

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 23 OF 2021

(C/F Civil Case No. 4 of 2020 in the Resident Magistrate Court of Arusha)

T.G. WORLD INTERNATIONAL LTD APPELLANT

Versus

CARRIER OPTIONS AFRICA (TANZANIA) LTD RESPONDENT

RULING

15/2/2022 & 4/4/2022

ROBERT, J:-

The appellant herein having been aggrieved by the decision of the Resident Magistrates' Court of Arusha in Civil Case No. 4 of 2020 preferred this appeal against the decision of the trial Court. In response, the respondent filed his reply to the appeal and raised a preliminary objection against the appeal on a point of law to the effect that:-

- (1) The Appellant's appeal is hopeless for being brought under wrong legal title and not be (sic) accompanied by a copy of the decree appealed from contrary to Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap. 33 (R.E.2019).

As a matter of practice, the Court invited parties to address it on the point of preliminary objection raised by the respondent before proceeding with the appeal in case the objection raised is not sustained. At the request of parties who appeared in person without representation, hearing proceeded by way of written submissions whereby the respondent's submissions were drawn and filed by Zuberi M. Mgawa, learned counsel from Mughwai & Co Advocates whereas the Appellant's submissions were drawn and filed by Ms. Saad, Advocate from BNS Attorneys.

Highlighting on the point of objection, the respondent submitted that, the present appeal is incompetent as it was preferred in the form of a "petition of appeal" instead of a "memorandum of appeal" as required by the law. Further to that, the appeal was not accompanied by a copy of the decree appealed against.

He maintained that, this appeal is governed by Order XXXIX of the Civil Procedure Code, Cap. 33 (R.E.2019) as it originated from a civil suit filed at the Resident Magistrates' Court of Arusha. He argued that Rule 1(1) of the cited Order requires every appeal to be preferred in the form of a memorandum signed by the appellant or his advocate and the memorandum shall be accompanied by a copy of the decree appealed from

and, unless the Court dispenses therewith, of the judgment on which it is founded.

He maintained further that, having perused the Court file he noted that the appellant did not attach the copy of the decree appealed against contrary to the requirement of the cited provision. To support his argument, he cited the cases of **Goodluck Kysnd vs Republic (2006)TLR 363; Edward Otesoi vs Maingwa Mario, Misc. Land Appeal No. 36 of 2019 and Amidu Damian Likiliwike vs. Steven Temba, Land Appeal No. 03 of 2020.**

He prayed for appeal to be struck out with costs for being legally incompetent.

In response, counsel for the appellant submitted that, the words “petition of appeal or “memorandum of appeal” are one and the same and the use of the words in distinctive of the other does not render the appeal incompetent. He cited the case of **Mary Mwambene versus Benson Mwashambwa, Land Appeal No. 42 of 2016** in support of his argument.

He maintained that, Order XXXIX Rule 3(1) of the Civil Procedure Code, Cap. 33 (R.E. 2019) provides that when a memorandum of appeal is not drawn in the manner prescribed the Court has two options either to reject or order amendment of the memorandum. Thus, he argued that the preliminary objection raised by the respondent holds no water and does not render the appeal incompetent.

He cited the case of Alliance One Tobacco Tanzania Limited and another versus Mwajuma Hamis Misc. Application No. 803 of 2018 (unreported) where the Court held that Courts should uphold the overriding objective principle and disregard minor irregularities and unnecessary technicalities in order to achieve substantive justice.

He argued further that, the faulted title of the appeal does not touch on the content of the appeal hence, if given an opportunity to amend the document, the contents of the appeal will remain the same. However, if the Court opts to strike out the appeal the appellant will have to refile again the appeal which will delay the matter and waste the Court's time.

With regards to the lack of copy of decree attached to the appeal, he maintained further that there is no any reason for the appeal to be struck

out because there is a room for an amendment and the orders in the decree are clearly provided for in a copy of judgment attached in the petition of appeal. To support his argument, he cited the case of **Frank Kibanga versus ACU Limited, Civil Appeal No. 24 of 2003 (unreported)**.

Submitting further, he maintained that the preliminary objection raised by counsel for the respondent lacks merit and goes against Article 107A (2) (e) of the United Republic of Tanzania Constitution, 1977 as amended from time to time which requires the Court to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice.

Based on the submissions made he prayed for the preliminary point of objection to be overruled for lack of merit.

In rejoinder submissions counsel for the respondent argued that, there is no gain saying that there is no difference between the "memorandum of appeal" and the "petition of appeal" because the law itself made that distinction as it did in respect of procedure of filing an appeal originating from the District Court in its appellate or revisional jurisdiction as opposed to an appeal from the District Court or resident

Magistrate exercising its original jurisdiction or in respect of the time limitation in lodging of appeals in the respective settings.

He argued that, while the case of Mwambene cited by the counsel for the appellant speaks on this matter, he urged the Court to use the decisions cited by the Respondent in his submissions in chief as they are the most recent than Mwambene's case to the issue in dispute as decided by the Court of Appeal in the case of **Zahara Kitindi & Another vs Juma Swalehe & 9 others, Civil Application No. 4/05/2017** (unreported).

On the advice that the Court should apply the principle of overriding objective because the irregularity on the title of the appeal is minor and does not touch on the content of the appeal, he argued that the Court of Appeal has decided in several cases that the overriding objective principle cannot be applied blindly even where there are clear rules of procedure couched in mandatory terms as decided in the case of **Amidu Damian Likiliwike** (supra) while citing the decision of the Court of Appeal in the case of **Mondorosi Village Council and 2 others vs Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017** (unreported).

With regards to the argument that the absence of the copy of the decree does not render the appeal incompetent he submitted that, attaching a copy of the decree is a legal requirement and the provision imposing this requirement is couched in mandatory terms.

He maintained that since the appeal was instituted contrary to the mandatory provisions of Order XXXIX Rule 1(1) it is legally incompetent and it should be struck out with costs.

From the submissions of both parties and the records of this appeal, it is not disputed that the appeal was lodged in the form of "petition of appeal" instead of "memorandum of appeal" and it was not accompanied with the copy of the decree appealed from as required under Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap. 33 (R.E. 2019). The central question for determination is whether lodging the appeal in the form of a petition of appeal instead of the memorandum of appeal and failure to attach a copy of the decree appealed against renders the appeal incompetent.

It is obvious that the appellant's failure to prefer the appeal in the form of a memorandum and to attach the decree appealed from means he did

not comply with the requirements of Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap. 33 (R.E. 2019). This Court is of the view that, the requirements in the cited provision are made in mandatory terms for the purpose of establishing orderly procedures for the conduct of appeals filed at the Court and promoting efficient determination of appeals. Thus, this provision needs to be interpreted and applied knowing it is couched in mandatory terms and with above purpose in view. In the circumstances, the appellant's failure to comply with the mentioned requirements renders the appeal incompetent.

This Court finds that the overriding objective principle invoked by the appellant is not intended to disregard the rules of procedure made in mandatory terms (see **Njake Enterprises Ltd vs BLUEROCK LTD & ANOTHER, Civil Appeal No. 69 of 2017** (unreported)).

On the basis of the foregoing, I find the point of objection raised by the respondent to have merit. As a consequence, I proceed to struck out this appeal with costs.

It is so ordered.

K.N. Robert



K.N. ROBERT
JUDGE
4/4/2022