IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A. MASSATI, J.A., And MANDIA, J.A.)

ZNZ CRIMINAL APPLICATION NO. 1 OF 2013

FARID HADI AHMED & 9 OTHERS ..... APPLICANTS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Application from the Ruling of the High Court of Zanzibar, at Zanzibar)

(Mwampashi, J.)

Dated the 11th day of March, 2013

In

Criminal Application No. 4 of 2013

RULING OF THE COURT

10th & 14th June, 2013

MSOFFE, J.A.:

It is common ground that the applicants are accused persons in Criminal Case No. 9 of 2012 of the High Court of Zanzibar. The case is still pending. On 25/10/2012 they appeared before Mr. George J. Kazi, Registrar of the High Court of Zanzibar. No plea was taken because, according to Mr. Kazi,

> *....they will take their plea when the matter is before a judge for the hearing.*

In the meantime, at the same sitting the applicants made an oral application for bail. Ms. Raya Mselem, learned State Attorney appearing on behalf of the respondent Director of Public Prosecutions, resisted the application urging that the Registrar had no jurisdiction to entertain the application. In her view, since the Registrar had no jurisdiction to record the applicants' plea it followed logically that he too had no jurisdiction to deal with the application for bail. After hearing the parties on the above point, Mr. Kazi composed and delivered a ruling on the same date in which he opined and held that he was clothed with the requisite jurisdiction by virtue of:-

> *...a practice of the court since 2004, and that was after the verbal directive of Hon. Chief Justice by the power conferred to him under section 13 of the High Court Act No. 2 of 1985 that all trials before the High Court, after been lodged should be brought before the Registrar or Deputy Registrar for the initial procedure...*

Having ruled so, he went on to determine the application on merit and dismissed it in the process. Undaunted, the applicants moved the High Court of Zanzibar by way of a chamber application seeking "review" of the Ruling of Mr. Kazi, RHC. The respondent raised and argued a preliminary objection to the effect that the court had not been properly

moved and also that the application was incurably defective. In a Ruling given on 11/3/2013 the High Court (Mwampashi, J.) agreed with both learned counsel appearing before him that the Registrar had no jurisdiction to determine the application for bail. Henceforth, he nullified the ruling by Mr. Kazi dated 25/10/2012 (*supra*). On the issue of bail, the learned judge reasoned as follows:-

> *....This Court is also of a view that since the oral bail application made by the applicants in person was not made to a properly constituted court and since the applicants are now legally represented they can now make a well and proper application to the court. The application for bail is therefore refused and the applicants are advised to file a proper fresh application*
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> .....

In his Ruling the learned judge also considered the preliminary objection and overruled it. Aggrieved, on 12/3/2013 the Director of Public Prosecutions filed a Notice of Appeal to this Court against that part of the Ruling which overruled the preliminary objection. At the same time, on 3/5/2013 the applicants filed this application in which the aforesaid notice of appeal is sought to be struck out on grounds set out in the affidavit of Abdalla Juma Mohamed in support of the notice of motion.

The application is apparently taken under Rule 4(2) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and Section 5(2) (d) of the Appellate Jurisdiction Act, (CAP 141 R.E. 2002).

In order to be able to make a meaningful decision in this matter it is apposite that we state a few aspects of the law as provided for in the Rules.

First and foremost, is the fact that under Rule 68(1) of the Rules a notice of appeal institutes a criminal appeal. In this sense, the notice of appeal filed on 12/3/2013 against the decision of Mwampashi, J. dated 11/3/2003 has already instituted on appeal in that context.

Secondly, once a notice of appeal is lodged then under Rule 71(1) of the Rules the Registrar of the High Court is mandated to prepare a record of appeal. Among the documents that have to be included in the record of appeal is a notice of appeal – See Rule 71(2) (j) of the Rules. Once the record of appeal is prepared and certified by the Registrar then it is served on the appellant. Once served, under Rule 72(1) of the Rules the appellant is required to lodge eight copies of the memorandum of appeal. In this regard, it is evident that a memorandum of appeal is not

one of the documents that have to be contained in a record of appeal as per Rule 71(2) or (4) of the Rules.

