

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

HC. CIVIL APPEAL NO. 46/2019

(Originating from Civil Case No 05 of 2018 of the District Court of Bukombe before Hon. Kahimba SRM)

1. BILO STAR DEBT COLLECTION CO. LIMITED APPELLANT

2. CAMEL OIL (T) LIMITED APPELLANT

VERSUS

BAHATI MOSHI MASABILERESPONDENT

RULING

20th April, & 09th July, 2020

TIGANGA, J

The appellants in this appeal were the defendants in Civil Case No. 05/2018, before Bukombe District Court, (hereinafter referred to as the trial court), before which after full trial, the trial court entered judgment in the favour of then plaintiff who is now the respondent in this appeal.

Aggrieved by the decision of the trial court, the appellants decided to appeal against the judgment and decree and in such an endeavour, they filed a total of five grounds of appeal as follows;

- i. That the honourable trial magistrate erred in law and facts for failure to evaluate the evidence on record by holding that the tendered notice did establish the truth of facts upon which it was tendered.

- ii. That the honourable magistrate erred in law and facts for confusing submission with evidence by holding that failure by the second appellant to file final submission final submission made the second issue to remain uncontested.
- iii. The honourable magistrate erred in law and fact for giving his verdict basing on the assumptions that, the first defendant in a suit was an employee of the 2nd appellant herein.
- iv. That the honourable magistrate erred in law and fact for relying on the hearsay evidence which was not backed up by documentary proof.
- v. That having regard to the evidence on record, and circumstances of the case, the learned trial magistrate grossly misdirected himself by awarding general damages without adhering to proper principles.

When the memorandum of appeal was served to the respondent, he filed a notice of preliminary objection on point of law to the effect that;

"The appeal is incompetent as the original case proceeded exparte against the 1st appellant BILO STAR DEBT COLLECTION COMPANY LIMITED"

As a matter of procedure, the preliminary objection was argued first before the merit of the appeal. By the consents of the parties and leave of the court, the preliminary objection was argued by written submission which, were filed according to the schedule.

In the submission in chief the counsel for the respondent submitted that, the appeal is jointly filed by the 1st and 2nd appellant. However, before

the trial court the case proceeded exparte against the 1st appellant. Having not heard before the trial court, then the trite law is that the proper and correct course for whoever aggrieved by the decision of the court or tribunal passed exparte against him, is to apply for setting aside the exparte decision and not to prefer an appeal.

He cited and relied on two case authorities in the case of **Jaffari Sanya Jussa and Ismail Sanya Jussa vs Salehe Sadia Osman**, Civil Appeal No. 54 of 1997 CAT (unreported) and **Kuyela Chugulu & Another Vs Maua Mgata**, Land Appeal No. 25/2012 (unreported) High Court Iringa.

He in the end asked the appeal to be dismissed as the same is incompetent. In reply, the applicant conceded that there is a typographical error in the appeal filed by the 2nd appellant by inclusion of the 1st appellant who did not have audience before the trial court. He said the submitted that an error does not necessitate the striking out of an entire appeal rather, it is the 1st appellant who should be struck out from the memorandum of appeal by the court itself or by way of amendment.

He submitted that the error is curable by way of amendment with the leave of the court if the circumstances warranty the same to be done, because the commission of the 2nd appellant, including the 1st appellant is not fatal due to the following reasons; first, that the body of the memorandum of appeal in its introductory part has stated that it is the second, respondent who is appealing, and that the said typographic error refers to the appellants instead of the appellant.

However the intention of the appellant is clear that, it is the second appellant who is appealing and the relief sought could not involve the first appellant.

The other part, is the prayers, the memorandum is clear that, it is the 2nd Appellant who prays for the reliefs in the said appeal. Further to that he submitted that the law is silent on how the prescribed format of the memorandum of appeal should be when it comes to the naming of the appellant who did not have the common ground in a suit as one of the defendant whose suit proceeded *exparte* against other defendants and *interpartes* as between himself and the plaintiff. He cited Order XXXIX Rule 4 of the Civil Procedure Code [Cap 33 RE 2019].

He further submitted that, under that provision. The appellant may prefer an appeal for others on which the decree may be reversed or varied in favour of all of them, even those who did not appeal. He also submitted that the appellant's advocate signed while indicating that he was for the 2nd appellant. Further to that, he submitted that the preliminary objection is also misconceived as there was no party before subordinate court called Bilo Star Debt collector, this means he prayed that the preliminary objection be disregarded.

Distinguishing the authority in the cases cited by the counsel for the respondent in the submission, he submitted that the cases authorities are in applicable in this case. Furthermore, on his fifth grounds in his submission, he submitted that the law provide a room of amendment in

case the memorandum of appeal is defective. He cited order XXXIX Rule 3 (1) of the CPC (supra) to that effect.

He also cited the case of **FINCA, Tanzania Limited Vs Wild Aman Masika and 11 others**, CA, at Iringa, in which it was held that, Rule 111 of the Court of Appeal Rules, which mandate the court at any time to allow the amendment of the notice of appeal, a cross notice or the memorandum of appeal or any other part of the record as the court may deem fit.

Last but not one, he asked this court to invoke the principle of overriding objective, basing on the facts that there is no mandatory provision of the law which goes to the very foundation of the case which has been violated. He recited Civil Procedure Code 33 as amended by the written law (Misc Amendments) (No.3) Act No. 8 of 2018 to introduce the overriding objective principle with the view of giving a statutory effect to Article 107A (2) (e) of the constitution of the United Republic of Tanzania 1977.

In conclusion he submitted that, if the court is of the opinion that the memorandum of appeal is defective in its form, then it may struck out the 1st appellant whose purported appeal is defective and proceed with the 2nd appellant whose appeal was properly filed before the court or may order the amendment to be done within the specified period by this Honourable Court. According to him, in each case no injustice shall be occasioned to the respondent.

In rejoinder, the counsel for the appellant submitted that at the 1st and 2nd page of the submission in reply by the counsel for the appellant, the counsel conceded to the raised preliminary objection, but he is

mitigating the defects by asking for the amendment. On that Mr. Egbert Colonel Mujungu submitted that, in the case of **Kantibhai M. Patel Vs Dahyabhaif Ministry** [2002] TLR 437, in which the Court of Appeal held inter alia that;

"Once an objection is taken to the competence of an appeal, it would be contrary to law to entertain a prayer, the effect of which would be to defeat the objection, if such prayers were entertained, rule 100 which permits objection would be negated."

He submitted that principle discourages the amendment to be effected at this stage.

Further to that, he submitted that a party to the suit or proceedings cannot be introduced by the introductory part or by the conclusion party, but by the title of the pleading, and in this appeal the memorandum of appeal speak loud that the appellants are two. He insisted that the 1st Appellant cannot appeal without first setting aside the exparte order.

Regarding the invocation of the overriding objective principle, he submitted that, the matter at hand for which a preliminary objection was raised is not a mere technicalities but substantive because it goes to the right of the party to move the court.

In the end, he insisted that even the summons issued, indicate that **Bilo Star Debt collection, company Limited** is the 1st appellant. He

submitted that the appeal be struck out on the basis of the authority in the case of **Kantibhai M. Patel** (supra).

That marked the end of the submission by both parties, hence this ruling. From the objection raised, and submission made by the parties for and against the raised objection.

It is evident that before the District Court of Bukombe, the current respondent sued the two appellants who are Bilo Star Debt collector Company Limited and Camel Oil (T) Limited who were the 1st and 2nd defendant respectively. It is also vivid on record that as against the 1st Defendant the case proceeded exparte. Further to that, it is also vivid that the decree was passed against both defendant as reflected in item (i) and (iv) of decree.

It is also evident that the memorandum of appeal filed before this court shows that the appellants are two, Bilo Star Debt collection Company Limited and Camel Oil (T) Limited.

It is also evident that the status of the parties remained the same up to when the preliminary objection was raised against the appeal lodged by the 1st appellant, on the ground that he had no right to appeal, but to first apply to set aside exparte judgement and decree against him. On the other hand, the counsel for the appellant said that it was just a typing error, and asked the court to cure it by an order of amendment or the court itself to struck out the name of the 1st Appellant and remain with the 2nd Appellant.

From both sides submission it is not disputed that it is trite law that, a party whose case was heard *ex parte* before any court has no right to appeal before setting aside an *ex parte* judgment before the court which passed the *ex parte* judgment and decree against him. That is according to the authority cited by the counsel for the respondent in **Jaffari Sanya Jussa & Another Vs. Saleh Sadia Osman**, (supra) as well as in **Kuyela Chulungu & Another Vs Maua Mgata**, (supra).

That being the principle and having been conceded by the counsel for the appellants, I remain with one issue of what are the legal consequences? Technically the non filing of the application to set aside the *ex parte* order takes away the jurisdiction of the appellate court to entertain the appeal of that party. Now the issue is what should be the legal consequences in the situation like the one in this case where the appellants are more than one but only one of the appellant is barred to appeal? Can the court order an amendment to remove the names of one appellant, or move itself to struck out the name of the defaulting appellant?

While the appellants' counsel see that to be possible, the respondent's counsel submits that, once the preliminary objection has been taken, it is not proper to allow the amendment of the appeal as the amendment will be pre - emptying the raised objection, he said that the only option is to struck out the appeal for being incompetent.

The only option given by the counsel for the appellant are two, one that the court can move itself and struck out the name of the 1st Appellant, or to allow amendment. In dealing with these issues, I will start with the

first option. It is important for the parties to understand that the appeal before the court has two appellants, who have appealed jointly and together just like as they were sued jointly and together. The court having not been asked by the party concerned cannot disjoint the interest of any of the appellant, having preferred the appeal together under the service of one Advocate, it is the Advocate himself who can, basing on who gave him instruction to appeal, decided on this issue by taking appropriate action. Asking the court to do so is asking it to step into shoes of the party which the court should not do. For that reason, I decline to do as asked by the counsel by the appellants by striking out the name of the 1st Appellant.

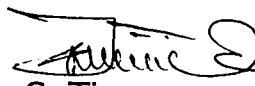
On the second issue on whether I may allow the amendment, while acknowledging the extensive research on the parties to the case as done by the counsel for the appellant. I am constrained to hold that, it is now a principle of law that an amendment asked after the competence of the matter sought to be amended has been challenged by way of preliminary objection remain to be an afterthought, calculated to defeat or pre empty the raised preliminary objection, which a number of case authorities discourages to allow. One of the authorities is the one cited by the counsel for the respondent in the case of **Kantibhai M. Palet** (supra).

That said, I remain with only one option, which is to declare that by involving the name of the 1st appellant, the appeal becomes incompetent. The rectification if any, may be made by an Advocate for the appellants after the court has struck out an in competent appeal.

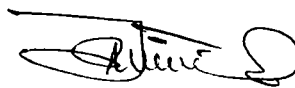
That being the state of affairs and the stands of the law, I do struck out the appeal for want of competence, and grant leave to the counsel to refile it properly within fourteen days from the date of this order.

The order striking out the appeal is with costs in favour of the respondent.

It is so ordered.


J. C. Tiganga
Judge
09/07/2020

DATED at MWANZA on this 09th day of July 2020


J. C. TIGANGA
JUDGE
09/07/2020