

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 422/01 OF 2018

PARDEEP SINGH HANSAPPLICANT

VERSUS

- | | | |
|--|--|--------------------------|
| 1. MEREY ALLY SALEH | | |
| 2. ISLAM ALLY SALEH | | |
| 3. DAR ES SALAAM CEMENT CO. LTD | | RESPONDENTS |
| 4. AMSONS INDUSTRIES (T) LTD | | |

(Application to strike out a Notice of Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Miyambina, J.)

dated the 30th day of July, 2019

in

Land Case No. 34 of 2016

RULING OF THE COURT

25th August & 13th October, 2021

MWAMPASHI, J.A.:

By way of a notice of motion made under Rules 89 (2) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), the applicant is moving the Court to issue an order for striking out the notice of appeal lodged by the 1st, 2nd and 3rd respondents on 02. 08. 2019, to challenge the decision of the High Court of Tanzania (Miyambina, J.) dated 30.07.2019. The application is supported by an affidavit of the applicant and it is resisted by an affidavit in reply of Mr. Peter Kibatata, learned advocate for the 1st, 2nd and 3rd respondents.

According to the notice of motion the application is predicated on the following grounds:

- (i) On 30th July, 2019 the High Court of Tanzania (Hon. Mlyambina, J.) delivered a ruling in Land Case No. 34 of 2016, following a notice of points of objection in law, overruling the same and ordering the hearing of the suit to proceed.*
- (ii) The said ruling of the High Court, did not dispose of the main suit and therefore no appeal lies from that ruling and order by virtue of section 5(2)(d) of the Appellate Jurisdiction Act, Cap 141 of the Revised Laws Edition, 2019.*
- (iii) The notice of appeal in question makes reference to the judgment of the High Court of Tanzania delivered on 31st July, 2016 whereas there is no judgment delivered on 31st July, 2016, hence it being defective.*
- (iv) The notice of appeal is calculated to stall the pending suit at the High Court, which cannot proceed while that notice is in place.*
- (v) No appeal lies as intimated by filing the notice of appeal which initiates the intended appeal and the said notice of appeal has to be struck out.*

In the supporting affidavit it is essentially deponed that the order dated 30.07.2019 is not appealable for being an interlocutory order not

finalizing the case and also that because of the said notice of appeal the main suit cannot proceed.

Briefly, the background to the matter is as follows; The applicant filed Land Case No. 34 of 2016 in the High Court of Tanzania at Dar es Salaam for an order, among others, that the sale and transfer of the landed property belonging to the 3rd respondent on Plot No. 62064 at Mbagala Industrial Area, to the 4th respondent, be declared null and void. In resisting the suit, the 1st, 2nd and 3rd respondents, raised a preliminary objection on two grounds, **first**, that the suit was bad for want of Board Resolution and **second**, that the suit was bad for having been presented as a suit instead of a petition. On 30.07.2019 the High Court (Mlyambina, J) overruled the objection and directed that the suit be heard on merits. Being aggrieved by that ruling, the 1st, 2nd and 3rd respondents, did on 02.08.2019, lodge a notice of appeal. Since then, the intended appeal has not been filed hence the instant application for the notice of appeal to be struck out.

At the hearing of the application the applicant had the services of Mr. Joseph Rutabingwa, learned advocate whereas, on their part, the 1st, 2nd and 3rd respondents were represented by Mr. Peter Kibatata, also learned advocate. The 4th respondent though duly served with the notice of

hearing through its advocate Mr. Job Kerario, did not appear and the hearing of the application proceeded in its absence in terms of rule 63(2) of the Rules.

Mr. Rutabingwa began by adopting the supporting affidavit and written submission he had earlier filed in terms of Rule 106(1) of the Rules. He then argued that the ruling by Mlyambina, J. being an interlocutory decision cannot be appealed against. He further submitted that even the notice of appeal sought to be struck out is defective for bearing an incorrect date of the impugned ruling. Mr. Rutabingwa finally complained that the suit is still pending in the High Court and it cannot proceed to hearing because of the notice of appeal in question. He thus insisted that the notice of appeal should be struck out with costs.

On his part, Mr. Kibatala, readily conceded that section 5(2)(d) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) provides among other things that unless a decision has an effect of finally determining the matter, it cannot be appealed against. He, however, argued that the impugned ruling in Land Case No. 34 of 2016 substantially decided on some issues that were finally decided in Civil Case No. 189 of 2011, which was over the same subject matter. It was his contention that when this Court exercises its appellate jurisdiction over High Court, it also exercises

revisional jurisdiction, then the respondents' grievances on those issues can be addressed by the Court in the intended appeal. He contended that the notice of appeal has been lodged and the intended appeal is intended to be filed based on that revisional jurisdiction of the Court. To buttress his argument, Mr. Kibatata referred us to the case of **Sea Saigon Shipping Limited v. Mohamed Enterprises (T) Limited**, Civil Appeal No. 37 of 2005 (unreported).

It was also submitted by Mr. Kibatata that the High Court ruling has some material errors calling for the intervention of the Court. He insisted that the notice of appeal should not be struck out because the intended appeal would be perfectly tenable in law. He contended that it is through the said intended appeal that the Court will be seized with an opportunity to intervene and make an appropriate order to correct the confusion in the proceedings and abuse of court process in the two High Court cases.

In his brief rejoinder, Mr. Rutabingwa submitted that if the respondents have any complaints on the decision made in any other case, then they ought to have challenged it. He also insisted that the intended appeal is seeking to challenge an interlocutory matter which is not appealable.

Having heard the submissions made for and against the application, we wish to begin our determination of the application by restating that the power of the Court to strike out a notice of appeal and the grounds on which an application for such an order may be made are provided for by Rule 89 (2) of the Rules whereby it is provided that:

“Subject to the provisions of sub-rule (1), any other person on whom a notice of appeal was served or ought to have been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time”.

