IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., KISANGA, J.A. And OMAR, J.A.)

CIVIL APPLICATION NO. 20 OF 1987

C/F CIVIL APPLICATIONS NO. 21 & 22/1987
In the Matter of an intended Appeal

Between

DAR ES SALAAM CITY COUNCIL. . . . . APPLICANT

And

JAYANTILAL PRAGULBHAI RAJAN. . . . . .RESPONDENT

(Application for an order for extension of time to file fresh Notice of Appeal to the Court of Appeal under Rule 76 of the Tanzania Court of Appeal Rules, 1979 from the judgement and Decree of the High Court of Tanzania at Dar es Salaam (Mnzavas, J.K.) dated the 3rd day of August, 1985

in

Civil Case No. 40 of 1982

R U L I N G

KISANGA, J.A.:

This matter arises substantially from a reference to this Court under r.57(1)(b) of the Court of Appeal Rules. It is a reference from the order of a single judge of the court (Nyalali, C.J.) to the effect that the intended appeal in High Court Civil Case No. 40/82 be marked or deemed withdrawn. Following such order of withdrawal, Professor Mgongo Fimbo, acting for the applicants, The Dar es Salaam City Council, has filed in this Court three notices of motion. In the first one (Civil Application No. 20/87) he is seeking an extension of time to make an application to refer the decision of a single judge to the full court. In the second notice of motion (Civil Application No. 22/87) he is seeking an extension of time to give fresh notice of appeal, and in the third notice of motion (Civil Application No. 21/87) he is seeking to have the order of the single judge discharged or reversed. The applications were set down for hearing before the full court, and for the

purpose of...../2

purpose of this ruling, only the first two applications are directly relevant.

At the beginning of the hearing, Mr. M. Raithatha, counsel for the respondent, raised two preliminary objections, first that the application No. 20/87 for the extension of time to apply for a reference to the court ought to be heard by a single judge, and second, that the application No. 22/87 for extension of time to give fresh notice of appeal is incompetent in that it ought to have been made to the High Court in the first instance, which it has not. Upon reflection Mr. Raithatha intimated that he did not wish to press the first point in his preliminary objection, and so we shall say very little about it.

The power to grant a reference in civil matters from the decision of a single judge is conferred by rule 57(1)(b) of the Court of Appeal Rules. That provision says,

> "57.-(1) Where any person is dissatisfied with the decision of a single judge exercising the powers conferred by section 68 G of the Constitution he may apply informally to the judge at the time when the decision is given or by writing to the Registrar within seven days after the decision of the Judge -
> (a).....
> .....
> .....
>
> (b) in any civil matter, to have any order, direction or decision of a single judge varied, discharged or reversed by the Court.".

Had the application been made informally at the time when the order in question was made or given, the natural course would have been to make the application to the very judge making the order. Where the application is made only subsequently by writing to the Registrar whether within the specified time or after the specified time has expired, however, it seems that the application need not necessarily be heard by a single judge. It may have to depend on the circumstances of each particular case. It is true

that under..... /3

that under r.55 of the Court of Appeal Rules every application shall be heard by a single judge who, however, may adjourn the application for determination by the full court. But, as intimated earlier on, the order of a single judge in the present case was made by the Chief Justice, and it is the Chief Justice who set down this matter for hearing before the full court. It may very well be that he decided to exercise his discretion from the very outset instead of having to commence the hearing and then adjourn it for determination by the full court. Be that as it may, since as intimated earlier, Mr. Raithatha did not seek to press this point in his preliminary objection, we desire to confine ourselves to these brief remarks without deciding on the point; we defer the decision to a future date when we shall have heard fuller arguments.

Mr. Raithatha's second objection was that the application for the extension of time to give notice of appeal is incompetent in as much as that application was not brought before the High Court in the first instance. His line of argument is as follows: Section 11(1) of the Appellate Jurisdiction Act confers on the High Court the power to extend time for giving notice of appeal. The relevant part of that provision reads:-

> "11.-(1) Subject to sub-section (2), the High Court... ... ...may extend the time for giving notice of intention to appeal from a judgement of the High Court.... .....".

Sub-section (2) is not relevant to the facts of the present case. Then r.8 of the Court of Appeal Rules confers on this Court a similar power as that conferred on the High Court by section 11(1) of the Appellate Jurisdiction Act. That rule says:-

> "8. The Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court or of the High Court for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as reference to that time as so extended.".

It is to be...../4

It is to be noted that the time limit for giving notice of appeal is set out in r. 76, so that r. 8 empowers this Court to extend that time for sufficient reason. Then r.44 says that where a person has the option whether to apply to the High Court or to this Court, he shall first apply to the High Court. Thus Mr. Raithatha maintained that while the applicant Council had both options open to it, it did not go to the High Court first; it chose to come straight to this Court. This, he concluded, offended r.44 and consequently rendered the application incompetent.

Professor Fimbo in reply took the view that r.44 was not applicable here. He strenuously contended that that rule applies only to cases falling under section 5(1)(c) of the Appellate Jurisdiction Act which makes provision for appeal to this Court, in certain cases, with the leave of this Court or the High Court. But since the application here was not for leave to appeal, he contended, r.44 could not be held against him; he could choose, as he did, to come to this Court before going to the High Court first.

