

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 87 OF 2019

MOHAMMED SULEIMAN MOHAMED APPLICANT

VERSUS

AMNE SALUM MOHAMED..... 1ST RESPONDENT

MOZA SALUM MOHAMED..... 2ND RESPONDENT

ZEYANA SALUM MOHAMED..... 3RD RESPONDENT

GHANIA SULEIMAN KHELEF..... 4TH RESPONDENT

HALIMA SALUM MOHAMMED..... 5TH RESPONDENT

MOHAMED SALUM MOHAMMED6TH RESPONDENT

SAID SALUM MOHAMMED..... 7TH RESPONDENT

RAYA SALUM MOHAMMED..... 8TH RESPONDENT

JOKHA SALUM MOHAMMED..... 9TH RESPONDENT

SHEKHA SALUM MOHAMMED..... 10TH RESPONDENT

FATMA SALUM MOHAMMED.....11TH RESPONDENT

**(Appeal from the judgment and decree of the High Court of Zanzibar
at Vuga)
(Issa, J.)**

dated the 25th day of April , 2017

in

Civil Appeal No. 65 of 2016

.....

RULING OF THE COURT

26th November & 4th December, 2019

MWARIJA, J.A.:

The appellant, Mohamed Suleiman Mohamed was dissatisfied with the judgment and decree of the High Court of Zanzibar sitting at Vuga (Issa, J.)

dated 25/4/2017 in Civil Appeal No. 65 of 2016. The impugned judgment and the decree originated from the decision of the Land Tribunal for Zanzibar in Civil Case No. 126 of 2011. In that case, the above named respondents sued the appellant claiming that he trespassed into their land situated at Bububu Kikaangoni in the Urban-West region, Zanzibar (the suit land). At the conclusion of the trial, the Tribunal found that the respondents had proved their claim and therefore, declared them the lawful owners of the suit land. They were also awarded Tzs 5,000,000.00 being a compensation for the trees which the appellant felled after his act of trespassing into the suit land.

The appellant was aggrieved by the decision of the Tribunal and therefore, appealed to the High Court. His appeal was unsuccessful hence this second appeal.

After service upon them of the record of appeal, on 18/11/2019 the counsel for the respondents lodged a notice of preliminary objection which consisted of the following grounds:

"(a) The appeal is incompetent for want of notice of appeal.

- (b) *The appellant's appeal is incompetent as it lacks leave to appeal.*
- (c) *That, the appellant's appeal is incompetent for want of complete record of appeal.*
- (d) *That, the letter found at page 24 and 25 of the record of appeal is a trespasser to the corridor of this Court."*

At the hearing of the appeal on 26/11/2019, the appellant was represented by Messrs Haji Suleiman Tetere and Salum Bushir, learned advocates while the respondents were represented by Mr. Rajab Abdalla Rajab, also learned advocate. Going by the rule of practice, we proceeded to hear first, the preliminary objection before we could embark on hearing the appeal on merit.

At the outset, after being probed by the Court, Mr. Rajab abandoned grounds (c) and (d) of the preliminary objection and went on to argue together grounds (a) and (b). The learned counsel argued that the appeal is incompetent for want of the notice of appeal and leave to appeal. He contended that, according to the record, on 13/12/2018 the appellant's previous appeal, Civil Appeal No. 142 of 2017 was struck out by the Court for his failure to comply with Rule 96 (1) (h) and (2) (c) of the Tanzania

Court of Appeal Rules, 2009. In its ruling dated 13/12/2018, the Court found that the appellant had omitted to include in the record of appeal, a valid decree and the record of proceedings of the Tribunal. It thus proceeded to strike out the appeal with leave to the appellant to refile it within sixty days from the date of delivery of the ruling.

According to the learned counsel, although the striking out of the appeal was with leave to refile it, the decision had the effect of rendering the notice of appeal and the leave to appeal non-existent. He argued therefore that, in re-filing the present appeal, the appellant should not have included in the record of appeal, the same two documents, the notice and leave to appeal which were included in the record of the struck out appeal. This, he said, is because the same became invalid after the striking out of the appellant's previous appeal. Relying on the case of **Tanganyika Cheap Store v. National Insurance Corporation of Tanzania Limited**, Civil Appeal No. 51 of 2005 (unreported), Mr. Rajab argued that in re-filing the appeal, the appellant ought to have complied with the requirements of filing a notice of appeal and obtaining leave to appeal. In doing so, he said, the

appellant should have first applied for extension of time to file the two documents.

In reply, although he agreed that the appellant's previous appeal was struck out on 13/12/2018, Mr. Tetero opposed the contention that its striking out had the effect of also striking out the notice of appeal and the leave to appeal. He argued that, since in its decision, the Court acted under s. 3 A (1) and (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] as amended by Act No. 3 of 2018 and granted leave to the appellant to re-file his appeal, the appeal is properly before the Court. Upon such leave, Mr. Tetero went on to argue, the appellant did not have to start afresh the whole process of filing his appeal.

From the rival arguments of the learned counsel for the parties, the only issue for determination is whether or not the appeal is incompetent for want of a notice of appeal and leave to appeal. With regard to the existence or otherwise of the notice of appeal, it is a correct position of the law as argued by Mr. Rajab that, following the striking out of Civil Appeal No. 142 of 2017 for which the notice of appeal included in this appeal was lodged, the notice suffered the same consequence of being struck out.

In the case of **Tanganyika Cheap Store** (supra) cited by the respondent's counsel, the Court had earlier on, in Civil Appeal No. 37 of 2011 involving the same parties, found the appeal incompetent for want of a valid decree. It proceeded to strike out that appeal and directed that the appellant was at liberty to re-institute it within fourteen days from the date of obtaining a valid decree from the High Court. Having obtained a valid decree, the appellant re-instituted the above cited appeal using the same notice of appeal lodged in respect of the struck out appeal. The Court considered the status of that notice of appeal and the order which provided that the appellant was at liberty to re-institute his appeal within fourteen days of the date of obtaining a valid decree from the High Court.

Having considered the issue, the Court reiterated the position it took in the case of **Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) v. Adam Molele**, Civil Appeal No. 2 of 1990 (unreported). Faced with a situation, similar to one pertaining in this case, the Court held **first**, that when Civil Appeal No. 2 of 1990 was struck out, the notice of appeal was also struck out. **Secondly**, that the directions that

the appellant was at liberty to re-institute the appeal were subject to the rules of the Court and not otherwise.

In the case at hand, the appellant's counsel argued that the situation is different because the Court granted leave to the appellant to re-file the struck out appeal by including in the record of the appeal a valid decree and other omitted documents. For ease of reference, we reproduce what the Court stated in its ruling found at pages 196 – 197 of the record of appeal:

"Given the non-compliance of the Rule 96(2) of the Rules, the appeal is incompetent, but for the purpose of meeting substantive justice as per rule 4(2) (b) of the Rules and the overriding objective as per section 3A (1) (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 as amended by The Written Laws (Miscellaneous Amendments) (No.3) Act, 2018, we strike out the appeal with leave to refile the proper record within sixty (60) days from the date of delivery of this ruling..."

We agree with Mr. Teterere that, unlike in the case of **Tanganyika Cheap Store** (supra) in which the Court directed that the appellant was at

liberty to re-institute the struck out appeal, in the case at hand, the appellant was granted leave to re-institute his appeal. As found above however, we are in agreement with Mr. Rajab that the striking out of Civil Appeal No. 142 of 2017 had the effect of striking out the notice of appeal as well. In the circumstances, when the appellant filed the present appeal relying on the notice of appeal which was filed in the struck out appeal, he did so without a valid notice of appeal.

Mr. Rajab had argued also that the appeal is incompetent for want of leave to appeal. It was his submission that, like the notice of appeal, leave to appeal which was included in the present record of appeal had disappeared following the striking out of the appellant's previous appeal No. 142 of 2017. With respect, we are unable to agree with that argument. Unlike a notice of appeal which initiates the appellate process, leave to appeal is sought in a separate proceeding. In this case, it was sought and obtained in Civil Application No. 21 of 2017. Furthermore, Rule 45(a) of the Rules, one of the provisions under which the leave to appeal in question was sought and obtained, an application for leave to appeal may be made informally before the High Court when the decision which is desired to be

appealed against is given or by a chamber summons within thirty days of the decision. Leave to appeal can therefore be sought and obtained before a notice of appeal is lodged. Rule 45 (a) states clearly that this can be done notwithstanding the provisions of Rule 46 (1) which provides that an application for leave to appeal shall be made after the notice of appeal has been lodged.

In our considered view therefore, since leave to appeal is sought and obtained in a proceeding which does not form part of the proceedings of the appeal, and because such an application may be made before a notice of appeal is lodged the striking out of the appeal did not have the consequential effect of annihilating the leave to appeal granted in a separate proceeding. We do not therefore, find any irregularity in the appellant's act of including in the record of appeal, the same ruling which he included in the struck out appeal to show that he was granted leave to appeal against the impugned decision. The leave granted to him in Civil Application No. 21 of 2017 could not be taken away by the order which struck out his previous appeal.

As we have found above however, that the appeal was re-instituted without a notice of appeal, we agree with Mr. Rajab that the same is incompetent. In the event, we hereby strike it out with costs.

DATED at ZANZIBAR this 3rd day of December, 2019

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 4th day of December, 2019 in the presence of Mr. Hajji Suleiman Tetere, counsel for the Appellant and Mr. Rajab Abdalla Rajab, counsel for the Respondents is hereby certified as a true copy of the original.




A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL