IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., MUSSA, J.A, And JUMA, J.A.)

CIVIL APPEAL NO. 53 OF 2014

WILSON TARIMO ..... APPELLANT

VERSUS

NIC BANK (T) LIMITED

(Formerly known as SAVINGS AND

FINANCE COMMERCIAL BANK LIMITED ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania Commercial Division at Mwanza)

(Makaramba, J.)

dated the 25th day of February, 2014
in
Commercial Case No. 06 of 2011

.....

RULING OF THE COURT

2nd & 9th September, 2014

MUSSA, J.A.:

In the High Court (Commercial Division), the respondent, a banking institution, sued the appellant over a sum of Shs. 126.290,448.03, allegedly, outstanding from a credit facility extended by the former to the latter.

In the course of the trial, evidence was led on behalf of the respondent to the effect that on the 14th June, 2007 she extended to the

appellant a credit facility amounting to a sum of Shs. 170,000,000/= which was, respectively, made up of an installment loan to the tune of Shs 95,000,000/= plus an overdraft facility amounting to a sum of Shs. 75,000,000/=. The transaction was executed in a deed titled: "**CREDIT FACILITY – TSHS 170.0 MILION ONLY"** which was, according to the trial court's record, adduced into evidence and marked "**exhibit P1.**"

It was further contended on behalf of the respondent, that the purpose of the credit facility was to finance working capital for the appellant's mobile phone business venture. As security for the credit facility, the appellant, allegedly, created an equitable mortgage over plot No. 332, block B, Nyegezi, Mwanza city and gave a lien over a fixed deposit account for Shs. 100,000,000/=. In addition, the appellant pledged repayment through three documents, namely, a promissory note, a letter of continuity and a letter of arrangement which were collectively adduced into evidence and marked "**exhibit P2.**" In similar vein, a certain Waziri Christopher Tarimo committed himself as guarantor of the transaction through **exhibit P3.**

The case for the respondent was that, against the foregoing backdrop, the appellant failed to pay the already mentioned outstanding debt which was comprised of the unpaid principal amount plus the accrued interest. Furthermore, it was claimed, the appellant failed to surrender the title deed with respect to the immovable property which was, allegedly, demised as security for the credit facility. Thus, the respondent sought to be granted the principal sum plus the accrued interest on it at the rate of 22 per centum from the 1st March, 2011 until the date of judgment or, as the case may be, after sooner payment; general damages for breach of contract as may be assessed by the court; interest on the decretal sum at the court rate from the date of judgment until payment in full and; the sale of the demised property.

In reply, the appellant categorically refuted the respondent's claim and, in addition, he counter – claimed a sum of shs. 100,240,000/= which, he said, was owing to him on account of a fixed deposit which he opened in anticipation to a credit facility which he expected to be extended to him by the respondent and which, according to him, never was. In the counter claim, the appellant just as well sought to be redressed with the principal sum plus interest and general damages as may be assessed by the court.

On the whole of the evidence, the High Court (Makaramba, J.), granted the respondent's claim, albeit, at the reduced sum of Shs. 47,319,799.82, plus interest at the rate of 22% per annum from 1st March, 2001 until the date of judgment. As it turned out, the appellant's counter – claim was dismissed on account that the sums on the fixed deposit were, in course of time, actually liquidated by the appellant himself. The appellant is aggrieved, hence the present quest to impugn the decision below which is upon a memorandum of appeal comprised of three points of grievance. The respondent is similarly dissatisfied by a portion of the trial court's verdict and, as such, she has picked the cue to mount her own Notice of Cross – appeal in terms of Rule 94 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules").

At the hearing before us, the appellant was represented by Messrs Kassim Gilla and Denis Kahangwa, both learned Advocates. On the adversary side, the respondent had the services of Mr. Menard D'Souza, also learned advocate. For a reason that will shortly come into light, we need not belabour on the points raised in the respective memorandum of appeal and the cross-appeal.

As it were, from the very outset we prompted Mr. Gilla, the lead counsel for the appellant, to comment on some of the exhibits which are notably missing from the record of appeal. We had in mind exhibits P1, P3, D1 and D2 which were vividly adduced into evidence in the course of the trial. Unfortunately, despite the glaring reality, Mr. Gilla hesitated long before finally conceding that the referred documents are actually no show in the compiled record of appeal. But, even as he so conceded, the learned counsel for the appellant insisted upon us to grant the appellant leave to redress the record through the preparation of a supplementary record of appeal. Mr. Gilla was of the view that Rules 2 and 111 of the Rules would cumulatively accommodate his prayer. Incidentally, Mr. D'Souza for the respondent went along and he just as well supported the bid for the preparation of a supplementary record of appeal on account of the need to achieve substantive justice, as he conceived it.

Dealing with the issue of contention, we should first address the invitation by counsel from either side to the effect that it is open for the Court to allow the appellant to redress the record of appeal by way of supplementary record. Both counsels were of the view that the suggested course is permissible under Rule 111 of the Rules which stipulates:-

"The court may at any time allow amendment of any notice of appeal or 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."* (Emphasis added).

Both Mr. Gilla and Mr. D'Sauza sought to impress that the expression "or *any other part of the record of appeal*" entitles the appellant to redress the record of appeal through a supplementary record. As to what amounts to a properly constituted *"supplementary record"* we need do no more than reiterate what we stated in Civil Appeal No. 10 of 2007- **Haruna Mpangaos and 902 Others** (unreported):-

".....a supplementary record of appeal presupposes the existence of a complete record of appeal lodged by an appellant. Complete in the sense that it contains all the essential documents itemized under Rule 89(1). Under Rule 92(1) the use of the words "containing copies of any further documents or additional parts of documents which are, in his opinion required for the proper determination of the appeal" mean, in effect, that the supplementary record of appeal may be lodged for the purpose of

making good deficiencies in the record of appeal not affecting the competence of the appeal. A supplementary record of appeal should, therefore, add something to the otherwise complete record of appeal".

In the foregoing extract, the Court was grappling with a construction of Rules 89(1) and 92(1) of the revoked Tanzania Court of Appeal Rules, 1979. It is noteworthy that the referred Rules 89(1) and 92(1) as comprised in the old Rules, are, respectively, similar to the present Rules 96(1) and 99(1) of the Rules.

In terms of Rule 96(1) the original record of appeal has to contain certain basic documents which are enumerated therein. For ease of reference we propose to reproduce the provisions of Rule 96(1) in full:-

" For the purposes of an appeal from the High Court or a tribunal, In its original jurisdiction, the record of appeal ***shall****, subject to the provisions of sub-rule(3), contain copies of the following documents:-*

a) an index of all documents in the record with the numbers of the pages at which they appear;

b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by Rule 86, his last known address and proof of service on him of the notice of appeal;

c) the pleadings;

d) the record of proceedings;

e) the transcript or any shorthand notes taken at the trial;

f) ***the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in English language, their certified translations;***

g) the judgment or ruling;

h) the decree or order;

i) the order, if any, giving leave to appeal;

j) the notice of appeal; and

k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant,

save that the copies referred in paragraphs (d), (e) and (f) shall exclude copies of any documents or any of their parts that are not relevant to the matters in controversy on the appeal". (Emphasis supplied).

It is, perhaps, pertinent to just as well extract the rider referred to by the provision which is comprised in sub-rule 3 and going thus:-

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

From the foregoing extracts, we wish to observe, at once, that the provisions of Rule 96(1) of the Rules are spelt out in mandatory terms. Thus, under the Rule, it is, for instance, imperative to put on the record of appeal all documents which were adduced at the hearing, save for any such documents or their parts that have been excluded on account of not being relevant to the matters in controversy on the appeal. In this regard, we should be quick to caution that the decision to exclude from the record any of the documents on account of irrelevancy is not optional on the party filing the record; rather, such is the mandate of a Justice or Registrar of the High Court or Tribunal in terms of the sub-rule 3, that is, in response to an application by the desirous party. (see Civil Appeal No. 8 of 2008 – **Fedha fund Limited and two others vs George T. Varghese and Another**; and Civil Appeal No. 77 of 2011 – **Juluma General Supplies Ltd vs Stanbic Bank Ltd** (both unreported).

Furthermore, it is trite in terms of Rule 96 (6) of the Rules, that where a document in the enumerated list is omitted from the record, the appellant may, within 14 days of lodging the record of appeal, as of right, include the document in the record without having to secure the leave of the Court.

As already intimated, from the record of the proceedings below, it is beyond question that the appellant omitted to put on the record of appeal exhibits P1,P3,D1 and D2 which were adduced into evidence at the hearing. It was not suggested and, indeed, there is no indication that, at any time, the appellant sought and obtained the directions of the High Court to exclude the documents from the record. What is more, neither did the appellant exercise the opportunity to put the documents upon the record of appeal, as of right, within 14 days of lodging the record. To say the least, the omission to include the referred document's in the record of appeal was unilateral and, accordingly, it are violative of the mandatory provisions of Rule 96(1)(f) of the Rules. The issue is, what is the attendant consequences of the non-compliance?

In this respect, a hint on what befalls on a record of appeal to which, as in this case, some vital documents are missing, was given in **Fortunatus Masha Vs William Shija** and Another [1997] TLR41:-

> *".....An incompetent appeal is one in which in law did not come into existence although efforts were made to bring it into existence. In such circumstances, therefore, one*

cannot properly talk of there being an insufficient or incomplete appeal which one can improve upon by filing a supplementary record, because in law no appeal came into existence in the first instance, there was only a purported appeal, if you wish".

Of recent, in a plethora of decisions, this Court has consistently held that an unilateral omission by an appellant to put on the record of appeal one or several of the documents enumerated under Rule 96 (1) of the Rules will have the effect of rendering an appeal incompetent (see, for instance, the decisions in **Fedha Fund Limited vs George T. Varghese** (supra); Civil Appeal No. 93 of 2012 - **Dodsal Hydrocarbons and Two Others vs Hasmukh Bhagwanji Masrani;** and Civil Appeal No. 20 of 2013 – **Mariam Iddi vs Abdulrazack Omary Laizer** (all unreported).

To the extent that the appellant did not attempt to exclude the omitted documents on account of irrelevancy, we can hardly glean any element of a technicality as the non – compliance goes to the very root of the appeal. As regards the cross-appeal, having adjudged the appeal incompetent for failure to put on record the referred vital documents, we are of the settled

view that the same is left with no legs to stand on. Accordingly, both the appeal and the cross-appeal are hereby struck out but, as the vitiating non – compliance was prompted by the Court, we give no order as to costs.

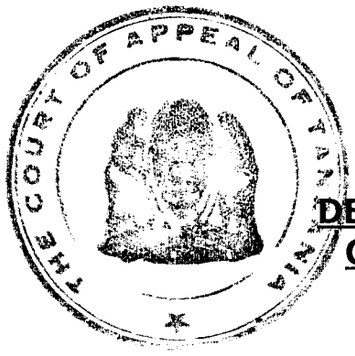
DATED at **MWANZA** this 5th day of September,2014.

M. S. MBAROUK
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APEAL