Thirdly, unlike criminal appeals, in civil appeals a notice of appeal filed under Rule 83 of the Rules does not initiate an appeal. On the contrary, in terms of Rule 96(1) or (2), as the case may be, of the Rules an appeal is only instituted once the record of appeal containing the stipulated documents is filed.

Fourthly, since under Rule 72(1) (*supra*) an appellant can only file a memorandum of appeal after service on him of the record of appeal it follows that a copy of the memorandum of appeal dated 15/4/2013 and attached to this application is idle and redundant. The said memorandum may only be relevant in the appeal which, as already stated, has already been lodged by virtue of the notice of appeal in question. Even then, it will only be relevant if the appellant Director of Public Prosecutions was served with the record of appeal within twenty one days before lodging the said memorandum of appeal. Therefore, since the order sought under paragraph (a) of the notice of motion is essentially referring to the said memorandum of appeal it is evident that the order sought for is inconsequential and irrelevant.

Finally, under the scheme of the Rules, in terms of Rule 89(2) only a respondent or other person on whom a notice of appeal has been served may apply to the Court to strike out a notice of appeal. There is no similar provision in criminal appeals.

At this juncture, the question is whether or not there is basis for us to accede to the invitation to strike out the notice of appeal filed on 12/3/2013. In other words, the issue is whether there is basis for us to strike out the appeal which has already been instituted by virtue of Rule 68(1) (*supra*).

After giving the matter the benefit of our careful thought and consideration, we are not inclined to accept the invitation extended to us in this application for the following reasons. **One**, even if we were to seek inspiration from Rule 89(2) it is clear that a notice of appeal may be struck out on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. In this case, no inspiration could be sought from Rule 89(2) in favour of the applicants because, as already observed, this being a criminal matter an appellant has no part in the preparation of a

record of appeal so as to be "condemned" for failure to take an essential step, etc. in the prosecution of an appeal.

Two, as stated above, the application is made under Rule 4(2) (a) of the Rules under which the Court may give directions as to the procedure to be followed in dealing with any matter for which no provision is made by the Rules. In this case, the above provision does not apply. We say so because, as we have attempted to show above, there is an elaborate procedure on the steps that have to be taken in processing criminal appeals, i.e. from the time the notice of appeal is filed thereby instituting the appeal, the preparation of the record of appeal, etc. to the time of service of the record on the appellant. In other words, once the above is done then an application to have the notice of appeal, which instituted the appeal for that matter, struck out could only be taken in that appeal and not by way of an application of this nature.

In the course of hearing, learned counsel also addressed us on the issue pertaining to whether or not Mr. Kazi, Registrar of the High Court of Zanzibar, was properly seized in law with jurisdiction to deal with the application for bail and the effect thereof on the decision of Mwampashi,

J. In the process, as already alluded to above, learned counsel were of the affirmative view that he had no jurisdiction to do so, as was also held by Mwampashi, J. In our considered opinion, although the issue raises a novel and important point of law it is not the serious issue of the moment. We hope the issue could be canvassed in the appeal. At any rate, at the hearing Ms. Elizabeth Mkwizu, Deputy Registrar of the Court of Appeal, told us that the record of appeal has since then been prepared and filed in the Court Registry. This means that only a date of hearing of the appeal is yet to be fixed. If so, it occurs to us that the point may hopefully be raised and determined in that appeal.

We also notice that in the notice of motion and also in his oral submission before us Mr. Abdalla Juma Abdalla, learned advocate for the applicants, it was contended that no appeal lies against the decision of Mwampashi, J. in view of the relevant provisions of Act No. 25 of 2002 which bars appeals from interlocutory matters. Yet again, we hope and believe that this too is a point which could be raised in the appeal and not in this application.

All in all, for reasons stated, this application is misconceived. We hereby strike it out.

DATED at DAR ES SALAAM this 11th day of June, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL