

TANZANIA / JUDGMENT

crdb bank plc ltd vs george methiew kilindu 2020 tzca 361 23 july 2020

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CO RAM: MUGASHA. J.A., WAMBALI, J.A. And KEREFU, 3.A.) CIVIL APPEAL NO. 110 OF 2017 CRDB BANK PLC (FORMERLY CRDB (1996) LTD)..... APPELLANT VERSUS GEORGE MATHEW KILINDU..... RESPONDENT (Appeal from the Judgment and Decree of the High Court of Tanzania, at Dar es Salaam) (Muruke, 3.) dated the 30th day of December, 2016 in Civil Case No. 269 of 1996 RU LIN G O F TH E C O U R T 13th & 23rd July, 2020 KEREFU. J.A.: This appeal arises from the judgment and decree of the High Court of Tanzania, at Dar es Salaam (Muruke, J) dated 30th December, 2016 in Civil Case No. 269 of 1996. In that case, George Mathew Kilindu, the respondent herein sued CRDB (1996) Limited for declaration that the CRDB (1996) Limited Board's decision dated 22nd October, 1995 was maliciously intended to defeat the ends of justice and should be rescinded. The respondent also prayed to be allowed to purchase the CRDB (1996) i Limited's house situated at Plot No. 500 Tosamaganga Road, Masaki in Dar es Salaam (suit property) and permanent injunction to prevent the CRDB (1996) Limited from evicting the respondent from the suit property until the Industrial Dispute No. 30 of 1993 is finally determined. The brief facts leading to this appeal as obtained from the record of appeal indicate that, the respondent was an employee of the CRDB (1996) Limited at the position of Company Secretary and Head of Legal Department and Administration from 1973 to 1993 when he was retrenched. In the course of his employment he was allocated the suit property and lived therein with his family. In 1994, the CRDB (1996) Limited vide its letter dated 26th July, 1994, informed the respondent that is in the process of selling her houses including the one occupied by the respondent. That, since the respondent lived in the suit property for quite sometimes, found it appropriate to invite him to participate in the intended sale and thus required him, if interested, to respond before 28th July, 1994. The respondent did not respond. However, in October, 1994 the respondent learnt that the suit property had already been sold to Faiza International. This prompted him to file a suit (Civil Case No. 221 of 1994) against the CRDB (1996) Limited in the High Court of Tanzania at Dar es Saalam for declaratory orders that the purported sale of the suit property was unlawful because the notice and advertisement to sell the same was issued while a temporary injunction not to do so was still in force. The

respondent also prayed to be given an opportunity to purchase the suit property as he had lived therein for sixteen (16) years. The CRDB (1996) Limited defaulted to defend the said suit hence on 30th November, 1995 the High Court (Maina, J.) decided the matter in favour of the respondent. On 12th November, 1996 the CRDB (1996) Limited wrote to the respondent informing him of the Board's decision made on 22nd October, 1995 to the effect that the suit property was no longer for sale and that, the CRDB

(1996) Limited has arranged with Faiza International for the refund of the purchase price.

Subsequently, the respondent lodged Civil Case No. 269 of 1996 in the High Court as indicated above. The said suit was decided in favour of the respondent hence this appeal. In the Memorandum of Appeal, the appellant has raised four grounds of appeal. However, for reasons to be apparent in due course we shall not reproduce the said grounds herein. 3 The appeal was confronted with two sets of notice of preliminary objections lodged by the respondent on 1st August, 2017 and 5th September, 2018 respectively. The first set is to the effect that: -

- (a) The notice of appeal appearing at page 296 of the record of appeal is in respect of a judgment dated 29th December, 2016 whereas the judgment in the case being appealed against was delivered on 30th December, 2016;
- (b) The decree appearing at page 227 of the record of appeal is incompetent and incurably defective as it relates to the different unrelated case and not Civil Case No. 269 of 1996;
- (c) The letter to the Deputy Registrar dated 3rd January, 2017 asking for documents appearing at page 298 applied for judgment and decree dated 29th December, 2016 when in fact the case was finalized on 30th December, 2016; and
- (d) The memorandum of appeal on page 3 of the record of appeal is defective and incapable of being amended as it contains the words 'IN THE MATTER OF AN INTENDED APPEAL' in the title of the appeal. Then, the second set is to the effect that: - "The appeal is vitiated for want of a valid notice of appeal in that the name of the appellant in the said notice of appeal is not that of the party who featured in the proceedings before the High Court. The appeal is therefore incompetent and should be struck out with costs. " At the hearing of the appeal, the appellant was represented by Mr. Juvenalis Ngowi, learned counsel while the respondent was represented by Mr. Roman Masumbuko, also learned counsel. As the practice of the Court demands, the preliminary objection has to be disposed first before determination of the appeal on merit. Having that in mind, we invited the counsel for the parties to address us on the preliminary objections raised by the respondent. We propose to start with the second set of the preliminary objections. Submitting in support of that point of objection, Mr. Masumbuko argued that the name of the appellant in the notice of appeal is not that of the party who featured in the proceedings, judgement and decree of the High Court. Specifically, Mr. Masumbuko submitted that, before the trial court parties were the respondent and the CRDB (1996) Limited but in this appeal the appellant is indicated in the notice of appeal as CRDB Bank PLC who was not a party to the case in the High Court. He

contended further that the said change of a party to the case was done at the time of lodging the notice of appeal without leave or order of the court. He also added that, there was no proof that a party to the case has changed his/its name. He further contended that, even the appellant's letter to the Registrar of the High Court dated 3rd January, 2017 requesting for copies of the proceedings, judgment and decree together with the Registrar letter of the High Court dated 15th March, 2017 and the certificate of delay all cited the name of the wrong party to the case, that is CRDB Bank PLC. It was the strong argument of Mr. Masumbuko that, the act of including a wrong party to the appeal without leave of the High Court or this Court is a fundamental error which goes to the root of the matter and had rendered the notice of appeal invalid and the entire appeal incompetent. To support his proposition, he referred us to the cases of Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd (2008) 2EA 69 and Inter - Consult Limited v. Mrs. Nora Kassanga & Another, Civil Appeal No. 79 of 2015 (unreported). He then insisted that the appeal is incompetent for being initiated by the notice of appeal which is invalid. 6 Based on his submission on this point, Mr. Masumbuko urged us to strike out the entire appeal with costs for being incompetent. In response, Mr. Ngowi though conceded to the pointed discrepancy but he strongly submitted that the same is not fatal as the respondent has not been prejudiced in any way. Mr. Ngowi contended further that the said discrepancy has not caused any confusion to the parties because the respondent has managed to file written submissions and the notices of preliminary objection on the appeal. To bolster his proposition, he referred us to the case of CRDB Bank Limited v. Issack B. Mwamasika & 2 Others, Civil Appeal No. 139 of 2017 (unreported). Mr. Ngowi distinguished the case of Christina Mrimi (supra) by arguing that the same was reviewed by the Court in Civil Application No. 113 of 2011 involving the same parties where it changed its earlier strict position over errors on the names of parties to the case. He thus insisted that the pointed error is not fatal and he urged us to overrule the preliminary objection raised by the respondent with costs. He also added that, if the Court will find that the same is fatal then, instead of striking out 7 the notice of appeal and the entire appeal for being incompetent may consider to grant leave to the appellant to amend the record of appeal. In rejoinder, Mr. Masumbuko challenged the submission made by Mr. Ngowi that it has not managed to address the issue at hand. He contended that the right to lodge an appeal is for the parties who have been involved in the original suit. He said, without the order of the court, a stranger who has not participated in the original trial cannot lodge an appeal. He distinguished the case of CRDB Bank Limited v. Issack B. Mwamasika & 2 Others (supra) with the case at hand, by arguing that in that case the error was clerical on the name of a party to the original suit, while in this case, the appellant indicated in the notice of appeal is a wrong party to the original suit. Mr. Masumbuko concluded his rejoinder by urging us to sustain the preliminary objection and strike out the appeal with costs for being incompetent. On our part, having examined the record of appeal and the oral submissions advanced by the counsel for the parties for and against the preliminary objection, the main issue for our determination is whether the objection raised is meritorious. 8 From the record of the appeal and the submissions made by the counsel for the parties, there is no doubt that the notice of appeal lodged in this Court by the appellant

has indicated a wrong party to the case. Looking at the plaint which initiated the suit and as eloquently submitted by both learned counsel for the parties, the parties to the case before the High Court were George Mathew Kilindu (the Plaintiff) versus CRDB (1996) Limited (the defendant). These are the same parties appearing in the proceedings, judgement and decree of the trial court. There is nowhere indicated that there was an order of the trial court changing the names of those parties. However, in the notice of appeal lodged in this Court the name of the appellant is indicated as CRDB Bank PLC. This, has featured in other documents of appeal such as the appellant's letter to the High Court Registrar dated 3rd January, 2017 requesting for copies of proceedings, Judgement and Decree, the High Court Registrar's letter dated 15th March, 2017 together with the certificate of delay issued on 21st March, 2017. Worse still, although the notice of appeal indicates the name of the appellant as CRDB Bank PLC, the title of the record of appeal and the Memorandum of Appeal lodged in this Court on 15th May, 2017 have indicated a different name of the appellant as 'CRDB Bank PLC (Formerly 9 CRDB (1996) LTD/ It is our considered view that citing of all these new names for the appellant without leave or an order of the court is a fatal irregularity which has affected the competence of the entire appeal and cannot be rectified by a Slip Rule as we decided in the case of Inter - Consult Limited (supra) cited to us by Mr. Masumbuko. We have considered Mr. Ngowi's argument, relying on CRDB Bank Limited v. Issack B. Mwamasika & 2 Others (supra) that the discrepancy is not fatal. With respect, we find the cited case distinguishable from the facts of this appeal. In that case the errors involved the misspelling of initials in the name of a party to the suit which was found to be a minor clerical error and not fatal. In the instant case, as eloquently argued by Mr. Masumbuko, the discrepancy pointed out is not on the misspelling of the name of a party to the suit but a complete change of the name of the appellant which was done without leave or an order of the court. Similarly, the Christina Mrimi's case (supra) is distinguishable from the circumstances of this appeal, because even in that case there was no a complete change of a name of the party to the case but only to correct the name of the respondent who was a party to the original suit. We wish to emphasize that the issue of names of parties to the case is central for their identification. The right of appeal is for the parties who have been involved in the original suit and not any other person. This was also the position in the cases of Attorney General v. Maalim Kadau & 16 Others [1997] TLR 69 and Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd, Civil Appeal No. 34 of 2010 (unreported) and Inter - Consult Limited (supra). Specifically, in the former case the Court stated that: - "...any o f the parties involved in the original suit and not any other person, can appeal... Names o f parties is centra! to their identification in litigation. Both parties are limited liability companies with aii their attributes. I f one changes its name, it becomes a different legal entity, altogether. Consequently, the name o f the appellant in the Notice o f Appeal was fundamentally different from that in the plaint It was fatally different from that in the plaint It was fatal irregularity rendering the Notice o f Appeal incompetent." We shall be guided by the above position in determination of the matter at hand. Therefore, and since under Rule 83 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), it is the notice of appeal which initiates the process of appeal to this Court, its invalidity renders the entire appeal

incompetent. We are however mindful that under Rule 83 (7) of the Rules a notice of appeal which deviates from the prescribed form can be amended. However, in the appeal at hand, the notice of appeal does not deviate from the prescribed format to deserve such an order of amendment under Rule 111 of the Rules because it has completely cited a wrong party to the original case. Throughout the proceedings at the High Court the current appellant was referred to as CRDB (1996) Limited. We are therefore unable to discern as when did the appellant change her name as this was not entirely addressed to us by Mr. Ngowi. In the circumstances, we sustain the point of objection raised by the respondent in the second set of the preliminary objections. We thus find the notice of appeal bearing the name of a stranger invalid and has rendered the entire appeal incompetent liable to be struck out. It is therefore noteworthy at this juncture that, considering the position we have taken, we do not see the need to consider other points of objections raised by the respondent in the first set of the preliminary objections. 12 In the event and for the foregoing reasons, the incompetent appeal is hereby struck out with costs. DATED at DAR ES SALAAM this 17th day of July, 2020. S. E. A. MUGASHA JUSTICE OF APPEAL F. L. K. WAMBALI JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL The ruling delivered this 23rd day of July, 2020 in the presence of Mr. Bonaventure Masesa and Mr. Charles Lauwo, learned Counsels for the Appellant and Mr. Roman Masumbuko, learned Counsel for the Respondent, is ' ' f the original. 13

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