– Delays in filing Appl. @ day be expl'd.
+ Concurrent Hs 7 < Appl. prel. obj. – in order p.3

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 98 OF 2008

HARUNA MPANGAOS & OTHERS.....APPLICANT

VERSUS

TANZANIA PORTLAND CEMENT CO. LTD.....RESPONDENT

(Application for extension of time from the ruling of the High Court of Tanzania at Dar es Salaam)

(Shaidi, J.)

dated the 16th day of June, 2008
in
Civil Case No. 173 of 2003

RULING

3 September & 7 October, 2008:

KIMARO, J.A.:

This motion is filed under section 5(1) (C) and 11(1) of the Appellate Jurisdiction Act, 1979 Cap. 141 R.E. and Rules 8, 9, 44 and 45 (1) of the Court of Appeal Rules, 1979. It seeks for three orders; one, extension of time for the applicants to give notice of appeal and for serving the respondent, two, extension of time to enable the applicants apply for record of the proceedings, judgment, decree and

all the necessary documents for preparing the record of appeal and serving the respondents, lastly, stay of execution of the decree pending filing of the notice of appeal on extension of time.

To understand the gist of the application, brief background information is important. The applicants were aggrieved by the judgment of the High Court in Civil Case No.173 of 2003. They lodged Civil Appeal No.10 of 2007in the Court but the record of appeal had an improperly dated decree. Upon discovery of the mistake, the applicants filed a supplementary record of appeal under rule 92(3) of the Court Rules with a properly dated decree. When the appeal was called on for the hearing, the Court upheld a preliminary objection raised earlier on by the respondent, that the appeal was incompetent as it had an invalid decree. The Court sustained the preliminary objection with a remark that a valid decree was, under Rule 89 (1) (h) a vital document. Since it was not filed with the record of appeal when the appeal was first lodged, the Court said, the omission was not cured by the filing of the supplementary record because under sub-rule (3) it was not "such other documents" as may be necessary for the determination of the appeal as provided for

under item (k) of sub- rule (1) of Rule 89. As for the definition of a supplementary record, the Court said it presupposes the existence of a complete record of appeal lodged by the appellant which is then supplemented by another record of appeal for making good any deficiencies in the initially filed record of appeal. The supplementary record however, does not affect the competence of the appeal.

An attempt by the applicant to start the process of filing the appeal afresh, by filing the same application as this one in the High Court was not successful because it was dismissed. It was then the applicant opted to come to the Court for a second bite.

Mr. Marando, learned counsel appeared for the applicants. For the respondents, it was Mr. Thadayo, learned counsel, who held brief for Mr. Rostan Mbwambo, learned counsel. The respondent had raised a preliminary objection earlier on, and during the hearing of the application both counsel proposed to have the preliminary objection and the main application be heard simultaneously in order to save time and costs, of which the court accepted.

The preliminary objection consisted of three limbs; one, the application is not properly before the Court. Two, the applicants have not filed a notice of appeal against the decision of the High Court as provided for under Rule 76 (1) of the Court of Appeal Rules and thirdly, the applicants have not taken necessary steps as required under section 5(1)(C) of the Appellate Jurisdiction Act, Cap. 141.

Mr. Thadayo opted to consolidate the three points of objection and argued them together. He submitted that since the same application was filed in the High Court and was refused, the applicant could not come to the Court for the same application because the Court Rules do not provide for such procedure. What the applicant should have done, the learned counsel contended, was to seek leave of the High Court and lodge an appeal against its decision. He said it was wrong for the application to be the filed in the Court as it does not have concurrent jurisdiction with the High Court on this matter. The learned counsel supported his argument by a decision of a single judge of this Court in the case of **IBRAHIM ALLY YUSUF MPORE VS NICAS ELIKINA** CAT Civil Application No. 84 of 2005 (Unreported) where the Court found itself in a similar situation and it

refused to grant the order for extension of time. Unlike in an application for leave to appeal, the learned counsel contended, in an application for extension of time, a party is disadvantaged under the law in the sense that he/she can not file the same application in this Court after the High Court has refused the application.

