

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

PC CIVIL APPEAL NO. 50 OF 2021

(Arising from Civil Appeal No. 3 of 2021 from Ilemela District Court.)

EDWARD MRUGUSI----- APPELANT
VERSUS
ENOS HANGI MASALU----- RESPONDENT

RULING

Last Order: 19.11.2021

Ruling Date: 10.12.2021

M. MNYUKWA, J.

In this Appeal, the Appellant Edward Mrugusi appealed against the decision of Ilemela District Court in Civil Appeal No. 3 of 2021 before Hon. P.P. Kubaja. Whereby the appellant had four grounds of appeal which are;-

- 1. That, the learned magistrate grossly erred in law and fact in holding that the appellant admitted to 5,000,000/= Tsh Half of the 7,000,000/= without any proof.*



2. *That, the learned magistrate erred in law and fact for failure to properly evaluate the evidence on record.*
3. *That, the learned magistrate erred in law and fact on relying hearsay evidence without any exhibit to prove balance of probability.*
4. *That, the learned magistrate erred in law and fact in granting cost to respondent.*

Whereas the Appellant prayed for the decision of the first appellate court to be quashed and set aside, the appellant be declared a winner and any other relief the court see fit to grant.

When this court scheduled the matter for hearing, the respondent prayed to serve the notice of preliminary objection. The notice contained one point of objection that;

1. *That, the appeal is incompetent before this court for failure to conform to the requirement of section 25 (3)(4) of the Magistrates' Courts Act, Cap 11 RE 2019 by filing the appeal directly in the High court registry hence abuse of court process.*

The court ordered the Preliminary objection to be heard by way of written submissions and both parties adhered to the court order hence this ruling.

On this battle, the appellant enjoyed the legal services of learned counsel Mr. Machere P. Mkaruka while the Respondent enjoyed the legal services of learned counsel Mr. Akram Adam.



On his submission, the respondent's counsel started by submitting that the appellant filed an appeal on 13th September 2021 directly in the registry of the High Court of Tanzania Mwanza District Registry as reflected in the petition of appeal, while the same being a second appeal as the first appeal was before District Court of Ilemela at Ilemela from the decision of the Primary Court of Ilemela at Ilemela in Civil Case No. 88 of 2020 at Ilemela Primary Court.

The counsel continued that, the act of filing an appeal to the High Court Registry by the appellant is contrary to the mandatory requirement imposed under section 25(3)(4) of the Magistrates' Courts Act, [Cap 11 R.E 2019] of filing an appeal which is originated in primary Court to the District Court. The learned counsel went on to reproduce the said provision.

The counsel further submitted that, failure of the appellant to comply with the required procedure is a violation of the mandatory procedure of the law. And that this failure cannot even be cured by the overriding objective principles. He cited the decision in the case of **Juma Busiya Vs Zonal Manager, South Tanzania Postal Corporation**, Civil Appeal No. 273 of 2020 Court of Appeal of Tanzania at Mbeya, where the court held that:



"The principle of overriding objective cannot be applied blindly to cure every failure to comply with the mandatory provision of the law".

He concluded his submission by submitting that this instant appeal suffers legal fault in it, for the failure to comply with law render it unfit and incompetent before this court. He prayed this appeal to be dismissed with costs.

In reply, the Appellant's learned counsel submitted that the point of preliminary objection is not properly before the court. That the Respondent's point of preliminary is in contravention of Order VIII Rule 2 of the Civil Procedure Code, Cap. 33, RE 2019. The counsel went on to quote the provision.

He further submitted that, the Respondent's point of preliminary objection was not raised in his reply to the petition of appeal which they filled on 12th November 2021. He cited the case of **Moto Matiko vs Ophir Energy PLC & 6 Others**, Civil Appeal No. 119 of 2021, CAT at Dodoma Registry(unreported). The Court cited the case of **Ali Shaban and 48 Others Vs Tanzania National Roads Agency and The Attorney General**, Civil Appeal No 261 of 2020 held that:

"...At any rate we hold the view that no preliminary objection will be taken abstract without reference to some



facts plain on the pleadings which must be looked at without reference examination of any other evidence”

He went on that the preliminary objection is discovered after filing the written statement of defence and the proper course would amend it to plead the newly discovered point of law.

The Appellant’s counsel further submitted that, they are aware that the court enjoyed article 107A (2)(e) of the Constitution of United Republic of Tanzania, 1977(amended time to time) and the provision of section 3A and 3B of the overriding objectives, which was introduced recently vide Miscellaneous Amendment (No. 3) Act No. 8 of 2018 currently in the Civil Procedure Code, Cap 33, R. E 2019, to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes, toward attained of substance, in making sure that time is served and trials are focused on important issues and not mere technicalities.

The counsel averred further that, being aware with that essence it is two fold. First, in the cause of determining cases and interpreting the rules of justice should be upheld giving less regards to procedural technicalities. Second, that unnecessary objection should be discouraged. He lastly argues this court to overlook and disregard raised technicalities



and consider the substance. He prayed the Preliminary objection be dismissed with cost.

With the competing submissions from the counsel of both parties, the single issue for consideration and determination is whether the appeal is competent and properly before the court.

I will start with the provision of law upon which the preliminary objection is raised. Section 25(3) and (4) of The Magistrates' Courts Act, Cap 11 R.E 2019 provides that:

"25(3) Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought....

25(4) Upon receipt of a petition under this section the district court shall forthwith dispatch the petition, together with the records of the proceedings in the primary court and the district court, to the High Court."

In my view, the above-cited provision of law makes it mandatory for an appeal to the High Court be filed in the district court. The section is couched in mandatory terms when the words "shall" is used in any written law, as it confers a mandatory adherence. This requirement finds its way in the Interpretation of Laws Act, Cap 1 R.E 2019. (See the case of



Enerico Kakala Vs Mohamed Mussa (Administrator of Estate of the late Ahmed Zahoro Ahmed), Civil Application No 40 of 2011, CAT at Dar es Saalam (unreported). It is settled that in interpreting the word shall as it is used by the written laws, the court must look and interpret the said provision in its context so as to achieve what has been intended by the Legislature. (See the case of **Leonard Magesa Vs M/S Olam(T) LTD**, Civil Application No 117 of 2014 (Unreported)).

In our case at hand, I find that, this is one of the provisions in which the word "shall" meant that the intended function must be performed. To my understanding, among others, the objective of the provision is to facilitate and speed up the process of appeal originating from the primary court by avoiding the unnecessary delay in calling the records of proceedings from the lower courts. This is because, since the appeal originated from the decision of the primary court, the records of proceedings of the primary court will be in the district court as the first appellate court. If the party is dissatisfied with the decision of the district court like in our case at hand, it became easy for the district court to compile the records of the proceedings and dispatch them to the High Court within time.

The danger of filing the appeal direct before this Court without the knowledge of the district court, may result to unnecessary delay of



brought the records of the proceedings as the district court may not be aware of the appeal, the district court may remit the records of the trial primary court and create a difficult in transmitting the same to this Court.

For that reason, I do not agree with the learned counsel of the appellant that this fault can be cured by the principle of overriding objectives for the law did not give the appellant a forum shopping to choose the mode of filing the appeal rather it directs with authority that the appeal from the district court in matters originated from primary court to be filed in district court.

On the appellant's learned counsel argument that the respondent's point of preliminary objection was not raised in his reply to the petition of appeal, this should not detain me much for the circumstance of this case is distinguishable from the cited case of **Moto Matiko** (supra) for two reasons. First, this appeal is not properly before this court for failure of the appellant to adhere to section 25(3) (4) of the Magistrates' Courts Act, Cap 11 R.E 2019. And second, following the nature of the defects, the same could be raised even by the court *suo moto* and ordered the procedures to be adhered to. Therefore, the argument that the preliminary objection was not proper could not cure the mischief.

In the premise, I find that the appellant was not prejudiced in hearing of Preliminary objection because he was properly notified over



the preliminary objection on time and was not taken by surprise. In **M/S Majembe & Auction Mart vs Charles Kuberuka** Civil Appeal No 110 of 2005, it was held that the preliminary objection has to be raised in time and with sufficient notice in which in this instant case the same was complied.


The above said and done and for the reasons stated above, the Preliminary objection raised by the respondent learned counsel is sustained and the appellant if so wishes, may file his appeal in compliance with the laws governing appeals of this kind. I, therefore, proceed to struck out the appeal with no orders as to costs.

It is so ordered.




M.MNYUKWA
JUDGE
10/12/2021

Ruling delivered on 10/12/2021 via audio teleconference where by all parties were remotely present.


M.MNYUKWA
JUDGE
10/12/2021