

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 9 OF 2018

1. PRISTINE PROPERTIES LIMITED
2. GULAM MOHAMEDALI PUNJANI
3. MUSLIM SHIVJI KARIM

..... APPELLANTS

VERSUS

UBL BANK (TANZANIA) LIMITED RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Commercial Division
at Dar es Salaam)

(Mruma, J.)

dated the 15th day of November, 2017

in

Miscellaneous Commercial Application No. 215 of 2017

RULING OF THE COURT

2nd November & 24th December, 2018

NDIKA, J.A.:

In the High Court, Commercial Division at Dar es Salaam, Pristine Properties Limited (the first appellant), a limited liability company incorporated in Tanzania, along with its two directors Gulam Mohamedali Punjani and Muslim Shivji Karim (the second and third appellants respectively), applied for leave to defend a summary suit (that is, Commercial Case No. 99 of 2017) instituted against them by UBL Bank (Tanzania) Limited (the respondent). The said suit was for recovery of an

outstanding sum of US\$ 1,161,737.00 being the principal sum and interest thereon in respect of a credit facility availed by the respondent to the first appellant and guaranteed by the second and third appellants. In its decision dated 15th November, 2017, the High Court dismissed the said application and proceeded to enter judgment and decree in favour of the respondent as prayed in the summary suit. Dissatisfied by the refusal of leave, the appellants lodged the present appeal upon four grounds.

When the appeal came up before us for hearing on 2nd November, 2018, Mr. Ashiru H. Lugwisa, learned counsel for the appellants, rose up and prayed for withdrawal of the appeal without any order on costs. The appellants had filed a notice to that effect under Rule 102 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017, G.N. No. 362 of 2017 and served it on the respondent. However, Mr. Lugwisa acknowledged that the appellants were in receipt of a letter dated 30th October, 2018 from the respondent indicating that the respondent bank intended to object to the withdrawal prayed for and that it would, instead, move under Rule 102 (5) for dismissal of the appeal with costs. Clearly perturbed by the respondent's unanticipated stance, Mr. Lugwisa

contended that Rule 102 (2) allows withdrawal of an appeal at any time and that Rule 102 (5) was inapplicable in the circumstances of this matter.

For the respondent, Mr. Dilip Kesaria, learned counsel, at first, notified the Court that the respondent had lodged Civil Application No. 162/16/2018 to move the Court to strike out the present appeal on the ground that it was lodged without requisite leave to appeal. Then, Mr. Kesaria urged us to dismiss the appeal with costs on the ground that the respondent did not consent to the requested withdrawal of the appeal. The learned counsel relied upon the provisions of Rule 102 (5) of the Rules, which stipulate that:

"If all the parties to the appeal do not consent to the withdrawal of the appeal, the appeal shall stand dismissed with costs, except as against any party who has consented, unless the Court, on the application of the appellant, otherwise orders."[Emphasis added]

Mr. Kesaria added that even after the respondent had intimated its intention to withhold consent to the withdrawal prayed for, the appellants lodged no application under Rule 102 (5) for the Court to order otherwise than dismissing the appeal with costs.

On being probed by the Court on the propriety of an order for dismissal of the appeal acknowledged by both parties to be incompetent for want of leave to appeal, Mr. Kesaria stuck to his guns stating that the appeal ought to be dismissed with costs rather than being struck out with costs.

Rejoining, Mr. Lugwisa pressed for withdrawal of the appeal without costs. However, on reflection he agreed that the appeal was liable to be struck out on account of its incompetence.

It is common ground from the rival submissions of the parties that this purported appeal against the High Court's refusal of leave to defend is plainly incompetent for want of leave to appeal. We agree with the parties that the lack of leave to appeal renders the appeal incompetent. Therefore, it occurs to us that the Court has no jurisdiction to entertain the matter. The purported appeal, being abortive, is only liable to be struck out; it cannot be dismissed or adjourned or withdrawn. On the fate of an incompetent appeal like the present one, we only need to pay homage to the holding by the erstwhile Eastern African Court of Appeal in **Ngoni-Matengo Cooperative Union Ltd. v. Alimohamed Osman** [1959] 1 EA 577 at page 580 that:

"In the present case, therefore,... when the appeal came before this court, it was incompetent for lack of the necessary decree.... This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to 'strike out' the appeal as being incompetent, rather than to have 'dismissed' it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of." [Emphasis added]

We subscribe to the above position, which has been consistently followed by this Court: see, for instance, the unreported decisions of the Court in **Hashim Madongo & Two Others v. Minister for Industry and Trade & Two Others**, Civil Appeal No. 27 of 2003; **Mustafa Fidahusseini Esmail v. Dr. Posanyi Jumah Madati**, Civil Appeal No. 43 of 2003; **Peter Ng'homango v. Attorney General**, Civil Appeal No. 114 of 2011; and **Joseph s/o Mahona @ Joseph s/o Mboje v. Republic**, Criminal Appeal No. 215 of 2008.

The above said, we come to the conclusion that the present appeal being incompetent for want of leave to appeal cannot be withdrawn or dismissed. We have no option but to strike out the purported appeal with costs.

Ordered accordingly.

DATED at DAR ES SALAAM this 20th day of December, 2018.

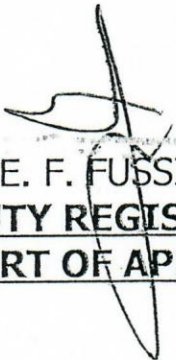
K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL