IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 112 OF 2004

FAZAL & COMPANY LIMITED ..... APPLICANT
VERSUS
BARCLAYS BANK TANZANIA LIMITED ..... RESPONDENT

(Application for Leave to appeal to the Court of Appeal of Tanzania at Dar es Salaam)

(Mihayo, J.)

dated the 26th day of February, 2004
in
Civil Case No. 217 of 2004

R U L I N G

6 & 13 July 2006

MSOFFE, J.A.:

At the hearing of the application Mr. Kesaria, learned advocate for the respondent, canvassed a preliminary objection, so to speak, which is borne out by the contents of the averments under paragraph 9 of the affidavit in reply sworn by Mr. Dilip Kesaria and lodged on 28/6/2006. The paragraph reads:-

> 9. The Decree exhibited to Mr. Fazal's affidavit is defective because it has been signed by the District Registrar and not the Judge. This defect was brought to the Applicant's counsel, Mr. Martin Matunda's attention in June last year during the hearing of a

> separate Application for extension of time (Civil Application No. 118 of 2004) made by this Applicant against the Respondent. That Application was struck out because of the defective Decree. Over one year has since elapsed and surprisingly no steps have been taken by the Applicant or its counsel to remedy this defect and the present Application continues with the Defective Decree.

Mr. Martin Matunda, who is also advocating for the applicant in this matter, swore and filed a supplementary affidavit on the point raised under paragraph 9 above. In the supplementary affidavit Mr. Matunda is essentially saying that once Civil Application No. 118/2004 was struck out he applied for a copy of a properly signed decree but he is yet to be supplied with one todate. In his oral submission at the hearing of the application he prayed that he be given opportunity to refile the application if this application is to be struck out eventually.

It is common ground that no properly signed decree was drawn and annexed to the application. In a sense, the failure to do so offended part of the provisions of rule 46 (3) requiring that a copy of the High Court decision be annexed

to an application of this nature.

Having said so, the issue is whether the application should be struck out and end up there, or whether it should be struck out with liberty to refile. As earlier stated, Mr. Matunda's stance on the point is that in the event the application is struck out the applicant be given leave to reinstitute it after obtaining a properly signed decree. In maintaining this view he is of the opinion that the applicant is not to blame in that the High Court is yet to give the said applicant the copy of a properly signed decree. On the other hand Mr. Kesaria is of the view that the applicant should not be given the opportunity to refile because there was a serious inaction on the part of the said applicant. In his opinion, the decision in Civil Application No. 118/2004 was given over a year ago. Yet, no follow up has been made by the applicant to secure a copy of the decree.

In my view, a decision in this matter poses no difficulty. The parties are agreed, and I have no strong reasons for disagreeing with them, that there is no valid decree annexed to the application. Their only point of departure lies on one major point: Whether or not the application should be struck out with liberty to refile. In my considered view, in the circumstances of this matter, it will not serve any useful purpose if I make a finding on the point. If I do so, there is a danger that I might end up prejudicing a future application (if any) for enlargement of time to file an application for leave

to appeal. At the moment, I would rather leave the point to the applicant to decide whether or not to take any steps towards instituting a fresh application for leave to appeal once this one is struck out.

Consequently, the application is struck out with costs.

DATED at DAR ES SALAAM this 13th day of July, 2006.

J.H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)
DEPUTY REGISTRAR