On the prayer for stay of execution, the learned counsel submitted that the Court has persistently held in its decisions that it cannot grant an order for stay of execution if the decree sought to be stayed is not attached to the application. He said neither the decree nor the judgment which is sought to be challenged on appeal is attached to the application. Moreover, Mr. Thadayo submitted, no notice of appeal has been filed and therefore the preliminary objection should be sustained and the application be dismissed.

On his part, the learned counsel for the respondent said the application in the High Court was brought under section 11 of the Appellate Jurisdiction Act, 1979, the provisions which empowers it to extend time. It is coming to the Court by way of a second instance as required by the law, after the High Court refused to grant the

same. He insisted that it was the proper procedure to follow after the Court struck out the appeal because all the preparatory stages that preceded the filing of the appeal went down, and the whole process of filing the appeal again has to start afresh. It was for this reason, the learned counsel said, that the applicants came to the Court to ask it to overrule the decision of the High Court. The opinion of the learned counsel is that since the ruling of the High Court which is being challenged is attached to the application, that suffices for the determination of the application and there is no need for attaching the judgment as that will be challenged in the appeal. On the decision of **Mpore,** supra, Mr. Marando said it is inapplicable because an improper procedure was invoked in the filing of that application. Instead of the applicant starting the process in the High Court as a court of first instance, it was filed in the Court of Appeal and that is why the prayer was properly refused. He prayed that the preliminary objection be dismissed and the application be heard on merit.

In brief reply, the learned counsel for the respondent said section 11of the Appellate Jurisdiction Act, 1979 is applicable only in the High Court but not in the Court of Appeal. Since prayer C in the

application relates to stay of execution, Mr. Thadayo contended, the only order capable of being executed is the one given in the judgment of the High Court and not the ruling which is annexed to it. He reiterated the prayer for sustaining the preliminary objection and dismissing the application.

As for the preliminary objection let me start by stating that the learned counsel for the respondent submitted correctly, that section 11 of the Appellate Jurisdiction Act, 1979 is only concerned with applications for extension of time filed in the High Court and is not applicable to applications filed in the Court. Applications for extension of time filed in the Court are governed by Rule 8 of the Court Rules. Rules 44 and 45 of the Court Rules provide for the procedure to follow, for those applications which can be entertained by both the High Court and the Court. In terms of Rule 44, any such application has to start in the High Court. In this respect, sections 5(1) C and 11(1) of the Appellate Jurisdiction Act were wrongly cited as they have nothing to do with the application brought before the Court.

The issue in this preliminary objection is whether the application is properly before the Court. I have considered the submissions by both counsel and I must, with respect to the learned counsel for the respondent, answer the issue positively. There is no need for me to dwell much on the issue because the position of the law is clear. Rule 8 of the Court Rules states:

> The Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court or **of the High Court for the doing of any act authorized or required by these Rules whether before or after the expiration of that time and whether before or after the doing of the act,** and any reference in these Rules to any such time shall be construed as reference to that time as so extended.

Under section 11(1) of the Appellate Jurisdiction Act, 1979 the High Court is empowered to extend time to give notice of intention to

appeal, leave to appeal as well as to issue a certificate that the case is fit for appeal to the Court.

The application which was filed by the applicant in the High Court was seeking for extension of time to give notice of appeal. In the case of **William Shija Vs Fortunatus Masha** [1997] TLR 213 The Court said that:

> ...In terms of the provisions of section 11(1) of the Appellate Jurisdiction Act, 1979 and Rule 8 of the Court Rules, this Court and the High Court have concurrent jurisdiction to grant extension of time to give notice of appeal. However, under rule 44, the application for extension of time shall in the first instance be made in the High Court...

In view of what I have shown above, the preliminary objection raised by the respondent is misconceived. The case of **Mpore** supra cited by the learned counsel for the respondent is not applicable under the circumstances. After the application for extension of time

filed in the High Court failed, the applicants are entitled by the law, not to appeal, but to come to the Court for a second bite as they appropriately did in this case. In Tanzania **Revenue Authority Vs Tango Transport Company Ltd CAT** AR. Civil Application No. 5 of 2006 (Unreported), the Court reiterated the same principle. The preliminary objection is therefore misconceived and it is dismissed with costs.

