IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 4 OF 2000

SAIDI PATA . . . . . APPELLANT

Versus

MOSHI RUMEZE . . . . . RESPONDENT

R U L I N G

Jundu, J.

The background of this application is worth knowing. The applicant had instituted PC. Civil Appeal No. 62 of 2000 in this court against the decision of the District Court of Temeke in Civil Appeal No. 51 of 1999 which nullified the decision of the Primary Court of Temeke in Civil Case No. 15 of 1999. The appeal filed by the Appellant in this court was heard and dismissed by my brother Manento, J. for lack of merits. The Applicant lodged notice of his intention to appeal to the Court of Appeal of Tanzania against the decision of the court by my brother Manento, J. At the same time, the Applicant had filed in this court an application for extension of time to apply for leave to appeal to the Court of Appeal of Tanzania against the decision of Manento, J. delivered on 20/7/2001.

The Court of Appeal struck out the Notice of Appeal filed by the Applicant for contravening mandatory provisions of law and this court struck out the application for extension of time to apply for leave to appeal to the Court of Appeal filed by the Applicant for being superfluous after the notice of appeal had been struck out by the Court of Appeal of Tanzania.

Now, in the present application, the Applicant is praying for the following orders as put forth in his chamber summons:-

"(1) That your Honourable court may be pleased to enlarge time to the applicant to enable him file his notice of appeal out of time.

(2) That your Honourable Court may be pleased to grant the applicant to file his application for leave to appeal to the Court of Appeal out of time.

(3) Costs to follow the event.

(4) Any other reliefs this Honourable court may deem fit and just to grant".

However, the respondent has raised and filed a notice of preliminary objection on 19/11/2003 that the application is bad in law and prays that the same be dismissed with costs. On 17/2/2004, this court had ordered the parties to argue the said preliminary objection by way of written submission. Both parties have dutifully complied with the said order of this court.

With due respect to the submissions made by the parties, it appears that the learned counsel for the Respondent has not only dwelt with the preliminary objection but has gone further to argue the demerits of the application itself while the Applicant has submitted on the merits of the application and said nothing on the Preliminary Objection. However, I will limit this Ruling to thrust of the Preliminary Objection only as submitted by the learned counsel for the Respondent.

The learned counsel for the Respondent has submitted that the application filed by the Applicant is bad in law because there are no provisions of law which permit parties to re-institute applications which have been struck out and/or dismissed for contravening the Court of Appeal Rules and that once a notice of appeal is struck out and the application for leave is dismissed for breaching the mandatory provisions of Rule 77 (1) of the Court of Appeal Rules, 1979 and for being superfluous respectively, that is the end of the matter, no party is under whatever circumstances permitted to reinstitute the same because reinstituting the same is an abuse of the process of the court and that such applications are bad in law and should be dismissed for ends of justice. He further argued that Section 14 of the Law of Limitation Act, 1971 and Rule 43 and 4 of the Court of Appeal Rules upon which this application has been based are not dealing with an application which has previously been struck out or dismissed. Therefore the learned counsel for the Respondent prayed to this court to dismiss the application with costs as being bad in law. There are other points which the said learned counsel has submitted such as effects of violation of Rule 77 (1) of the Court of Appeal Rules, that the intended appeal has no chances of

.../3

success all of which in my considered view should be relevant on the merit and demerits of the application itself.

As I have already said, the Applicant submitted nothing on the thrust of the Preliminary Objection but has argued on the merits of the application itself. He has submitted on how he lost the appeal in this court from the High Court; how his notice of appeal was struck out by the Court of Appeal for contravention of the mandatory provisions of the Court of Appeal Rules; how this court struck out his application to apply for leave to appeal to the Court of Appeal as being superfluous; how he came to institute the coment application; and his belief that the intended appeal has overwhelming chances of success.

The only relevant point to be considered in this matter is whether the strucking out of the notice of appeal by the Court of Appeal for contravening Rule 77 (1) of the Court of Appeal Rules, 1979 and the striking out of the application for leave to appeal to the Court of Appeal by this court as being superfluous renders this application as bad in law on the ground that there are no provisions of law that permit or allow such matters to be reinstituted. The learned counsel for the Respondent in his endeavour to support the application has referred me to decisions of the Court of Appeal in the case of Grace Frank Ngowi V. Dr. Frank Ismail Ngowi [1984] TLR 120; Salum Sunder and Capital Development Authority Vs. Sadrudin Sharif Jamal [1983] TLR 224; D.P. Valambia V. Transport Equipment [1992] TLR 246; and the decision of this court in the case of Rajabu Kadimwa Mgeni and another V. Iddi Adamu [1991] TLR 38. In my considered view all these court decisions do not state that an application or a notice of appeal which has been struck out by the court marks the end of the matter and to embark on them afresh or reinstitute them is bad at law on the ground of abuse of the process of the court. On the contrary, for example, I am aware of a decision of this court in the case of Martha Daniel V. Peter Thomas Nko [1992] RLR 357 by my brother Mroso, J. (as he then was) who allowed a party's application to file an appeal out of time after this court has struck out the appeal which was not properly before this court. The learned counsel for the Respondent has not cited to me any judicial decision which support his thrust of the Preliminary Objection.

In the final result, I find that the Preliminary Objection has no merit and accordingly it is hereby overruled and dismissed with costs.

F.A.R. Jundu

JUDGE

30/4/2004

Delivered in the presence of Mr. Mkali/Mr. Ndumbaro, the learned counsel for the Respondent and in the presence of Applicant in person.

F.A.R. Jundu

JUDGE

30/4/2004