failure to follow the prescribed procedure under section 9 of Chapter 25, I order that each party meets its own costs.

ITAL AFRICAN TRANSPORTERS LTD *v* GIAFAR M. BEDER

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Kisanga, J.A)

CIVIL APPLICATION No. 15 OF 1998

(Application for Leave to Appeal from the Ruling of the High Court of Tanzania at Dar es Salaam, Kileo, J., dated 6 March 1998, in Civil Case No. 160 of 1993)

Court of Appeal – Applications – Service of Notice of Motion on the respondent – Time within which the respondent is be served with a copy of the Notice of Motion – Rule 52(1) of the Court of Appeal Rules 1979.

Court of Appeal – Leave to Appeal – Application for leave to appeal to the Court of Appeal – Application to be made to the High Court first – Rule 44 of the Court of Appeal Rules 1979.

Court of Appeal Rules – Form of Application – Format for bringing applications to the Court of Appeal – Form A of the first schedule to the Court of Appeal Rules 1979.

An application for leave to appeal to the Court of Appeal was struck out by the High Court for being incompetent. A Notice of Motion was then filed before the Court of Appeal asking for leave to appeal to the Court of Appeal, the same relief that the applicant had failed to obtain from the High Court. It was contended, by way of a preliminary objection, that the Notice of Motion was not served on the respondent in time; that it was faulty as it did not follow the proper format as required by law; that it was not properly titled as it was amended; and that after the High Court had struck out the application for leave to appeal to the Court of Appeal, the applicant had the remedy of appealing to the Court of Appeal, not lodging another application.

Held: (i) The requirement of rule 52(1) that a Notice of Motion should be served to the other party in "not less than two clear days before the hearing" should be taken to refer to the hearing date as re-scheduled;

(ii) Where the law or a rule provides for a mode or way for the doing of anything, attempt should be made as far as possible to comply therewith;

(iii) The application is not properly before the court because it contravenes the provisions of rule 44 of the Court of Appeal Rules requiring such application to be made to the High Court first; the applicant must first make a valid application to the High Court before knocking on the door of the Court of Appeal; in this case no valid application had been made to the High Court in the first instance.

(iv) *Obiter:* It was open to the applicant to appeal to the Court of Appeal against the High Court decision, after obtaining the necessary leave to do so, but not to make further application to the Court of Appeal.

Application struck out

Statutory provisions referred to:

(1) Court of Appeal Rules 1979, rules 44 and 52(1)

(2) Civil Procedure Code 1966, Order 1, rule 10(3) and Order VI, rule 17

Mr Kalunga, for the Applicant

Prof. Fimbo, for the Respondent

RULING

(Dated 04 August 1998)

KISANGA, J.A.: There was before Kileo, J., an application for leave to appeal to this court against the ruling of the High Court (Kaji, J.) delivered on his behalf by the District Registrar on 12 December 1997. Kileo, J., found the application to be incompetent and accordingly struck it out, for failure by the applicant to specify the provision

under which relief was being sought, and for failure to annex to the application the ruling that was intended to be appealed against.

Mr LT Kalunga, learned advocate for the applicant, filed in court a confused document which purports to be an appeal against the ruling of Kileo, J. and which at the same time purports to be a Notice of Motion seeking various reliefs against the ruling of Kileo, J. and attacking the ruling of Kaji, J. as being "flooded in serious legal errors." This peculiar document was accompanied by the affidavit of the learned counsel.

When the matter came on for hearing on 29 June 1998 Professor M. Fimbo, learned advocate for the respondent, took a preliminary objection, the prior notice of which had been duly given. In the course of hearing the objection, Mr Kalunga conceded to some of the points raised, and upon his application I granted an adjournment to enable him to submit an amended proper Notice of Motion on or before 1 July 1998, with an order for resumed hearing on 8 July 1998. It turned out that 8 July 98 was a public holiday and so the hearing was later re-scheduled. When the hearing was resumed on 23 July 1998, Professor Fimbo objected to the amended Notice of Motion on the ground, *inter alia*, that a copy of it was not served on him, or the other two advocates representing the respondent, in compliance with rule 52 of the Court of Appeal Rules which says that:

> 52(1) The Notice of Motion and copies of all affidavits shall be served on all necessary parties not less than two clear days before the hearing.

Professor Fimbo stated that the amended Notice of Motion was received by their side only on 20 July 1998, when it should have been served on 6 July 1998. Professor Fimbo's second point of objection which was readily conceded by Mr Kalunga was that the amended Notice of Motion is not so titled; it is titled simply "Notice of Motion". On these grounds Professor Fimbo applied to have the amended Notice of Motion struck out.

In the alternative, the learned counsel submitted that once Kileo, J., struck out the applicant's application for leave to appeal, it was

not open to him to come to this court by way of further application, and that as far as the document purports to be an appeal against the ruling of Kaji, J., the whole exercise was misconceived because no leave has been obtained or sought to appeal against that ruling.

In response Mr Kalunga submitted that once the resumed hearing of the application was set for 23 July 1998 he was justified to serve the amended Notice of Motion on the other side on 20 July 1998 because in terms of rule 52 that was within".... Not less than two clear days before the hearing". I tend to agree with Mr Kalunga here. I think that the expression"... before the hearing appearing in rule 52(1) should be taken to refer to the hearing date as re-scheduled. For, it seems to me that rule 52(1) was designed to ensure that the party who is to be served with the documents in question has sufficient or reasonable time to study those documents. Thus had the hearing in this case proceeded on 8 July 1998 as originally fixed, the objection would, in my opinion, have merit because the respondent then would not have the stipulated time at his disposal to study the documents. However, the application having been re-scheduled for hearing on 23 July 1998, Mr Kalunga was justified to serve the respondent's counsel with the copy of the amended Notice of Motion on 20 July 1998, which gave two clear days before the matter came on for hearing after the re-scheduling.

As conceded by Mr Kalunga himself, the amended Notice of Motion should have been so titled but I am prepared to say that the omission is not so serious as to warrant the striking out of the document.

Responding to Professor Fimbo's alternative submission, Mr Kalunga maintained that after his application for leave to appeal was struck out by Kileo, J. he was perfectly entitled to come to the Court of Appeal by way of further application for leave to appeal. As far as his appeal against the Ruling of Kaji, J. is concerned, Mr Kalunga did not show that he had obtained or sought leave to appeal against it.

In order to fully appreciate the confused nature of Mr Kalunga's application, it is necessary to reproduce his amended Notice of Motion which he filed after I had granted him leave to do so:

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

In the Matter of an Intended Civil Application Number 15 of 1998

Between

ITAL African Transporters Ltd ... Applicant/Plaintiff

Versus

Giafar Mohamed Beder ..... Respondent/ Defendant

In the Matter of an Intended Appeal Civil Case Number 160 of 1993

Between

Ital African Transporters Ltd ..... Plaintiff

And

Giafar Mohamed Beder ..... defendant

Appeal from the ruling of the High Court of Tanzania at D.S.M. Kaji J. dated 4 December 1997 and delivered on 12 December 1997 in Civil Case Number 160 of 1993.

NOTICE OF MOTION

As ordered by Kisanga J.A. on 29 June 98

TAKE NOTICE that on ... the day of ...1998

At 9:00 o'clock in the morning or as soon thereafter as he can be heard Mr L.T. Kalunga, learned advocate for the above-named applicant, will move a judge of the court for an Order that:

(1) Refusal of Kileo J. granting leave to appeal to the Court of Appeal be reversed.

(2) Leave to appeal to the Court of Appeal be granted on the grounds that:

(i) The learned judge misdirected herself on the meaning and effect of rule 43(a) of the Tanzania Court of Appeal Rules 1979 and its applicability to the High Court.

(i) The learned judge misdirected herself on applicability and citation of the Appellate Jurisdiction Act 1979 in the Chamber Summons of the High Court.

(1) The Ruling of Kaji J. is flooded in serious legal errors in that:

(i) The added parties were added without their knowledge and/or consent in violation of Order 1, rule 10(3) and Order VI, rule 17 of the CPC 1966.

(ii) The amended Written Statement of Defence containing a "counter-claim" for which a ruling was given in favour of the defendant to proceed *ex-parte* was filed against a non-existent plaint of the "plaintiffs."

And for an Order that the costs of and incidental to this application abide the results of the said application. The application will be supported by the affidavit of L.T. Kalunga, Esq; Advocate.

L.T. Kalunga

Advocate for the applicant

Professor Fimbo pointed out that the format for bringing applications to the court is provided in Form A of the first schedule to the Court of Appeal Rules, but that Mr Kalunga's amended Notice of Motion is not in conformity therewith. This criticism is not without justification. For instance, the contents of numbers (1) and (3) of this document constitute a most unconventional way of framing prayers to be made in a Notice of Motion. It is accordingly emphasized that where a law or rule provides the mode or the way for the doing of anything, attempt should be made as far as possible to comply therewith.

It seems to me that the crucial question for determination in this matter is: What remedy was open to the applicant after Kileo, J. had struck out his application for leave to appeal to this court? Was it open to him to come to this court by way of a further application or to appeal to this court against the order of striking out that application? Professor Fimbo submitted that only the latter remedy was available but Mr Kalunga strongly maintained that either remedy was open to him, and that he chose the former.

Kileo, J. struck out the application for being incompetent in that the application was not properly before her, and that rendered her without jurisdiction to hear it. In other words the purported application was something which did not exist in law and which therefore, she could not entertain. So that in law there has been no application to the High Court for leave to appeal. The purported application before me, therefore, is not properly before me because it contravenes the provisions of rule 44 of the Court of Appeal Rules which requires that such application be made before the High Court first. In terms of that rule the applicant must have made a valid application to the High Court before coming to knock on the door of this court; it is not enough merely to show, as in this case, that a purported application was made to the High Court. The purported application before me, therefore, is incompetent, and that is a sufficient ground for striking it out.

Perhaps it is pertinent to point out that if Mr Kalunga considered himself aggrieved with the reasoning of the learned judge for striking out his application for leave to appeal, he was not without remedy. It was open to him to appeal to this court against that decision, after obtaining the necessary leave to do so of course, but certainly not to make further application to this court because he had made no valid application to the High Court in the first instance.

With that remark I conclude the matter by upholding Professor Fimbo's preliminary objection. For the reasons set out above, I hold that the purported application for leave to appeal is incompetent, and it is accordingly struck out with costs.