

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MBAROUK, J.A. And MUSSA, J.A.)

CIVIL APPLICATION NO. 156 OF 2011

1. BLAZE MWITA NDEGE
2. AUGUSTINE BAHATI NDEGE
3. BAZIL SAFARI CHACHA NDEGE, a minor by }APPLICANTS
BLAZE MWITA NDEGE, his next friend }

VERSUS

NDEGE INSURANCE BROKER LTD.....RESPONDENT

(Application for striking out a notice of appeal from the ruling of the High Court of Tanzania (Commercial Division))

(Makaramba, J.)

dated 23rd day of September, 2011

in

Miscellaneous Commercial Cause No.6 of 2011

RULING OF THE COURT

29th April & 13th May, 2015

KIMARO, J.A.:

The applicants filed a petition in the Commercial Division of the High Court of Tanzania for rectification of the register of members of Ndege Insurance Brokers Limited, the respondent. A preliminary objection arose in respect of the time the respondent filed an answer to the petition. The decision of the High Court was that the respondent filed the answer to the petition out of time. It ordered the answer to the petition be struck out.

Aggrieved by that decision, the respondent lodged a notice of appeal against that decision in this Court. The notice of appeal prompted the

applicants to file this application. The application is filed by a notice of motion under Rule 89(2) of the Court of Appeal Rules, 2009 on the ground that no appeal lies against the decision of the High Court because it was interlocutory in nature and did not finally determine the rights of the parties. The respondent should not have lodged a notice of appeal against that decision.

The notice of motion is supported by the affidavit of Dennis Michael Msafiri. He deposes at paragraph 9 of the affidavit that the decision of the High Court was merely interlocutory and did not finally determine the rights of the parties. The petition has not been heard and the rights of the parties in the petition are yet to be determined.

The respondent also filed an affidavit in reply, to oppose the application. The affidavit was deposed by Mr. Juvenalis Joseph Ngowi. He avers at paragraph 7 of the affidavit in reply that the order of the High Court finally and conclusively denied the respondent the right to be heard and defend the application in the High Court.

When the application was called on for the hearing, Mr. Dennis Michael Msafiri learned advocate entered appearance for the applicants, while Mr. Juvenalis Joseph Ngowi entered appearance for the respondent.

In compliance with Rules 106(1) and 106(8) the learned advocates filed written submissions to support their respective positions in the application. Mr. Msafiri submitted in emphasis to the submissions he filed that under section 5(2) (d) of the Appellate Jurisdiction Act, as amended by Act No. 25 of 2002 the intended appeal is barred because the order is interlocutory in nature and did not have the effect of finally determining the rights of the parties. He cited the case of **Archbishop Zachary Kakobe V John Manusi Laurent Katondo** Civil Application No. 59 of 2008 (unreported) to augment his submission. He prayed that the notice of appeal be struck out with costs.

Mr. Ngowi conceded that it is true that from the wording of section 5(2) (d) of the Appellate Jurisdiction Act, one cannot appeal against an interlocutory decision but he insisted that the respondent was denied the right to be heard in the sense that he has been barred by the order to present his defence to the petition. He prayed that the preliminary objection be upheld and the respondent be allowed to proceed with the appeal as it has already been filed. He said if the applicant wishes, he can raise the preliminary objection in the appeal proceedings.

In brief reply Mr. Msafiri conceded that the respondent has already filed the appeal. However, the learned advocate submitted, Rule 89(2)

allows the applicant to challenge the competence of the appeal either before the filing of the appeal or after filing the appeal. He insisted that he has followed the correct procedure and asked the Court to strike out the notice of appeal.

The issue in this application is very simple. It is not one to detain us.

The order prompting the filing of the application for striking out the notice of appeal reads as follows:

"The Petitioners/Applicants Counsel has told this Court that the summons to appear was served on the Respondent together with the initial notice and a copy of the Petition on the 26th day of May 2011. According to Order VIII Rule 1(2) of the Civil Procedure Code, the Respondent was required to file an answer to the Petition within 21 days. The respondent filed the answer to the petition on 17th June 2011 without the leave of the Court, which clearly is in contravention of the provisions of Order VIII Rule 1(2) of the Civil Procedure Code. The answer to the Petition filed by the Respondent in this Court on 17th day of June 2011 is therefore time barred....The answer to the petition is hereby struck out from the Court record for being time barred with costs."

The order that was given by the trial court is self evident that it did not have the effect of finally determining the rights of the parties in the suit. Section 5(2)(d) of the Act, as amended reads:-

"No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charges or the suit."

The order which was given by the trial court did not definitely finally determine the rights of the parties in the suit. The parties have not been heard on the petition itself. The respondent cannot claim that his rights of being heard have been infringed. The respondent's claim that the application has been filed prematurely is not correct. Rule 89(2) of the Court of Appeal Rules 2009 reads:

*"Subject to the provisions of sub rule (1), a **respondent** or other person on whom a notice of appeal has been served **may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies** or that some essential step in the*

proceedings has not been taken within the prescribed time."

The wording of the provision of sub rule 2 of Rule 89 provides in very clear terms that an application to strike out a notice of appeal preferred from an interlocutory order can be made either before or after the appeal is instituted. The notice of appeal having been filed in respect of an interlocutory order from which no appeal lies by virtue section 5(2)(d) of the Appellate jurisdiction Act , [CAP 141 R.E.2002] the application to have the notice of appeal be struck out has merit and we allow it and strike out the notice of appeal with costs.

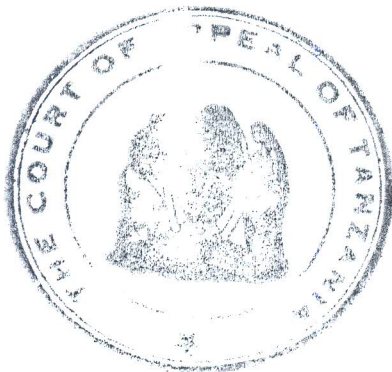
DATED at DAR ES SALAAM this 6th day of May, 2015.

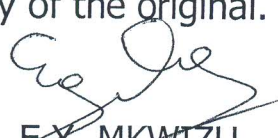
N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL