

23 August 2018



## New era on Preliminary Objections at the Court of Appeal

- Preliminary objections heard simultaneously with the main appeal
- Held typographical errors did not occasion any confusion as to the identity of the parties nor did it occasion any injustice to either party
- Certification of record as 'true' conveys similar meaning with certifying record as 'correct'
- Missing pages in records of Appeal regarded as minor irregularity in the case
- Court should be inclined to abide with the need to achieve substantive justice
- Guarantors of bank loans continue to be liable until any other loans guaranteed by them are discharged in full

On 7 August 2018, the Court of Appeal of Tanzania, sitting in Dar es Salaam delivered a landmark judgment on legal technicalities in Civil Appeal no. 139 of 2017 between CRDB Bank Limited versus Issack B. Mwamasika (1<sup>st</sup> Respondent), Registered Trustees of Dar es Salaam International School Trust Fund (2<sup>nd</sup> Respondent) and EDBP & GD Construction Co. Ltd (3<sup>rd</sup> Respondent). The bench was led by His Lordship the Chief Justice, Professor Ibrahim Juma, and Justices of Appeal Mugasha, JA and Mwambegele JA.

In this case, the Appellant CRDB Bank was challenging the decision of the High Court of Tanzania in Civil Case No. 79 of 2012 by Judge Mkasimongwa. In its decision, the High Court had ruled that the refusal by the Appellant to release the Respondents' title documents that were used as security for loan by the Appellant to the 2<sup>nd</sup> Respondent had occasioned a loss of business opportunities to the 3<sup>rd</sup> Respondent. Consequently, the High Court had awarded a colossal USD 30M in favour of the three Respondents.

While the Appellant raised fifteen grounds in support of the appeal, the Respondents filed a cross-appeal to manifest their own dissatisfaction with certain aspects of the decision of the High Court. In addition, the Respondents filed a Notice under Rule 100(1) of the Tanzania Court of Appeal Rules 2009 (the Rules) containing grounds by which they urged the Court of Appeal to affirm the decision of the High Court on other grounds, other than those grounds which the High Court had relied on in its decision. Further, the Respondents filed three sets of Preliminary Objections (PO), seeking to strike out the appeal altogether. First PO was that the parties shown in the Notice of Appeal did not correspond with the parties appearing in the record of appeal as 3<sup>rd</sup> Respondent, as cited with initials DG in the Memorandum of Appeal, was 'not a party' in the trial Court. Second PO was that the appeal was incompetent on account of incomplete Record of Appeal in as much as pages 2, 4, 6 and 8 of a certain exhibit were missing therein. Third PO was that the Record of Appeal was incurably defective for lack of the certificate as to the correctness of the record of appeal.

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# LEGAL UPDATE

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Having been plagued with POs for decades now, and trying to move away from the 'PO trend', the Court chaired by the Chief Justice ordered that it would hear the POs with the substantive appeal, cross-appeal and grounds seeking the affirmation of the decision of the trial Court, all in one session, something unheard of.

In reply to the points of objection, the Appellant argued that initials 'DG' used in the Memorandum of Appeal, instead of the initials 'GD' appearing in the rest of the documents in the record of appeal, is a typographical error which is not the type of an error that should result in the Court striking out of the appeal on grounds of incompetence. The counsel for the Appellant further urged the Court to dismiss the ground of objection on missing pages as it was distinguishable from other such cases since it was not the entire document that was missing but merely a few pages which did not cause any substantive injustice to anyone. Finally, the counsel for the Appellant regarded the phrase *true copy of the original record* as synonymous with certifying the record to be correct and proper under Rule 96 (5) of the Rules given that the certificate showed the Rule under which it was made.

In its ruling, and in line with the Court's new found energy not to entertain POs that do not cause substantive injustice, the Court in dismissing all POs held the name of the 3<sup>rd</sup> Respondent appearing in the Memorandum of Appeal was because the Appellant had inadvertently used the initial 'DG' instead of 'GD' and such inadvertence did not occasion any confusion as to the identity of the 3<sup>rd</sup> Respondent, nor did it occasion any injustice to either party. As regards to the second PO, the Court held that the few pages missing out from exhibit P11 are regarded as a minor irregularity. The Court held that it should be inclined to abide with the need to achieve substantive justice under Rule 2 of the Rules. Finally, the Court stated that certification of record as 'true' conveys similar meaning with certifying the record as 'correct'. Consequently, the Court found that all three sets of POs in their entirety lacked merit, and were overruled accordingly.

As regards to the main case, the Court was of the view that the major issue for determination was whether the Appellant had legal justification to retain the securities even after the 2<sup>nd</sup> Respondent had cleared the two loan debts owed to the Appellant. In its decision, the Court held that since the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were guarantors to the loan taken by the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents retain their burden as guarantors until the 3<sup>rd</sup> respondent clears its debt to the Appellant bank. The Court concluded that the Appellant bank, was within its legal right under the personal guarantees, to refuse to release the title documents to the guarantors.

This decision presents one of the points of departure from the orthodox position taken by the Court of Appeal of stringent application of the Rules on procedures and other legal technicalities. By this decision, the Court of Appeal is not only creating a precedent but also sending a strong message to both legal practitioners and the judiciary that they should endeavour to ensure that legal technicalities should not override substantive justice. It is, indeed, a welcome decision by the country's highest Court, which has embarked on an aggressive and successful drive to clear case backlogs.

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