IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 148 OF 2020

ALLI CHAMANI ..... APPELLANT

VERSUS

KARAGWE DISTRICT COUNCIL..... 1ST RESPONDENT
LIVINGSTONE NKILILEHI ..... 2ND RESPONDENT

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

(Mallaba, J.)

dated the 2nd day of November 2015
in
Land Case Appeal No. 16 of 2012

.....

RULING OF THE COURT

26th & 30th November, 2021

KOROSSO, J.A.:

Alli Chamani, the appellant herein was the unsuccessful party in the District Land and Housing Tribunal (DLHT) in Application No. 247 of 2008 where he sued the 2nd respondent herein (then the 2nd respondent) and the Director, Karagwe District Council (then 1st respondent). In the DLHT, the suit was over plot No. 31 commercial and residential purposes situated at Kayanga Town (the suit premises). The appellant sought for the following reliefs: vacant

possession of the suit premises, permanent injunction against the 1st respondent not to allocate other areas, general damages and costs.

In his judgment, the DLHT found that since the suit premises was declared a planning area, customary land right cannot co-exist along the granted right of occupancy and additionally, that the appellant's purchase of the land was irregular for lacking endorsement from a local leader. The application was accordingly dismissed with costs.

The appellant was aggrieved and his appeal to the High Court was dismissed for want of merit. Unperturbed, the appellant lodged a notice of appeal to this Court on 9/11/2015. On 12/11/2015 he sought leave to appeal to this Court through Misc. Land Application No. 67 of 2015 which on 25/11/2016 was struck out being found to be incompetent. Discontented, on 27/12/2016 the appellant instituted an application seeking extension of time to file an application for leave to appeal to the Court together with leave to appeal to the Court. The prayers sought were granted but limited to the 2nd respondent only after the appellant sought and was granted leave to withdraw the 1st respondent as a party to the application. Armed with the leave to appeal for the 1st respondent and a certificate of delay, the appellant

proceeded to lodge an appeal in this Court on 14/2/2020 against the 1st and 2nd respondent. The memorandum of appeal is premised on five grounds which we will not reproduce for reasons which shall soon become apparent.

On the date the appeal came for hearing, Mr. Alli Chamani, the appellant appeared in person and fended for himself whereas, the 1st respondent was represented by Ms. Happiness Nyabunga, learned Principal State Attorney who was assisted by Mr. Solomon Lwenge, learned Senior State Attorney and Mr. Gerald Njoka and Ms. Mariam Matovolwa both learned State Attorneys.

Before hearing of the appeal commenced, we noted that the 1st and 2nd respondents on the 23/11/2021 through their counsel had filed separate notices of preliminary points of objection. Whilst the notice of preliminary objection by the 1st respondent had five points of objection, the 2nd respondent notice of preliminary objection contained two points of objection. Invariably, the competence of the appeal was being challenged with a prayer to strike out the appeal.

Understanding the ordinary practice of the Court, where preliminary objections have been raised, we proceeded by deferring

the substantive part of the appeal to deliberate and dispose of the preliminary objections first.

Additionally, there was an interjection by Ms. Nyabunga who sought leave and was granted to abandon four points of objection (No. 1, 2, 4 and 5) filed by the 1st respondent and thus remained with one point of objection (No. 3). On the part of the 2nd respondent, Mr. Kabunga sought and was granted leave to abandon both points of objection from the notice of preliminary objection filed by the 2nd respondent and decided to support the objection raised by the 1st respondent.

For ease of reference, we shall reproduce the remaining preliminary points of objection before the Court for determination. For the 1st respondent, the point of objection reads:

> *3. The appeal is incompetent against the 1st respondent for being filed in Court without first having obtained leave of the High Court contrary to section 47(1) of the Land Disputes Courts Act, 2002.*

After a short dialogue with the counsel for the parties, the counsel proceeded to address the Court on the competence of the instant appeal considering the absence of the leave to appeal to the

Court with respect to the 1st respondent in terms of the provision of section 47(1) of the Land Disputes Courts Act, Cap 216 R.E 2002 (the Land Disputes Act).

The learned Principal State Attorney submitted that before the High Court, the appellant's application for leave to appeal was confronted with a preliminary objection filed by 1st respondent challenging its competence for reason that it was omnibus and contained irrelevant facts and arguments and that it should be struck out. The learned Principal State Attorney argued further that before the points of preliminary objection raised were heard, on the 19/6/2019, the appellant (then the applicant) prayed that the 1st respondent be withdrawn from the application and only the 2nd respondent remains as a party in the application. That the High Court (Dyansobera, J.) granted the prayer and ordered that the 1st respondent (Karagwe District Council) be marked withdrawn from the Land Application No. 117 of 2016. She contended that since the 1st respondent was withdrawn from the application for leave to appeal while the current appeal involves both the 1st and 2nd respondents, the appeal is incompetent and should be struck out.

