Selected

IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA

(CORAM: RAMADHANI, J.A., NSEKELA. J.A., And KAJI,J.A.)

CIVIL APPEAL NO. 77 OF 2002

BETWEEN

TANGA CEMENT COMPANY LIMITED.....APPELLANT

AND

CHRISTOPHERSON COMPANY LIMITED.....RESPONDENT

(Appeal from the judgment/decree of the High Court of Tanzania at Moshi)

(Mchome. J

dated the 8th day of October, 2001 in

Civil Case No. 11 of 1998

R U L I N G

KAJI. J.A.: (27 OCTOBER 2004)

The respondent Christopherson Company Limited, successfully sued the appellant, Tanga Cement Company Limited, for various amounts of money for breach of contract. The appellant lodged this appeal against the whole decision of the trial High Court (Mchome, J.) through its advocates W.A.L. Mirambo & Co., Advocates and Shayo, Jonathan & Co., Advocates.

When the appeal was called on for hearing, Mr. Makange learned counsel for the respondent, raised a preliminary objection under Rule 100 of the Court Rules, 1979, notice of which had been served on the Court and on the appellant.

In the preliminary objection Mr. Makange raised the following grounds:-

(1) That the Notice of Appeal lodged in the High Court of Tanzania at Moshi on the 10th day of October, 2001, being related to an imperfect decision/judgment and orders of the Honourable Mr. Justice L.B. Mchome, given at Moshi on the 8th day of October, 2001, is both premature and legally incompetent with the effect that Civil Appeal No. 77 of 2002 ought to be struck out with costs.

(2) That, in the event of this Honourable Court upholding the first-mentioned preliminary objection, both the decree and memorandum of appeal are, as corollary, misconceived at law with the effect that Civil Appeal No. 77 of 2002 ought to be struck out with costs.

That in the event of this Honourable Court overruling the first-mentioned preliminary objection, Civil Appeal No. 77 of 2002 ought to be struck out with costs for want of service of Notice of Appeal on the respondent as mandatorily required under Rule 77 (1) of Tanzania Court of Appeal Rules, 1979.

That, as there exists no nexus between the judicial proceedings dated 18/2/2000 and those resumed on 27/9/2000, the record of appeal is bad at law on grounds of incompleteness with the result that Civil Appeal No. 77 of 2002 ought to be struck out with costs.

In the course of hearing the preliminary objections Mr. Makange abandoned ground No. 3 after he learned from his client that before he took over the conduct of the appeal from Mr. Mahatane, learned counsel, his client was duly served with the Notice of Appeal. Mr. Makange proceeded with the remaining three grounds.

In elaborating ground No. 1 Mr. Makange stated that, on 8.10.2001, judgment was entered in favour of the respondent. But reasons for the judgment were reserved till on 15.10.2001 when they were read. Before the reasons were read, on 10.10.2001 the appellant lodged the Notice of Appeal against the whole decision of 8.10.2001. It was the learned counsel's submission that the decision delivered on 8.10.2001 was not a judgment which could be appealed against. He said that the judgment of the case was the one which was read on 15.10.2001 which contained the grounds for the decision. The learned counsel referred us to the case of RAICHAND & ANOTHER V ASSANAND & SONS (1957) EA 82, and the definition of the word "judgment" under section 3 of the Civil Procedure Code, 1966. He said that since the grounds for the judgment which was the judgment

in the case were delivered on 15.10.2001, the Notice of Appeal which was lodged on 10.10.2001 was lodged prematurely and was legally incompetent.

Arguing ground No. 2, the learned counsel stated that, a decree must agree with the judgment as stated under ORDER XX Rule 6 (1) CPC. He said that in the instant case the decree filed by the appellant, does not agree with the judgment, especially in terms of the amount which the respondent was awarded. He said that, whereas the amount in the judgment dated 15.10.2001 shows the amount to be Shs. 30,000,000/=, the decree shows the amount to be Shs. 30,062,000/= which is also reflected in the decision of 8th October, 2001. The learned counsel further stated that, even the memorandum of appeal was defective because it purportedly showed that it referred to the whole decision and moreover in its heading it refers to the decision of 8.10.2001 which was not the judgment of the case. It was the learned counsel's submission that the decree and the memorandum of appeal were misconceived.

