IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CIVIL APPEAL NO. 5 OF 2007

(Appeal from the decision and orders of the District Court of Iringa in Civil Case No. 7 of 2005)

LEYLA IMTIAZ BANDALI ..... APPELLANT

VERSUS

KARIM NIZAR MANJI ..... RESPONDENT

31/10/2014

R U L I N G

MADAM SHANGALI, J.

The appellant, Leyla Imtiaz Bandali, is challenging the two decisions of the Iringa District Court in Civil Case No. 7 of 2005, in which she was the plaintiff. The two decisions were delivered by two different Magistrates but they all relates to Civil Case No. 7 of 2005.

It is in that respect, the two appeals were incorporated in one appeal to form the (DC) Civil Appeal No. 5 of 2007 which is now the concern of this Court. The memorandum of appeal filed in this Court by the appellant's counsel, Mr. Mwamgiga

consists of five grounds; the 1st to 4th ground of appeal are against the decision by Hon. Lyimo RM dated 3/7/2006 and the 5th ground of appeal is against the decision by Hon. Mwaiseje, [*the then DRM i/c for Iringa District Court*] dated 22/2/2007.

The Respondent through the service of Mr. Waryuba, the learned counsel, filed a notice of preliminary objections against the appeal which consisted of three points namely;

a) The memorandum of appeal is bad in law for being omnibus;

b) The appeal against the trial Court's order dated 3/7/2006 is hopelessly time barred; and

c) The entire appeal is untenable in law as it is not appealable under S. 74 (2) of CPC 1966 as amended by Act No. 25/2002 as it originates from interlocutory order or decisions.

By the Order of this Court dated 19th February, 2008 (*Hon. Mchome, J.*) parties were allowed to dispose of the preliminary objections by way of written submissions. The parties observed the court schedule order and submitted their concerns accordingly.

It is unfortunate that Hon. Mchome, J. who was handling this matter failed to compose the ruling in time until his retirement. The case was later retrieved from him and placed before me in August, 2014 to compose the Ruling. Parties are highly excused for the inconvenience caused by the Hon. Retired Judge.

Mr. Waryuba, the learned counsel for the appellant, on the first point of the preliminary objection contended that, combining the two decisions in one appeal deny the respondent a good chance to attack. He termed the memorandum of appeal omnibus and bad in law.

On the second limb of the objections Mr. Waryuba submitted that, appeal against order dated 3/7/2006 was filed out of time as it was supposed to be filed within 90 days as per the Law of Limitation Act, 1971, 1st schedule, part II, item 1. The appeal was lodged on 18/07/2007. No extension of time was sought and obtained.

Submitting on the third point of preliminary objection Mr. Waryuba discovered that he had wrongly based his objection under Section 74 (2) of the Civil Procedure Code, 1966. He expressed his misgivings and rectified the error by citing the correct Section 43 (2) of the Magistrate Court Act, 1984 as amended by Act No. 25 of 2002.

The gist of his argument is that, no appeal can be leveled against an interlocutory decision or order, unless it has the effect of finally determining the matter. He argued that both orders/Ruling of the court dated 3/7/2006 and that of 22/2/2007 were not final and conclusive to the effect of finally determining the suit. Therefore they were unappellable. He prayed the appeal to be dismissed with costs.

In response, Mr. Mwamgiga started with the third point of preliminary objection on which he submitted at lengthy on the issues of wrong citation of the law committed by the respondent's counsel. He contended that having committed that error the respondent's counsel decided to correct the error suo motu and without leave of the court. He also observed that according to the procedure an application for leave to amend a document filed in court has to be made before the opposite party makes a reply to the filed document in court. He further retorted that even the amended citation was wrong because the counsel for the respondent cited Section 43 (2) of the Magistrate Court Act 1984 as amended by Act No. 25 of 2002 instead of Section 43 (2) of the Magistrates Courts Act, 1984 as amended by Written Laws (Misc. Amendment) Act No. 3 of 2002. With such flouts of the law, Mr. Mwamgiga prayed the court to struck out the point of preliminary objection for being incompetent.

On the first and second points of objection Mr. Mwamgiga argued that, the consolidation of the two appeals was done because, the decision by Honourable Lyimo was delivered on 3/7/2006 which was interlocutory decision and which did not finally determine the suit, thus the Appellant was barred to appeal in terms of section 43 (2) of the Magistrates Courts Act, 1984 as amended by Written Laws (*Miscellaneous Amendment*) (No. 3) Act, 2002.

