IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., MNZAVAS, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 43 OF 1996

BETWEEN

DR. FORTUNATUS LWANYANTIKA MASHA ..... APPELLANT

AND

1. DR. WILLIAM SHIJA ..... 1ST RESPONDENT
2. THE HON. ATTORNEY-GENERAL ..... 2ND RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Mwanza

(Chipeta, J.)

Dated 18th April, 1996

in

Misc. Civil Cause No. 15 of 1995

RULING OF THE COURT

KISANGA, J.A.:

There is before us an appeal against the ruling of the High Court (Chipeta, J.) on a matter pertaining to an election petition. When the appeal was called on for hearing Mr. Mwale, learned counsel for the first respondent, took a preliminary objection in terms of rule 100 of the Court of Appeal Rules.

The objection was based on three grounds. The first ground in effect alleges that the notice of appeal does not comply with the requirements of rule 76 (3) of the Court of Appeal Rules and the format made under that rule as set out in Form D of the First Schedule to the Court of Appeal Rules. The relevant portion of rule 76 (3) provides that:-

> "(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision ..."

The appellant's notice of appeal had simply stated that the intended appeal was against the particular ruling of the High Court. Mr. Mwale vigorously contended that failure to state whether the appeal was against the whole or part only of that ruling was necessarily fatal; and in this connection he drew our attention to the use, in the provision, of the word "shall" which, according to him, made the requirement mandatory.

The appellant is represented by Mr. B. Makani and Mr. Mutaitina, learned advocates. In response to Mr. Mwale's contention, Mr. Makani in effect conceded that there was no strict compliance with the provisions of rule 76 (3) but submitted that such non-compliance was not fatal.

We entirely agree with Mr. Makani's submission. We think that the use of the word "shall" does not in every case make the provision mandatory. Whether the use of that word has such effect will depend on the circumstances of each case. For our part we think that the word "shall" in rule 76 (3) does not have the effect of making that provision mandatory, nor do we think that Parliament can have intended so.

Failure by a party to state whether the intended appeal is against the whole or part only of the decision does not in any way prejudice the opposite side. Mr. Mwale argued that he might have been prejudiced or ill-effected by having to examine the whole ruling while the appeal was in fact against part only of the ruling, in which case he wasted or might have wasted his valuable time and energy doing unnecessary work. With due respect to counsel, however, we find not much force in this argument. Our understanding is that Mr. Mwale started preparing for the appeal seriously only after

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receiving the record of appeal including the memorandum of appeal. Upon studying the grounds of appeal he was then able to know the extent of the appeal, in which case if he found that the appeal was against part only of the ruling he would limit himself accordingly and there was no need to prepare himself in respect of the whole ruling. For these reasons we think that the failure to comply strictly with the provisions of rule 76 (3) was not fatal, and if this was the only ground of objection to the appeal we would not sustain the objection, although of course we stress the importance of complying with the Rules. That ground, therefore fails.

Objection was also taken that the record of appeal did not contain the certificate of the Registrar as to the exact time that was necessary for the preparation and delivery of the record to the appellant. Again there is little substance in this ground and, indeed, Mr. Mwale argued it only half heartedly. For, the record at page 82 contains a certificate duly issued by the District Registrar and showing, inter alia, that on 2.5.96 he received from the appellant's counsel a request for the supply to him of the record of proceedings which was duly supplied on 6.9.96, and that the period up to this latter date should be excluded in computing the time within which to lodge the appeal. We could find nothing wrong with that. The purpose of the Registrar's certificate is to ensure that an appellant lodges the record of appeal within 60 days of filing his notice of appeal or within 60 days of the supply to him of the record of proceedings. The record of appeal was lodged in court on 4.11.96. This was within 60 days from 6.9.96 which, according to the District Registrar, was the date the period of limitation started to run against the appellant. Therefore, this ground of objection also fails.

The third and last ground of objection was that the appeal is incompetent because the record of appeal does not contain the drawn or extracted order in appeal, and in support of this ground Mr. Mwale cited numerous authorities of this Court and of its predecessor, the Court of Appeal for East Africa.

In response to this submission Mr. Makani concede the non-compliance with rule 89 (1)(h) of the Court of Appeal Rules which requires the record of appeal to include the extracted order but strenuously contended that this did not render the appeal incompetent. In his view such non-compliance was merely a procedural or administrative irregularity which renders the appeal incomplete and which could be rectified by making an appropriate order for the filing of a supplementary record.

The law as it now stands is that failure to extract the decree or order in terms of rule 89 (1)(h) and (2)(v) of the Court of Appeal Rules renders the appeal incompetent, see for instance The Commissioner of Transport v. The Attorney-General of Uganda and Another (1959) E.A. 329 and Juma Mtale v. K.G. Karmali Civ. Appeal No. 11 of 1993 (unreported). The finding that an appeal is incompetent has constantly resulted in striking out such appeal, see for instance The National Bank of Commerce v. Methusela Magongo Civ. Appeal No. 30 of 1994 (unreported). There is no room for Mr. Makani's view that non-extraction of the decree or order is a mere procedural or administrative irregularity. In Arusha International Conference Centre v. Damas Augustine Ndemasi Kavishe Civ. Appeal No. 34 of 1988 (unreported) it was held that such non-compliance was fundamental and went to the root of the matter. Likewise Mr. Makani's effort to urge us to grant an order to lodge a supplementary record of appeal or to invoke rule 3

and direct a departure from the Rules cannot bear any fruit. This Court adequately considered such submissions in the Arusha International Conference Centre case cited above and found them untenable.

Mr. Makani cited the recent decision of this Court in the case of Leonsi Silayo Ngalai v. Justine A. Salakana and Another Civ. Appeal No. 38 of 1996. There the Court had occasion to say this:-

> "We need however to point out for future guidance, that insufficiency or incompleteness of the record of appeal is not a ground for incompetency of an appeal, because such a defect is rectifiable by an appellant at any stage of the proceedings as provided under sub-rule 3 of rule 92 of the Tanzania Court of Appeal Rules, 1979 ..."

Counsel took the view that consistent with this decision non-extraction of the decree or order only constituted an insufficiency or incompleteness which did not make the appeal incompetent.

With great respect, however, we do not agree. First, it is not apparent from the judgment cited what kind of insufficiency or incompleteness the Court was considering or was having in mind because the allegation of insufficiency or incompleteness had been withdrawn by the party raising it before the Court heard arguments on it. However, we are of the view that where by reason of non-extraction of the decree or order, as in this case, the appeal is rendered incompetent, the issue of insufficiency or incompleteness does not really arise. The position that arises is simply one of non-existence of the appeal. Because insufficiency or incompleteness connotes something which is in existence and which can be improved upon, say by adding to it. But an incompetent appeal is one which in law did not come into existence although efforts were made to try to

bring it into existence. In such circumstances, therefore, one cannot properly talk of there being an insufficient or incomplete appeal which one can improve upon by filing a supplementary record, because in law no appeal came into existence in the first instance; there was only a purported appeal, if you wish.

Mr. Makani also relied on rule 27 (1) of the Elections (Election Petitions) Rules, 1971 in his valiant attempt to urge us to overrule the objection. That sub-rule says that:-

> 27. - (1) Save as is expressly provided to the contrary in these Rules, no petition shall be dismissed for the reason only of non-compliance with any of the provisions of those Rules, or for the reason only of any other procedural irregularity unless the court is of the opinion that such non-compliance or irregularity has resulted or is likely to result into miscarriage of justice."

We have to state at once that the reference to this provision was obviously misconceived. The Elections Rules govern the conduct of election cases when they are before the High Court. The clear demonstration of this is the fact the word "court" which is used in the sub-rule is defined in rule 2 to mean the High Court. The preliminary objection before us is based not on any provision of the Elections Rules but on the provisions of the Court of Appeal Rules. The conduct of the present proceeding before us, therefore cannot be governed by the Elections Rules.

Of course the Elections Rules would have been relevant if we were dealing with a matter which had been before the High Court. In

that the High Court would have done. But the matter before us i.e. the preliminary objection is a matter which was not, and could not have been before the High Court. In the circumstances, therefore, there could be no room at all for our invoking the Elections Rules in dealing with the preliminary objection.

Mr. Malaba, learned Senior State Attorney appearing for Republic, the Second Respondent, rightly supported the objection.

In the result, and for the reasons set out above, the preliminary objection is sustained. The appeal is incompetent for non-extraction of the order in appeal in terms of rule 89 (1)(h) of the Court of Appeal Rules, and it is accordingly struck out with costs. It is now open to the appellant, if he so wishes, to institute the appeal afresh by making the appropriate application before the High Court.

DATED at DAR ES SALAAM this 10th day of January, 1997.

R. H. KISANGA
JUSTICE OF APPEAL

N. S. MNZAVAS
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

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

B. M. LUANDA
SENIOR DEPUTY REGISTRAR