On the part of Mr. Kabunga, he commenced his submission concurring with the arguments and prayers of the learned Principal State Attorney. Essentially, he pointed out that after the 1st respondent was withdrawn from the application for leave to appeal to this Court at the instance of the appellant, what the High Court granted was leave to appeal to the Court against the 2nd respondent only. Mr. Kabunga maintained that by virtue of Section 47(1) of the Land Disputes Act, for one to appeal to the Court in matters that arise from DLHT, leave to appeal is a requirement. He argued that since both the 1st and 2nd respondents are parties to the current appeal, leave to appeal against solely the 2nd respondent is no leave and renders the appeal incompetent and urged the Court to struck it out.

In response, the appellant conceded to the fact that the 1st respondent was withdrawn by the High Court in the application for leave to appeal upon his prayer. He contended that after the 1st respondent was marked withdrawn, all the relevant documents to the appeal including the Ruling of the application for leave continued to have the names of both respondents. According to him, understanding the predicament he was in, not mentioning the 1st respondent as a party in the documents necessary for the appeal was

not an option. That the Court continued to put both respondents as parties in all documents including the Ruling granting leave to appeal for 2nd respondent, certificate of delay and others. He sought the indulgence of the Court to adjourn the hearing to accord him time to amend all the relevant documents for the appeal including those emanating from the High Court for purposes of excluding the name of the 1st respondent under Rule 111 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules).

In the alternative, he urged the Court to remedy the omission by invoking revision powers and proceed to hear the appeal. The appellant stressed the fact that the 1st respondent was not a necessary party hence his prayer for his withdrawal from the proceedings.

In rejoinder, Mr. Lwenge emphasized the fact that the appellant's concession implied that the incompetency of the appeal had been acknowledged. He argued that leave to appeal to the Court where there are two parties should not be taken for granted and that even if the 1st respondent is removed from the appeal that will not suffice since the appeal was for both parties in the absence of leave for one of the parties. He had nothing to comment on prayer that the

powers of revision be exercised by the Court to proceed with hearing the appeal, stating that the earlier submissions suffice.

On the part of the 2nd respondent, Mr. Kibunga's rejoinder concentrated on responding to the appellant's prayer that the Court invoke its revision mandate and stated that the Court can only use the said powers where there are errors which require the Court to see the merit of the appeal. He reiterated his prayer for the appeal to be struck out since it was incompetent before the Court.

With the foregoing submissions from all the parties in arguing the preliminary points of objection, we now delve to address the rival arguments. The issue before us is the competence of this appeal. The fact that there is no leave to appeal with respect to the 1st respondent is not an issue since the appellant conceded to the anomaly as revealed by the record.

The fact that the instant appeal requires leave to appeal is not contested. Section 47(1) of the Land Disputes Act, prior to the amendments ushered in by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 - Act No. 8 of 2018. At the time the impugned decision was instituted, section 47 (1) of the Land Disputes Act read:

."47(1) Any person who is aggrieved by the decision of the High Court in the exercise of its original, revisional or appellate jurisdiction, may with the leave from the High Court appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act."

Our revisit of the record shows that the impugned decision of the High Court for which the appellant had initiated appeal process by filing a notice of appeal as alluded to above, was one in exercise of its appellate jurisdiction since Land Case Appeal No. 16 of 2012 originated from the DLHT in Land Application No. 247 of 2008. Thus, the Application for leave in Misc. Land Application No. 117 of 2016 was in pursuant of the law.

As rightly argued by the learned Principal State Attorney, supported by the learned counsel for the 2nd respondent and conceded by the appellant, on the 19/6/2019 before the hearing of the preliminary objection by the 1st respondent, the Court granted the prayer for the withdrawal of the 1st respondent as a party to Land Application No. 117 of 2016, an application for leave to appeal to the High Court. Consequently, as earlier stated the leave to appeal to the Court of Appeal granted on the 25/6/2019 (Dyansobera, J.) was only

with respect to the 2nd respondent. Continued appearance of the 1st respondent in the Ruling granting leave to appeal and subsequent certificate of delay cannot override the High Court's order to have the 1st respondent withdrawn in the respective application. This was incumbent on the High Court, before giving its Ruling to remove the 1st respondent. In the alternative, it was open for the appellant to seek for correction of the Ruling by invoking section 96 of the Civil Procedure Code, Cap 33 R.E 2002, now 2019 (the CPC).

The importance of procuring leave to appeal to this Court in land matters where they emanate from decisions of the High Court in its appellate or revisional jurisdiction cannot be underscored. As highlighted above it has been provided under section 47(1) of the Land Disputes Act. In **Dorina N. Mkumwa vs Edwin David Hamis**, Civil Appeal No. 53 of 2017 (unreported) the Court stated:

> *"In land disputes, the High Court is the final court on matters of fact. The legislature has taken this finality so seriously that it has, under subsection (1) and (2) of section 47 of Cap 216 [as amended by the Written Laws (Miscellaneous Amendments) Act (No. 3) Act, 2018 Act No. 8 of 2018] imposed on the intending appellant the statutory duty to obtain*

either leave or a certificate on point of law before appealing to this Court"

(See also, **Fulgensi Mfunya vs Juma Hereye and 2 Others**, Civil Appeal No. 40 of 2020, **Baghayo Gwandu vs Michael Ginyau**, Civil Application No. 568/17 of 2017 and **Palumbo Reef Limited vs Jambo Rafiki Bungalow**, Civil Appeal No. 226 of 2020 (all unreported)).

In the instant appeal since the leave before the Court is only against the 2nd respondent, it means there is no proper leave for the appeal before us where the appellant has appealed against the 1st and 2nd respondents. Given the mandatory nature of Section 47(1) of the Land Disputes Act, the anomaly without doubt renders the appeal incompetent as rightly stated by the Learned Principal State Attorney and Mr. Kabunga.

Having found the appeal to be incompetent, what is before us is the way forward. We have considered the prayer by the appellant, for him to be allowed to amend the record of appeal under Rule 111 of the Rules, we are of the view that what is before us is not what is envisaged under that Rule. The Court in the case of **FINCA Tanzania Ltd vs Wildman Masika and 11 Others**, Civil Appeal No. 173 of

2016 (unreported), discussed circumstances that should lead to grant of prayer for amendment and the Court held:

> "... *We are settled that any desired amendment must be for the purpose of enabling the Court to determine the real question in controversy between parties. In allowing amendments, the Court aims to do justice to the parties. Thus, in order to adhere to this quest for justice,* ***the Court must always look at the circumstances of each particular appeal, and exercise its discretion guided by certain factors; including, the need for amendments, the nature and extent of the amendments, the party's conduct, whether the hearing has commenced, the risk of the requested amendment (whether the appeal may be derailed from its normal route), the prejudice if any to the other party, and the type of amendments sought.***" [Emphasis Added]

We subscribe to the above holding. Applying the above to the instant appeal, we are of the firm view that the circumstances in the instant appeal do not fall within the above criteria set out for Rule 111 of the Rules to apply. In the current case, the issue is lack of a

mandatory requirement to process an appeal, a proper leave to appeal, which render the appeal incompetent and as such there is nothing before us to be amended under Rule 111 of the Rules. The appellant also sought the Court to invoke its revision powers and proceed to hear the appeal, which Mr. Kabunga contested arguing that the current circumstances where there is not serious error shown do not warrant the Court to exercise its revisional powers.

It suffices to understand that the powers of revision of this Court are exercised very sparingly, In the case of **Halais Pro-chemie vs Wella A.G.** [1996] TLR 269, the Court laid down the legal prerequisites to move the Court to invoke its revisional powers pursuant to section 4(2) and (3) of AJA that is: **One**, where there are irregularities to the proceedings in the High Court. **Two**, where the appellate process has been blocked by judicial process. **Third**, where the decision and or order is not appealable and **fourth**, the fact that revision is not an alternative to appeal. We do not find failure to obtain leave to appeal to this Court falls within the ambit of any of the four conditions set above. Therefore, we reject the invitation.

Having found the instant appeal to be incompetent for reasons stated above, we follow suit to what was stated in the case of **Ghati**

Methusela Vs. Matiko Marwa Mariba, Civil Application No. 6 of 2006 (unreported) in which a full Court categorically stated that, the remedy for an incompetent appeal or application is to strike it out. Consequently, for the foregoing, the appeal is struck out with costs.

DATED at **BUKOBA** this 29th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 30th day of November, 2021 in the presence of appellant in person and Mr. Gerald Njoka, learned State Attorney for the 1st respondent and Mr. Peter Matete, learned counsel for the 2nd respondent is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL