IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A, And FIKIRINI, J.A)

CIVIL APPEAL NO. 234 OF 2019

KARIAKOO AUCTION MART.....APPELLANT

VERSUS

MASHAKA DYANGA.....1st RESPONDENT

JUMA S. SAMBA.....2nd RESPONDENT

ABDULWAHAB HAMZA.....3rd RESPONDENT

NASSORO SAIDI.....4th RESPONDENT

MOHAMED MMANDE.....5th RESPONDENT

SIASA MOHAMED.....6th RESPONDENT

RAMADHANI J. YAGGA.....7th RESPONDENT

ABDUL S. DUNDA.....8th RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam)

(Mwandambo, J.)

dated the 26th day of February, 2016
in
Civil Case No. 86 of 2008

.....

RULING OF THE COURT

14th & 28th June, 2022

FIKIRINI, J.A.:

The respondents successfully sued the appellant for damages in Civil Case No. 86 of 2008 after the latter terminated their shareholding and participation in the appellant's company's activities. Dissatisfied, the appellant appealed to this Court on the following grounds:

1. *That the High Court had no jurisdiction to entertain the matter.*

2. *The Honourable trial judge erred in law and fact in entertaining the suit in the absence of the properly appointed administrator of the estate of the 8th respondent as one, Mr. Shafii Swalehe Dunda, was the administrator of the late Abdulwahab Dunda and not the 8th respondent.*

3. *That the Honourable trial judge erred both in law and fact in entertaining the suit while the appellant had no locus to be sued.*

When the appeal was called on for hearing on 14th June, 2022, Mr. Edward Peter Chuwa, assisted by Ms. Anna Lugendo, learned advocates entered appearance for the appellant. In contrast, Mr. Godfrey Ukongwa also learned advocate appeared for the respondents.

Rising to address the Court, Mr. Chuwa, despite being ready to proceed with the hearing of the appeal, prayed to be allowed to move the Court by making two applications.

The first application was made under Rule 113 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), requesting to be allowed to lodge an additional ground of appeal, namely that the respondents had no *locus standi* to institute the Civil Case No. 86 of 2008.

Mr. Chuwa submitted that though the point was raised late, he believed that since it involves a question of jurisdiction, it could be raised at any time. Moreover, the learned advocates were not handling the matter when it was before the High Court, contended Mr. Chuwa. After they were engaged and searched, the finding led to the present oral application. In support of his submission, he referred us to the case of **Hashi Energy (T) Limited v. Khamis Maganga**, Civil Application No. 200/16 of 2020 (unreported). Adding to his submission, he contended that the point being jurisdictional, the respondents would not be prejudiced.

His second prayer was pegged on Rule 36 (1) (b) and (2) of the Rules. He urged us to exercise our discretion and take additional evidence or direct the High Court to do so. Expounding on this prayer, Mr. Chuwa contended that taking additional evidence under certain circumstances by this Court or the High Court is permissible under the cited provision. Buttressing his position, he referred us to the case of **Jamaat Ansaar Sunna v. The Registered Trustees of Umoja wa Vijana wa Chama cha Mapinduzi,** Civil Application No. 46 of 1996 (unreported). He further stated that although the appellant's defence challenged that the respondents were not shareholders, no conclusive evidence was led to determine who the shareholders were. While searching who the

shareholders were, the appellant approached the Business Registrations and Licensing Agency (BRELA) and found that the respondents were not, asserted Mr. Chuwa. The Memorandum and Article of Association (MEMARTS) did not disclose that, and the information could not be timely secured as the file was with the Prevention and Combating of Corruption Bureau (PCCB).

On his part, Mr. Ukongwa objected to the application's grant, arguing that the appellant had previously filed Civil Appeal No. 123 of 2016 and never raised those issues. He further argued that the present appeal was filed in September, 2019, yet nothing was raised while the appellant had all the time to prepare the grounds of appeal. Bringing the present application at this juncture was, according to Mr. Ukongwa, a reason to dissuade the respondents from exercising their rights. Stressing on time, Mr. Ukongwa contended that the appellant had ample time to bring all the evidence, and more so, the High Court judgment was pronounced long ago if it was anything to go by. Insisting that his clients were shareholders who were not benefiting, he referred us to annexture "A" to the plaint on pages 14 – 20 of the record of appeal. In the same breath, he wondered if the appellant appealed, then what else was to be proved? He further submitted that this case had taken long urging the appellant's counsel to act

seriously, even though they have the right to exercise their right to appeal; nevertheless, this application was not brought at the right time, retorted Mr. Ukongwa.

On the first limb of the application on additional ground of appeal, Mr. Ukongwa contended that the raised ground was not different from the first ground already existing since it would have covered the parties' *locus standi* as well. On the strength of his submission he urged us to dismiss the application.

Rejoining, Mr. Chuwa admitted the issue of pecuniary jurisdiction was indeed raised, not the issue on *locus standi*. He added that this information came about in March 2022, after receiving search results from BRELA, prompting the appellant to apply for furnishing of additional evidence. Discounting Mr. Ukongwa's submission that annexture "A" to the plaint proved that the respondents were shareholders based on the share certificates, he argued that is not conclusive proof since the respondents are not mentioned in the MEMARTS, and their names do not appear at BRELA.

Mr. Chuwa reiterated his earlier submission in answering Mr. Ukongwa's concern on the lateness in bringing the application, that it was because the backing information was recently received from BRELA.

Emphasizing the importance of the information, he contended it is vital even to the respondents, as without it, the execution of the decree in their favour would be problematic.

The application before us is predicated on two limbs: one, that the appellant be allowed to add additional ground of appeal under Rule 113 (1) of the Rules, and two, the exercise by the Court of its discretion to take or order the taking of additional evidence in terms of Rule 36 (1) of the Rules.

The first limb of the application shall not detain us. While it is evident that the appellant had previously raised the ground, as the third ground in the memorandum of appeal lodged on 16th September, 2019, the ground was dropped in the course of the written submission. However, this does not bar the appellant from raising it again. The reason we say so is apart from the point being raised initially, but being a point of law thus worth consideration by this Court. Mr. Ukongwa concerns about the lateness of bringing up this application, though rational but cannot tramp over what justice demands. Justice demands that parties be heard, and in this situation the avenue is availed under Rule 113 (1) of the Rules. The provision provides as follows:

> *"**A party shall not without leave of the Court, argue** that the decision of the High Court or*

tribunal, should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or in support of the decision of the High Court or tribunal on any ground not relied on by that court or specified in a notice given under rule 94 or rule 100." [Emphasis added].

Given the nature of the point upon which additional ground of appeal is sought to be raised, we are inclined to grant the prayer. This is not the first time this Court is approached with this kind of application. In the case of **Hashi Energy (T) Limited v. Khamis Maganga**, Civil Application No. 200/16 of 2020 (unreported), encountered with the same issue, we in stressing on the fundamental and constitutional right to be heard, made reference to the cases of **Mbeya-Rukwa Auto-Parts and Transport Ltd v. Jestina George Mwakyoma** [2003] T. L. R. 251 and **Hamisi Rajabu v. R** [2004] T. L. R. 181. In yet another case, **Abbas Sherally & Another v. Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported), this Court did not hesitate to hold that: -

"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been

reached had the party been heard, because the violation is considered to be a breach of natural justice."

In the interest of justice and the fact that the intended ground of appeal raises a legal issue pertaining to jurisdiction, we find that the application is deserving and proceed to allow it. The intended additional ground on *locus standi* would thus form part of the memorandum of appeal.

On the second limb concerning the taking of additional evidence in terms of Rule 36 (1) (b) of the Rules, the relevant Rule provides as follows:

> "*36. -(1) On any* ***appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction****, the Court may-*
>
> *(a).....*
>
> *(b) in its* ***discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner****....."* [Emphasis added].

Reading from the provision, whereas this Court is vested with discretionary powers to grant the application, there is, however, conditions to be met, as amply illustrated in the case of **African Barrick Gold Plc v. Commissioner General (TRA),** Civil Application No. 177/20 of 2019

(unreported). The prerequisite set by the Court are: **one,** an existence of an appeal before this Court. **Two,** the appeal must stem from a High Court decision exercising its original jurisdiction. **Three**, in exercising its discretion, this Court must be furnished with sufficient reason to allow it to decide one way or the other and also to decide whether it is the Court or the High Court which should take the additional evidence.

In the application before us, all three conditions have been met. Before this Court, there is a pending Civil Appeal No. 234 of 2019, emanating from the High Court decision in Civil Case No. 86 of 2008, in which the High Court exercising its original jurisdiction, decided a suit before it between the parties in the present appeal in favour of the respondents. In addressing us, Mr. Chuwa argued that although the appellant's defence challenged the respondents' shareholding claims, no conclusive evidence was found to determine who the actual shareholders were. According to him, the information about who were shareholders was secured later from BRELA, after the High Court decision. Even though Mr. Ukongwa objected to the grant of the application, arguing that the appellant had previously filed Civil Appeal No. 123 of 2016 and never raised those issues and that annexture "A" to the plaint was evidence proving the

respondents were shareholders, we find no evidence was led in that regard. The issue thus needs to be determined in one way or the other.

In the decision referred to us by Mr. Chuwa, **Jamaat Ansaar Sunna** (supra), almost with the same scenario, the Court granted the application. In the cited case the litigation involved titles to land. It was after the High Court decision counsel for the appellant embarked on researching and discovered the existence of some survey maps which would have established that there was no double allocation of the plot in issue. The High Court would not have concluded so if it had been aware of the survey maps. Appreciating the actual picture, the court would have avoided the demolition of a mosque already in use. In contrast, the counsel for the other party considered the demolition of the mosque was justified, regardless of the new found evidence.

We have pondered on the issue, and we firmly believe in the circumstance of the matter, it will be more just that the additional evidence be tendered to answer the issue whether or not the respondents were the material time the shareholders.

We are persuaded further by Mr. Chuwa's assertion that without determination of who are the shareholders, even the respondents might have difficulties in executing the decree in their favour, since there was no

evidence led in that regard proving on the balance of probabilities that respondents were shareholders in the appellant's body. Therefore, taking additional evidence would benefit not only the appellant but the respondents. We thus order the High Court to take additional evidence on the issue of who were the shareholders of the appellant's body in terms of Rule 36 (1) (b) of the Rules.

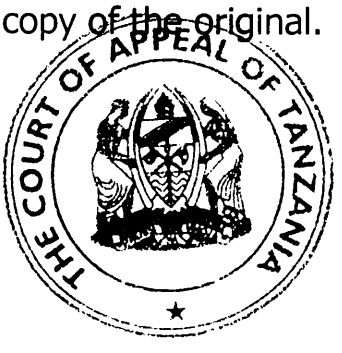
DATED at **DAR ES SALAAM** this 27th day of June, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 28th day of June, 2022 in the presence of Mr. Godfrey Ukongwa, learned counsel for the respondents also holding brief of Mr. Edward Peter Chuwa, learned counsel for appellant, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL