

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.,)

CIVIL APPEAL NO. 66 OF 2017

- 1. MONDOROSI VILLAGE COUNCIL
 - 2. SUKENYA VILLAGE COUNCIL
 - 3. SOITSAMBU VILLAGE COUNCIL
- }APPELLANTS

VERSUS

- 1. TANZANIA BREWERIES LIMITED
 - 2. TANZANIA CONSERVATION LIMITED
 - 3. NGORONGORO DISTRICT COUNCIL
 - 4. COMMISSIONER FOR LANDS
 - 5. THE ATTORNEY GENERAL
- }RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha (Moshi, J))

dated 28th day of October, 2015
in
Land Case No. 26 of 2013

RULING OF THE COURT

10th & 14th December, 2018

KWARIKO, J.A.:

The appellants herein sued the respondents before the High Court of Tanzania at Arusha (Moshi, J.) in Land Case No. 26 of 2013, for recovery of land known as Sukenya Farm or Enavisha Nature Refuge comprising of

about 12,167 acres within Ngorongoro District Council. The appellants lost the suit in the decision dated 28/10/2015. They have thus come before this Court by way of this appeal which was lodged on 3/2/2017.

Consequent to the foregoing, the 2nd respondent's counsel filed a notice of preliminary objection on 24/7/2017 on the following two points of law:

- 1. that the Appellants have omitted to include in the Record and Memorandum of Appeal a letter to the lower court requesting for copies of judgment, decree and records of proceedings; and*
- 2. that in the absence of the Appellant's letter to the lower court requesting for copies of judgment, decree and record of proceedings in the Record and Memorandum of Appeal the certificate of delay thereof is ineffective.*

This appeal was called on for hearing on 10/12/2018. Whereas Mr. Wallace Kapaya and Ms Fatuma Amir, learned advocates, appeared for the appellants, Messrs John Umbulla and Sinare Zaharan learned advocates appeared for the 1st and 2nd respondents respectively, and Mr. Killey

Mwitasi, learned State Attorney, represented the 3rd, 4th and 5th respondents.

As the practice of the Court demands, we had to dispose of the preliminary objection first. Thus, Mr. Zaharan argued the preliminary objection to the effect that, the letter of application of the proceedings of the High Court (the letter), is not included in the record of appeal. That, its inclusion was necessary for the purpose of computing the time limit for lodging the appeal as required under Rule 90 (1) (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He added that, if the letter is not served to the respondent the appellant is precluded from relying on the exemption under Rule 90 (2). He argued that, due to its importance, this letter falls under the provisions of Rule 96 (1) (k) of the Rules. To fortify his contention Mr. Sinare cited the decision of this Court in **MS UNIVERSAL ELECTRONICS AND HADRWARE TANZANIA LIMITED v. STRABAG INTERNATIONAL GmbH (TANZANIA BRANCH)**, Civil Appeal No. 104 of 2015 (unreported). For that reason, he prayed that this appeal be struck out. He also prayed for costs because the appellant failed to rectify the omission within 14 days of the filing of the appeal as provided under Rule

96 (6). He added that the appellant could have as well utilized the avenue provided for under Rule 77 (1) of the Rules to withdraw the appeal soon after he was served with the notice of preliminary objection on 24/2/2017.

On his part Mr. Umbulla supported the foregoing submission, and added that, the appellants have indicated in the index at item 29 that, the letter has been included in the record of appeal at pages 848- 849, but what is in those pages is something different. This signifies that the appellants know that the letter is important.

Mr. Mwitasi concurred with the submissions by his learned friends. He added that, the Court cannot easily depart from its own decisions which have laid down the requirement of including the letter in the record of appeal.

In response to the foregoing submissions, Ms Amir admitted that the letter is missing from the record of appeal. However, she argued that the letter is not among the core, primary or necessary documents which have been listed under Rule 96 (1) of the Rules. She argued that it was not the

intention of the legislature to extend the application of Rule 96 (1) (k) to inclusion of the letter in the record of appeal. She added that, had that been the case, it must have been clearly indicated as it is the case under Rule 90 (1) (2). To support her contention, Ms Amir cited the case of **MSAFIRI PHARMACEUTICAL & ASSOCIATES LTD & 3 OTHERS v. NATIONAL BANK OF COMMERCE**, Civil Appeal No. 104 of 2016. She argued that in view of that decision, the letter falls in the second category. This is because; there is no specific provision which requires it to be included in the record of appeal, she insisted.

It was Ms Amir's further contention that, the letter is not necessary for determination of the appeal. To fortify her argument, she referred the Court to its decision in the case of **LEILA JALALUDIN HAJI JAMAL v. SHAFFIN JALALUDIN HAJI JAMAL**, Civil Appeal No. 55 of 2003 (unreported). She added that, the respondents have not complained because they were served with the letter and they have not been prejudiced by its absence in the record of appeal.

The learned counsel argued in the alternative that, should the Court find that the letter is necessary and that the same must have been included in the record of appeal, it should invoke the overriding objective principle and decide to determine the matter justly. In support of this argument, she cited the decision of this Court in the case of **YACOBO MAGOIGA GICHERE v. PENINAH YUSUPH**, Civil Appeal No. 55 of 2017. Finally, Ms Amir argued that, the case cited by the counsel for the 2nd respondent is distinguishable in that, the same was struck out for the appellant's failure to serve the letter to the respondent as required by Rule 90 (2) of the Rules. She therefore urged the Court to overrule the objection.

As regards the issue of costs, Ms Amir said that, the appellants were exempted to pay costs by the High Court because they were granted legal aid by the Legal and Human Rights Centre.

In his rejoinder submission, Mr. Zaharan contended that, the authorities cited by Ms Amir are distinguishable. He argued that, in the case of **MSAFIRI PHARMACEUTICAL** (supra), the objection related to

address for service furnished by the respondent. He said that, the letter falls under the first category of Rule 96, hence a necessary document to enable the Court to determine whether the appeal is within the prescribed time. Regarding the overriding objective principle, the learned counsel contended that, the same was not introduced in order to do away with the well-established principles and practice of the Court of Appeal. Therefore, the Court cannot turn blind to the omission concerning Rules 90 (1) and 96 (1) (k) of the Rules.

Concerning the issue of payment of costs by the appellants, Mr. Zaharan argued that, the said exemption related to court fees before the High Court and not any other costs like instruction fees to the respondent's counsel. Because the appellants are Government entities, they are covered by Rule 118 of the Rules which exempts the Government from payment of court fees not the costs of the case. However, to the contrary, Rule 118 (b) of the Rules exempts the Government from paying fees in respect of any criminal application or appeal.

Mr. Umbulla subscribed to the foregoing submission. On his part, Mr. Mwitasi argued that, it will be very dangerous to allow a party to choose which documents to include in the record of appeal. He added that, in the case of **UNIVERSAL PHARMACEUTICAL** (supra), it was decided that the letter ought to have been included in the record of appeal. He submitted that the overriding objective principle should not be misapplied; reiterating the argument that the appellant could have applied for the amendment of the record of appeal.

On our part, we find that, the importance of the letter is clearly shown under Rule 90 (1) (2) of the Rules. The provision reads;

"90.-(1) Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with –

- (a) a memorandum of appeal in quintuplicate;*
- (b) the record of appeal in quintuplicate;*
- (c) security for the costs of the appeal;*

save that where an application for a copy of the proceedings in the High Court has been made within

thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.

(2) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy was served to the Respondent."

Therefore, according to Rule 90 (1) of the Rules, an appeal must be filed within sixty (60) days after the notice of appeal was lodged. In the instant case the notice of appeal was lodged on 30/10/2015. However, it is not disputed that the letter applying for copy of proceedings of the High Court is not included in the record of appeal. The inclusion of the letter was important for determining whether the applicant complied with Rule 90 (1) of the Rules. Further, Rule 90 (2) of the Rules provides that the appellant cannot rely on the exception clause under Rule 90 (2), unless a copy of the letter is served to the respondent. In the absence of the letter in the record

of appeal, it is impossible for the Court to know if there has been compliance with the law.

We agree with Mr. Zaharan that, in the absence of the letter, the appellants ought to have filed their appeal within sixty (60) days from the date the notice of appeal was filed. Therefore, when the appeal was filed on 3/2/2017, the same was far away from being within the prescribed time of sixty (60) days. We have taken inspiration from the decision of the Court in the case of **VICTORIA MBOWE v. CHRISTOPHER SHAFURAE MBOWE & ANOTHER**, Civil Appeal No. 115 of 2012 (unreported) in which the same issue arose. It was observed in that case that;

".....We have found nothing in the record showing or suggesting that the appellant ever applied for the copy of the proceedings within the time and in a manner provided under Rule 90 (1) of the Rules. Similarly, Rule 90 (2) lays it down that an appellant cannot rely on the exception clause in Rule 90 (1) unless his application for a copy is in writing and served on the respondent. Again, there is nothing in the record upon which

compliance with the provisions of the said Rule 90 (2) of the Rules could be ascertained”.

In finding that the appeal in question was time barred in the absence of the letter, the Court went on to state thus;

"As matters stand, we are in agreement with Mr. Muganyizi that in the absence of a letter applying for the copy of proceedings, the appellant was supposed to institute her appeal within sixty (60) days reckoned from 7/12/2010 when she lodged her notice of appeal. Thus, we are settled in our mind that the present purported appeal which was instituted on 11/12/2012 in violation of Rule 90 (1) of the Rules is, unarguably, time barred."

The foregoing position of the law was applied by the Court in the cited case of **MS UNIVERSAL ELECTRONICS** (supra). It was held in that case thus;

"We on our part are inclined to agree with Mr. Sinare that the appeal is incompetent. According to Rule 90 (2) of the Tanzania Court of Appeal Rules, 2009 (the Court

Rules), Mr. Stolla cannot rely on the certificate of the Registrar of the High Court in computing the time in the absence of the letter to the Registrar requesting for a copy of the proceedings. Given the circumstances the appeal is hereby struck out for being incompetent....."

Despite of the foregoing position of the law, Ms Amir maintained that the letter is not among the necessary, core or primary documents which have been listed under Rule 96 (1) of the Rules. She added that, it was not the intention of the legislature that Rule 96 (1) (k) should extend to the letter. As rightly argued by Mr. Zaharan, the letter is a very necessary document in the determination of the appeal. As we have seen earlier, the letter is a basic document under Rule 90 (1) (2) of the Rules, in the determination of whether the appeal is within time or not. It is our considered view that the letter is one of "*such other documents*" necessary for the determination of the appeal as provided under Rule 96 (1) (k) of the Rules.

In support of the foregoing, this Court in the case of **NATIONAL BANK OF COMMERCE v. BASIC ELEMENT LIMITED**, Civil Appeal No. 70 of 2014 (unreported), where the letter was found missing in the record

of appeal, the Court, after it had quoted Rule 96 (1) (k) it went on to say that;

"It is discernible from paragraphs (d) and (k) of the extracted Rule that copies of ancillary Rulings as well as such other documents as may be necessary for the proper determination of the appeal must be contained in the record of appeal."

We have gone through the case of **MSAFIRI PHARMACEUTICAL** (supra) cited by Ms Amir and found it distinguishable. This is because; in that case the issue was non-inclusion of a statement showing the address for service furnished by the respondent. In the **LEILA JALALUDIN** case (supra), the issue related also to non-inclusion of the plaint and the written statement of defence. The Court found that, those documents were not necessary for the determination of the appeal against the ruling in the application for security for costs. The Court said that such documents were necessary in the determination of the appeal in the main case.

Further, if the appellants found that, the letter was not necessary, they could have applied before the Court for the exclusion as provided under Rule 96 (3) of the Rules; this provision states that;

"A Justice or Registrar of the High Court or tribunal, may, on the application of any party, direct which documents or parts of the documents should be excluded from the record, application for which direction may be made informally."

The appellants thus, have no mandate to choose which documents are important and which are not, to be included in the record of appeal. See also the case of **NATIONAL BANK OF COMMERCE v. BASIC ELEMENT LIMITED** (supra). As rightly submitted by Mr. Umbulla, the appellants indicated that the letter is found at pages 848-849 of the record of appeal, but actually something else is found therein. This shows that, the appellants know the importance of the letter, only that they omitted to include it as required.

Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the

mandatory provisions of the procedural law which go to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle under section 3 of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, which enjoins the courts to do away with technicalities and instead, should determine cases justly. According to the Bill to the amending Act, it was said thus;

"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...."

See also the Court's recent decision in the case of **NJAKE ENTERPRISES LIMITED v. BLUE ROCK LIMITED & ANOTHER**, Civil Appeal No. 69 of 2017 (unreported). The Court applied that principle in the cited case of **YACOBO MAGOIGA GICHERE** (supra) because the omission was in respect of the names of the members of the Ward Tribunal. It is thus distinguishable.

As regards the issue of costs, we have found that, the said exemption covered fees and other court costs, granted to the appellants by the Registrar in the High Court of Tanzania at Arusha on 11/11/2015, in

relation to Land Case No. 26 of 2013. The exemption does not extend to the proceedings of the appeal before this Court.

In the event, we sustain the preliminary objection and strike out the incompetent appeal with costs to the respondents.

DATED at **ARUSHA** this 13th day of December, 2018

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original



S. J. Kainda
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL