IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LUBUVA, J.A., RUTAKANGWA, J.A., And KIMARO, J.A.)

CIVIL APPEAL NO. 129 OF 2002

1. PAUL A. KWEKA
2. HILLARY P. KWEKA ..... APPELLANTS

VERSUS

NGORIKA BUS SERVICES AND
TRANSPORT COMPANY LIMITED ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mchome, J.)

dated the 10th day of May, 2002
in
Miscellaneous Civil Application No. 104 of 2001

ORDER OF THE COURT

11 September & 4 October 2006

RUTAKANGWA, J.A.:

This is an appeal against the ruling and order of the High Court at Moshi (Mchome, J.) in Miscellaneous Civil Application No. 104 of 2001. The background giving rise to the appeal will shortly be apparent. Suffice it to say that the appellants instituted a suit against the respondent company and two others (The National Insurance Corporation or the N.I.C. and John Hosea) in the High Court at Moshi. The respondent company failed to file the written

statement of defence (w.s.d) and so the High Court entered an *ex parte* judgement against it under Order VIII, rule 14 of the Civil Procedure Code 1966 (hereinafter the C.P.C.). That was on 14th December 2000.

Subsequent to obtaining the *ex parte* judgement in their favour, the appellants withdrew the suit as against the NIC and John Hosea. However on becoming aware of the *ex parte* judgement against it the respondent, on 5th October 2001, through Prof. Msanga, learned advocate, filed Miscellaneous Civil Application No. 104 of 2001, under Order IX, rule 13 of the C.P.C., seeking an order to set aside the *ex parte* judgement.. The said application was vigorously resisted by the two appellants who were represented by Mr. Jonathan, learned advocate from M/s Shayo, Jonathan and Company, Advocates. The said application was heard and conclusively determined on 5th May, 2002 when the High Court (Mchome, J.) delivered the ruling. In the said ruling the learned judge granted the order sought. The *ex parte* judgement was accordingly set aside and the respondent ordered to file its w.s.d. within twenty one days from the date of the ruling.

The appellants were dissatisfied with the said ruling and order of the High Court and desired to appeal against it. To execute their desire to appeal the appellants duly filed, Miscellaneous Civil Application No. 52 of 2002 in the High Court at Moshi. They were applying for leave to appeal in terms of section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. The application was heard *ex parte* and leave to appeal was granted by the High Court. The applicants were dissatisfied hence this appeal before us.

The memorandum of appeal filed by M/s Shayo, Jonathan and Company, Advocates, contains six (6) grounds of appeal. When this appeal was called on for hearing Mr. Jonathan decided to argue the appeal on the following two grounds of complaint namely:-

(a) that the learned High Court judge acted without jurisdiction in entertaining and determining the application in as much as the same was barred by limitation, and

(b) that the learned judge erred in finding that the respondent had shown good

cause for not entering appearance and
for not filing a w.s.d.

Mr. Jonathan zealously addressed us at length on why he believed that the learned High Court judge erred in granting the order appealed against while it was patently obvious that the application was time barred and the respondent had failed to show good cause for his failure to enter appearance. He accordingly urged us to allow this appeal in its totality by quashing and setting aside the High Court order and substituting therefor an order dismissing the application with costs.

With enthusiasm, Prof. Msanga, counsel for the respondent resisted the appeal. According to him, the respondent not only gave a satisfactory account for its failure to enter appearance and/or to file a w.s.d. but it also filed the impugned application within fourteen days as ordered by the High Court judge following the withdrawal, with leave, in Miscellaneous Civil Application No. 1 of 2001. This latter application was one for review of the *ex parte* judgement. Professor Msanga rested the matter there

In the course of hearing the appeal it transpired that there were two serious legal issues which were not adverted to by both counsel in their respective submissions. These issues relate to, **first,** the fact that the record of appeal does not contain a copy of the order of the High Court granting leave to appeal which was signed by the judge. This is a mandatory requirement under rule 89 (1) (i) of the Rules of the Court, 1979. **Secondly**, there is the issue of jurisdiction, in the sense whether the order of the High Court appealed from is appealable. We gave counsel for both parties full opportunity to address us on these two issues. They did commendably well and their contributions have been of invaluable assistance to us.

It was Mr. Jonathan's strong submission that going by the clear provisions of the Appellate Jurisdiction Act, 1979, (hereinafter the Act), the C.P.C. does not apply to proceedings before the Court. This point was not disputed by Professor Msanga in his submission. Mr. Jonathan specifically directed his mind to section 5 (1) of the Act, which sets out the types of decrees and/or orders of the High Court which are appealable to this Court. He specifically drew our attention

to section 5 (1) (c) of the Act which, he gallantly submitted, governs this appeal. For ease of reference we shall reproduce that provision of the Act here. It reads as follows:-

> "5 – (1) In all 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 leave of the High Court or of the Court of Appeal, against every other decree, order, judgement, decision or finding of the High Court" (emphasis is ours).

According to Mr. Jonathan an order setting aside an *ex parte* decree falls under the category of "other order" not covered by sub-section (1) (b) of the Act; and as leave to appeal was sought and granted, the appeal is competently before the Court.

We invited Mr. Jonathan to address his mind to Order XLII, rule 7 which bars appeals from orders rejecting applications for review with a view of finding out if there is any similarity between it and Order XL, rule 1 (d) which also bars appeals from orders setting aside *ex parte* decrees under Order IX, rule 13. We did so advisedly because this Court at times invoked its revisional powers to entertain applications for revision where the High Court had rejected an application for review. This is done because an aggrieved party has no right of appeal under the said rule 7 (1) of Order XLII of the C.P.C. Mr. Jonathan simply stated that he saw no similarity between the two. He only reiterated his position that where an application to set aside an *ex parte* decree is either granted or refused, an aggrieved party may appeal to the Court provided leave to appeal is obtained.

We also invited Mr. Jonathan to tell us what he made out of the provisions in section 5 (1) (b) (ix) of the Act, when read together with section 74 (1) (i) and Order XL, rule 1 and XLIII, rule 1 of the C.P.C. Mr. Jonathan readily conceded, and we think correctly so, that Order XLIII rule 1 spells out the powers of the Registrar of the High

Court under the C.P.C., while Order XL, rule 1 spells out appealable orders under the C.P.C. It was his opinion therefore that there might have been a typing error in that the words "rule 1 of Order XLIII" were mistakenly substituted for the words "rule 1 of Order XL". All the same, he insisted that this appeal falls under section 5 (1) (c) of the Act and not section 5 (1) (b) of the Act.

Professor Msanga firmly maintained that an order of the High Court setting aside an *ex parte* decree under Order IX, rule 13 of the C.P.C. is not appealable in terms of Order XL, rule 1 (d). He sought to fortify his position by relying on commentaries by MULLA in his treatise entitled MULLA ON THE CODE OF CIVIL PROCEDURE ACT V OF 1908. Commenting on the provisions of Order IX rule 13 of the Indian Code which are almost identical with our rule 13 of Order IX and relying on decided cases in India, the learned author says:-

> "If, in a case open to appeal, an application under this rule is dismissed, an appeal lies from the order dismissing the application, whether the dismissal was on merits or for default (citing Order 43, rule 1 (d). <u>But where the application is granted no appeal lies from</u>

> the order granting the application. And this is so when the *ex parte* decree set aside is one passed by the High Court in the exercise of its original jurisdiction ..." (emphasis is ours) at page 1354 of Volume II 15th edition.

Professor Msanga further submitted that appeals to this Court are governed by procedures before the High Court. It was his contention that where the C.P.C. bars an appeal, as in Order XL, rule 1 in respect of an order under Order 9, rule 13, no appeal to this Court should be entertained. He urged the Court to seek inspiration from Order XLII, rule 7 where an appeal against an order of the High Court rejecting an application for review is barred and the Court has so held in the past paving way for the aggrieved party to move the Court to intervene by way of revision. According to him the two situations are indistinguishable. He accordingly urged us to hold that this appeal is incompetent and strike it out with costs.

Coming to the issue of the signing of the order extracted from the ruling giving leave to appeal both counsel were in agreement on only one basic fact. This is that such order ought to be signed by the judge who issued it or his/her successor in office, as is the case with

a decree issued under Order XX, rules 7 and 8 of the C.P.C. Thereafter they parted company with each other. According to Mr. Jonathan, if the order is not so signed this is an irregularity which can be rectified by an amendment under rule 104 of the Rules of the Court, 1979. Mr. Jonathan even went further to suggest that it is not even necessary for a copy of the formal order to be incorporated in the record of appeal if the record contains a copy of the ruling/order giving leave.

On his part, Professor Msanga urged us not to endorse Mr. Jonathan's position on the issue. To him non-signing of the formal order granting leave to appeal by a judge is fatal. He predicated his stance on the definition of the word "order" found in section 3 of the C.P.C. The word "order" is defined therein as "the formal expression of any decision of a civil court which is not a decree". According to Professor Msanga it is only the judge who can know exactly what was ordered in the decision giving leave to appeal. While conceding, quite rightly, that this was a novel situation, he invited us to deal with this issue in a similar manner as the court has been dealing with identical situations in relation to decrees. Regarding section 5 (1) (b)

of the Act, he insisted that there was a typing error as the proper order to be cited therein ought to have been Order XL, rule 1.

We shall first deal with the issue whether this appeal is competently before the Court. We have given due consideration to the submissions of both counsel on the issue. We hasten to say that we have found the submission of Professor Msanga on the issue to be very persuasive and we have decided to go along with him. It is our view that an order under Order IX, rule 13 of the C.P.C. is not appealable, as is the case in India. The reasons which led the legislature to bar an appeal against the order of the District Court and/or Resident Magistrates' Courts setting aside *ex parte* decrees should be applied indiscriminately to bar such appeals from orders issued by the High Court in identical situations.

The rationale for making the orders non-appealable is not hard to find. **Firstly**, it promotes an expeditious administration of justice, that is it ensures timely justice, at the same time making access to justice affordable, that is less costly. **Secondly,** and more importantly, it affords both parties in the case equal opportunity to be heard at the full trial. It would be recalled that the right to a full

hearing is one of the basic attributes of the right to equality before the law granted under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.

It should also be recalled that the right of appeal is a creation of a statute. There is therefore no automatic right of appeal to this Court. Whenever there is an appeal to this Court there is a law behind which gave the right to appeal. In this appeal, the appellants, as shown in Mr. Jonathan's submission, are relying on the Appellate Jurisdiction Act, 1979. This being a civil proceeding the controlling section is-section 6 (1) of the Act, which we have already partly reproduced above. This right of appeal granted by the Act is all the same restrictive in nature. In part, it provides that in civil proceedings before the High Court, an appeal shall lie to this Court "except where any other written law for the time being in force provides otherwise". It is our considered opinion that with respect to orders under Order IX, rule 13 of the C.P.C., the written law for the time being in force, is, the C.P.C. It is provided in Order XL, rule 1 (d) that an appeal shall lie only from an order under rule 13 of Order IX rejecting an application for an order to set aside a decree or

judgement passed *ex parte* (in a case open to appeal). That being the legal position, it will be accepted without further elaboration that this appeal is barred by the C.P.C. This is the law which provides otherwise in terms of section 5 (1) of the Act. Consequently, we are, with respect, in agreement with Professor Msanga in his submission that this appeal is incompetent. We are reinforced in this view by the learned author MULLA when he states:-

> ... an order under Order 9, rule 13 setting aside an *ex parte* decree is not an order that affects the merits of the case, such an order merely ensures a hearing upon the merits (MULLA, supra Vol. 1 P. 748).

We entirely agree with this sound approach. After all, that is what justice is all about.

In the event, we are satisfied that an order granting an application to set aside the *ex parte* judgement is not appealable. The appeal before us is, as urged by Professor Msanga, incompetent. It is accordingly struck out with costs.

Having taken this course of action, it therefore becomes unnecessary to deal any further with the issue relating to non-

inclusion of a properly signed order in terms of rule 89 (1) (i) of the Rules of the Court, 1979.

It is so ordered.

DATED at ARUSHA this 4th day of October, 2006.

D. Z. LUBUVA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR