IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KISANGA, J.A., LUBUVA, J.A., And LUGAKINGIRA, J. A.)

CIVIL APPEAL NO. 36 OF 1997

BETWEEN

PETER NG'HOMANGO .....APPELLANT

AND

THE ATTORNEY GENERAL .....RESPONDENT

(Appeal from the Order and Decree of the High Court of Tanzania at Mwanza)

(Massanche, J.)

dated the 25th day of April, 1997

in

Civil Case No. 57 of 1996

J U D G M E N T

LUBUVA, J.A.:

This appeal is against the decision of the High Court (Massanche, J.) of 5.4.1997 in High Court Civil Case No. 57 of 1996 striking out the suit filed by the appeallant against the Attorney General.

Initially, the appellant had filed Civil Case No. 161 of 1994 against the Principal Secretary Ministry of Education Culture and Nature. The plaint was duly filed on 25.7.1994 in the High Court Dar es Salaam Registry. When proceedings commenced on 7.12.1994, the Defendant represented by State Attorney from the Office of the Attorney General had not filed written statement of defence.

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The State Attorney was granted extension of time to file written statement of defence. On 12.7.1996, the appellant applied for three orders: First, to substitute the Attorney General for the Principal Secretary, Ministry of Education and Culture, second, transferring the case to the High Court, Mwanza Registry and thirdly, the plaintiff, the appellant in this appeal, to be at liberty to amend the plaint. On 12.7.1996, Kaji, J. granted the application allowing the substitution of the Attorney General for the Principal Secretary and the transfer of the case to Mwanza High Court Registry on the same fees paid in Dar es Salaam.

In Mwanza, the case number was changed from No. 161 of 1994 to No. 57 of 1996. After the appellant/plaintiff had filed the amended plaint, the case came on for hearing before Masanche, J. on 24.4.1997, when the appellant's application for what he called "to perfect" the order by Kaji, J. was to be heard. Mr. Mbago, learned State Attorney for the Attorney General, raised the issue that the had been instituted contrary to the provisions of section 2 (2) of the Government Proceedings Act, 1967, as amended by Act No. 30 of 1994, [herein after referred to as the Act] which requires notice to be given before instituting a suit against the Government. As a result and as already stated, the learned trial judge held that the suit was incompetent in law, he struck it out.

In the memorandum of appeal, the appellant raised two points of complaint. First, that the learned trial judge erred in not determining the chamber application before him in terms of sections 96 and 97 of the Civil Procedure Code. Second, that it was not proper for the judge to strike out the suit on the ground that it did not comply with section 2 (2) of the Act.

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When the case was called on for hearing, at the prompting of the court a preliminary point was raised whether the appeal could be lodged as of right or with leave. The appellant who was unrepresented vigorously and enthusiastically contended that the matter was appealable as of right. He advanced the following reasons: First, by striking out the suit the matter was put to an end which amounted to a rejection of the plaint in terms of Order VII Rule 11 (c) of the Civil Procedure Code, 1966. Secondly, the plaint having been rejected, that finally and conclusively determined the case before Masanche, J. This is evident from the fact that a decree was drawn based on the order rejecting the suit. The rejection of the plaint in this manner, Mr. Ng'homango, the appellant submitted, amounted to a decree as defined under section 3 of the Civil Procedure Code. As defined under section 3 of the Civil Procedure Code, a decree shall be deemed to include the rejection of a plaint as happened in this case. The decree in this case, he urged, meets the requisite conditions laid down under section 5 (1) (a) of the Appellate Jurisdiction Act, 1979. In elaboration, he said the decree was made by the High Court in a suit under the Civil Procedure Code in exercise of its original jurisdiction. With these conditions fulfilled, he concluded, no leave was required in filing the appeal. He referred the Court to its decision in the case of Tanganyika Motors Limited v Transcontinental Forwarder Limited, Civil Appeal No. 44 1993 (unreported).

Mr. Shio, learned Principal State Attorney appeared for the respondent, the Attorney General. With respect, he did not have much to say in response to the appellant's submission on this point. Even then, he seemed to prevaricate in his submission. At some stage, he

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maintained that them matter was not appealable without leave. According to him, the main issue in the matter before the trial judge was one of procedure which the State Attorney had raised, namely, that the procedure for suing the Government provided under the Act had not been followed. He said, as the procedure was not followed, the trial judge was justified in striking out the suit with direction to reinstitute the suit in accordance with the law if the appellant so wished. At a later stage however, Mr. Shio apparently changed his position. He conceded that the suit having been struck out, it was finally and conclusively determined. He left the matter at that while praying the Court to proceed with the hearing of the appeal on its merits.

Having heard submissions by the appellant and Mr. Shio on the preliminary issue pertaining to leave, we reserved our ruling on the issue until submissions on the merits of the appeal were concluded. It was ordered that the ruling on the prelimary issue would be incorporated in the main body of our decision in the appeal. We now set out to deal frist with the preliminary point, whether the appeal in this matter requires leave. We think the determination of this issue turns on the question whether the order of the High Court of 25.4.1997 finally and conclusively disposed of the suit. From the record, it seems clear to us that form the outset the learned trial judge was minded to strike out the suit. The opening part of the order starts with the words "this matter must be struck out." Similarly, in its concluding part, it states that the suit is struck out as incompetent in law. In our view, the very wording of the order indicates the intention of the learned judge to dispose of the matter finally while leaving it open for the appellant if he was so minded, to reinstitute the case according to the law. That is why we think the judge ordered the plaintiff, the appellant to comply with the provisions of section 2 (2) of the Act.

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Otherwise, so far as the suit before the learned trial judge was concerned, we agree with the appellant that that was the end of the matter. On the other hand, if the learned judge had intended otherwise, we can see no reason why he did not invoke the proviso to rule 11 Order VII of the Civil Procedure Code as amended by Government Notice No. 228 of 22.10.1971. Under this amendment, if the judge was satisfied that if the appellant (plaintiff) was permitted to amend the plaint, the suit will cease to appear from the plaint to be barred by law, he would have allowed the appellant to amend the plaint and not to strike it out. This was not the case, instead, the suit was struck out and a decree was duly drawn to the effect that the suit was struck out.

The next question which falls for consideration is whether the striking out of the suit amounted to a rejection of the plaint. Rule 11 of Order VII provides for circumstances under which a plaint shall be rejected. Sub-rule (c) provides to the effect that where the suit appears from the statement in the plaint to be barred by law, the plaint shall also be rejected. In this case, and as the appellant contended, the learned judge in unambiguos words stated that the suit was struck out because it did not comply with section 2 (2) of the Act. We therefor agree that the suit was, in the view of the learned judge, barred by law and therefore its being struck out amounted to a rejection of the plaint. As a decree is defined under section 3 of the Civil Procedure Code, 1966 to include the rejection of a plaint, it is our view that this was a decree. Section 5 (1) (a) of the Appellate Jurisdiction Act, 1979, sets out the conditions for an appeal to lie to the Court. Sub-section (a) provides that an appeal shall lie:

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(a) against every decree, including ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, 1966 in the exercise of its original jurisdiction."

In Tanganyika Motors Limited v Transcontinental Forwarder Limited Civil Appeal No. 44 of 1993, [unreported] the Court set out these conditions. In that case in more or less similar circumstances a preliminary objection was raised that the appeal did not lie to the Court because it did not satisfy the three conditions. As one of these conditions was lacking, we found that the decree did not fall under section 5 (1) (a) of the Appellate Jurisdiction Act, 1979. In the instant case, we are satisfied that the order of 25.4.1997, the subject of the appeal, was a decree made by the High Court in exercise of its original jurisdiction under the Civil Procedure Code. As the decree satisfies the three conditions, it falls within the provisions of paragraph (a) of sub-section (1) of section 5 of the Appellate Jurisdiction Act, 1979. It follows that the appellant was entitled to appeal to the Court without leave.

We will now deal with the merits of the appeal. In a gallant and high spirited manner, the appellant made long and extensively researched submissions to the effect that the suit was wrongly struck out. In response to these submission, Mr. Shio, learned Principal State Attorney for the Attorney General at first resisted the appeal. However, upon reflection, he conceded that the appeal was wrongly struck out. He said that the learned trial judge should have heard the applicant's application before the court which sought to "perfect" Kaji, J.'s order. The learned Principal State Attorney having conceded to the appellant's submissions, and we think correctly so, we do not find it necessary to deal any further with the appellant's submissions on the merits of the appeal.

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Accordingly, by consent the High Court order of 25.4.1997 striking out the suit is set aside. In order to expedite the finalisation of the case which has had a chequered history since it was filed on 25.7.1994, the appellant had asked the Court to step into the shoes of the High Court in allowing the application to "perfect" Kaji, J.'s order. Mr. Shio, did not have any objection to this application. As the amended plaint was already filed with the High Court, we agree to step into the shoes of the High Court and grant the application to perfect Mr Kaji, J.'s order.

In fine, and for purposes of clarity, the High Court order of 25.4.1997 is set aside, The appellant's application to "perfect" Kaji, J.'s order of 12.7.1996 is granted. It is further ordered that the case be remitted to the High Court with direction to continue the proceedings according to the law.

DATED at MWANZA this 19th day of November, 2001.



R. H. KISANGA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
DEPUTY REGISTRAR