He further submitted that the decision by Honourable Mwaiseje delivered on 22/2/2007 finally determined the appellant's suit when the court found that there was no validly concluded partnership between the parties in terms of Section 191 (1) of the law of contract Act, Cap. 345. Mr. Mwamgiga submitted much on the non-existence of the valid partnership but eventually stated that he resisted to appeal against the interlocutory order dated 3/7/2006 and waited for the final decision of the court which was delivered in the order dated 22/2/2007 hence the pending appeal against both orders. He finally submitted that the argument by the respondent's counsel that the appeal can not be attached together holds no water. He also submitted that the appeal is not time barred.

In rejoinder, Mr. Waryuba reiterated his earlier submission and insisted that the correct and proper citation is Section 43 (2) of the Magistrate Court Act, 1984 as amended by Written Laws (*Misc. Amendment*) Act No. 25 of 2002 and

not Act No. 3 of 2002. He insisted that the error is not fatal and indeed it is curable by correction made in the written submission. He further contended that this is not a proper forum to argue on the issues of the existence or non-existence of partnership between the parties because it is a ground for appeal. Mr. Waryuba asked the court to uphold the grounds of preliminary objection.

Having critically digested the submissions from both parties, I propose to start with the third point of preliminary objection. First of all there is no dispute that the notice of preliminary objection wrongly pegged the third point of preliminary objection under wrong citation of the law. In his reply to the notice of preliminary objection the appellant's counsel did not discover that error. Later on, the court allowed the parties to argue the preliminary objection by way of written submission. In that exercise and when the respondent's counsel was preparing his written submission in accordance with the court's scheduled order he discovered the error. In order to abide by the said scheduled order for filing the written submission, the counsel decided to express his misgivings on the slip, rectified the error in his written submission and filed his written submission in time. In my considered opinion the learned counsel was absolutely right in the circumstances. He acted prudently and abide by the court scheduled order for filing the written submissions. If we agree that the practice of conducting applications or appeals by way

of written submission is tantamount to the hearing of the same, it goes without saying that parties are allowed to argue and submit all their grievances including incidental matters in their written submissions. Therefore there was nothing wrong with the approach employed by the respondent's counsel to rectify the errors at the earliest opportunity in his written submission.

In addition the rectified provision of the law was correctly cited as Section 43 (2) of the Magistrate Courts Act, 1984 as amended by Act No. 25 of 2002.

The second limb on the third point of preliminary objection is whether the two decisions dated 3/7/2006 and 22/2/2007 are interlocutory orders which are not apeallable in law. I would prefer to tackle this issue together with complaints in the first point of preliminary objection. On this issue I agree with Mr. Mwamgiga that the first decision dated 3/7/2006 is indeed an interlocutory order while the second decision dated 22/2/2007 is not an interlocutory order because it finally and conclusively determined the rights of the parties as far as the Civil Case No. 7 of 2005 was concerned. In fact the suit was struck out on the point of preliminary objection based on no cause of action. Aggrieved by that decision the appellant had no other forum but to appeal against that decision which completely threw away his suit. On his appeal the counsel decided to include an appeal

against an interlocutory order dated 3/7/2006 which was equally against his wish. The record of proceedings is clear that when the court delivered its decision dated 3/7/2006 the appellant exercised his patience and waited for the final decision. After the final decision dated 22/2/2007 the appellant appealed against both decisions. I do understand that courts always abhor a multiplicity of suits, appeals or applications but in the present case the appellant is intending to appeal against decisions originating from the same Civil Case No. 7 of 2005. In my considered opinion that does not constitute omnibus appeal or combination of appeals.

On the second point of preliminary objection I am certain that considering the above discussion, the appeal was not lodged out of time. The pending appeal is an appeal against the decisions emanating from Civil Case No. 7 of 2005 which was finally and conclusively determined on 22/2/2007.

In conclusion, all points of preliminary objection are hereby rejected and dismissed with costs.

M. S. SHANGALI

JUDGE

31/10/2014

Ruling delivered in the presence of the respondent in

person and in the absence of all advocates and the appellant. The appellant to be notified.

M. S. SHANGALI

JUDGE

31/10/2014