IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And ORIYO, J.A.

CIVIL APPEAL NO. 104 OF 2009

ZAINABU MWINJUMA..... APPELLANT
VERSUS
HUSSEIN ABDALLAH.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Mussa, J.)

(Dated the 25th day of September, 2007)
in
(PC). Civil Appeal No. 31 of 2003

JUDGMENT OF THE COURT

10TH & 15TH NOVEMBER, 2011

ORIYO, J.A.:

The facts leading to the appeal may be briefly stated as follows: In or around December 1997, the respondent, Hussein Abdallah entered into an agreement with the appellant, Zainab Mwinjuma in that the respondent, a mason, agreed to construct a residential house for the appellant. Apparently the building materials which were procured by the appellant were handed over to the respondent for that purpose. In consideration, the appellant paid the respondent a total of Shs. 150,000/=. The house which

was handed over to the appellant ready for occupation in 1998, had by early 2002 developed big cracks to the extent that it was dangerous for human occupation.

As the respondent was unwilling to carry out major renovations on the house for free, the appellant complained to the Arusha Sokoni 1 Ward authorities. When the respondent was summoned by the Ward authorities, he responded and willingly signed before them an undertaking to renovate the appellant's house with effect from 5 April, 2002. The respondent defaulted and the appellant lodged Civil Case No. 61 of 2002 in the Arusha Urban Primary Court against the respondent for the recovery of a total sum of shs 2,150,000/= being the cost of building materials and labour. Relying on Exhibit "A" which was the respondent's undertaking executed before the Ward officials, the Arusha Urban Primary Court found in favour of the appellant. The respondent's appeal to the District Court at Arusha was unsuccessful. In (PC) Civil Appeal No. 31 of 2003 lodged by the respondent in the High Court of Tanzania, at Arusha, the learned High Court Judge stated:-

"In terms of the Customary Law (Limitation of Proceedings) Rules, G.N. No. 311 of 1964; the period of limitation within which a party can institute proceedings for breach of contract is six years for written contracts and three years if the contract is not in writing.

At the trial it was not suggested that the contract between the appellant and the respondent was in writing and; so it is logical and all the more realistic to assume that the same was oral."

On the basis of the limitation period, and taking into account that the respondent handed over the disputed house to the appellant in 1998, the learned judge held that the appellant's right to institute the proceedings in the Primary Court in 2002, was time barred, being a period beyond the three years limitation prescribed by law. He accordingly allowed the appeal with costs. Aggrieved by the decision of the High Court the appellant has lodged this appeal in Court.

In the memorandum of appeal, the appellant essentially challenged the decision of the High Court in holding that the suit in Arusha Urban Primary Court, Civil Case No. 61 of 2002 (*supra*) was time barred. That was the essence of her complaints in the three grounds of appeal listed in the memorandum of appeal.

Section 5 (2) of the Appellate Jurisdiction Act, Cap 141, R.E. 2002, (the Act) partly provides:-

> *"(2) Notwithstanding the provisions of subsection (1)*
>
> *(a) N/A*
>
> *(b) N/A*
>
> *(c) No appeal shall lie against any* ***decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act*** *unless the* ***High Court certifies that a point law is involved in the decision or order"***
>
> *(Emphasis supplied).*

For the avoidance of doubts, Section 5 of the Appellate Jurisdiction Act, generally regulates civil appeals from the High Court to this Court

originating from subordinate courts. Section 5 (2) (c) specifically regulates appeals from the High Court to this Court originating from Primary Courts. In the instant appeal, the appellant duly complied with the law as the appeal originated from the Arusha Urban Primary Court. She filed a chamber summons in terms of Section 5(2) (c) *(supra)* and Rule 43 (a) of the then Tanzania Court of Appeal Rules, 1979, (the Rules) in the High Court for a certificate that there were points of law involved in the intended appeal. The chamber summons was supported by the appellant's affidavit dated 2 October, 2007, which listed three points of law to be certified by the High Court to this Court.

As it transpired at the hearing of the application on 21st November, 2007, after being satisfied that the respondent had no objection to the application, the learned judge made a Ruling in the following terms:-

> *"Having considered this application,* ***leave is granted to the applicant to appeal to the Tanzania Court of Appeal*** *against the decision of this Court in (PC) Civil Appeal No. 31 of 2003."*

In essence, the appellant was granted an order for **"leave to appeal**" to the Court of Appeal; an order which she did not apply for.

Going by the record, apparently both the applicant and the respondent were present in court on 21/11/2007 when the ruling was delivered. But the possibility is that both parties being laymen, probably neither realized that the High Court had granted an order which was not sought by the applicant/appellant. The appellant, believing that she was granted the order she sought, proceeded to file the appeal before the Court.

The most glaring issue that has to be disposed of before proceeding further is on the competency of the appeal before us dated 20 August 2009.

To start with, there is no gainsaying that the appeal, having originated from a Primary Court had to comply with the provisions of section 5 (2) (c) *(supra)* of the Act before coming to this Court. As pointed out earlier, the High Court did not certify that there are points of law

involved in the intended appeal. In the absence of a certificate of the High Court the Record of Appeal is incomplete and is rendered incompetent because in terms of Rule 89 (2) of the Rules, the Record of Appeal has to contain a copy of the certificate of the High Court. The Rule provides in part as follows:-

> *"…**and in the case of a third appeal, shall contain also the** corresponding documents in relation to the second appeal and **the certificate of the High Court that a point of law is involved."***
>
> *(Emphasis added).*

In the absence of a certificate of the High Court the appeal is incompetently before the Court and ought to be struck out. The lack of a certificate suffices to dispose of the matter.

As stated earlier, in High Court Miscellaneous Civil Application No. 109 of 2007, the appellant had applied for a certificate as required by law. The application came up for hearing on 21 November, 2007 and this is how the proceedings went:-

*"**Court** :- This an application for leave to appeal to the Court of Appeal. Any objection to the application?*

***Respondent**:- I have no objection. It is her right to do so, so long as the law allows.*

RULING

Having considered this application, leave is granted to the applicant to appeal to the Tanzania Court of Appeal against the decision of this court in PC Civil Appeal No. 31 of 2003. The appeal be filed by 21/12/2007"

It is evident from the proceedings that the learned High Court judge confused the **application for a certificate** before him with an **application for leave to appeal,** which is normally sought where the appeal complained of originated from a district court.

This was, in our view, a fundamental error on the part of the High Court because essentially and as the above extract of the proceedings of 21st November, 2007, show, the appellant's application for a certificate was not heard. Fortunately, this is not a virgin territory. In the case of **1. The Managing Director, Kenya Commercial Bank (T) Ltd 2. Albert Odongo vs. Shadrack J. Ndege,** (MZA) Civil Application No. 7 of 2009, (unreported) the High Court had granted **a certificate** to the applicant instead of a **leave to appeal** sought. When the matter came before us, this is what we stated:-

> *"…we are of the settled mind that the High Court fundamentally erred in law in failing to determine an application for leave to appeal and instead purported to determine an application for a certificate on a point of law which was not before it. That error cannot be left to stand as it greatly prejudiced the applicants. We accordingly have no option but to invoke the Court's revisional*

powers to nullify and set aside the ruling and order…"

In the similar circumstances of this appeal, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act (*supra*), to quash and set aside the proceedings, ruling and order of the High Court dated 21 November, 2007. We order that the appellant's application for a certificate pending in the High Court be heard as expeditiously as possible.

DATED at **ARUSHA** this 14th day of November, 2011.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

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

Z. A. Maruma
DEPUTY REGISTRAR