

TANZANIA / JUDGMENT

Land Cae No

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 137 OF 2021 MISHED CHUNILAL KOTAK.....
PLAINTIFF VERSUS OMARY SHABANI..... 1st DEFENDANT
KELLEN ROSE RWAKATARE KUMTU..... 2nd DEFENDANT HUMPRELY
KAULILA KENETH RWAKATARE.....3rd DEFENDANT TIBE KENNETH
RWAKATARE..... 5th DEFENDANT

RULING

23/7/2024 & 02/8/2024 GWAE, J By the letter dated 22nd July 2024, Mr. Jerome J. Msemwa, the learned advocate for the plaintiff moved this court to correct the decree dated 11th July, 2024 on the reason that, it is not in conformity in some parts with the judgment delivered by the Court. The letter portrays that; paragraph 2 of the decree at page 2 has omitted the word "as well as his co-administrator of the Estate". The parties were entertained, through their respective advocates to address the Court on the matter on 23rd July, 2024 as required under 1 Article 13 (6) (a) of the Constitution, 1977 as amended from time to time. (See also Rule 42 (3) of the Court of Appeal Rules, 2009). Mr. Jerome Msema appeared on behalf of the plaintiff while Mr. Adnan Chitare represented the first defendant. Mr. Msemwa requested this Court to correct the decree at para 2 to read "as well as his co-administrator" which was omitted in order to be in conformity with the judgment especially at page 29 clause two of the judgment. Mr. Adnan opposed the application by raising a point of objection that, the application is not proper before the Court as the said Mished Chunilal Kotak who was the plaintiff in Land Case No. 137 of 2021, subject of the intended appeal has filed a notice of appeal to the Court of Appeal. The Parties' advocate aforementioned were given an audience to address the court on the point of law raised. In support of his objection, Mr. Adnan submitted that, this court has no jurisdiction to rectify the decree sought by Mr. Msemwa due to the fact that, the parties' suit including the proceedings have been transferred to the Court of Appeal by presentation of the Notice of Appeal to the Court of Appeal of Tanzania. 2 Mr. Adnan further stated that, by filing the Notice of Appeal, it means the matter is no longer within the High Court's province. He added that, according to the notice, the plaintiff is challenging the judgment and decree as they are with their contents. Similarly, Mr. Adnan argued that, the plaintiff has no room for correction since he has requested the Court to be availed with judgment, decree and proceedings. Thus, the plaintiff is now presumed to have read and understood the nature of the judgment and decree that is why he has expressly his intention to

appeal to the Court of Appeal. He was further of the belief that, the plaintiff ought have applied for correction before filing of the Notice of Appeal, which is presentable to the Court of Appeal within thirty (30) days from the date of delivery of

judgment.

To buttress his argument, he cited the case of Exaud Gabriel vs. Yona Seti and 9 Others, Civil Appeal No. 91 of 2019, John Barnaba Machera vs. North Mara Gold Mine Limited, Civil Case No. 29 of 2016 and Serenity on the Lake Ltd vs. Dorcus Martin Nyanda, Civil Revision No. 1 of 2019. Mr. Adnan likewise submitted that, once there is an application for correction or amendment, the court had to issue an order reflecting 3 the changes contemplated in the judgment. Hence, issuance of a separate order and not the former one. He stated that, the Notice filed to the Court of Appeal of Tanzania does not reflect the sought rectification of the decree. He added that, Section 96 of the Civil Procedure Code, Cap 33, R. E, 2019 (CPC) is no longer applicable after the act of the said Mished having filed the Notice of Appeal. In his reply to the submissions by the counsel for Mr. Omari Shabani/1st defendant Mr. Msema submitted that, the Notice of Appeal was filed to the Court of Appeal on 12th July 2024 and the same was lodged on 15th July 2024. Thus, the Notice of Appeal was filed even before being availed with copies of judgment and decree. Mr. Msemwa further submitted that, section 96 of the CPC permits the court to rectify omissions done in the decree. He stated that, there is an omission to include the co- administrator. (Words "as well as his co-administrator of the late Abdallah Tanganyika as plainly reflected in the judgment but those words do not appear in decree). In his view, such omission is curable under section 96 of the CPC. To support his argument, he referred to the cases of NIC Bank Tanzania Limited & Another vs. Samora Mchuma Samora Co. Limited, Civil Appeal No. 4 340 of 2020 at page 10 and John Barnaba Machera vs. North Mara Gold Mine Limited (Supra) Mr. Msemwa firmly submitted further that, there are incidents entertainable by the High Court when there is a Notice of Appeal, such as Applications for leave and certificate of law in order to appeal to the Court of Appeal as well as enlargement of time to file Notice of Appeal. To him, a mere lodgment of Notice of Appeal does not oust jurisdiction of the Court in every action including the rectification of judgment or decree. He added that, in all cases cited by the counsel for the first defendant now decree holder are not applicable in the circumstances. He stated that, the sought rectification or correction is not aimed at rectifying the contents of the judgment. He prayed the court to overrule the point of objection raised with costs. In brief rejoinder, Mr. Adnan reiterated his submission in chief and stated that, section 96 of the CPC does not come into play if the applicant has filed the notice of appeal to the Court of Appeal unless and until the same withdrawn the Notice duly signed. He further stated that, according to the Court of Appeal Rules, 2009, the term "judgment" includes decree, order, etc. He urged this court to sustain the objection 5 raised and if it pleases the court to rectify the decree and order as to costs be waived. Having carefully gone through the competing submissions by both parties' advocates as well as the judgment and its decree pronounced on 11th July 2024, I find that, there is a vivid accidental slip or omission to include the following words "as well as his co-administrator in the decree, an extract from the judgment. Therefore, the issue of determination by the Court is, whether this

court is competent to rectify its own omission in its decree after the plaintiff has lodged the Notice of Appeal in the Court of Appeal. The power of this court to correct its clerical or arithmetical errors in the judgments, decrees or orders is provided for under Section 96 of the CPC, provides that:- "Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or on the application of any of the parties." In the same vein, the Court of Appeal has the power to correct its apparent errors or omission or accidental slip and the like by virtue 6 of Rule 42 of the Court of Appeal Rules, 2009 which is self-explanatory and I herein under quote

42. -(I) A clerical or arithmetical mistake in any judgment of the Court or any error arising in it from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to what the intention of the Court was when judgment was given." In the instant suit, the counsel for the plaintiff has moved this court to correct the decree at paragraph 2 of the decree to read "as well as his co-administrator" which was omitted by the Court and then not in conformity with the judgment delivered on 11th July 2024 especially at page 29 clause two. On the other hand, the counsel for the 1st defendant has vehemently opposed this application by raising an objection to the effect that, this court is ceased with the requisite jurisdiction to rectify the decree as the parties' dispute has been transferred to the Court of Appeal by presentation of a Notice of Appeal. I have keenly examined the records and noticed that, the plaintiff, being aggrieved by the judgment and decree in respect of this suit pronounced on 11th July 2024, filed a Notice of Appeal to the Court of 7 Appeal of Tanzania on 12th July, 2024 and the same was lodged on 15th July 2024. I am of the view, as correctly argued by both parties' advocates, that, a presentation of the Notice of Appeal to the Court of Appeal by the party who is aggrieved by the decision or order of this court is an initial legal step towards an intended appeal. Hence, such notice requires the proceedings, relating to the matter to be appealed against, to be transmitted to the Court of Appeal. Therefore, in essence once such initial step has taken place, this court remains with nothing substantially to do relating to a matter whose judgment or order is subject to the intended appeal to the Court of Appeal of Tanzania. Thus, ceasure of the Court's jurisdiction to further adjudicate or hear any matter pertaining to that case. The plaintiff has presented nothing before this court to show that the Notice of Appeal has been withdrawn or was deemed to have been withdrawn. In the circumstances, I find this Court ordinarily lacks the requisite jurisdiction once appeal proceedings have been commenced before the Court of Appeal including the initial stage of filing notice of intention to appeal. I subscribe In the case of *Milcah Kalondu Mrema 8 vs. Felix Christopher Mrema*, Civil Appeal No. 64 of 2011 (unreported) where the Court of Appeal was held; "It is settled law that, once a notice of appeal to this Court has been lodged, the High Court ceases to have jurisdiction" See also *Aero Helicopter (T) Ltd vs. F.N. Jansen* (1990) T. L.R at page 142, *Arcado Ntangazwa vs. Buyongera Bunyango*

