IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 81 OF 2001
In the Matter of an Intended Appeal
Between
ALEX MAGANGA.....APPLICANT
AND
DIRECTOR MSIMBAZI CENTER.....RESPONDENT

(Application for leave to appeal to the Court of Appeal of Tanzania at Dar es Salaam)

(Manento, PRM/Extended Jurisdiction)

dated the 2nd day of June, 1998
in
Civil Appeal No. 76 of 1997

R U L I N G

MROSO, J.A.:

The applicant lost in the High Court an application for leave to appeal to this Court. He has now made an application to a single judge of this Court for such leave under Rule 43 (b) of the Court Rules. Before me the applicant appeared in person as he also did in the High Court and the respondent was represented by Mr. E. Mbuya, learned advocate, both in the High Court and before me.

It appears that the applicant lost his application before the High Court ostensibly because he did not annex to his application a copy

of the judgment and the decree against which he intended to appeal to the Court of Appeal. Mr. Mbuya told the High Court, Chipeta, J., that it was mandatory under Rule 43 of the Court Rules for the applicant to attach those documents to the application or it would be rendered incompetent. The High Court agreed with Mr. Mbuya and the applicant's application was dismissed with costs for being incompetent. The merits of the application were not considered.

Rule 43 (a) of the Court Rules which has the relevant provisions for an application for leave which is made to the High Court reads as follows:-

> "43. In Civil matters
>
> (a) Where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber Summons according to the practice of the High Court, within fourteen days of the decision;"

It is apparent that the applicant did not make an informal application for leave at the time the decision against which he desired to appeal

was given. So, he resorted to the second option of filing his application for leave in the High Court within fourteen days. He filed a chamber summons and supported it with an affidavit. As mentioned earlier, he did not also annex to his application a copy of the High Court judgment and the decree, which was said to be mandatory.

The applicant appears to agree with Mr. Mbuya that, indeed, he ought to have annexed to his application a copy of the judgment and a copy of the decree which he seeks to challenge by way of an appeal before the Court of Appeal. He explains, however, that at the time his application was before Chipeta, J. the High Court judgment was still in stencil form and that the stencils were in fact on Chipeta, J.'s table. It was for that reason that the applicant did not have a copy of the judgment or the decree to attach to his application to the High Court.

Mr. Mbuya has reiterated before me that it was mandatory for the applicant to annex to his application for leave before the High Court a copy of the judgment of the High Court and a copy of the decree. He said there were court judgments which pronounced that those documents were necessary. He promised to send to court

copies of such decisions. True to his word, he sent copies of three rulings of the High Court.

One was Misc. Civil Cause No. 59 of 1998 – Edmund Aaron Mwasaga and Four Others v. Senate of the University of Dar es Salaam of the High Court at Dar es Salaam (unreported). In that matter the respondent's preliminary objection was overruled and they intended to appeal against the ruling. To do so, after filing notice of appeal, they applied to the High Court for leave to appeal. Their application was made by a chamber summons which was supported an affidavit. During the hearing of the application it was contended by the applicant that the application was incompetent because a copy of the ruling and of the order against which the appeal was intended had not been attached to the application. Katiti, J. (as he then was) upheld the contention and declared the application incompetent.

Similarly, in Misc. Civil Cause No. 29 of 1996 of the High Court at Dar es Salaam – Phil M. Temu v. National Housing Corporation

(unreported) the High Court said in a ruling in an application to the High Court for leave to appeal to the Court of Appeal –

> "... a formal order or decree ... must be extracted and be attached to an application for leave to appeal to the Court of Appeal and this is not a mere formality".

He ruled that the court had no jurisdiction to entertain an application which was not accompanied by an extracted decree or order, like the one which was before him, and struck it out as incompetent.

In both rulings of the High Court reference was made to Rule 46 (a) of the Court Rules in which it is provided that every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and a copy of the order of the High Court. In Miscellaneous Civil Cause No. 59 of 1998 for example, the High Court specifically said that since the applicant did not comply with Rule 46 (3) of the Court Rules "... the said application would for this reason be incompetent".

With respect, the High Court misunderstood rule 46 (3) of the Court Rules. The rule, like rule 43 (b), both relate to applications for leave to appeal which are made to the Court of Appeal, not to the High Court. The word "Court" (with a capital 'C') in Rules 43 (b) and 46 (3) refers to the Court of Appeal. This is clear from Rule 2 of the Court Rules where the word is defined.

One of the three copies of decision of the High Court which were supplied to me by Mr. Mbuya, Civil Case No. 18 of 1998 – Phenix (sic) Bureau De Change Ltd. v. Bank of Tanzania, unreported, Manento, J. correctly understood the word "Court" as used in Rule 46 (3) of the Court Rules to mean the Court of Appeal. He said "under the Court of Appeal rules, the word "court" (sic) has the meaning of the Court of Appeal only and not any other subordinate (sic) court to it". Manento, J. further said:-

> "If I have held that ignorance of the law is no defence, and that there was no requirement under Rule 43 (a) of the Court of Appeal Rules to attach a copy of the decision appealed against when the application is made to the High Court ... then there is no justifiable cause to extend the time of limitation ..."

Manento, J. dismissed an application for extension of time to apply for leave to appeal because a copy of the judgment against which it was intended to appeal had not been typed and supplied in order to attach it to the application for leave.

With respect, Manento, J. was right in holding that in an application for leave to appeal which is made to the High Court under Rule 43 (a) of the Court Rules a copy of the judgment of the High Court need not be attached to the application. The usual practice in the High Court is to be found in Order 43 rule 2 of the Civil Procedure Code. Under that rule, all that is required is for the applicant, in a formal application, to file a Chamber Summons supported by affidavit, provided the application is made within 14 days of the decision against which the appeal is intended. Since the record of the High Court will still be with the High Court at the time the application is heard, the court will easily be in a position to read it in the record.

It should by now be obvious that there was no valid reason for the High Court, Chipeta, J., to declare as incompetent the present

applicant's application for leave to appeal. The court should have considered the application on its merits and decide it as appropriate.

Mr. Mbuya has questioned the competence of the application now before me, submitting that, first, all the relevant documents under Rule 46 (3) had not been filed and, second, that considering that the application to this Court was made on 28th June, 2001 there should have been filed an affidavit to explain why a copy of the judgment of the High Court dated 2/6/1998 (by Manento, PRM with Extended Jurisdiction) was not filed along with the notice of motion until on 25th February, 2003, which was barely a day before the application was brought up for hearing.

The applicant has explained that a copy of the decision of the High Court was not made available to him at the time he filed the present application to this Court and it was only shortly before the application came for hearing that he was able to get a copy which he purported to file under Rule 92 (3) of the Court Rules. Even so, the applicant did not file an affidavit containing that explanation and Rule 92 (3) relates to appeals, not applications. Apart from the fact that a copy of the decision was not filed along with the notice of

motion, the order of the High Court was also not filed. What was filed was a copy of the proceedings in the High Court during the hearing of the application for leave. It was in those proceedings that it was ordered that the application be dismissed for being incompetent. A copy of those proceedings does not satisfy the requirements of Rule 46 (3) of the Court Rules, as amended by GN. No. 157 of 1984. The words "order of the High Court" in the sub-rule mean an extracted order of the High Court, which was not filed. It is apparent, therefore, that the applicant did not comply with Rule 46 (3) at all and the application before me would be incompetent.

Although, as I have said, the application before me would be incompetent and could be struck out, yet, from what I said earlier in this ruling, the applicant did not have to come to this court to seek leave had the High Court properly directed itself regarding Rules 43 and 46 (3). Had the High Court appreciated that there was no requirement under Rule 43 (a) for the applicant to annex to his application for leave to appeal a copy of the decision and an extracted decree or order the application would have been

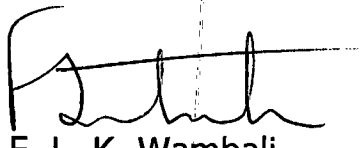
considered on its merits. Unfortunately, since I am not sitting either on appeal or on revision regarding the High Court order, I cannot order the High Court to hear the application on merit. Yet it is important, in my view, that the applicant be heard on the merits or otherwise of his application.

In the circumstances I will resort to the provisions of Rule 3 (2) (b) of the Court Rules to direct the applicant to file in this court within 14 days the copy of the decision of the High Court and an extracted order of the High Court when it dismissed his application. Thereafter, this application will be heard and decided as appropriate.

DATED AT DAR ES SALAAM this 25th day of April, 2003.

J. A. MROSO
JUSTICE OF APPEAL

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



F. L. K. Wambali
DEPUTY REGISTRAR