We have given careful thought to Professor Fimbo's submission but with due respect we cannot agree with him. The gravamen of his submission is that r.44 should be construed narrowly and restrictively so as to mean that it applies only to applications for leave to appeal to the Court of Appeal and not to any other applications. We can find no justification for construing the rule so narrowly. The relevant part of that rule reads:

> "44. Whenever application may be made either to the Court or to the High Court, it shall in the first instance be made to the High Court....."

The word "application" is not qualified. In our view, reading the rule as it stands, it makes good sense, and there is no apparent reason why it should be construed restrictively as submitted by Professor Fimbo. If it were intended to give the rule such a restricted meaning, then it was only too easy for the framer

of that rule...../5

of that rule to say so simply by providing that, "Whenever application for leave to appeal to the Court may be made either to the Court or to the High Court....." In the absence of any such qualification of the word "application" we can find no basis for the view that that word only means application for leave to appeal to the Court of Appeal.

In yet another dimension Professor Fimbo took the view that r.44 applies only where the option whether to come to the Court of Appeal or to go to the High Court is specifically conferred by the Appellate Jurisdiction Act. Thus according to him r.44 applies only to cases coming under section 5 (1) (c) of the Appellate Jurisdiction Act because it is that provision alone which confers concurrent jurisdiction on the Court of Appeal and the High Court to do something; no other provision of the Act does that. Turning to section 11(1) of the Act which, as we have seen, confers on the High Court the power to extend the time for giving notice of appeal, and r.8 of the Court of Appeal Rules which confers the same power on the Court of Appeal, he contended that r.44 did not apply here because the concurrency of powers was not wholly conferred on both courts by the Appellate Jurisdiction Act; that is to say the power of the High Court was conferred by the Act while that of the Court of Appeal was conferred only by the Rules.

We could not quite appreciate this argument. On perusing the Appellate Jurisdiction Act we can find nothing in it to suggest that r.44 applies only where the concurrent jurisdiction is wholly conferred on both courts by the Act itself. The distinction which Professor Fimbo seeks to draw here appears somewhat unrealistic. The Court of Appeal Rules which were made under section 12 of the Appellate Jurisdiction Act are meant to facilitate the proper and smooth administration of that Act, and to that extent they are deemed to be part and parcel of the mother Act. Viewed in that light it seems

that r.44...../6

that r.44 applies irrespective of whether the concurrent jurisdiction on both courts was conferred wholly by the Act itself or partly by the Act and partly by the Rules. On the facts of the present case we are prepared to hold that r.44 applies even if the concurrent power to extend the time to file notice of appeal was conferred not by the Appellate Jurisdiction Act itself but partly by that Act i.e. section 11(1) for the High Court and partly by the Rules i.e. r.8 for the Court of Appeal.

But even if it were to be conceded that r.44 applies only where the concurrent jurisdiction on both courts is conferred by the Appellate Jurisdiction Act itself, Professor Fimbo's argument crumbles down when one examines the provisions of section 4(2) of that Act. The sub-section reads:-

> "(2)For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power, authority and jurisdiction vested in the Court from which the appeal is brought.".

This sub-section confers on the Court of Appeal very wide powers on appeal. Under the provision the Court of Appeal has, not only the powers which are conferred on it by the Act, but also those powers which are vested in the court from which the appeal emanates i.e. the High Court in this case. And, as has been shown, among the powers conferred on the High Court by section 11(1) of the Act is that of extending the time for giving notice of appeal. In those circumstances one can rightly say that both the High Court and the Court of Appeal have concurrent jurisdiction under the Appellate Jurisdiction Act itself to extend the time for giving notice of appeal. That is to say the High Court has that power under section 11(1) of the Act and the Court of Appeal has it under section 4(2) of the Act. Therefore, in accordance with professor Fimbo's line of argument r.44 should apply.

We have made...../7

We have made it quite plain that we cannot accept Professor Fimbo's submissions on the matter under review. We can find nothing in the Appellate Jurisdiction Act or in the Court of Appeal Rules, which were made under that Act, confining the operation of r.44 to applications for leave to appeal only, or to cases in which the concurrent power to entertain the application is conferred on both courts by the Acts itself. We are of the settled view that where an intending applicant has the option whether to apply to the Court of Appeal or to the High Court, r.44 applies in which case he has to make the application to the High Court first. That rule applies whether such concurrent jurisdiction to entertain the application is conferred by the Appellate Jurisdiction Act itself or partly by the Act and partly by the Court of Appeal Rules.

In the event, we sustain Mr. Raithatha's preliminary objection to Civil Application No. 22/87 and dismiss that application as being incompetent. The respondent to that application is to have his costs.

Now the position in this matter is this: Application No.22/87 stands dismissed following Mr. Raithatha's successful objection to it. The remaining two applications are still before us; Application No. 21/87 having not been objected to, and Mr. Raithatha having decided not to press his objection to Application No. 20/87.

DATED at DAR ES SALAAM this 25th day of February, 1988.

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

A. M. A. OMAR
JUSTICE OF APPEAL

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I certify that this is a true copy of the original.

(J. H. MSOFFE)
SENIOR DEPUTY REGISTRAR