- (1997) TLR 242, Exaud Gabriel Mmari (Being an apparent legal representative of the estate of the late Lazaro Seti Akyoo) vs. Yona Seti Akyo (Civil Appeal No. 91 of 2019) [2021] TZCA 726 (3 December 2021), just to mention few. Moreover, I am mindful of the legal position that, once there are appeal processes including a notice of Appeal to the Court of Appeal are being undertaken, the laws applicable are Appellate Jurisdiction Act, Cap 141, R. E, 2019 (AJA) and Tanzania Court of Appeal Rules, 2009 (Rules). Hence, the provisions of the CPC cease to be applicable. I am fortified by the decision of the Court in Aero Helicopter (T) Ltd vs. F.N. Jansen
- (1990) TLR at page 143 the Court of Appeal discouraged use of section 95 of CPC once notice of intention to appeal to the Court of Appeal has been issued it stated; 9 "Once proceedings of appeal to the Court of Appeal of Tanzania have been commenced, the High Court could not properly apply section 95 of the Code for the simple reason that, the proceedings are no longer in the court as required by section 2 of the Code, Guided by the judicial jurisprudence herein above, it goes without saying that, this Court ceases to have the requisite jurisdiction once notice of appeal is filed to the Court of Appeal. Henceforth, mostly the provisions applicable in moving the Court are those in AJA and in the Rules except where the applicable law has expressly provided so, for instance section 47 of the Land Disputes Courts Act, Cap 216, Revised Edition, 2019 (LDCA). Since the notice of appeal initiates proceedings before the Court of Appeal and since through the act of filing the notice of appeal, an aggrieved party may file an application for certificate on point of law or leave to appeal or extension of time in order to file notice of appeal to the Court of Appeal (See 44 of AJA). More so, under Rule 96 of the Rules, a record of appeal requires completeness of certain documents including but not limited, judgment and decree of the High Court in order that, the intended appeal may be heard and determined. In that situation, I find section 96 of the CPC comes into play provided and only where there is clerical or arithmetical errors arising from accidental slip or omission, in which do not go to the root or substance of the judgment or decree to be appealed. In other words, the correction, which does affect the contents of judgment or decree appealed against in order to facilitate proper record of the appeal and eventually to enable the intended expeditious hearing and determination of the appeal. Now therefore I am bound to ascertain if the sought correction of the decree, which is vividly not in conformity with the judgment of this Court is attainable. It is clear from the wording of section 96 of the CPC that, where there is a clerical or arithmetical mistakes or error arising or an accidental slip or omission, such mischief is amendable or correctable by the Court as was also stressed in NIC Bank Tanzania Limited & Another (Supra) cited by the 1st defendant's counsel. In this case, the learned High Court judge formulated second version of the judgment instead of issuing a separate order, the Court of Appeal held; "The rectification should not have been done by formulating the second judgment in one case, the original and the amended of the judgment. Under section 96 of the CPC, cited by the counsel for the appellants, a judgment may only be corrected if it contains clerical or arithmetical mistakes The section provides as follows: 11 Such correction may be done by a separate order, not by formulating a

corrected version of the judgment? Basing in the above decision, therefore, I do not agree with the submission of the counsel for the 1st defendant that, in order to have the clerical or arithmetical error corrected, the plaintiff ought to have his notice of appeal withdrawn first. I am holding so, for the following underscored reasons:- Firstly, that, the sought correction is a mere omission of the words "as well as his co-administrator of the estate" plainly appearing in the judgment intended to be appealed but not reflected in the decree. Therefore, distinguishable from the cases cited by Mr. Adnan as the former decisions dealt with following situations;- Proceeding with hearing of execution of a decree intended to be appealed where the notice of appeal was issued was found improper. (See NIC Banks case (supra). Furthermore, where this Court proceeded with hearing of the case on merit where while there was a notice of appeal duly filed against an order arising from PO (see Arcado's case (supra). Equally, in Exaud's case where this Court (Masengi, J) overruled the respondents' PO on limitation of time but proceeded with the hearing of the main case without taking into account of the notice of appeal so filed against her order. 12 Secondly, that, the decree of the Court is an abstract of the judgment, in other words decree must agree with the judgment unlike the case of John Barnaba's case (supra) where the errors were in the judgment. (See, Order XX Rule 6 of the CPC). In our case, the judgment is clear as to its recognition of the 1st defendant's co-administrator one Selemani Mwajeka of the estate (Suit property) pursuant to the decision of this Court (Munisi, J as she was) vide Civil Revision No. 124 of 2003, which I have no mandate to reverse. Thirdly, that, the omission, which appear apparently to be an accidental if not cured by the Court, the hearing of the intended appeal will not take off because of variance in the judgment and its decree. Hence, unnecessary delay of justice for both parties. It would even be worse and more awkward, if take the version of Mr. Chitare, as in old days when judgment were in handwritten forms and therefore not obtainable within the required period than currently when judgments and decrees are collectable immediately after their pronouncements and Fourthly, that, the required facilitation of the proper records of appeal, includes proper judgment and decree and other documents including issuance of certified documents or certificate of delay if the delay is so caused by the Court (See Rule 90 of the Rules). 13 Having demonstrated as herein, I find the preliminary objection raised by the learned counsel for the 1st defendant his misplaced and it is thus overruled. However, given the nature of the PO and source of the error or omission, the Court, which prepared the decree. I refrain from making orders as to as to costs. It is so ordered. DATED at DAR ES SALAAM this 2nd day of August 2024. 14

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