as prayed by Ms. Charles in my firm view is tantamount to hearing and extension of time of the application for the prayer to file the appeal through back door as in this matter the applicant neither presented such application before the Court be it orally or by way of chamber summons nor did she assign reasons for such extension of time. It is from the fore reason, I am refraining from granting such prayer for refiling of the appeal as prayed by Ms. Charles unless the proper application is preferred by the appellant.

In the instant matter, since the appeal before the Court is incompetent and guided with the spirit of the above cited case in **Mic Tanzania Limited** (supra), I proceed to strike it out for want of competence.

Concerning the prayer for costs, I am not prepared to heed the same for two good reasons, **one**, the matter has not been determined on merit and **second**, the issue under determination was raised by the court suo motu. As a matter of practice, when an issue is raised by the court suo motu, an order for costs is waived. All said and done, the appeal is struck out for want of competency. The appellant is free to file a competent appeal subject to limitation of time.

It is so ordered.

Dated at Dar es Salaam this 2nd day September 2022.

E. E. KAKOLAKI

JUDGE

02/09/2022.

The ruling has been delivered at Dar es Salaam today 02nd day of September, 2022 in the presence of Ms. Pendo Charles, advocate for the appellant who is also holding brief for Mr. Joseph Msengezi, advocate for the respondent and Ms. Asha Livanga, Court clerk .

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
02/09/2022.