Rule 89 (2) of the Rules, allows a person on whom a notice of appeal has been served or ought to have been served to apply for the notice of appeal to be struck out on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. See also - **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012, **Barclays Bank (Tz) Limited v. Hood Transport Limited and Another**, Civil Application No. 134 of 2014, **Jackson Mwaipyana v. Parcon Limited**, Civil Application No. 115/ 01 of 2017 and **Yunus**

Kashakala v. Anthony Haji, Civil Application No. 106/ 01 of 2018 (all unreported).

Regarding the instant application, it is apparent that principally the application is premised on the ground that no appeal lies from the High Court ruling against which the respondents intend to appeal. It is also a common ground that the impugned ruling in which the preliminary objection raised by the respondents was dismissed, was an interlocutory order that had no effect of determining the suit. At this juncture, we wish to refresh our minds on what we stated in **Britania Biscuits Limited v. National Bank of Commerce and Doshi Hardware (T) Limited**, Civil Application No. 195 of 2012 (unreported) where we confronted an akin scenario regarding an attempt to challenge a High Court ruling on a preliminary objection by way of revision. It was observed that:

*"...We are of the opinion that the Ruling and order of the High Court sought to be revised **is an interlocutory order..... because in that order nowhere it has been indicated that the suit has been finally determined.**"* [Emphasis added].

Having held that the impugned ruling of the High Court dismissing the preliminary objection, was an interlocutory order with no effect of finally determining the suit, the following issue, which appear to be very

simple, is whether or not the said ruling is appealable. This takes us to section 5 (2) (d) of the AJA which provides that:

*"No appeal or application for revision shall lie against or be made in respect 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 added].

It is therefore trite law that no appeal lies to the Court against any preliminary or interlocutory order of the High Court unless such decision or order has the effect of finally determining the suit. The right of appeal or revision in respect of preliminary or interlocutory decisions or orders of the High Court where such decisions or orders have the effect of finally determining the suits is therefore statutory. The phrase '*finally determining the suit*' has been defined to mean a decision or order which has an effect of finally determining the rights and liabilities of the parties. In the case of **Junaco and Another v. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 (unreported) the phrase was defined as follows:

"An order or decision is final if it finally disposes the rights of the parties."

See- also **Jitesh Jayantilal Ladwa and Another v. Dhirajilal Walji Ladwa and 2 Others**, Civil Application No. 154 of 2020 and **Vodacom Tanzania Public Limited Company v. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (both unreported).

It is therefore plainly clear that the impugned ruling of the High Court was an unappealable interlocutory order from a preliminary objection. We wish to emphasise that no right of appeal exists when the decision intended to be appealed against does not finally determine the matter. Fortunately, Mr. Kibatata had no qualms about this. He was in agreement that the impugned ruling is not appealable and therefore that ordinarily the notice of appeal in question is liable to be struck out in terms of Rule 89 (2) of the Rules. His contention, which we outrightly find unfounded, was however that there are exceptional circumstances that make the intended appeal to the Court against the said unappealable ruling tenable in law. With due respect to Mr. Kibatata, we do not agree with him that under the clear provisions of section 5 (2) (d) of the AJA where appeals or revisions against interlocutory decisions or orders which have no effects of finally determining suits are prohibited, there can be any exceptional circumstances justifying us to defy such clear provisions of the law. The fact that the intended appeal by the 1st, 2nd and 3rd respondents intends to challenge an interlocutory order which is not

appealable makes the relevant notice of appeal liable to being struck out. It is under these circumstances that we find Mr. Kibatata's contention that there are exceptional circumstances for us to spare the notice of appeal and let the respondents lodge an appeal against an unappealable order wanting, misconceived and out of place.

We also noted that in his attempt to persuade us not strike the notice of appeal Mr. Kibatata relied on the case of **Sea Saigon Shipping Limited** (supra). We have gone through the said case and with due respect to Mr. Kibatata, we again do not agree with him that the case is of any assistance to the respondents. That case is not only distinguishable from the instant case but it is also not relevant. It suffices to point out that unlike in the instant case, in **Sea Saigon Shipping Limited** (supra) what was before the Court was a competent appeal. In that appeal the Court found it right to use its revisional powers under section 4 (2) of AJA and revise the decision made on an application which was considered incompetent but which was not before the Court, because the facts in the appeal before it, were so much intertwined with that of the application, that it was almost impossible to arrive at a proper decision in that appeal without also considering the application. It was under those circumstances that the Court held that it had jurisdiction and power to revise the decision

in that application though it was not appealed against in the appeal that was before it. That is not the case in our instant matter.

In the event, for the above given reasons, we find merit in the application. The notice of appeal is on a decision from which no appeal lies. We thus grant the application by striking out the notice of appeal lodged on 02.08.2019. The applicant shall have his costs of the application.

Order accordingly.

DATED at DAR ES SALAAM this 8th day of October, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 13th day of October, 2021 in the presence of Mr. Evodius Rutabingwa, learned counsel for the applicant and Ms. Hadija Aron, learned counsel for the 1st, 2nd and 3rd respondents and in the absence of the 4th respondent is hereby, certified as a true copy of the original.

E. G. Mrangu
DEPUTY REGISTRAR

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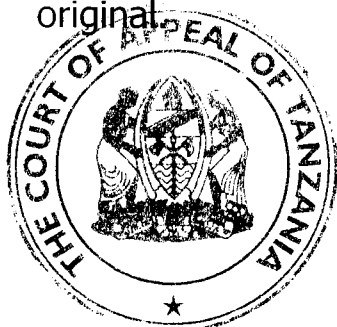
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