Coming to the main application, the affidavit of Richard Mairi deposed in support of the application shows that the notice of intention to appeal, the first essential step in lodging an appeal went down with the striking out of the appeal. Elaborating on the application, Mr. Marando, learned counsel for the applicants said that since his clients are still interested to pursue the appeal, they must have an extension of time to give notice of the intention to appeal. In his opinion, sufficient reasons were put before the High Court in the application which was filed before it but were rejected. He is highly convinced that since the Court did, for a long period close its eyes to the mistake of having defective decrees rectified by filing of supplementary records, it would not be fair for the applicants to be

denied their right of appeal. This was particularly so, argued Mr. Marando, because the Court itself has a share of the blame in the appeal which was struck down. It issued the improperly dated decree. He said the Court made the admission of giving the parties improper advice on the procedure of correcting the defects in the decrees in its judgment. Commenting on the case of **Kiboro Vs Posts and Telecommunication Corporation** (1974) EA 155, which was extensively discussed by the Court in relation to supplementary records, Mr. Marando said, although the case was reported way back in 1974, the Court went on accepting rectified decrees brought into the record of appeal by supplementary records of appeal until when the Court gave its decision in Civil Appeal No. 10 of 2007 on 10th March 2008. Under the circumstances, the learned counsel argued, the Court should seriously take this to be an important area for development of the law in our country. Throughout his submission, he insisted that he acted in accordance with the advice given by the Court and that sufficient reasons were put before the High Court but the application was refused. He prayed that the application be granted.

Mr. Thadayo, learned counsel for the respondent adopted the counter affidavit of Aloys Bahebe, sworn to oppose the application. Essentially what the deponent contends is that the applicants were not careful in the whole process of lodging the appeal, as they should have discovered the defects in the decree at the time of collection of the decree. This was more so, because the applicants were represented by a highly experienced advocate, the learned counsel contended. While acknowledging that the decision of the Court which struck out the appeal is generous in the sense that the applicants were allowed to re-file the appeal without further payment of fees, the learned counsel argued that this did not mean that the right was automatic. It is subject to compliance with other relevant Rules in such applications. He challenged Mr. Marando for not showing the shortfalls in the decision of the High Court and instead, he submitted on the merit of the appeal itself. His conclusion was that the High Court refused the application because what was involved in the appeal is ownership of the property and there is no way in which the Court can determine the issue because the applicants have no title to the property and the authorities who granted the title to the

respondent are not a party to the proceedings. He prayed for the dismissal of the application.

In brief reply, Mr. Marando reiterated that the decision of the High Court was wrong and that the applicants have very good grounds for the application to be granted. Regarding the title of the disputed property, the learned counsel said it was the respondent who filed the suit which was challenged in appeal, and what they had prayed for was a declaratory order in respect of the ownership of the suit property. In this respect, the learned counsel argued, there will not be any problem in determining the appeal.

It is common ground that once an appeal is struck out, the parties revert to the position they were before the appeal was lodged. In the event the parties are still interested to pursue the appeal, the whole process of filing the appeal has to start afresh, the initial stage being giving a notice of the intention to appeal. Under Rule 76(2) of the Court Rules the notice of appeal has to be lodged within fourteen days. It is also common ground that since the parties are starting afresh the process of lodging the appeal, the time for giving the notice

of appeal was long gone. This explains why they are here with this application which seeks for extension of time as a second bite after the High Court refused to grant the same.

In an application for extension of time under Rule 8 of the Court Rules, the Court normally looks at the reasons given by the applicant in accounting for the delay in order to satisfy itself on the sufficiency of the reasons. In this application the reason for the delay is obvious. The applicant had pursued an appeal which was struck out because of the defectiveness of the decree. Much as they did take remedial measures, they used a procedure which initially was accepted by the Court to be a proper one, but it was later declared to be wrong.

Since this is the position that emerges from the proceedings, in the light of the argument raised by Mr. Marando, learned counsel for the applicants that the High Court did contribute to the striking out of the appeal because it issued an improperly dated decree, my considered opinion is that the issue for the determination of the Court is whether the Court should consider the circumstances of what took

place in this case as amounting to sufficient reasons to account for the delay in filing the application.

The High Court in considering the role played by the Court in issuing the improperly dated decree said:

> "It is common ground that the applicant approached the Court of Appeal with a defective decree. He is throwing part of the blame to the court. The position adopted by the applicant is clearly wrong. The blame for a defective decree lies squarely on the applicant himself. He was supposed to check his documents properly before filing them, indeed he certified the documents as correct. Was the Court involved? I therefore firmly reject the contention that the court was privy or otherwise to blame for the applicants failures. He is responsible for his troubles through and through."

The circumstances of this case are unique in the sense that the applicants did take steps to rectify the defective decree. The problem was the procedure they used in rectifying the mistake. They did that by filing a supplementary record of appeal. This procedure was accepted by the Court at the time they did so, until when the Court gave its decision in Civil Appeal No. 10 of 2007. In underscoring this position, the Court did say in its decision that:

> "In the justice of this matter however, we think we should not end up there. We realize that **for quite some time** the appellants have always resorted to Rule 92(3) as a remedy in filing supplementary records of appeal containing valid decrees. **Part of the reason for doing so was a result of this Court's decisions in a number of cases advising the appellants to do so. For instance, in NBC HOLDING CORPORATION Vs MAZIGE MAUYA & ANOTHER, Civil Appeal No. 36 of 2004 (CA)(unreported) in a situation where the copy of the decree in the record was invalid for being**

signed by the District Registrar the Court had this to say;-

> **"With regard to pending appeals not yet scheduled for hearing, parties would be well advised to resort to Rule 92(3) of the Court of Appeal Rules. 1979, to rectify the defects and regularize the same in conformity with the law." Emphasis added**

The applicants were not at fault when they used the procedure of rectifying the defective decree by a supplementary record. This procedure was accepted by the Court then. In such a situation it would be grave injustice to deny the applicants their right of appeal .Unlike the Court which did not discover the defects in the decree at the time of either signing or issuing it, the applicants did discover the defects. Only that they discovered it after filing the appeal. But even then, they took action to rectify the mistake. As already stated the problem was on the procedure which was used. It was an accepted one until when the Court said it was not the right

procedure. That came after the ruling of the Court but before the ruling the position was accepted as a correct one. This being the position, and with respect to the learned Judge of the High Court, I do not see how the Court can exonerate itself from the blame and throw it entirely on the applicants. The Court in **VIP ENGINEERING AND MARKETING & OTHERS VS CITIBANK TANZANIA LIMITED** Consolidated Civil Reference No. 6, 7, and 8 of 2006 (unreported) cited with approval the cases of **SHANTI VS HINDOCHE & OTHERS [1973] E. A. 207 and ABDALLA SILANGA & 63 OTHERS AND TANZANIA HARBOURS AUTHORITY** Civil Application No. 4 of 2001 CAT (Unreported) where the Court said that in applications for extension of time there is no particular reason which has been set out as standard reasons. The reasons are dependant on the circumstances of each case. In this particular case the delay was occasioned by using a wrong procedure, which unfortunately, the Court was the source. There is no way in which the Court can now turn its back against its own mistake and throw the blame on the applicants alone. It is a shared mistake. The Court did not see its mistake; the applicants saw it at a later stage but used a wrong procedure that was given by the Court to correct the mistake. This

procedure was later declared to be a wrong one. What would be the justification for denying the applicants their right of appeal? There is none.

The role of the Court under article 107A(1) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended, is to disregard technicalities and met out substantive justice. This is one of those cases where technicalities should be disregarded. Indeed the Court admitted that for quite sometimes, it issued decisions which wrongly advised the parties. The applicants were a victim of the wrong advice given by the Court.

On the views expressed by Mr. Thadayo that the appeal has no chances of success what I would say is that it is the Court which has to determine whether the appeal has merit or not. See the case of **VIP** supra. This question cannot be determined in this application. This is particularly so because of the circumstances of the case.

Regarding the order for stay of execution, it has to be considered in relation to the circumstances of this case. In view of

what I have said be-fell this case, the execution must be stayed to enable the applicants to exercise their right of appeal.

From what has been demonstrated above, I grant all the orders prayed for with costs. The applicants are given a period of two months from the date of reading of the ruling within which to re- file the appeal without payment of fees. It is ordered accordingly.

DATED at DAR ES SALAAM, this 29th day of September, 2008.

N.P.KIMARO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(P. B. KHADAY)
Ag. DEPUTY REGISTRAR
COURT OF APPEAL