

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. LAND APPLICATION NO. 56 OF 2022

(Arising from Consolidated Civil Appeals No. 24 and 22 of 2021 at High Court of Tanzania at Musoma)

ABAA RAMOGI 1ST APPLICANT

ABAA LUKA 2ND APPLICANT

VERUS

ELIAKIM OWINORESPONDENT

RULING

3rd & 7th August, 2023

M. L. KOMBA, J.:

This is a ruling in respect of a Preliminary Objection (PO) raised by the counsel for respondent in regard to the application by the applicant to appeal to the Court of Appeal of Tanzania (the Court) so that this court can struck out the application. The application is filed under Section 5(1) (c) of Appellate Jurisdiction Act, Cap 141 R. E. 2019 (Cap 141). Upon filling of the same, counsel for respondent raised a preliminary objection and prayed it to be heard on the date scheduled for hearing of Application that;

'This honorable court be pleased to order that a notice of appeal by the applicants lodged on 21/09/2022 against the decision of the High Court in Consolidated Appeal No 24 and 22 of 2021 delivered on 25/08/2022 be struck out.'

As a custom, PO has to be determined first. See **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal No. 86 of 2018, CAT at Mwanza. When the date fixed for hearing was scheduled, parties agree the PO to be disposed of by way of written submissions. Mr. Wambura Kisika the Learned Advocate presented the written submissions for the respondent in support of the objection whereas on behalf of the applicants, Mr. Ostack Mligo also the learned Advocates filed reply in opposing the Objection. Both parties adhered to the filing schedule as directed.

In his submission, Mr. Kisika submitted that the application for leave to appeal to the Court of Appeal was filed on 21/09/2022 as required by law but it does not indicate under which law the Notice of Appeal was made. To him, the notice of appeal is made under rule 83(1) of the Tanzania Court of Appeal Rules GN 344 of 2019 (GN 344 of 2019) and applicant did not serve him or rather the respondent the copy of notice as it is a mandatory requirement that once a notice of appeal is filed, it should be served to

those who are likely to be affected by the notice within fourteen days after the date of filing the notice of appeal. He acknowledged to be served with application for leave and notice on 24 February, 2023 which is 5 months later contrary to rule 84(1) which requires the same to be served within 14 days. He referred this court to the case of **Hamis Paschal vs. Sisi Kwa Sisi Panel Beating And Enterprises Ltd**, Civil Appeal No. 165/2018 (CA) MWANZA at pages 9,11, 12 and 13 the court of Appeal was faced with a situation where the applicant did not serve the notice of appeal to the respondent, the court observed that compliance of rule 84 is mandatory.

On the other side, Mr. Mligo was of the position that, Notice of Appeal is not a legal requirement when an aggrieved party files an application for leave to appeal to Court of Appeal of Tanzania. It was his submission that the issue of notice of appeal is a legal requirement when lodging appeal to court of Appeal of Tanzania. For that matter, challenging notice of appeal at this level of seeking leave in order to appeal to the Court is totally improper. He further submitted that the applicant complied with the requirement of the law, as stated by rule 45 and 49 of GN 344 of 2019 whereby, Notice of Appeal is not among the documents required by the law to be attached in application for leave, he said only copy of the decision

appealed from needed to be attached.

Mr. Mligo distinguishes the case of **Hamis Paschal vs. Sisi kwa Sisi Panel Beating and Enterprises Ltd, (supra)** as cited by the counsel for respondent. He said that case was determined by the Court after applicant has been given leave by High Court of Tanzania, upon filing appeal to the Court of Appeal the appellant failed to serve notice of appeal to respondent, circumstance is different from the case at hand. He prayed this court to dismiss the PO with costs.

In rejoinder, counsel for the respondent. Mr. Kisika insisted that Notice of Appeal is filed only once by a person intending to appeal under rule 83 (1) which is mandatory that an aggrieved party cannot seek leave to appeal to the court of appeal without first filing a notice of appeal. He said it is a notice of appeal that initiates the appeal process to the Court. He further submitted that leave to appeal is granted upon there being a Notice of Appeal. Mr. Kisika refers this court to the case of **David Malili vs. Mwajuma Ramadhani, Civil Appeal No. 119 of 2016, (CAT)** at Dar es Salaam at page at pages 5 and 7 the court held that: -

'We draw the inference that the notice of appeal must be filed first for other processes to institute the appeal to be undertaken from our

reading of rule 83 and 90 of the Tanzania Court of Appeal Rules, 2009 (the rules).'

He said application seeking leave of the High Court cannot commence without a Notice being filed and served to the other party as the purpose of notice is to make the respondent aware that an appeal is being preferred hence be able to marshal his arsenals properly as observed by the court in of **David Malili vs. Mwajuma Ramadhani** (supra). He maintained that the current application is incompetent as they were not served within 14 days as law requires.

I have carefully made a close follow up of submission by parties, my task is to decide whether PO has merit. First of all, I wish to reproduce Section 5 (1) (c) of Cap 141 which is used by the applicant to move this court.

5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(a).....

(b).....

(c) With the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.

The section used by the applicant to file this application does not mention which documents has to accompany the application but it directs clearly that appeal of the nature of the case which applicants intends to appeal shall lie to the Court of Appeal. In his submission the counsel for the applicants referred rule 46 and 49 of GN 344 of 2019 on how the leave will be made, that is informally or by chamber summons as to the practice of this court. And when application for the leave is filed to this court an order of the High court must accompany application.

Respondent relied on rule 83 of the GN 344 of 2019 that it is a notice of appeal that initiates the appeal process to the Court of Appeal. I agree with that position, however, before this court is application for the leave to appeal and not an appeal and on top of that Rules as cited by the counsel for the respondent are for the Court of Appeal and not for this court.

I refrain from dwelling much on the cited GN 344 of 2019 as Cap 141 is clear on procedure. Leave is filed to this court and notice is filed to this court so as to initiate the appeal if all go well and not otherwise. While noting the position on all cited cases, I find the issue of when the notice was served to the other party will be determined by the Court of Appeal which has jurisdiction over the rules. Before this court is application for

leave to appeal and not an appeal.

All being said and done, I find preliminary objection has no merit and is hereby overruled with costs.

It is so ordered.



Nek

M. L. KOMBA

Judge

07 August, 2023