IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 64 OF 2016

(Originating from the decision of Civil Case No. 17 of 2016 of the District Court of Ilala)

MIC TANZANIA LIMITED ..... APPELLANT

VERSUS

HAMISI MWINYIJUMA ..... 1ST RESPONDENT

AMBWENE YESAYA ..... 2ND RESPONDENT

CELLULANT TANZANIA LIMITED ..... 3RD RESPONDENT

RULING

I. ARUFANI, J.

This ruling is for preliminary objection on point of law raised by the first and second respondents in this appeal against the appeal of the appellant that:

1. The appeal has been preferred by the appellant contrary to the mandatory provisions of Order XXXIX Rule 1 (1) and (2) of the Civil Procedure Code, Cap 33 R.E 2002.

At the hearing of the above point of Preliminary Objection the appellant was represented by Advocates Rosan Mbwambo and Ashery Utamwa and the respondents were represented by Advocates Albert Msando and Ally Hamza. Mr. Albert Msando told the court that, while the Memorandum of Appeal filed in this court by the appellant shows the appeal is against the judgment and decree of Civil Case No. 17 of 2016 of the District of Ilala

dated 11th day of April, 2016 but is accompanied by the copies of the judgment and decree of Civil Case No. 17 of 2012. He stated further that, while the parties in the Memorandum of Appeal filed in this court by the appellant are indicated to be MIC Tanzania Limited Versus Hamisi Mwinyijuma, Ambwene Yesaya and Cellulant Tanzania Limited the parties in Civil Case No. 17 of 2012 were Hamisi Mwinjuma and Ambwene Yessayah Versus MIC (T) Limited.

Advocate Albert Msando argued that, under Order XXXIX Rule 1 (1) of the Civil Procedure Code it is mandatory that the Memorandum of Appeal shall be accompanied by a copy of the decree appealed from and the judgment on which it is found. He argued that, the Memorandum of appeal filed in this court by the appellant is not supported by a copy of decree and judgment that is appealed from because while Memorandum of Appeal is in respect of Civil Case No. 17 of 2016 but what is accompanying the Memorandum of Appeal filed in this court is the copy of decree and judgment of Civil Case No. 17 of 2012.

He argued further that, while the copy of judgment of Civil Case No. 17 of 2012 attached to the memorandum of appeal involved Hamisi Mwinjuma as first plaintiff and Ambwene Yessayah as second plaintiff versus MIC (T) Limited as the sole defendant but the Memorandum of Appeal shows the appeal is between MIC Tanzania Limited as the appellant versus Hamisi Mwinyijuma as the first respondent, Ambwene Yesaya as the second respondent and Cellulant Tanzania Limited as the third respondent. He argued that, Cellulant Tanzania Limited is not appearing anywhere in the judgment and decree accompanying the Memorandum of Appeal.

Having pointed out the above stated observation advocate Albert Msando submitted that, in the light of the stated defects the Memorandum of Appeal filed in this court by the appellant is defective and the same is supposed to be dismissed as is incompetent. He argued that, it is now established principle of law that failure to put the correct name of the parties in a case is fatal and referred the court to the case of **Marwa Kachang'a V. R,** Criminal Appeal No. 84 of 2015 and case of **Denis Kasege V. R**, Criminal Appeal No. 359 of 2013, CAT at DSM (Both Unreported) which were found incompetent and struck out after being found the number of the case and names of Hon. Judges presided over those matter were wrongly inserted in the notice of appeal of those cases. He submitted that, as the memorandum of appeal filed in this court by the appellant is defective the appeal be struck out with costs.

In his reply Mr. Rosan Mbwambo told the court that, after looking into the Memorandum of Appeal they have noted some anomalies in its contents as the names of the first and second respondents as appearing in the Memorandum of Appeal are different from those appearing in the judgment and the decree of the trial court. He argued that, they have also noted that, the names of the first and second respondents as appearing in the Memorandum of Appeal are the same as appearing in the plaint and that shows the respondents have been using their names interchangeably. He submitted that, if at all the respondents are adopting the names appearing in the judgment and decree and not the names appearing in the plaint they cannot say they are different persons and thus the alleged difference is not fatal.

He argued that, if the court will find there is such a difference they are praying the court to find the same is misnaming of the parties which is a slip of a pen and is an error

which can be ignored or overlooked and at most an amendment can be the most appropriate step which they are praying for. To support his prayer he referred the court to the case of **Chang Qing International Investment Limited V. TOL Gas Limited**, Civil Application No. 292 of 2016, CAT at DSM (Unreported) and said though the Court of Appeal found name of the respondent in the said case was put as TOL Gas Limited instead of TOL Gases Limited but it found the error was not fatal.

He also referred the court to the case of **OTTU on Behalf of P. L. Assenga & 106 Others & 3 Others V. Ami Tanzania Limited**, Civil Application No 35 of 2011, CAT at DSM (Unreported) where it was stated misdescription of the Rules does not make the Rules nonexistence and is harmless and curable. He stated that, the above view relating to misdescription of Rules is more than misdescription of a year appearing in the Memorandum of Appeal. He referred the court to the case of **Leila Jalaludin Haji Jamal V. Shaffin Jalaludin Haji Jamal,** Civil Appeal No. 55 of 2003, CAT at DSM (Uhreported) where it was stated that, error of citing year 2002 instead of year 2001 in an appeal is a minor curable defect. He submitted that, on the basis of the three cases he has cited all the omission or anomalies pointed out are curable and are not requiring the appeal to be struck out as proposed by the counsel for the respondent.

He argued in relation to the impleading of third respondent in the Memorandum of Appeal that, from the pleadings filed in the trial court the third respondent is not a total stranger in the matter. He contended that, the third respondent was brought into the suit through third party procedure but later on he was exonerated from the suit that is why was omitted in the judgment and decree. He submitted that, the third respondent was inadvertently impleaded in the Memorandum of Appeal. He

referred the court to Order XXXIX Rule 3 of the Civil Procedure Code, Cap 33, 2002 which is providing for rejection, return or amendment of the Memorandum of Appeal. He also referred the court to the Mulla on **The Code of Civil Procedure of India,** 16 Edition, Vol – IV 2002, at page 3859 which discussed Order XXXIX Rule 3 of the Civil Procedure Code of India which is pari materia to Order XXXIX Rule 3 of our Civil Procedure Code. He said section 107 of the Civil Procedure Code of India is also pari materia with section 76 of our Civil Procedure Code which provides for the power of the High Court when is entertain an appeal.

He submitted that, when the High Court is sitting on appeal has the same powers and duties as the trial court and said the cumulative of all the provisions of the law he has cited above is to bring the court to the point that, as provided under Order 1 Rule 9 of our Civil Procedure Code which states when a party is wrongly impleaded is a misjoinder of party and prayed the court to find the impleading of the third respondent into the memorandum of appeal is misjoinder of the parties which under Rule 10 (2) cannot defeat the case. He submitted further that, the defects raised in the preliminary objection are minor, harmless and curable and said Order XXXIX Rule 3 (1) of the Civil Procedure Code allows the court to make correction of the defects pointed out.

He prayed the court to put the right year, right names of the respondents and remove the third respondent from the memorandum of appeal. He said by doing so the court will have discharge its duties provided under section 76 of the CPC which allows the court to do general amendment for any defect for the purposes of determined the real issue or question on merit. He said the court will also be observing the requirement of Article

107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 which requires the court to determine matters on merit and not to entertain technicalities.

He also referred the court to Order VII Rule 11 of the CPC which states when a plaint can be rejected and said the same provision of the law allows amendment to be done in the pleadings when defect is discovered. Finally he prayed the court to desist to entertain the Preliminary objection raised by the counsel for the first and second respondents and the same to be overruled with costs.

In his rejoinder the counsel for the first and second respondents stated that, as the counsel for the appellant has admitted there are defects in the memorandum of appeal then the prayer of dismissal of the preliminary objection cannot be granted. He said the defects they have raised are not minor or mere technicalities but they are fatal and they call for the memorandum of appeal to be struck out. He said further that, this is an appeal and not a suit thus all the provisions of the law and rules relating to the suit which have been cited by the counsel for the appellant are irrelevant in the circumstances of the matter at hand.

He explained under what circumstances Order XXXIX Rule 3(1) of the CPC can be invoked and said all the steps provided in the said provision of the law are exercised at the time of admission of the appeal and cannot be invoked at this stage where they have already raised a Preliminary objection. He said in the case of **Chang Qing** the names of the parties were rectified but in the case at hand no rectification has been made. He also stated that, the court cannot wore the shoes of the appellant and correct the memorandum of appeal which was wrongly prepared.

As for the issue of citing wrong year which was stated in the case of **Leila** as minor but the case of **Denis Kasege** is a recent decision than the one cited by the counsel for the appellant and prayed the court to base its finding on the said case. As for the case of **OTTU** he said the same is inapplicable in the case at hand as it was decided on misdescreption of Rules while the case at hand is about wrong naming of the parties in the appeal. With regards to the wrong impleading of the third respondent in the memorandum of appeal he submitted that, the same is not a minor error which can be cured by striking it out of the record.

He submitted further that, the court cannot be moved by way of submission to amend the memorandum of appeal and said it is a settled principle of law that, if a party want a court to act in his favour he must move the court properly. He said as the appellant has not moved the court properly the prayer of amending the memorandum of appeal cannot be granted as it will render the preliminary objection they have raised useless and prayed the court to desist to entertain the same. He argued that, the appellant had all the time to pray to amend the memorandum of appeal or withdraw and refile the same from when the notice of preliminary objection was filed in this court but they have not done so hence it is unfair to allow the amendment to be made at this stage. Finally he prayed the memorandum of appeal to be struck out with costs.

After considering the rival submission of the counsel for the parties the court has found proper to start by looking into the provision of the law the counsel for the respondents is alleging was contravened by the memorandum of appeal filed in this court by the appellant. The said provision which is Order XXXIX Rule 1 (1) of the Civil Procedure Code states as follows:-

"Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and ***the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded."*** (Emphasize is mine).

The bolded part of the above provision shows is mandatory that the memorandum of appeal must be accompanied by a copy of decree appealed from and if the court has not dispensed with the copy of judgment on which it was extracted. Now in the appeal at hand there is no dispute that, while the memorandum of appeal is showing the appeal is being preferred against the decision of Ilala District Court made in Civil Case No. 17 of 2016 but the copies of judgment and decree annexed to the memorandum of appeal are of Civil Case No. 17 of 2012. Also there is no dispute that the names of the first and second respondents appearing in the memorandum of appeal are different from the names appearing in the copies of the judgment and decree annexed to the memorandum of appeal. Again there is no dispute that the third respondent in the memorandum of appeal is not featuring as party in the copies of judgment and decree annexed to the memorandum of appeal.

The dispute as raised in the rival submission of the counsel for the parties is whether the said defects are minor to the extent that, as proposed by the counsel for the appellant can be cured by way of the court to amend the memorandum of appeal or ordering the appellant to amend the same or the defects are fatal and not curable to the extent of requiring the appeal to be struck

out as proposed by the counsel for the respondents. Starting with the argument made by the counsel for the appellant that the court can amend the defects found in the memorandum of appeal or order the appellant to amend the same under Order XXXIX Rule 3 of the Civil procedure Code the court has considered the same but failed to see how it can accept the proposal of the counsel for the appellant.

The court has come to the stated finding after reading carefully Order XXXIX Rule 3 of the Civil Procedure Code together with other Rules of the cited Order and find as rightly argued by the counsel for the respondents the court cannot use the powers conferred to it by the said provision at this stage of the matter to amend the memorandum of appeal as prayed by the appellant's learned counsel. The court has found so after seeing the cited provision of the law is conferring the said power to the court to do so when the memorandum of appeal is at the stage of being filed in court and not after being filed in court and the respondents being served with its copy and filed their reply as it is for the matter at hand.

The court has also come to the above views after seeing even Order VII Rule 11 of the Civil Procedure Code referred by the counsel for the appellant which is providing for rejection of the plaint the same is intending the said step to be taken at the stage of admission of the plaint and not at the later stage where it has already been admitted in court and the defendant being served and filed his written statement of defence in court. Therefore as in the instant matter the memorandum of appeal is not only that it has already being admitted in court but also the respondents have already been served and they are now challenging the competency of the said memorandum of appeal then the court cannot amend the same at this stage.

As for the alternative prayer that the appellant be allowed to amend the memorandum of appeal so as to put right the defects found in the memorandum of appeal the court has gone through section 76, 97 and proviso of Order VII Rule 11 of the Civil Procedure Code and come to the finding that, it is true that the above provisions of the law gives power to the court to allow parties to amend the pleadings filed in court for the purpose of enabling determination of the matter on merit and Article 107A (2) (e) of the Constitution of the United Republic of Tanzania requires courts not to be tied up by technicalities in dispensation of justice.

However, after going through the record of the trial court, I have found as rightly pointed out by the counsel for the appellant the defects appearing in the memorandum of appeal filed in this court by the appellant are not appearing on the memorandum of appeal alone which the appellant would have been able to amend if they would have been allowed to do so but the defects are also going up to the copies of the judgment, decree and proceeding of the trial court when compared with the pleadings filed in the trial court by the parties. The court has found the names of the first and second respondents appearing in the copies of judgment, decree and proceeding of the trial court as plaintiffs which are Hamisi Mwinjuma and Ambwene Yessayah are different from the names appearing in the plaint and written statement of defence which are Hamisi Mwinyijuma and Ambwene Yesaya.

Therefore even if the court would have follow the position of the law stated in the cases of **Leila Jalaludin Haji Jamal** and **Chang Qing International Investment Limited** (Supra) relied upon by the learned counsel for the appellant to allow the appellant to amend the memorandum of appeal the only thing which they can be able to amend is the year of the decision of

case they are appealing from and to remove the name of the third respondent form their memorandum of appeal but they cannot amend the names of the first and second respondents as the amendment of their names is supposed to be done by the trial court itself by correcting its judgment, decree and proceeding.

Under that circumstances it is the view of this court that, the defects appearing in the memorandum of appeal of the appellant as stated hereinabove are not minor defect which can be cured by way amendment as prayed by the counsel for appellant but are fatal and goes to the root of the appeal at hand. In the premises the court has found the point of preliminary objection raised by the counsel for the first and second respondents has merit and is hereby upheld. In the upshot the appeal which has been found incompetent as indicated hereinabove is accordingly struck out with costs.

Dated at Dar es Salaam this 21st day of July, 2017

I. ARUFANI

JUDGE

21/7/2017

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CELLULANT TANZANIA LIMITED ..... 3RD RESPONDENT

DRAWN ORDER

WHEREFORE the first and second respondents filed in this court a notice of preliminary objection on point of law that:-

> "The appeal has been preferred by the appellant contrary to the mandatory provisions of Order XXXIX Rule 1 (1) and (2) of the Civil Procedure Code, Cap 33 R.E 2002."

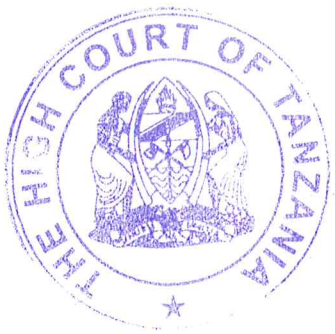
AND WHEREAS the matter is coming for ruling on the above stated point of preliminary objection before Hon. I. Arufani, J this 21st day of July, 2017 in the presence of Mr. Herman Lupogo, learned advocate for the appellant and Mr. Albert Msando and Mr. Ally Hamza, learned advocates for the respondents.

THIS COURT DOTH HEREBY ORDERED THAT

(1) The point of preliminary objection raised by the first and second respondents is upheld.

(2) The appeal is struck out with costs.

GIVEN UNDER my hand and the seal of the court this 21st day of July, 2017.



I. ARUFANI, J

21/7/2017