IN THE HIGH COURT OF THE UNITED REPUBLIC OFTANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 35 OF 2022

(Arising from the Ruling of Nyamagana District Court in Civil Case No. 10 of 2022)

1. **CHASA YAHAYA MONGELA**
2. **HUMUDI SEIF RIYAMI**
3. **AMIR JUMA**
4. **ADAM KAMA**
5. **JUMA MASONDOLE**
6. **AJAB M MBALAMWEZI**
7. **ISMAIL DOTTO**

.....APPELANTS

VERSUS

1. **REGISTERED TRUSTEES OF BARAZA KUU LA WAISLAMU TANZANIA**
2. **AMADHANI HARUNA CHANILA**
3. **ONGUJO SHABAN ONGUJO**
4. **ABAS ATHUMAN**
5. **ABDUL RAHMAN KHALFAN KANGE**
6. **AMIR ZUBER LUHENDE**
7. **MAWAZO HUSSEIN SALIM**
8. **ABDULSALAM OMARY**
9. **OMAR ISSA SURVE**
10. **HASSAN JUMA MBALA**
11. **HASHI ALY KALUNGAYA**
12. **HUSEEIN AMIR MAFTAH**

.....RESPONDENTS

RULING

Last Order: 22/09/2022
Ruling Date: 28/09/2022

M. MNYUKWA, J.

This is a Ruling on a preliminary objection raised by the respondents against the appellants. The preliminary points of objection arising from the Ex-parte Ruling of the District Court of Nyamagana (trial court) in Civil

Case No. 10 of 2022, in which the appellants sought to challenge it by way of appeal.

The brief background of the instant appeal goes that; the appellants who were the plaintiffs in the trial court moved the trial court to grant the following orders;

(i) *Nullify and declare that, the Election conducted at Masjid Raudhwa on 26th day of March, 2022 was illegal and untenable.*

(ii) *Issue a declaratory order that the 1st defendant is/has been intervening and trespassing to the plaintiffs' affairs.*

(iii) *Declare Baraza Kuu la Jumuiya na Taasisi za Kiislamu as a proper supreme authority to plaintiffs' and/or Masjid Raudhwa's and Registered Trustees of Raudhwa Mosque Mwanza affairs and in lieu of that, perpetual injunction to the defendants from interfering the plaintiffs' and/or Masjid Raudhwa's @ Registered Trustees of Raudhwa Mosque Mwanza undertakings.*

(iv) *Order the 1st defendant to pay Tsh. 250,000,000/= to the plaintiffs as general damages.*

(v) *Costs of the suit be provided for.*

(vi) *Any other relief(s) as the honourable court may deem fit to grant.*

When filing the written statement of defence in the trial court, the defendants filed the notice of preliminary objection which contained three points of objections. On the day scheduled for hearing, neither the plaintiffs nor their advocate who entered appearance. As the defendants' counsel prayed the matter to proceed ex-parte, for nonappearance of the plaintiffs on the date of hearing, the prayer was granted. The case proceeded ex-parte and after ex-parte hearing of the preliminary objections, all the preliminary objections were sustained and the suit was struck out with costs.

Dissatisfied with the ex-parte Ruling of the trial court, the then plaintiffs (who are now the appellants) appealed to this court by filing the Memorandum of Appeal with four grounds of appeal as they are presented hereunder: -

1. *That the trial Magistrate erred in law and in fact by entertaining the suit under ex-parte proceedings and subsequent ruling procured thereafter unprocedural.*
2. *That the trial Magistrate erred in law and in fact by biasely determined the dispute in question, entire case and ruled ex-parte against the appellants after severally being justifiably denied to proceed with entertaining the matter in proceedings.*
3. *That the trial magistrate erred in law and in fact by rendering ex-parte ruling illegally founded in disregard*

the notice of appeal intact filed and yet undermined, which was purposely intended to challenge erstwhile ruling emanating from the same proceedings.

4. *That the trial Magistrate erred in law and in fact by upholding preliminary objections erroneously raised and on incorrect findings.*

Upon being served with the Memorandum of Appeal, the defendants filed the Notice of Preliminary Objections and raised three points of objection which are;

(i) *That this appeal is incompetent for not being accompanied by an extract order.*

(ii) *Since appellants have not firstly applied to set aside ex-parte ruling, this appeal is incompetent.*

(iii) *That the impugned ex-parte ruling is not appealable.*

As a matter of practice that, once a court is seized with a preliminary objection it is required to dispose it first. This is the position of the Court of Appeal of Tanzania in the case of **Khaji Abubakar Athumani vs Daudi Lyakugile T. A D.C Aluminium & Another,** Civil Appeal No.86 of 2018. On that basis, the matter was scheduled for hearing of the preliminary objection. On the day of hearing the preliminary objection, both parties were represented. The appellants were represented by Mr. Gibson Ishengoma, learned counsel and the respondents were

represented by Mr. Masoud Mwanaupanga, the learned counsel too. The preliminary objection was argued orally.

Arguing on the first point of preliminary objection, the respondents' learned counsel avers that, the present appeal is filed without being accompanied with the Extract Order contrary to the requirement of Order XXXIX Rule (1) of the Civil Procedure Code, Cap 33 R.E 2019, which requires an appeal to be accompanied by a copy of Judgment and Decree. He remarked that, if an appeal lies from the Ruling, the same need to be accompanied by the copy of the Ruling and an Extract Order. He thus, attacked the present appeal that was filed without the Ruling that is accompanied with the Extract Order.

To support his argument, the counsel for respondents referred to different cases including the case of **Kotak Kooverji** 1967 EALR 348, the case of **Mmari v Kirango** 2013 2EA 192 and the case of **H.J Stanley & Sons Ltd v Ally Ramadhani** [1988] TLR 250, that in all cases cited above, the court held the appeal to be incompetent for failure to attach the Decree in Appeal which is equivalent to the Extract Order for the purpose of Ruling. He retires by submitting that, since there is no proper Order attached in this appeal, the present appeal is incompetent.

On the second point of preliminary objection, he averred that, as the appeal emanated from the ex-parte decision of the trial court, the proper remedy for the appellants, is to set aside the ex-parte Ruling first, because the three grounds of appeal among the four grounds advanced by the appellants challenged the ex-parte Ruling. He went on that according to Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019, the remedy is to set aside the ex-parte Ruling and not to appeal. He buttresses his argument by referring to the decisions of this court in the case of **Magongo and Company Advocates v Elizabeth Mponzi (the administrator of the late Edward Mponzi),** Misc. Application No. 125 of 2019 and the case of **Capital Drilling (T) Limited v Said Hamad Hemed,** Civil Apeal No. 11 of 2009. He further cited the decision of the Court of Appeal in the case of **Dangote Industries Ltd Tanzania v Warnercom (T) Limited,** Civil Appeal No. 13 of 2021, to cement his argument. He finalized by submitting that since the appeal challenged the ex-parte decision of the trial court and the merit of the case at the same time, the same is improperly before this court.

On the third point of preliminary objection, the respondent's counsel submitted that, in accordance to section 74(1)(a) up to (i) which reads together with Order XXXX Rule 1(a) up to (v) of the Civil Procedure Code, Cap 33 R.E 2019, the Ruling which is the subject matter of the present

appeal is not among the Order which is appealable. He concludes by submitting that, the appeal is incompetent and the same has to be struck out with costs.

In rebuttal, when arguing the first point of preliminary objection the appellants' counsel admitted to have filed the present appeal by attaching the copy of Ruling only without it being accompanied by the Extract Order. He complained the environment to be unpleasant for them to get the copy of the Extract Order in the trial court.

He added that, despite of that omission, the appeal is competent before this court. He refers to the decision of the Court of Appeal in the case of **Mohamed Ali Mohamed v Ajuza Shaban Mzee (administrator of the late Fatuma Kibwana),** Civil Appeal No 188 of 2016 in which the Court of Appeal used the principle of overriding objective to cure the anomaly of the different dates in judgment and decree by allowing a party to go back to the High Court to get a valid certificate with the correct dates. He retires in this point by submitting that, the case cited by him is current one compared with the one submitted by the respondent.

The counsel for the appellants proceeded by arguing jointly the second and third points of preliminary objection as they are intertwined.

In his submission he started by referring to section 70(2) of the Civil Procedure Code, Cap 33 R.E 2019, to say that, the ex-parte Ruling is appealable. He went on to submit that, Order XXXX Rule 1(a) up to (v) of the Civil Procedure Code, Cap 33 R.E 2019, is cured by the provision of section 70(2) of the same law which allows the ex-parte decision to be appealable and therefore, the impugned Ruling is one among the order which is appealable. He supports his argument by the decision of the Court of Appeal in the case of **Dangote Industries Ltd Tanzania** (supra). He insisted that, the law allows to challenge both the ex-parte order and the merit of appeal at the same time. He thus, prays the preliminary point of objection to be dismissed and the matter be heard on merit. He retires by stating that, as per the nature of the relationship of the parties, who are the religious leaders and religious institutions, they won't pray for costs.

Re-joining, on the first point of preliminary objection the counsel for respondents insisted that, the omission to attach the Extract Order cannot be cured by the principle of overriding objectives and that, the provision of the Civil Procedure Code, Cap 33 R.E 2019 should be complied with. He insisted that, as the appellants challenged both the ex-parte decision and the merit of appeal, they were required to firstly set aside the ex-parte decision. He insists the appeal to be struct out with costs.

I have gone through the available record in the court file and the parties' submissions and giving careful consideration to the arguments raised by the respondents as well as the appellants arguing for and against the points of preliminary objection. The only issue for consideration and determination is whether the points of preliminary objections raised has merit.

After carefully going through the grounds of appeal as advanced by the appellants, it would appear to me that, the first three grounds of appeal seek to challenge the ex-parte Ruling delivered by the trial court against the appellants, that was illegally procured. The fourth ground of appeal challenges the ex-parte Ruling on merit.

As I have earlier on noted, upon being served with the copy of the Memorandum of Appeal, the respondents filed three points of preliminary objection. For the purpose of convenience, I will determine the first ground of preliminary objection separately and I will jointly determine the second and third grounds of appeal as they are intertwined.

On the first point of preliminary objection, the main concern of the respondents is that, the impugned Ruling sought to be challenged was not accompanied by the copy of Extract Order contrary to the mandatory provision of Order XXXIX Rule 1 of the Civil Procedure Code, Cap 33 R.E

2019, which requires the copy of the Judgement to be accompanied with the copy of the Decree. He commented that, in our case at hand the copy of the impugned Ruling sought to be challenged has to be accompanied by a copy of the Extract Order.

Admittedly, the appellants' counsel averred that it's true that, it is mandatory for a copy of the Ruling to be accompanied by the copy of the Extract Order. But he complained that, the circumstances prevailed in the case at the trial court was difficult for them even to get the copy of the Ruling as they have collected the same in this court. He also observed that, failure to attach the copy of the extract order in the impugned Ruling is not fatal as the same can be cured by the principle overriding objectives.

In determining this ground of preliminary objection, for the purpose of appreciating the issue before me, I revisited Order XXXIX Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019, which provides that every appeal shall be accompanied by a copy of the decree appealed from.

Upon carefully examining the above provision, I agree with the counsels of both parties that, the impugned Ruling sought to be challenged need to be accompanied by the copy of the Extract Order because, these are two documents which are different from each other, even though the extract order is emanating from the Ruling sought to be

challenged. This is also the position of the Court of Appeal when interpreting Rule 49(3) of the Tanzania Court of Appeals Rules, 2009, as amended which placed the mandatory condition as it is provided for under Order XXXIX Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019. The emphasis on the compliance with the said mandatory condition is pointed out in the case of **Grace Fredrick Mwakapila v Jackline Fredrick Mwakapila and Another,** Civil Application No 51/6 of 2021 that:

> *"... In our view a ruling and an order are two different documents which are mutually exclusive, for one cannot be taken to mean the other and vice versa. Although the order is extracted from the ruling, still the two are not the same. We wish to observe therefore that, it is immaterial and inconsequential that the application is accompanied with the ruling like in this application. The application supposed to be accompanied with the order of the High Court refusing leave, which order, we indicated is missing."*

On emphasizing the need to attach the copy of the Order, the Court of Appeal in the case of **Grace Fredrick Mwakapila** (supra) quoted with approval the case of **Alex Maganga v The Director Msimbazi Centre,** Civil Application No. 81 of 2001, it stated that:

> *"Apart from the fact that a copy of the decision was not filed along with the notice of motion, the order of the High Court was also not filed. What was filed was a copy of*

the proceedings in the High Court during the hearing of the application for leave. It was in those proceedings that it was ordered that the application be dismissed for being incompetent. A copy of the proceedings does not satisfy the requirement of Rule 46(3) of the Court Rules as amended by GN No. 157 of 1984. ***The words order of the High Court in the sub-rule mean an extracted order of the High Court which was not filed.*** *It is apparent therefore, that the applicant did not comply with Rule 46(3) at all and the application before would be incompetent."*

When commenting on the case of **Grace Fredrick Mwakapila** (supra) and the decision in the case of **Alex Maganga** (supra) the Court of Appeal went on that:

"In this matter, like in the above authority of this court, what was not filed along with the application, was the order of the High Court, a drawn order, so to speak. In the circumstances, we are not hesitant to hold, as we hereby do, that an essential document required by Rule 49(3) of the Rules to accompany an application for leave before the court, was not attached with the application in which case it is incompetent."

In the present appeal it is undisputed that, the copy of the Ruling was not accompanied with the copy of the Extract Order. Upon carefully scrutinize Order XXXIX Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019, it is clear that, the words of the provision in the above Order is

couched with the mandatory terms of the word **shall** in which under the interpretation of law, its compliance, is not optional as the intended function must be performed. (See the case of **Leornard Magesa v M/S Olam (T) Ltd,** Civil Application No. 117 of 2014.) Therefore, I differ with the learned counsel of the appellants, who submitted that the same can be cured by the principle of overriding objective.

I say so because the Court of Appeal in case of **Juma Busiya v Zonal Manager South Tanzania Postal Corporation,** Civil Appeal No. 273 of 2020 pointed out that:

> *"The principle of overriding objective cannot be applied blindly to save every failure to comply with the mandatory provision of law."*

In supporting his argument on the omission to attach the Extract Order to be cured with the overriding objective, the counsel for the appellants supported his argument with the case of **Mohamed Ali Mohamed** (supra). It is my considered view that, the said case is distinguishable with the circumstance in our case at hand because in the cited case, all the essential documents were filed and that is not the case in the circumstances at hand in which the Ruling was not accompanied by the extract order as required. In **Mohamed Ali Mohamed** case, the only anomaly was on the date of the certificate of delay and decree, which

bears different dates from the date in which the judgement was pronounced. That's why the Court of Appeal sustained the objection but, instead of striking it out, it allowed the party to go seek and obtain a valid certificate of delay and a proper extracted decree to the High Court which will tally with the dates on which the judgment was pronounced to the parties.

For the aforesaid reason, the first point of preliminary objection is hereby sustained.

On the second and third points of preliminary objection, the respondents challenged the action taken by the appellants to appeal against the ex-parte Ruling on the reason that, the same is not subject to appeal and that, the appellants were required firstly to set aside the ex-pate Ruling before lodging the present appeal. He concludes that, the appeal is incompetent. On his part, the respondent submitted that the appeal is competent as the appellant has opportunity to appeal against the ex-parte decision without attempting to set aside the ex-parte Ruling.

It is beyond doubt that the in first three grounds of appeal, the appellants challenge the ex-parte Ruling. This is also reflected on appellants' counsel submissions, who confidently submitted that they have appealed to challenge the ex-parte Ruling of the trial court. It is

therefore my considered view that, those three grounds of appeal can form an independent appeal from the fourth ground of appeal which also can form its own independent appeal, as the appeal challenges the ex-parte decision and the merit of the Ruling respectively.

Before I resolve the merit of the preliminary points of objection raised by the respondents, it is better to appreciate the settled position of the law that, the ex-parte decree may be set aside upon the party showing good reasons that prevented him from appearing when the suit was scheduled for hearing, this is provided for Order 9 Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019.

In the event the court which passed an order for the matter to proceed ex-parte refuses to set aside its order, the affected party can appeal under Order XL Rule 1(d) of the Civil Procedure Code, Cap 33 R.E 2019. There are vast decisions on this area, which includes the case of **Yara Tz Ltd vs Dr. Shariprya & Co ltd,** Civil Appeal No. 245 of 2018, CAT at Dar es Salaam, **Ramadhani Kasase vs Tabu Ramadhani,** Misc. Land Appeal No. 31 of 2019, HC at Mwanza and **Mwita Chacha v Abdallah Rashid Mtumbo,** Misc. Land Application No. 04 of 2019 HC Land Division at Dar es Salaam.

On the other hand of the coin, an ex-parte judgement is appealable on merit under section 70(2) of the Civil Procedure Code, Cap 33 R.E 2019, in which a party is not required firstly to set aside the ex-parte decree. The section provides that:

> *"An appeal may lie from an original decree passed ex-parte".*

The above section does not impose any condition before appealing against an ex-parte judgement. The section gives a party an automatic right of appeal against the original decree. In other words, the appellant may invoke section 70(2) to appeal against exparte decree on merit only and he is not expected to challenge on the issue of denied right to be heard.

When commenting on the provision of section 70(2) of the Civil Procedure Code, Cap 33 R.E 2019, Hon. Maige, J (as he then was) in the case of **Registered Trustees of Pentecost Church in Tanzania vs Magreth Mukama (A minor by Her Next friend, EDWARD MUKAMA,** Civil Appeal No. 45 of 2015, HC at Mwanza stated that:

> *"In my opinion therefore, since the provision of section 70(2) of the CPC clearly and unambiguously provides for an automatic right of appeal against an ex-parte judgement, it is not for the court to, by way of interpretation, cut down*

its scope by speculating that the legislature intended to impose such a precondition. I have therefore no doubt from the foregoing authorities; that a right to appeal against an exparte decree on its merit is automatic and does not depend upon there being a prior attempt to have it set aside.

If, however, contrary to the opinion I have articulated, an appeal against an ex-parte judgement was conditional upon the appellant exhausting all the available remedies, an appeal against an ex-parte judgement would not arise until the appellant had exhausted the available remedies, namely appealing against an order refusing to set aside the ex-parte judgement in terms of Order XL rule 1 (d) of the CPC in the event of failure, a second appeal to the Court of Appeal."

The same is also the position of the Court of Appeal in the case of **Dangote Industries Ltd Tanzania** (supra) when interpreting the decision of **Jaffari Sanya & Another vs Saleh Sadiq Osman,** Civil Appeal No. 54 of 1997, CAT at Zanzibar pointed out that:

"It would appear to us to be the principle in the said authorities that, where the defendant intends to challenge both the order to proceed ex-parte and the merit of the findings in the ex-parte judgment, he cannot challenge the merit of the findings before dealing with an application to set aside exparte judgement first. This principle is based on the long-standing rule of procedure that, one cannot go for

appeal or other actions to a higher court if there are remedies at the lower court."

As it was rightly submitted by the counsel of the respondents, which I joined hands, if the appellants wants to challenge the ex-parte Ruling, the remedy was to set it aside at the trial court and if the appellants would have wished to challenge the merit of the findings of the trial court, the appellants would have appealed to this court as it is provided for under section 70(2) of the Civil Procedure Code, Cap 33 R.E 2019, which was well elaborated by the Court of Appeal in the case of **Dangote Industries Ltd Tanzania** (supra) as I have pointed out above.

In our case at hand, the appellants who were the plaintiffs did not enter appearance when the matter was scheduled for hearing of the preliminary points of objection. The law is very clear as it is provided under Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019, that as they wanted to challenge the ex-parte decision, they needed first to set it aside. Therefore, this objection is sustained too.

Based upon the above discussion, it is my considered view that, the act of the appellants to prefer appeal to complain on the ex-parte order and the merit of appeal is the abuse of court processes as the remedy was either to set aside first the ex-parte decision or to appeal against the merit of the ex-parte Ruling.

Consequently, I find the appeal is incompetent and it is accordingly struck out.

Costs to follow event.

It is so ordered.

M.MNYUKWA
JUDGE
28/09/2022

The right of appeal explained to the parties.

M.MNYUKWA
JUDGE
28/09/2022

Court: Ruling delivered in the presence of the counsel of both parties.

M.MNYUKWA
JUDGE
28/09/2022