IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 38 OF 2011

SHABAN FUNDI ..... APPELLANT

VERSUS

LEONARD CLEMENT ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

Dated the 20th day of July, 2009
in
Civil Appeal No. 15 of 2017

RULING OF THE COURT

16th & 29th August, 2017

MWAMBEGELE, J.A.:

Against this appeal filed by Shaban Fundi, the respondent Leonard Clement, on 14.08.2017, lodged a Notice of Preliminary Objection pursuant to rule 107 of the Tanzania Court of Appeal Rules, 2009 (hereinafter "the Rules"). The Preliminary Objection comprises the following three points:

1. *The Appeal is incompetent for contravening Rule 96 (1) of the Tanzania Court of Appeal Rules, 2009 by non-inclusion of one Proceedings of the Primary Court in Madai No. 134/2003 (Pages 7 to 9 of the Records); two, Ruling and Drawn Order of Misc. Civil Application No. 127 of 2006 which was for Extension of time to appeal (page 36 of the Records); three no proceedings for un-numbered Application for leave to appeal (page 63 of the records);*
2. *The Appeal contravenes section 5 (1) and (2) (c) of the Appellate Jurisdiction Act, Cap. 141 RE. 2002 as there is no Application for Leave to Appeal against Judgment and Decree of 20th July, 2009; and*
3. *The Memorandum of Appeal is defective for contravening Rule 93 (3) and Form F of the Tanzania Court of Appeal Rules, 2009 where at the top stated that it is challenging a decision of High Court, Dar es Salaam District Registry while at the bottom asked this Court to*

set aside Judgment and Decree of High Court, Land Division, (page 4 of the Records).

As the law in this jurisdiction founded upon prudence dictates, we had to hear the preliminary objection before going into the hearing of the appeal on its merits. We heard the parties on the Preliminary Objection (henceforth "the PO") on 16.08.2017. At the hearing, the appellant and respondent were, respectively, represented by Messrs Daniel Ngudungi and Bernard Shirima, learned advocates. This is a ruling thereof.

Before we could allow Mr. Shirima for the respondent to front his arguments in support of the PO, Mr. Ngudungi rose to intimate to the Court that he was conceding to the first point of the PO. He thus had no qualm if the appeal would be struck out. However, he had two prayers to make on which, with leave, he quickly addressed the Court immediately after the concession. One, that, as he had readily conceded, the appeal should be struck out with no order as to costs and, two, as the proceedings and judgment intended to be

challenged are marred with illegalities, the Court should clothe itself with its revisional powers and accordingly revise them.

To the concession, Mr. Shirima had no objection. He was also of the view that the appeal should be struck out. As for costs, Mr. Shirima submitted, rather strenuously, that costs should follow the event. His view was predicated upon the fact that the respondent had expended time and money in preparation of the appeal as well as the PO. To him, given the circumstances, costs was the appellant's entitlement. Regarding the prayer for the Court to clothe itself with revisional powers, Mr. Shirima for the respondent strongly argued against the idea. He was of the view that once the appeal is struck out, there will be nothing before the Court on which to exercise the revisional powers craved for. The learned counsel opined that should Counsel for the appellant wish to move the Court to exercise its revisional powers on the matter, he should take appropriate measures of filing a formal application after the appeal is struck out.

In a short rejoinder, Mr. Ngudungi, in a tone that we could perceive was an attempt to solicit our sympathy, reiterated that the appellant should be exempted from the costs or, alternatively, again in the same tone, the appellant should be condemned to pay half the costs.

We have considered the arguments by the learned counsel for the parties. It is crystal clear in their arguments that the learned counsel for the parties are at one that the appeal is incompetent for the omission to include in the record of appeal some documents which are the subject of the first preliminary point of objection. There is a plethora of authorities holding that failure to include a relevant document in the record of appeal makes the record incomplete and renders the appeal incompetent – see: **African Barrick Gold Mine PLC v. Commissioner General TRA**, Civil Appeal No. 77 of 2016, **Mazher Limited v. Wajidali Ramzanali Jiwa Hirji**, Civil Appeal No. 64 of 2010, **Badugu Ginning Company Limited v. Siiwani Galati Mwantembe & 3 Others**,

Civil Appeal No. 91 of 2012 and **Pendo Masasi v. Tanzania Breweries Ltd**, Civil Appeal No. 20 of 2014; all unreported, to mention but a few.

The first point of the PO having been conceded by the learned counsel for the appellant, we need not belabour much on it. Without much ado, upon concession by the learned counsel for the appellant on the first point of the PO, we find and hold that the omission to include relevant documents in the record of appeal makes the record of this appeal incomplete and, as a result, renders the appeal incompetent. This incompetent appeal must therefore face the wrath of being struck out.

As for costs, with due respect, we find ourselves unable to agree with Mr. Ngudungi's arguments and prayers. With equal due respect, we accede to Mr. Shirima's argument that costs must follow the event. In this jurisdiction and perhaps elsewhere in the Commonwealth and the world at large, it is elementary law in civil litigation that costs must follow the event. That is to say, unless

there are strong reasons to the contrary, a successful party in civil litigation must have its costs. Luckily, it is not the first time the Court is confronted with this issue. In **Karimjee & others v. the Commissioner General of Income Tax** (1973) LRT n. 40, the Court of Appeal for East Africa (presided over by Duffus, P., Spry, VP and Mustafa, JA) in an appeal originating from Tanzania, held that the usual rule is that a successful litigant is entitled to his costs, in the absence of improper action on his part or some other special circumstances.

To argue the point a little bit further, we grappled with an akin situation in the recent past in an unreported case of **Said Nassor Zahor & 3 Others v. Nassor Zahor Abdulla El Nabahany & Another**, Civil Application No. 169/17 of 2017 whose decision the Court pronounced on the 24th ultimo. In that case, like in the present, counsel for the applicant conceded to the preliminary objection but prayed that there should be made no order as to costs. We firmly observed that costs were the respondent's entitlement

despite the applicant's concession. As we subscribe to the reasoning and verdict in that case, for easy reference, we will reiterate that reasoning and the conclusion thereof herein.

As already stated above, in civil litigation, the general rule is that costs must follow the event. Costs are a panacea that soothes the souls of litigants that, in the absence of sound reasons, the Court will not be prepared to deprive the successful litigant of. These are the usual consequences of litigation to which the appellant is not exempt. In **Waljee's (Uganda) Ltd v. Ramji Punjabhai Bugerere Tea Estates Ltd** [1971] 1 EA 188; a decision of the High Court of Uganda, Sheridan, J. (then Chief Justice of Uganda) referred to the passage in an old English case of **Cropper v. Smith** (1884), 26 Ch. D. 700 in which Bowen, L.J. had this to say at p. 711 which, in our considered view, holds true today regarding costs:

> *"I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have very*

seldom, if ever, been unfortunate enough to come across an instance where a party had made a mistake in his pleadings which has put the other side to such a disadvantage or that it cannot be cured by the application of that healing medicine".

In this jurisdiction, Othman, J. (as he then was - later Chief Justice of Tanzania) echoed that statement of the law in **Kenedy Kamwela v. Sophia Mwangulangu & Another,** Miscellaneous Civil Application No. 31 of 2004 (unreported) which decision, like **Waljee's (Uganda)**, being one of the High Court, does not bind us. However, we find both decisions as highly persuasive and depicting the correct principle regarding costs. His Lordship observed:

"Costs are one panacea that no doubt heal such sore in litigations".

Reverting to the case at hand, we share the sentiments of their Lordships in both **Kenedy Kamwela** and **Cropper v. Smith** (supra) and wish to apply the principle herein. In that line of reasoning, the mere fact that counsel for the first respondent readily conceded to the first point of the PO, would not entitle the respondent to be deprived of costs. Neither will he be entitled to half the costs.

Much as we agree that half the costs would have ameliorated the appellant's fate in terms of costs, we do not find any reason to justify that order. This being a Court of law and not one of sympathy, we stand firm and hold that the respondent will, in our view, be entitled to full the costs.

Next for consideration is Mr. Ngudungi's prayer to the effect that we should exercise the revisional powers bestowed upon us with a view to rectifying the allegedly grave illegalities in the proceedings and consequent decision of the High Court. We understood Mr. Ngudungi to mean that we should refrain from striking out the appeal

and, in its stead, we should revise the proceedings of the High Court to cure the alleged mischief in the proceedings of the High Court. Indeed, Mr. Ngudungi's prayer is not novel. We have exercised such powers before. However, we find it worthwhile to point out at this stage that such course has been resorted to by the Court very sparingly, particularly in public interest cases. One such case that immediately comes to our mind is **Chama cha Walimu Tanzania v. the Attorney General**, Civil Application No. 151 of 2008 (unreported). In that case, we found the application before us incompetent but we could not proceed to strike it out. Instead, we exercised the revisional powers of the Court to rectify the incompetent proceedings of the High Court (Labour Division). Other cases in which we exercised such powers include **Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu**, Criminal Application No. 6 of 2012, **Dainess Muhagama v. Togolani Mbuso**, Civil Appeal No. 15 of 2013, **Tanzania Heart Institute v. The Board of Trustees of NSSF**, Civil Application No. 109 of 2008 and **Mkuki James Kiruma v. R.**, Criminal Appeal No. 163 of 2012 (all unreported). In all those case, having ruled that the appeals or applications were incompetent we did not follow the ordinary procedure

of striking out the same, but proceeded to exercise our revisional jurisdiction to rectify the shortcoming in the proceedings and decision of the lower court.

The present case, in our view, does not fall within the scope of the circumstances obtaining in the above cases and therefore we find ourselves loathe to exercise the powers we otherwise sparingly exercise. Having dispassionately read the cases in the foregoing paragraph, we are certain that what invites the applicability of the revisional jurisdiction of the Court cannot be laid by any hard and fast rules; each case is determined by taking into consideration all the circumstances obtaining in each particular case.

In view of the above, and in the circumstances of the present matter, we entirely agree with Mr. Shirima for the respondent that the course suggested by Mr. Ngudungi will not be justifiable at law. The only option available to us, in the circumstances, will be to strike out the incompetent appeal. After striking out the appeal, as rightly submitted by Mr. Shirima, there will be nothing left before us to

revise. That is to say, the Court cannot revise a struck out appeal, for, the relevant appeal to be revised will be nonexistent. The Court cannot revise a nonexistent appeal.

We also wish to add that, in the same line of reasoning, given the circumstances of the present case, acceding to Mr. Ngudungi's prayer, will be tantamount to preempting the PO which course of action, upon a plethora of authorities, is illegal. The position on the point is settled in this jurisdiction. If we are asked to cite an authority on the point, two unreported decisions of the Court immediately linger in our minds. These are: **Mary John Mitchell v. Sylvester Magembe Cheyo & Others**, Civil Application No. 161 of 2008 and **Method Kimomogoro v. Board of Trustees of TANAPA**, Civil Application No. 1 of 2005. In both cases, we firmly held that the Court will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another preliminary objection or by trying to rectify the error complained of. In the circumstances, and with the foregoing in our minds, we decline the

invitation extended to us by Mr. Ngudungi to clothe ourselves with revisional powers and revise a nonexistent appeal. Mr. Ngudungi's prayer, therefore, must fail.

The above said and done, for the reason of incompetency, the present appeal is struck out with costs to the respondent.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th day of August, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL