

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO. 30 OF 2019

(Originating from the decision of the District Court of Ilala in Misc. Civil Application No. 13 of 2018)

DR. INNOCENT NGALINDA.....APPLICANT

VERSUS

SYKES TRAVEL AGENTS LIMITED.....RESPONDENT

RULING

MASABO, J.L.:-

There is before me an appeal seeking to challenge an order of the District Court for Ilala in Misc. Application No. 13 of which dismissed the Appellant's application for extension of time within which to set aside an expert decree pronounced by the Court against the Appellant. Having being served with the appeal, the Respondent filed a preliminary objection on a point of law challenging the competence of the appeal.

In the submission filed on his behalf by the Mr. Francis Mgare, learned Counsel, the Respondent briefly submitted that the appeal is incompetent on ground that the order appealed against is not appealable as it is not listed under section 74 of the Civil Procedure Code, Cap 33 RE 22. For the Appellant, Mr. Bernard Masimba, responded with a brief written submission

in which he argued that the order appealable and cited the case of **CARITAS KIGOMA V KG DEWSI LTD** [2003] TLR 420.

Briefly, the facts leading to the appeal are that the Respondent obtained an *ex parte* decree against the Appellant in Civil Case No. 105 of 2011 before the District Court for Ilala. Allegedly, the Appellant learnt about the *ex parte* decree against him after the time within which to apply to have the *ex parte* decree set aside had expired. To reinstate the matter, he moved the court with an application made under section 89 of the Law of Limitation Act, [Cap 89 RE 2002] seeking enlargement of time within which to lodge his application for setting aside the *ex parte* decree. The application, Misc. Civil Application No.13 of 2018, was dismissed for lack of sufficient cause. Discontented, he filed this appeal.

I have given due consideration to the submissions of both counsels. There is, only one issue for determination, namely, whether an order for dismissal of an application for extension of time is appealable?

At the outset, let me state that, it is a settled principle of law that the right of appeal is a creation of a statute. There is no automatic right of appeal unless there is an enabling law (**Paul A. Kweka & Hillary P. Kweka v Ngorika Bus Services and Transport Company Limited**, Civil Appeal No. 129 of 2002, CAT at Arusha. This being an appeal of civil nature from the District Court, the enabling law is Section 74 (1) read together with Order XL Rule 1 of the Civil Procedure Code, Cap 33 RE 2002. For clarity, I will reproduce both provisions in extenso. Section 74 provides as follows:

74.-(1) An appeal shall lie to the High court from the following orders of the District Courts, Resident Magistrate's Courts and any other tribunal, the decisions of which are appealable to the High Court, and save as otherwise expressly provided in this code or by any law for the time being in force from no other order-

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order filing or refusing to file an agreement to refer to arbitration;

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(f) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(g) an order under section 69;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention as

a civil prisoner of any person except where such arrest or detention is in execution of a decree; or

(i) any order made under rules from which an appeal is expressly allowed by rules (emphasis added)

Thus, in the context of this rule, a litigant who is aggrieved by the decision of a District Court or Court of Resident Magistrate on any of the orders listed under Section 74(1)(a) to (h) has a statutory right to appeal to this Court. As for orders not specifically listed, the applicable provision is paragraph (i). However, this too does not confer a blanket right of appeal. As it could be vividly seen in the wordings of this paragraph, the phrase “any order” is only confined to orders made under rules from which the right to appeal is expressly allowed. Thus, impliedly, no right to appeal vests if the applicable rule does not expressly provide for a right to appeal. Thus, in my settled view, for the orders not specifically listed in this section, one has to look at the specific rule under which the order is made so as to determine whether or not it is appealable and if the rule is silent recourse should be sought from Order XL Rule 1 of the Civil Procedure Code which provides a list of orders appealable to the High Court. It states as follows:

“An appeal shall lie from the following orders under the provisions of section 74, namely-

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;

(b) an order under rule 14 of Order VIII pronouncing judgment against a party;

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 of Order IX rejection an application (in a case open to appeal) for an order to set aside a decree or judgment passed ex parte;

(e) an order under rule 4 of Order X pronouncing judgment against a party;

(f) order under rule 18 of Order XI;

(g) an order under rule 10 of Order XVI for the attachment of property;

(h) an order under rule 20 of Order XVI pronouncing judgment against a party;

(i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

(k) an order under rule 9 of Order XXII refusing to set aside the abatement of dismissal of a suit;

(l) an order under rule 10 of Order XXII giving or refusing to give leave;

- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;
- (n) an order under rule 2 of Order XXV rejecting an application for an order to set aside the dismissal of a suit;
- (o) an order under rule 3 or rule 8 of Order XXXII refusing to extend the time for the payment of mortgage-money;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXIII;
- (q) an order under rule 3, rule 4 or rule 7 of Order XXXVI;
- (r) an order under rule 1, rule 2, rule 4 or rule 9 of Order XXXVII;
- (s) an order under rule 1 or rule 4 of Order XXXVIII;
- (t) an order of refusal under rule 19 of Order XXXIX to readmit, or under rule 21 of Order XXXIX to re-hear, an appeal;
- (u) an order under rule 23 of Order XXXIX remanding a case, where an appeal would lie from the decree of the High Court;
- (v) an order under rule 4 of Order XLII granting an application for review.

The instant appeal does not fall in the list above cited. What is somehow relevant is the order listed in Rule XL(1)(d) but this too is not applicable as what is being challenged in the instant appeal is not a rejection of an application for an *ex parte* decree or judgment. What is being challenged here is the rejection of an application for extension of time filed under Section 14 of the Law of Limitation Act, Cap 89 RE 2002, which does not provide for appeals.

Based on what I have stated above, I agree with Mr. Mgare that the appeal is untenable as the order appealed against is none appealable. Accordingly, I upheld the preliminary objection and dismiss the appeal for incompetence. Cost to follow event.

DATED at DAR ES SALAAM this 10th day of February 2020.



J.L. MASABO

JUDGE

Judgment delivered this this 10th day of February 2020 in the presence of Mr. Octavian Mshukuma for Applicant and Mr. Said Mpango a representative from the Respondent Company



J.L. MASABO

JUDGE