Arguing ground No. 4, the learned counsel stated that, on 18.2.2000 judgment was entered in favour of the respondent. According to the record of appeal, nothing is shown to have transpired until on 27/9/2000 when the case was fixed for hearing defence on 24.11.2000. The learned counsel wondered how a case whose judgment had been delivered on 18.2.2000 was again fixed for hearing defence on 24.11.2000. He said that there is no nexus between the judicial

proceedings dated 18.2.2000 and those resumed on 27.9.2000. When later it transpired from the bar that there were some proceedings between 18.2.2000 and 27.9.2000 whereby the judgment of 18.2.2000 was set aside, and that the said proceedings were not included in the record of appeal, the learned counsel stated that, in that respect the record of appeal is bad at law on the ground of incompleteness and a breach of Rule 89 (1) (k) of the Court Rules, 1979, and that it was falsely certified to be a correct copy of the record. He therefore called upon the Court to strike out the appeal with costs.

On the other hand Mr. Shayo, learned counsel for the appellant, stated that the first ground of objection can find its answer in logic. He said that the decision of 8.10.2000 is what the learned trial judge had in mind. The decision of 15.10.2000 are his reasons for his decision of 8.10.2000. The decree shows the reliefs granted. In his view, the difference in the amount awarded in the decision of 8.10.2000 and 15.10.2000 is minor which cannot make the judgment or decree imperfect. However the learned counsel conceded that he did not apply for amendment of the decree. The learned counsel further stated that, of the two decisions, the true judgment is that of 8.10.2000, and that the one of 15.10.2000 were merely reasons for the judgment of 8.10.2000. He cited the decision of the then Court of Appeal for Eastern Africa in the case of SHEIKHA BINTI ALLI BIN KHAMIS AND ANOTHER V HALIMA BINTI SAID BIN NASSIB AND OTHERS (1959) EA 500. In that respect it was the learned counsel's submission

that the Notice of Appeal is not premature nor is it incompetent.

On why there is no nexus between the judicial proceedings of 18.2.2000 and 27.9.2000, the learned counsel stated that, they applied before the trial court for copies of proceedings, judgment and decree for appeal purpose, and that they were supplied with the same minus those of between 18.2.2000 and 27.9.2000.

The learned counsel further submitted that if the respondent felt that the record was insufficient, he should have lodged a supplementary record under Rule 92 (1) of the Court Rules, 1979. The learned counsel urged the Court to overrule the preliminary objection.

It is common ground that the Notice of Appeal, the memorandum of appeal and the decree refer to the judgment/decision and orders of the High Court (Mchome, J.) dated 8th October, 2001. The crucial issue is which of the two is a judgment? Is it that of 8.10.2001 or that of 15.10.2001? Mr. Shayo, learned counsel for the appellant, argued vehemently that the judgment of the case is the one dated 8.10.2001 because it is what the trial judge had in mind. On the other hand Mr. Makange, learned counsel for the respondent, argued forcebly that the judgment of the case is the one dated 15.10.2001 because it contains the grounds for the decision.

In our view, before coming to the decision, we think it is imperative that we revisit the meaning of "judgment." The word "judgment" as defined under Section 3 of the Civil Procedure Code, 1966 has the following meaning:-

> "3 'Judgment' means the statement given by the Judge or the Magistrate of the grounds of a decree or order."

Let us see what the decision of 8.10.2001 says. It is recorded as follows:-

> 8/10/2001
>
> Order: Judgment entered for the plaintiff for:-
>
> (3) Shs. 30,062,000/= plus interests at 6% from 1/5/1986 till full payment.
>
> (4) General damages at Shs. 5,000,000/= for breach of contract.
>
> (5) Costs of this suit
>
> (6) Interest on 2 & 3 above at 12% 1/2 p.a. from date of judgment till full payment. Reasons for judgment to be given on 15/10/2001.

We ask ourselves: is this a judgment? We have already observed the meaning of

a judgment as defined under Section 3 of the Civil Procedure Code 1966. We ask: what are the necessary contents of a judgment? In order to answer this question properly we look at ORDER XX Rule 4 of the Civil Procedure Code, 1966 which states:-

> "4: Judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision"

In the instant case the decision of 8.10.2001 does not contain a concise statement of the case, the points for determination and the reasons for the decision. In that respect we are of the view that, it is not a judgment.

But the decision of 15.10.2001 has all the necessary elements; a concise statement of the case, the points for determination, the decision thereon and the reasons for the decision. We are satisfied that it is this decision of 15.10.2001 which is the judgment of the case. In that respect the Notice of Appeal, the memorandum of appeal and the decree should have been in respect of that decision and not that of 8.10.2001 for the reasons we have already stated. We therefore agree with the learned counsel for the respondent that the notice of appeal, the memorandum of appeal and the decree which were related to the decision of 8.10.2001, were premature and legally incompetent, and that legally,

there was no notice of appeal, memorandum of appeal and decree in respect of the real judgment of the case dated 15.10.2001.

We are aware of the decision by the then Court of Appeal for Eastern Africa in the case of SHEIKHA BINTI ALLI BIN KHAMIS AND ANOTHER V HALIMA BINTI SAID BIN NASSIB AND OTHERS (1959)EA 500 cited by Mr. Shayo, learned counsel for the appellant. In that case the appeal had been heard on 8/10/1958, at the end of which the court announced that the appeal had failed and that reasons would be given in writing later. These were read in open court on 24.10.1958. The motion for leave to appeal to the Privy Council was filed on Monday 8.12.1958, that is, 61 days after the decision given at the hearing on 8.10.1958. Counsel for the applicants argued that "judgment" in Section 4 of the Order in Council meant, in that case, the reasons for the Court's decision which were read on 24.10.1958, and not the decision given on 8.10.1958, and that therefore the application was well in time. In the alternative he argued that since the last day for filing the motion fell on a Sunday, it should be excluded when calculating the period, and that anything done on the day following should be held to be in time. The court held as follows:-

> (i) The "judgment" on the appeal was the decision given on 8.10.1958; the fact that the document giving the reasons of the court for its judgment was headed "judgment" could not alter the fact that judgment on the appeal had been given on 8.10.1958,

and the document merely set out reasons for that judgment and was not itself judgment."

(ii)

But in that case the court held so because the then Kenya Civil Procedure Ordinance had no provision defining what a judgment was, unlike in the instant case where the word "judgment" has been defined under Section 3 of the Civil Procedure Code, 1966, and elaborated under ORDER XX Rule 4 of the Civil Procedure Code, 1966. These two cases, therefore, were decided through two different laws. That is why we are not persuaded to adopt the holding in **Sheikha** case.

As for the absence of nexus between the judicial proceedings dated 18.2.2000 and those resumed on 27.9.2000, the learned counsel for the appellant has conceded the omission. He has also conceded the same to be a breach of Rule 89 (1) (k) of the Court Rules, 1979. However he said that the error can be cured by ordering a supplementary record of appeal under Rule 92 of the Court Rules, 1979.

In view of the position we have taken in respect of the first two grounds, we do not consider it necessary to consider and determine this ground.

In the event, and for the reasons stated, we uphold the preliminary objection by the respondent and we hereby strike out the appeal with costs.

DATED at ARUSHA This 27th October day, 2004.

A.S.L. RAMADHANI

JUSTICE OF APPEAL

H.R. NSEKELA

JUSTICE OF APPEAL

S.N. KAJI

JUSTICE OF APPEAL

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

S.M RAMUNYIKA

DEPUTY REGISTRAROF APPEAL