IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.76/2007

BADUGU GINNING CO. LTD .....APPLICANT

VERSUS

SILWANI GALATI MWANTEMBE AS RECEIVER

AND MANAGER OF MARA OIL MILLS & GINNERY

LIMITED..... 1ST RESPONDENT

FEDERAL BANK OF MIDDLE EAST LTD ..... 2ND RESPONDENT

AZANIA BANCORP LIMITED .....3RD RESPONDENT

TANZANIA ELECTRIC CO. LTD ..... 4TH RESPONDENT

RULING

BUKUKU, J.

The applicant, Badugu Ginning Co. Limited filed a Chamber Summons under Section 5(1)(C) of the appellate jurisdiction Act, (Cap 141) and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009) that:

(i) Leave to appeal to the Court of Appeal be granted; and

(ii) Costs be provided for.

Upon being served with the Chamber Summons, the 1st, 2nd and 3rd respondents filed a notice of preliminary objection on one point of law namely:-

"That, the application for leave to appeal to the Court of appeal is incompetent as the orders sought to be appealed against is not appealable pursuant to the provisions of Section 75 of the Civil procedure Act, Cap 33 R.E. 2002 and Section 5(1) of the appellate jurisdiction Act, 1979 Cap 141 R.E. 2002 read together with previous decisions of the Court of Appeal namely:

(i) East Africa Development Bank V. Khalfani Transport Co. Ltd, Civil Appeal No. 68 of 2003 (Unreported; and

(ii) CRDB Bank Limited V. George M Killindu & The Attorney General, Civil Appeal No.137 of 2008 (Unreported).

In a nutshell, the facts of the application are as follows: On the 13th day of April, 2010, the Court scheduled this case, Commercial Case No.76 of 2007 to proceed for hearing for two days that is 18th and 22nd June, 2011. On the first date of hearing, that is 18th June, 2011, Plaintiffs and their Counsels did not make appearance. Mr. Malimi who was Counsel for 1st, 2nd and 3rd defendants prayed to this Court that the matter be dismissed for want of prosecution pursuant to rule 8 of Order 9 of the CPC Cap.33 R.E. 2002. He also prayed for costs.

Having observed that the matter was an old case and that, when the date was fixed for hearing both Counsel for the plaintiff were in Court and no explanation has been given as to their non appearance on the due date, my learned brother Mruma, J. ordered the suit to be dismissed in terms of O.9 r8 of the CPC and that defendants will have their costs.

Aggrieved by that decision, on 24th June 2010, applicant through his advocates filed an application under Certificate of urgency to set aside the dismissal order made by this Court on 18th June. Much as the applicants tried to move this Court to set aside its order, Honorable Mruma, J. found no sufficient reasons adduced by applicant for his non appearance on that date, and to make matters worse, it was discovered that the life span of the matter had expired on the 20th November, 2009 and no application for departure from the scheduling order was made. The application was therefore dismissed with costs. The appellant was dissatisfied with the said ruling and order and desired to appeal against it. He applied for leave to appeal to the Court of appeal in terms of Section 5(1) (c) of the Appellate Jurisdiction Act, 1979 and rule 45(a) of the Tanzania Court of Appeal Rules, 2009.

Before the application was heard, the respondent filed a preliminary objection which is now the subject of this ruling. In arguing the Preliminary objection, both parties presented written submissions in support of their respective views.

Arguing in support of the preliminary objection, Counsel for the 1st, 2nd and 3rd Respondent addressed me at length on why it was patently obvious that the application is untenable since the ruling delivered by Mruma, J. is non appealable. He accordingly urged this Court to strike out the application with costs. Learned Counsel for respondents started by submitting that first, there is no inherent right of appeal. Appeals are creatures of Statues. In amplifying this, Counsel relied on the case of **H. M Chamzim and 71 others V. Tanzania V Breweries Ltd. Civil Appeal No.57 of 2004 (Unreported),** cited with approval in **CRDB Bank Limited V. George Killindu & Hon Attorney General, Civil Appeal No 137 of 2008 (unreported),** whereas, the Court of Appeal of Tanzania quoted with approval the passage from **Attorney General V Shah (1971) EA 50** where it was held that:

> "It has long been established and we think there is ample authority for saying that, appellate jurisdiction springs from Statute. There is no such thing as inherent appellate jurisdiction."

Counsel for Respondents therefore urged that, the right of appeal has to be provided in the relevant statute.

On the second point, Counsel for Respondent argued that, the right of appeal against orders of the High Court of Tanzania in its original jurisdiction to the Court of Appeal are guided by Section 75 of the Civil Procedure Code Act, Cap 33 R.E. 2002. The said provision states:

"Save as otherwise expressly provided, no appeal shall lie from any order made by a Court, but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the Memorandum of appeal."

It is from the foregoing provision that Counsel for 1st, 2nd and 3rd respondents maintain that, the provision of Section 75 of the CPC bars appeals to the Court of Appeal against any order of the High Court unless such appeal is expressly provided for under its provisions or in any other law. With regard to Section 5 (1) of the appellate jurisdiction Act, Cap 141 R.E. 2002, Counsel for 1st, 2nd and 3rd respondents maintain that, this provision restricts the right of appeals by subjecting it to other written laws and therefore cannot be used by the applicant in his application for leave to appeal. In this, Counsel for defendants cited the case of **CRDB Bank Limited V. George Kilindu & Another, Civil Appeal No.137/2008** (Unreported), where the Court of Appeal held that, no appeal, would lie because no Court would grant leave to appeal against an order which is not appealable as that would amount to granting Courts the power to create right of appeal, which is the preserve of the Legislature.

Finally, Counsel for defendants submitted that, the order of this Court refusing to set aside the dismissal of the suit is not appealable. Section 75(1) of the CPC bars it, and that Section 5 (1) of the Appellate Jurisdiction

Act does not provide for such order to be appealable and therefore, he prayed the application be struck out with costs.

Opposing the preliminary objection, Counsel for the applicant urged the Court to dismiss the same because it has no merit. In the first place, he stated that, the decision of Mruma J, which is sought to be appealed against, finally and conclusively, determined the rights of the parties, and therefore is appealable in terms of O.XL r.1(c) and (d) of the CPC, which states:

1. An appeal shall lie from the following orders under the provisions of Section 74 namely:

(a)-

(b)-

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

(d) An order under rule 13 of 0.IX rejecting an application (in a case open to appeal) for an order to set aside a decree or judgment passed ex parte."

Relying on the case of **Paul Kweka & another V. Ngorika Bus Services and Transport Co. Civil Appeal No 129 of 2009,** Counsel for applicant submitted that, the effect of an order setting aside the dismissal of the suit is not appealable while an order rejecting an application for

setting aside a dismissal of the suit is appealable. On the question of why an appeal against an order setting aside the dismissal was incompetent, the Court of Appeal in the case of **Kweka** (supra), stated:

> "Consequently, we are, with respect, in agreement with Prof. Msanga in his submission that this appeal is incompetent. We are reinforced in this view by the learned author MULLA when he states that, an order under 0.9 r.13 setting aside an ex-parte decree is not an order that affects the merits of the case, such an order merely ensures a hearing upon the merits (MULLA Vol. 1P. 748)".

Counsel for applicant also referred us to the case of **Rashid Hussein V. Boniface Nyamuhanga & another 2002 TLR 172.** In that case, the Court of Appeal held that, in law the appellant was entitled to be heard on the reasons for his non appearance when the suit came up for hearing. It is on the strength of **Paul Kweka** and **Rashid Hussein** cases (supra), and Section 74(2) of the CPC that the Counsel for applicant is of the opinion that the application for leave to appeal is competent since the order intended to be appealed against is of rejecting an application for restoration of the suit and thus finally determining the rights of the parties. He therefore submits that the preliminary objection has no merit and prays that it be dismissed with costs.

In rejoinder, Counsel for the Respondents reiterated that, Section 74 of the CPC is not applicable for appeals to the Court of Appeal against orders made by the High Court, rather, it applies to orders from Courts

Subordinate to the High Court. He also submitted that, Counsel for applicant misdirected himself by relying on the case of **Kweka** and **Rashid Hussein** (supra) since those cases are distinguishable from this case. Counsel for defendants reiterated that, the preliminary objection be upheld as prayed.

After a close examination of the material and rival arguments, and having examined the averments before me, it is apparent that the issue before me, is to determine whether the order made by Hon. Mruma, J. on 6th October, 2010, is appealable or not. But before I do so, it is important to state, albeit briefly, what is the position of the law regarding appeals. There is no definition of appeal in the code of civil procedure. However, there is no doubt that, any application by a party to an appellate Court, asking to set aside or reverse a decision of a subordinate court, is an appeal within the ordinary acceptation of the term. It is a remedy provided by law for getting the decree of the lower Court set aside; In other words, it is a right of entering a superior court and invoking its aid and interposition to redress an error of the court below.

As pointed out by counsel for respondent, appeal is a creature of statute and it is not an automatic right. Whenever there is an appeal there is a law behind which gave the right to appeal. The application for notice to appeal submitted by the applicant which gave rise to the preliminary objection was made pursuant to section 5 (1) (c) of the Appellate

Jurisdiction Act, 1979. For ease of reference, I shall produce that provision of the Act here. It reads:

> 5.-(1) In all civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal:
>
> (a).....
>
> (b).....
>
> (c) With leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court".

In order to properly address the objection raised, and fearful of arrogating myself the jurisdiction I do not have, I wish to ascertain whether the applicant has any right of appeal against the impunged order of this court. In order to do so, I shall briefly revisit the circumstances that gave rise to the dismissal of the suit. It is not in dispute that, applicant did not make appearance on the date set for hearing. The suit was dismissed for non appearance. On June 24, 2010, applicant filed an application for restoration of the suit. However the application was dismissed on the grounds that the applicant had not shown sufficient or reasonable cause for failing to appear on the due date.

One can pause and ask, what does the order of the Court mean? If the case has been finally determined, what are the remedies (if any) in law, to the aggrieved party, and if it has not been fully determined, what next.

Counsel for the applicant submitted that, the decision of Mruma, J. which is sought to be appealed against, finally and conclusively determined the rights of the parties, and therefore the order is appealable under Order XL rule 1(c) and (d) of the CPC. The said order provide:

1. An appeal shall lie from the following orders under the provisions of Section 74 namely :

   (a)

   (b)

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

   (d) An order under rule 13 of order IX rejecting an application (in case open to appeal) for an order to set aside a decree or judgment passed ex-parte.

In the instant case, when the case was first dismissed for non appearance, the order for dismissal was made pursuant to O.IX r.8 of the CPC which relate to dismissal of the suit, where only defendant appears. Considering that there is a remedy where the suit is dismissed for want of prosecution, applicant utilized the provisions of O.IX r 9 (1) by applying for an order to set aside the dismissal order. Having being unsuccessful, he then submitted an application for notice to appeal to the Court of appeal

knowing fully that, he had the right to do so, and also, it was the only available option to him.

Knowing fully that, the order to restore or not to restore the suit is a discretion of the Court depending on the facts adduced and determined, the applicants are now praying to be given the opportunity to move the Court of appeal to determine whether the discretion to dismiss the case for lack of prosecution was judiciously exercised in view of the fact that the matter was fixed for hearing on two successive days.

As emulated by the Court of Appeal in the case **Kweka and Hillary Kweka V. Ngorika Bus Service Civ. Appeal No. 129/2009 (Arusha unreported).** Appeals to the Court of Appeal are governed by the Appellate Jurisdiction Act, 1979, Section 5, Sub Section (a) and (b) which sets out all the situations in which a party may appeal as of right while subsection (c) provides:

> *"With the leave of the High Court or of the Court of Appeal against every order, judgment or finding of the High".*

In the Civil Procedure Code, the relevant provisions are Section 74(2) and order XL(1) (c). This means that, in the case at hand, we have to read Sec 5(1) of the Appellate Jurisdiction Act, 1979, together with the Civil Procedure Code to see if the order under scrutiny is appealable.

Section 5(1) of the Appellete. Jurisdiction Act lists down all orders made under the High Courts' original jurisdiction which are appealable. The test is whether the order dismissing the suit is among the listed orders. If we go back to Section 74 of the CPC we find that, this Section restricts appeals from orders from a "Court". "Court" is defined by Section 3 of the Code to include the High Court and therefore Section 74 (2) is applicable to appeals from orders made by the High Court under the Civil Procedure Code to the Court of appeal.

I am given to understand that, O.XL derives its authority under Section 74 of the Civil Procedure Code. What Honorable Mruma, J. did was to dismiss the suit. In the Black's law Dictionary, Ninth Edition, at Pg.537, the word ***"dismiss"*** connotes the following definition:

> *"To send (something) away; to terminate (an action or a claim) without further hearing, especially before the trial of the issues involved....."*

From the above definition it is clear that, the decision of this Court finally determined the right of the parties. It is my view that, an order under O.IX r.9 of the CPC is appealable.

Section 74 (2) as amended by Act No.25 of 2002 states:

> 74 (2) Notwithstanding Sub Section(1) no appeal shall lie against or be made in response of any preliminary or interlocutory

decision or order of the High Court *unless such decision or order has the effect of finally determining the suit.* (Emphasis mine).

Now having closely analyzed the decision of Mruma, J. did it finally determine the suit? If the answer is in the affirmative, then such a decision is appealable under order XL rule 1(c) of the CPC which provides:

"An appeal shall lie from the following orders under the provisions of Sec 74 namely

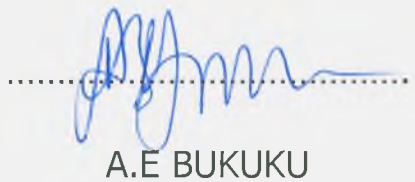
(a).....

(b).....

(c) An order under rule 9 of order IX rejecting an application (in a case open to an appeal) for an order to set aside dismissal of a suit".

Clause c of Order XL (1) embraces the rejection of an application under 0.9 r.9 of the CPC, irrespective of the fact whether that rejection is on merit or in default. With due respect, in the strength of Section 74 (2) of the CPC, read together with O.XL (1) (C) of the CPC, I find that, the applicants application for leave to appeal is competent since the ruling of Honorable Mruma J, determined the rights of the parties.

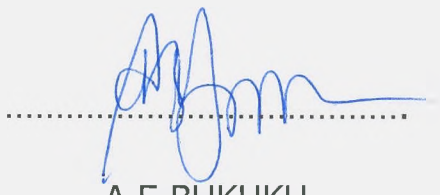
Therefore, the preliminary objection fails. It is dismissed with costs. Applicants to file their notice of appeal within 14 days from date of this ruling. It is accordingly ordered.



A.E BUKUKU

JUDGE

Ruling delivered this 21st day of June, 2011 in the presence of Mr. Mhango, Learned Counsel for the Applicant and Mr. Johnson Learned Counsel for the 4th Respondent and also holding brief for Mr. Malimi, Learned Counsel for the 1st to 3rd Respondents.



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JUDGE