IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MGEYEKWA, J.A.)

CIVIL APPLICATION NO. 636/01 OF 2021

WELLWORTH HOTELS & LODGES LIMITED..... APPLICANT

VERSUS

A.H. JAMAL (as administrator of the estate of
the late ALNOOR TAJDIN NANJI) ..... 1ST RESPONDENT
SONIX CORPORATION ..... 2ND RESPONDENT

(Application to strike out a notice of appeal against the decision of the High Court of Tanzania, District Registry at Dar es Salaam)

(Fovo, DR.)

Dated the 15th day of January, 2021
in
Execution No. 326 of 2002

.....

RULING OF THE COURT

10th November, 2023 & 11th March, 2024

WAMBALI, J.A:

The applicant, Wellworth Hotels & Lodges Limited together with Gullam Esmail (not a party to this application) sued the respondents in Civil Case No. 326 of 2002 before the High Court of Tanzania at Dar es Salaam. It is on the record of the application that a trial of the suit was not held as parties settled their dispute and entered into a deed of settlement which was endorsed by the High Court on 2nd March, 2009.

The record of the application reveals further that later, the respondents approached the Registrar of the High Court seeking

execution of the agreed payment as per clause 4 of the deed of settlement. The Deputy Registrar of the High Court (Fovo, DR) who presided over the application, heard the parties and ultimately dismissed it with costs on 11th January, 2021. In his decision, he formed an opinion that the respondent's prayer for execution before him was similar to the one which was dismissed by another Deputy Registrar (Mutaki, DR) in Miscellaneous Civil Application No. 82 of 2014. Basically, he was convinced that the matters of satisfaction of the decree in that case had been completed and closed in the said application which was determined by his colleague Deputy Registrar (Mutaki, DR) on 19th May, 2019. Indeed, he held that he could not entertain the said application as he was *functus officio* and that even an application for revision which was earlier on lodged by the respondents before the Court against that decision had by then been withdrawn with costs.

The respondents were seriously aggrieved and thus they lodged a notice of appeal to this Court to challenge the said decision. Subsequently, the respondents lodged Miscellaneous Civil Application No. 61 of 2021 seeking leave of the High Court to appeal to this Court. Unfortunately, the said application was struck out on 11th November, 2021.

In this application, the applicant urges the Court, in terms of rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to strike out the notice of appeal lodged by the respondents on 8th February, 2021 against decision of the Deputy Registrar of the High Court on the ground that no appeal lies as the respective leave to lodge an appeal has not been granted. The application is supported by an affidavit deposed by Mr. Henry Sato Massaba, learned advocate for the applicant who also appeared at the hearing.

The application is contested by the respondents through an affidavit in reply deposed by Mr. Audax Kahendaguza Vedasto, learned advocate who also represented them at the hearing.

During the hearing of the application, Mr. Massaba adopted the affidavit in support of the application and emphasized that in view of the nature of the decision of the Deputy Registrar of the High Court, the same is not appealable and thus no appeal lies. On the other hand, he submitted that even if it is taken that the respondents have the right of appeal, subject to being granted leave of the High Court or this Court, there is no further steps taken by them to ensure that leave is granted after the High Court struck out the initial application for such leave. In this regard, he prayed that the application be granted with costs for having merits

because of the failure by the respondents to take essential steps to institute the appeal. He added that, even in the affidavit in reply lodged by the respondents through Mr. Vedasto, they have not contested the applicant's averment in the affidavit in support of the application.

For his part, Mr. Vedasto resisted the applicant's prayer to have the notice of appeal struck out. He contended that, after the High Court (Mruma, J) struck out Misc. Civil Application No. 61 of 2021 on 11th November, 2021, the respondents on 10th December, 2021 filed before the same court, Civil Review No. 18 of 2021. He added that the application was still pending by the time the affidavit in reply was lodged before the Court on 19th April, 2022 and that the applicant's counsel has appeared in the said matter several times. The learned counsel maintained that the issue of satisfaction of the decree has not been settled and completed as decided by the Deputy Registrar of the High Court. In the circumstances, he argued that the respondents have taken essential steps to ensure that the issue of leave is sorted out before lodging the appeal.

On the other hand, he emphasized that as stated in paragraph 5 of the affidavit in reply, upon reflection, the respondents are of the view that no leave is required to appeal against the decision of the Deputy Registrar of the High Court since there is an automatic right of appeal under section

5 (1) (b) (ix) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA). He argued further that the said decision is appealable as the Deputy Registrar of the High Court exercised the power granted to him under Order XLIII rule 1 (m) of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC). To this end, he submitted that considering the contexts of the provisions of the law referred above, it cannot be said that no appeal lies as contended by the applicant. Besides, he argued, gauging from the disposition in the affidavit in reply, the respondents have taken essential steps towards lodging an appeal to this Court. He concluded his submission by pressing the Court to dismiss the application with costs.

Having heard the parties' contending submissions, the issue for our determination is whether the application has merit. We propose to start our deliberation by making reference to the specific provisions with regard to the party's right of appeal to the Court against the decision of the High Court from its original jurisdiction.

It is noted that before the amendment introduced by section 10 of The Legal Sector Laws (Miscellaneous Amendments) Act, 2023 (Act No. 11 2023), section 5 (1) (b) (ix) of the AJA provided as follows:

> *"5 (1) In 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) Against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;

(b) against the following orders of the High Court made under its original jurisdiction, that is to say-

(i) – (viii) N/A

(ix) any order specified in rule 1 of Order XLIII in the Civil Procedure Code or in any rule of the High Court amending, or in substitution for the rule."

It is noteworthy that before the stated amendment, while section 5 (1) (a) and (b) provided for an impinged right of appeal against the decision of the High Court on the listed matters, subsection (c) provided for the requirement of leave before lodging an appeal to this Court.

On the other hand, Order XLIII rule 1 of the CPC provides:

"1. Subject to any general or specific direction of the Chief Justice, the following powers may be exercised by the Registrar or any Deputy or District Registrar of the High Court in any proceedings before the High Court –

(a) *to appoint and extend time for filing the written statement of defence, to give leave to file a reply thereto and to appoint and extend the time for filing such reply under Order VIII, rule I, II, and 13;*

(b) *to order that a suit be dismissed under Order IX, rules 2, 3 and 5;*

(c) *to make an order or give judgment on admissions under Order XII, rule 45;*

(d) *to sign decrees under Order XX, rule 7;*

(e) *to admit, reject or allow the amendment of an application for execution of a decree under Order XXI, rule 15;*

(f) *to issue notice under Order XXI, rule 20;*

(g) *to order that a decree be executed under Order XXI, rule 22;*

(h) *to issue process for execution of decree under Order XXI, rule 22;*

(i) *to stay execution, restore property, discharge judgment debtors and require and take security under Order XXI, rule 24;*

(j) *if there is no judge at the place of registry, to issue a notice to show cause and to issue a warrant of arrest under Order XXI, rule 35;*

(k) *if there is no judge at the place of registry to order attendance, examination and production under Order XXI, rule 40;*

(l) *to order that an agreement, compromise or satisfaction be recorded under Order XXII, rule 3; and*

(m) *to exercise the powers and duties of a judge or of a magistrate and may pronounce judgment and sign decrees and make orders and transact the business of the High Court or the Court of a Magistrate."*

According to the record of the application, there is no doubt that the Deputy Registrar of the High Court made the decision, the subject of the impugned notice appeal, after the respondents prayed to enforce execution of clause 4 of the deed of settlement in Civil Case No. 326 of 2002. There is also no dispute that a similar kind of application was dealt with and determined by another Deputy Registrar of the High Court (Mutaki, DR) in Miscellaneous Civil Application No. 82 of 2014. It is thus plain that considering the nature of the decision of the Deputy Registrar

of the High Court in which he refrained from determining a similar kind of application on the contention that he was *functus officio*, the powers he exercised did not fall under the provisions of Order XLIII rule 1 (a- k) of the CPC.

The question thus is whether it fell under paragraph (m) of Order XLIII rule 1 of the CPC as contended by the respondents' counsel at the hearing. Our answer is to the contrary. It must be noted that the Registrar or Deputy Registrar of the High Court does not exercise the power of execution of the decree of the High Court under that paragraph. The powers of settling the issues of execution of a decree are clearly and specifically stipulated under paragraphs (e), (f), (g), (h), (i), (j) and (k) of Order XLIII rule I of the CPC.

For clarity, we wish to point out that paragraph (m) of Order XLIII rule I was deleted and substituted by the current new paragraph vide GN No. 136 of 2011 which become effective on 1st April, 2011. The amendment intended to empower the Registrar or Deputy Registrar of the High Court to exercise the powers of a judge or magistrate including pronouncing judgments and signing decrees in the absence of a judge or magistrate without causing injustice to the parties. Our reading of the said provision of the CPC leads us to the conclusion that it does not empower

the Registrar or Deputy Registrar of the High Court to preside over execution proceedings. It is for that reason that specific issues involving execution of decrees and orders are stipulated under the above mentioned paragraphs of Order XLIII rule I of the CPC. Indeed, the decisions of the Registrar or Deputy Registrar of the High Court in exercise of those powers were appealable to this Court as of right before the amendment as provided for by section 5 (1) (b) (ix) of the AJA. As intimated above, the provisions of paragraph (m) of Order XLIII rule 1 of the CPC was purposely introduced not to substitute the existing powers over execution proceedings but to enable the Registrar or Deputy Registrar of the High Court, among other duties, to pronounce judgment, sign decrees and make relevant orders.

In the circumstances, since the impugned decision of the Deputy Registrar of the High Court does not fall under other paragraphs of Order XLIII rule I of the CPC mentioned above, the respondents had by then no automatic right of appeal under Section 5 (1) (a) and (b) (ix) of the AJA. The respondents were therefore required to ensure that they took essential steps to lodge the appeal upon compliance with the law. Apparently, the respondents were enjoined to take essential steps to sort

out the issue of leave or embark on an alternative way forward after the initial application for leave was struck out by the High Court.

We are however aware of the respondents' counsel contention that upon reflection, the respondents formed an opinion that leave was not required to appeal to this Court and that they had notified the High Court before it heard and determined Miscellaneous Civil Application No. 61 of 2021. Particularly, it is deposed as follows by the respondents' counsel in paragraph 5 of the affidavit in reply:

> *"... I state in addition that after all, the Respondents have repeatedly stated, and they had told the High Court, and copied to the applicant that their stand, after reflecting on the matter, is that no leave is needed to appeal against that decision of the High Court (Hon. Fovo, DR) and the appellate process against that decision goes on and it has never stopped despite the order striking out Misc. Civil Application No. 61 of 2021.*
>
> *A copy of the letter of the Respondents through me, dated August, 13, 2021 and submitted to the High Court on 17.8.2021 and served on the Applicant on 17.8.2021 is annexed hereto marked C2 to form part of the present Affidavit in Reply."*

If we go by the respondents' stand stated above, it was expected that after the initial application for leave was struck out by the High Court, they would not have applied for review of that decision before the same court. Instead, they would have proceeded to take essential steps to institute the appeal as they have contended that the appellate process has not stopped. It follows that, since up to the time the instant application was lodged they had not instituted the appeal; they had failed to take essential steps within the prescribed period as required by law. In **Harman Singh Bhogal t/a Harman Singh & Co., v. Javda Karsan** (1953) 20 EACA 17 at page 18, the defunct Court of Appeal for Eastern Africa stated that:

> *"It is well settled law that a right to appeal can only be founded on a statute and that any party who seeks to avail himself of the right must strictly comply with the conditions prescribed by the statute."*

Therefore, even if the respondents believed, as averred in the affidavit in reply, that leave was not required, they would have taken essential steps to lodge the intended appeal within the prescribed period.

In the circumstances, we find that the application has merit and grant it. Consequently, in terms of rule 89 (2) of the Rules, we strike out the notice of appeal lodged by the respondents on 8th February, 2021.

We further hold that the applicant is entitled to costs.

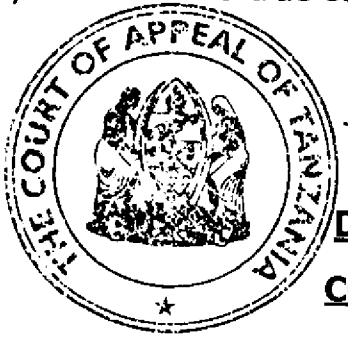
DATED at **DAR ES SALAAM** this 6th day of March, 2024

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of March, 2024 in the presence Mr. Shaloom Msaky, learned counsel for the appellant, also holding brief for Mr. Audax Kahendaguza Vedasto, learned counsel for the Respondent is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL