IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NSEKELA, J.A., MBAROUK, J.A., And LUANDA, J.A.)

CIVIL APPEAL NO. 34 OF 2010

JALUMA GENERAL SUPPLIES LTD ..... APPELLANT
VERSUS
STANBIC BANK (T) LTD ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Commercial Division, at Dar es Salaam)

(Makaramba, J.)

dated the 24th day of March, 2010
in
Commercial Case No. 37 of 2008

RULING OF THE COURT

3rd September, 2010 & 1st February, 2011

NSEKELA, J.A:.

When the appeal was called on for hearing, the respondent bank Stanbic Bank Limited, acting through D. Kesaria, learned advocate, raised in terms of Rule 107 (1) of the Court of Appeal Rules 2009, a Notice of Preliminary Objection with two grounds:-

1. *That the appeal is vitiated for want of a valid notice of appeal; and*

2. *The record of appeal is incomplete for Failure to include all exhibits produced at*

trial in the lower court in contravention of rule 96 (1) (f) of the Tanzania Court of Appeal Rules.

On the first ground of complaint, Mr. D. Kesaria, learned advocate, submitted that the name of the plaintiff in the trial court was **Jaluma General Supplies Ltd** which name appeared throughout the pleadings. However, the name of the appellant in the notice of appeal is **Jaluma General Enterprises Ltd.** He added that when the respondent filed the Notice of Address for Service under Rule 86 (1) (a) and (2), the respondent pointed out that the notice of appeal was defective but the appellant did not take any remedial measures. He added that this was a fundamental error which rendered the notice of appeal, invalid. It was an irregularity which went to the root of the notice of appeal. The learned advocate referred the Court to a number of cases to bolster his case, including Civil Appeal No. 13 of 2001, **Mansoor Daya** v **Jenus Limited** (unreported); **Attorney General** v **Maalim Kadau and 16 Others** [1997] TLR 69; Civil Appeal No. 39 of 2008, **Charles Muguta Kajeje** v **Mutamwega Bhatt Mugaywa** (unreported).

On his part, Mr. Lugano Mwandambo, learned advocate for the appellant readily conceded at the outset that the appellant's name in the Notice of Appeal is not the same as that appearing in the trial court as plaintiff. He submitted that there was no intention to substitute the name of the appellant. He contended that apart from the name, the parties knew that it was the same commercial case and that there was no prejudice occasioned to the respondent. In the interests of justice, the learned advocate prayed that the appellant be allowed to amend the notice of appeal in terms of Rule 111 of the Court of Appeal Rules, 2009.

As regards the second complaint, Mr. Kesaria submitted that the record of appeal was incomplete. He focussed mainly an exhibit D3 which he said was tendered in evidence. The Bank Statement Nos. 88-187 was admitted as exhibit "D3" to form part of the proceedings. The learned advocate added that it was not for counsel to pick and choose what documents should be included in the record of appeal. Failure to include Exh. D.3 was fatal and therefore the appeal should be struck out. Mr. Kesaria referred to, inter alia, **Grace Frank Ngowi** v **Dr. Frank Israel Ngowi** [1984] TLR 120; **Fortunatus Masha** v **William Shija and Another** [1999] TLR 4, **Frank Kibanga** v **ACU Limited**, Civil Appeal No. 24 of 2003 (unreported) in support of his submission on

this ground. On his part, Mr. Mwandambo, learned advocate for the respondent/appellant in effect conceded that the record of appeal did not include exhibit D3. If the respondent (applicant) wanted to include them, then he should file a supplementary record of appeal in terms of Rule 99 (1) of the Court of Appeal Rules. The remedy was not to strike out the appeal. He added that in the spirit of Rule 2 of the Court of Appeal Rules, 2009, disputes should be investigated and decided on their merits and that errors and lapses should not necessary debar a litigant from the pursuit of his rights. In support of his submission on this ground, the learned advocate referred inter alia to Civil Appeal No. 89 of 2002, **Paola Sibilia** v **(i) Pierre Limited (ii) Roberto Merlo** (unreported); **Leila Jalaludin Jamal** v **Shaffin Jalaludin Jamal,** Civil Appeal No. 55 of 2003 (unreported).

Our starting is Rule 83 (1) of the Court of Appeal Rules, 2009. It provides as follows-

> *"83 (1) any person who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court."*

Sub-Rule (1) was subject to interpretation in the case of **Attorney- General** v **Maalim Kadau** and **16 Others** [1997] TLR 69. The Court stated that any of the parties involved in the original suit and not any other person, can appeal. The learned advocate for the appellant was quick to concede that the name of the party appearing in the Notice of appeal is not the same name appearing in the plaint. Is this a minor error or is it a fundamental error going to the root of the appeal? Names of parties is central to their identification in litigation. Both parties are limited liability companies with all their attributes. If one changes its name, it becomes a different legal entity, altogether. Consequently, the name of the appellant in the Notice of Appeal was fundamentally different from that in the plaint. It was fatally different from that in the plaint. It was a fatal irregularity rendering the Notice of appeal incompetent.

After conceding that the notice of appeal was defective in the manner explained above, Mr. Mwandambo implored the Court that the respondent be allowed, in the interest of justice, to amend the notice of appeal under Rule 111 of the Court of Appeal Rules, 2009. This is undoubtedly an attractive argument. Rule 111 provides as follows:-

> *"111. The Court may at any time allow amendment of any notice of cross-appeal or memorandum of appeal, as the case may be, or any other part of the record of appeal, on such terms as it thinks fit "*

In Civil Appeal No. 101 of 1998 **(1) The Minister for Labour and Youth Development (2) Shirika la Usafiri Dar es Salaam v Gaspar Swai** and **67 Others** (unreported) the Court observed as under-

> *"where a preliminary objection to an appeal has been lodged in accordance with Rule 100 (now 107 (1),) it is, our view, improper for the appellant to seek to defeat the objection by acts designed to remove its basis. If such practice were allowed, Rule 100 (now 107 (1)) would lose purpose and meaning and decency of proceedings would be in jeopardy."*

The expression "at any time" in Rule 107 (1) means at any time before objection is taken. Upon objection being taken, time is up, so to speak. (see: **Alhaj Talib** v **Kiwen Mush** [1990] TLR 108). Mr.

Mwandambo's prayer to amend the notice of appeal was aimed at pre empting the preliminary objection. With respect, we cannot allow this course of action at this point in time.

Having reached this conclusion on the first ground of complaint, there is no need for us to consider and determine the second ground of complaint. We accordingly sustain the preliminary objection on the first ground of complaint and strike out the notice of appeal as incompetent with costs.

It is accordingly ordered.

DATED at **DAR ES SALAAM** this 26th day of January, 2011.

H. R. NSEKELA
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I certify that this is true copy of the original.

J. S. MGETTA
DEPUTY REGISTRAR