IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLLICATION NO. 172/08 OF 2020

1. ISRAEL MALEGESI
2. FRANCIS MAINGU .....APPLICANTS

VERSUS

TANGANYIKA BUS SERVICE RESPONDENT.....RESPONDENT

(Application for extension of time to revise the Ruling and Order of the High Court of Tanzania at Mwanza)

(Sumari,J.)

dated the 09th day of October, 2019

in

MISC. CIVIL APPLICATION NO. 47 OF 2013

.....

RULING

1st December, 2021 & 1st February, 2022

KAIRO, J.A.:

The respondent filed a notice of preliminary objection (PO) comprised of two points. It all started when the applicants filed a notice of motion seeking for an extension of time to file revision so that they can challenge the decision in Misc. Civil Application No.47 of 2013 of the High Court of Tanzania at Mwanza delivered on 9th October, 2014.

Initially the respondent filed two preliminary points of objection as follows:

1) That the applicants have no locus standi to file the application,

2) *That this application is in the name of strangers to the High Court application that gave rise to this application, thus incompetent.*

As per the custom of the Court, the raised points of objection are to be disposed first before proceeding with the application.

When the application was called upon for hearing, the applicants were represented by Mr. Elias Hezron, learned advocate while Mr. Faustin Malongo represented the respondent.

After a dialogue, Mr. Faustin Malongo, learned advocate decided to abandon the first point of objection and argued on the second one. This ruling therefore is in respect of the argued point of objection.

In his submission, Mr. Malongo told the Court that the parties in Miscellaneous application No. 47 of 2017 were Tanganyika Bus Service as the applicant and Israel Malegesi together with Francis Maingu; the administrators of the estate of the late Mnubi Maingu as the first and second respondents. However, in the application before the Court, the applicants are Israel Malegesi and Francis Maingu, but it was not indicated that they have brought the application as administrators of the estate of the late Mnubi Maingu as it was indicated before the High Court. He contended that in the circumstances, the applicants filed the application in their personal capacity which is not proper. He argued

that failure to indicate their correct capacities is fatal to the application for having been instituted by strangers.

Mr. Malongo went on to argue that, the applicants are not supposed to change the names of the parties without an order of the court. He cited the case of **CRDB Bank PLC (formerly CRDB (1996) Ltd) vs. George Mathew Kilindu,** Civil Appeal No. 110 of 2017 (unreported) to bolster his argument. He contended that, since the applicants did not apply as administrators, the application has been rendered incompetent and liable to be struck out.

It was Mr. Malongo's further contention that, though the ruling of the High Court in Misc. Civil Application No 47 of 2013 did not indicate that the applicants (respondents therein) were the administrators of the estate of the late Mnubi Maingu but the said error was supposed to be rectified by the applicants before filing of their application in Court so that the said ruling reflects the parties who were in the application before the High Court. Basing on the foregoing, the learned advocate contended that this application be struck out with costs for want of competence.

In his riposte, Mr. Hezron submitted that the status of the applicants is clearly stated in the first paragraph of the joint affidavit of the applicants. He went on that the said status was as well stated in the

proceedings of the High Court and thus the cited case of **CRDB Bank PLC** (supra) is distinguishable. Elaborating on the distinguishing features of the cited case, Mr. Hezron argued that, there was a total change of the names of the appellants as there was an addition of the name which did not feature in the proceedings of the High Court in the cited case, as such the Court was correct to struck out the appeal. He went on to argue that in the case at hand however, there is no change of the names of the parties. He further argued that, the capacity under which the applicants have lodged the application is clear in the first paragraph of the joint affidavit supporting the notice of motion. Mr. Hezron submitted further that the respondent's argument that the applicants are strangers to the High Court proceedings is therefore incorrect. He added that, the omission to indicate the applicant's status in the heading is not fatal as contended by Mr. Malongo because the parties were not prejudiced. He further argued that the applicants have been always suing as administrators of the late Mnubi Maingu as can be depicted in the Court's decision in Civil Application No. 13 of 2012 and referred the Court to Annexture JLC 5(C) to the notice of motion. He also argued that in the said case, the Court did not indicate the status of the applicants in the heading, but did so when preparing the ruling of the application.

Mr. Hezron further disputed the prayer for costs by Mr. Malongo arguing that, he was representing the applicants on ***pro bono*** basis under the Tanganyika Law society (TLS) Legal Aid scheme and prayed the costs to be waived should the Court decides to uphold the PO. He referred the Court to annexture JLC 12 (a) and (b) to the notice of motion to verify that he was assigned to represent the applicants on *pro bono* basis. In conclusion, Mr. Hezron prayed the Court to find the PO unmerited and reject it without costs, being a legal aid matter.

As a rejoinder, Mr. Malongo stated that, the principle stated in **CRDB Bank PLC** (Supra) case is still relevant to the case at hand. He argued that, the gist of the decision is that the parties appeared in the impugned decision should also be the ones to appear in the subsequent matters.

It was the learned counsel's further argument that the status of the parties can be known merely by looking at the citation of the case and that in the matter at hand, the appellants' status would have been known by indicating that they were lodging the application as administrators. He insisted on the fatality of the said omission adding that if the same is left to proceed, there would be confusion in future cases with regards to the status of the applicants. He argued that the only way to stop that confusion is to uphold the objection. Mr. Malongo

rejected Mr. Hezron's argument in Civil Application No. 13 of 2012 between the parties arguing that the issue of omitting the status of the applicants was not raised in the said application nor was it decided by the Court. Besides, the said application was struck out thus, it is not part of the record.

In conclusion, Mr. Malongo insisted on awarding costs to the respondent in the circumstances the PO would be upheld arguing that the Legal Aid under the Tanganyika Law Society absolves the appellants from paying the instruction fee to the opponent's advocate but not other costs.

I have heard the rival arguments of the learned counsel from both parties and gone through the record of the application. It is not disputed that the applicants are joint administrators of the estate of the late Mnubi Maingu. It is also not in dispute that the said status was neither indicated in the notice of motion nor in the joint affidavit. Instead, the citation shows that they lodged the application in their individual capacities. This is the omission which resulted to the raised PO as Mr. Malongo regarded the applicants as strangers to the application. He further argued that failure to indicate their real status is an incurable defect which renders the application incompetent and thus ought to be struck out.

On his part, Mr. Hezron argued that though the applicants' status were not indicated in the citation of both the notice of motion and the joint affidavit sworn by the applicants, but the applicants have clearly explained their status in the first paragraph of their joint affidavit, as such they are not total strangers to the application in the application before the Court as argued.

The issue for determination therefore is whether the said omission is fatal and thus renders the application incompetent. For ease of reference, I wish to let the first paragraph of joint affidavit of the applicants referred to by Mr. Hezron speak for itself:-

> *"We, Israel Malegesi and Francis Maingu, adults Tanzanian Christian and residents of Musoma Mara region do hereby make oath and solemnly swear and state follows:-*
> *1. That we are the Administrators of the estate of the late Mnubi Maingu ..."*

Looking at the quoted paragraph, I have observed that the applicants have stated the status under which they lodged the application at issue in the first paragraph of their joint affidavit. It is a settled procedure that every application before the Court is through the notice of motion supported by an affidavit as stipulated under rule 48 (1) of the Court of Appeal Rules 2009 (the Rules). Interpreting the rule,

the notice of motion and affidavit complements each other. Thus, failure by the applicants to state their status though an omission, but in my candid view is not fatal as to render the application incompetent. I therefore do not subscribe to Mr. Malongo's argument. In my view, since the applicants have stated their status, in the affidavit which is part of the application, the argument that they are strangers to the case does not hold water.

I have gone through the cited case of **CRDB Bank PLC** (supra) and noted that in the cited case, the notice of appeal indicated a party who was not in the original suit. Essentially, it is a notice of appeal which initiates an appeal. However, in the matter at hand, the applicants have stated their status in the affidavit which is part and parcel of the application, the situation which cannot render the application incompetent in my view. The two cases are therefore distinguishable. It goes thus, the omission does not go the root of the application. Besides, the respondent has not been prejudiced in any way as rightly argued by Mr. Hezron. It is my sincere conviction that the omission can be cured by invoking the overriding objective principle embodied in the provisions of section 3A (1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 as amended by the Written Laws (Miscellaneous

Amendments) (No. 3) Act No. 8 of 2018 (Amending Act) while stipulates as follows:-

> *"the overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of all matters governed by this Act."*

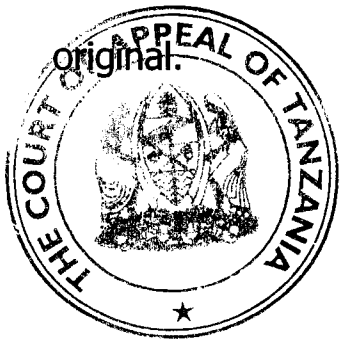
That apart, the overriding objective intends to give statutory effect to Article 107 (2) (e) of our Constitution which insists on dispensation of substantive justice instead of being tied up with technicalities. On account of the facts presented to the Court and for the interest of justice, I am of the view that, justice demands the application be heard on merit. As intimated earlier, the omission is not fatal, but curable, thus for the purpose of keeping the record proper, I hereby give the applicants thirty days from the date of this ruling within which to amend their application to include their proper status on the heading of the notice of motion and the affidavit. I make no order as to costs being a legal aid matter. The preliminary objection succeeds to that extent.

It is so ordered.

DATED at **DAR ES SALAAM** this 26th day of January, 2022.

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 1st day of February, 2022 in the presence of the Mr. Elias Hezron counsel for the Applicants and Mr. Faustin Malongo, counsel for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL