IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MJASIRI, J.A., And MMILLA, J.A.)

CIVIL APPEAL NO. 23 OF 2008

CITIBANK TANZANIA LIMITED ..... APPELLANT

VERSUS

1. **TANZANIA TELECOMMUNICATIONS COMPANY LIMITED**
2. **TANZANIA REVENUE AUTHORITY**
3. **TANZANIA COMMUNICATIONS REGULATORY AUTHORITY (AS SUCCESSOR TO THE TANZANIA COMMUNICATION COMMISION)**
4. **VIP ENGINEERING AND MARKETING LIMITED**
5. **THE LIQUIDATOR OF TRI-TELECOMMUNICTION TANZANIA LIMITED ("TRITEL") (IN LIQUIDATION)**

..... REDPONDENTS

(Appeal from the parts of the Ruling Finding and Orders of the High Court of Tanzania (commercial division) at Dar es Salaam)

(Kimaro, J.)

dated the 7th day of June, 2003
in
Misc. Commercial Case No. 6 of 2003

RULING OF THE COURT

4th June, & 19th August 2015

MMILLA, J. A.:

The appellant, Citibank Tanzania Limited, instituted Civil Appeal No. 23 of 2008 in this Court following its dissatisfaction with parts of the ruling of the High Court of Tanzania; Commercial Division at Dar es Salaam handed down

on 12th June, 2003. Its team of advocates, namely Mr. Dilip Kesaria, Mr. Tom Nyanduga, Ms Fatuma Karume and Mr. Godson Nyange, learned advocates, filed a memorandum of appeal which raised 19 grounds, pin – pointing the areas of the ruling which are the subject of complaints.

There are five respondents in this regard namely; Tanzania Telecommunication Company Limited, Tanzania Revenue Authority, Tanzania Communications Regulatory Authority (as successor to Tanzania Communications Commission), VIP Engineering and Marketing Limited and the Liquidator of Tri-Telecommunication Tanzania Limited ("Tritel") (in Liquidation). Mr. George Magambo, Mr. Juma Beleko, Mr. Ally Hassan Bwanga, Mr. Michael Ngalo and Prof. Gamaliel Mgongo Fimbo, learned advocates, represented the first, second, third, fourth and fifth respondents respectively. Mr. Ngalo and Prof. Fimbo raised preliminary objections on points of law on behalf of their respective clients.

The first notice of preliminary objection was filed on 12th June, 2008 by Law Associates, Advocates and Ngalo & Company, Advocates. It comprised of two grounds as follows:-

1. That the record of appeal is irreparably defective as it violates Rule 89 (1) (h) of the Court of Appeal Rules, G. N. No. 115 of 1979 read together with Order XX Rule 7 and/or Rule 8 of the Civil Procedure Code Cap. 33 (R. E. 2002) and Rule 24 of the Companies Winding Up Rules 1929 by incorporating an invalid decree found at pages 354 – 360 of the Record of Appeal dated 25th February, 2008.
2. Further that the record of appeal is even more defective by incorporating a defective judgment found on pages 317 – 353 of the Record of Appeal dated 25th February, 2008 in violation of Rule 89 (1) (g) of the Court of Appeal Rules G. N. No. 115 of 1979 read together with Order XX Rule 3 and/or Rule 8 of the Civil Procedure Code Cap. 33 (R. E. 2002) and Rule 24 of the Companies Winding Up Rules 1929.

The second notice of preliminary objection was filed by Mr. Ngalo on behalf of the fourth respondent on 22nd May, 2015. This one consisted of three grounds as follows:-

1. That the appeal is incompetent because the date of the drawn order and the date of delivery of the ruling differ.

2. That the appeal is premature for the reason that the appellant had and still has other remedies under section 198 (1) of the Companies Ordinance Cap 212 which the appellant did not pursue and has not exhausted the same.
3. That this Hounourable Court has no jurisdiction to correct the alleged misprint of section 269 (1) of the Companies Ordinance Cap 212 in the first ground of appeal.

The third notice of preliminary objection was filed by Mgongo Fimbo and Company, Advocates, on 27th May, 2015 on behalf of the fifth respondent. It raised a lone ground of preliminary objection similar to the first ground raised by Mr. Ngalo in the notice dated 22nd May, 2015 that the appeal is incompetent and should be struck out with costs on the ground that the drawn order in appeal does not bear the date on which the ruling was pronounced.

Upon being given chance to argue the preliminary objections raised, Mr. Ngalo discussed all of them, beginning with that one touching on the difference in dates between the ruling being complained of and the drawn order. As aforesaid, that is the ground which has also been raised by Prof. Fimbo.

We have found it appropriate to begin our discussion with this ground because in our view, if upheld, it is sufficient to dispose of the entire appeal. However, before we can do so we have found it useful to give the brief background facts of the matter as may be relevant to the ground under focus.

In 2003, the first, second and third respondents jointly petitioned the High Court of Tanzania, Commercial Division at Dar es Salaam to compulsorily wind up the fifth respondent company under section 167(e) of the Companies Act and the Winding Up Rules 1929. Then, the first respondent was claiming from the fifth respondent a debt of USD 11,125,968, while the second and third respondents were claiming debts of TZS 6,729,665.612 and TZS 3,279,357,735 respectively. Upon advertising the petition for winding up of the said company in the local newspaper, the fourth respondent served the petitioners with notice of intention to appear in the petition to support the petition both as a 40% shareholder of the fifth respondent and also as a creditor claiming from the latter not less than USD 18.628 million.

After complying with the initial procedures, the matter was heard resulting into the ruling under focus dated 12. 6. 2003 vide which the trial court ordered the winding up of the fifth respondent and appointed the late Peter Bakilana as the liquidator thereof, also it invalidated the appellant's

purported debenture dated 6th April, 2001 for having been created without proper corporate authorization. The liquidator was directed to investigate the affairs of the fifth respondent including its relationship with the appellant. On 24th June, 2003, the Deputy Registrar of the High Court of Tanzania, Commercial Division drew up, dated and signed an order of that court for the winding up of the fifth respondent. The shown difference in dates between the ruling and the drawn order is what has necessitated the preliminary objection ground under consideration.

In his submission on the point, Mr. Ngalo pointed out that while the ruling which is the subject of appeal was dated 12.6.2003, the drawn order was dated 24/6/2003. In his view, that contravened the provisions of Order XX Rule 7 of the Civil Procedure Code Cap. 33 of the Revised Edition, 2002 (the Code) which requires, among other things, for the decree to bear the date of the day on which the decision was pronounced. Order XX Rule 7 of the Code provides that:-

> *"The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge or magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree."*

He contended that since Rule 89 (1) of the Tanzania Court of Appeal Rules, 1979 (the old Rules) required the record of appeal to contain, among other things, the decree or drawn order which is the subject of appeal, and that such decree or drawn order must be proper in all respects, anything less renders the appeal incompetent and liable to be struck out. He relied on the case of **Gobanya F. Hezwa v. The Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 83 of 2008, CAT (unreported) in which, quoting the case of **Uniafrico Ltd and 2 Others v. Exim Bank (T) Ltd**, Civil Appeal No. 30 of 2006, CAT (unreported), the Court said at page 4 that under Order XX Rule 7 of the Civil Procedure Code, the decree must bear the same date as the judgment, and that the date of the decree is the date on which the judgment was delivered.

Mr. Ngalo submitted also that he was aware that the appellant attempted to file a supplementary record to cure that defect. He contended that it was not proper because a supplementary record cannot be filed to cure a defective appeal. On this, he relied on the case of **Haruna Mpangaos and 902 others v. Tanzania Portland Cement Co. Ltd,** Civil Appeal No. 10 of 2007, CAT (unreported) in which he said, the Court stated that the proper remedy was to

go back to the High Court. He therefore urged the Court to uphold this ground and strike out the appeal.

Prof. Fimbo held the same view expressed by Mr. Ngalo on the point. Relying on the case of **Kapinga & Company, Advocates v. National Bank of Commerce Ltd,** Civil Appeal No.42 of 2007, CAT (unreported), he stressed that this Court has consistently held that where the dale of judgment differs with the decree or drawn order, that decree or drawn order is defective/and or invalid. So also that, a defective decree cannot, on the basis of **Haruna Mpangaos** case (supra), be cured by filing a supplementary record. Like Mr. Ngalo, Prof. Fimbo pressed the Court to uphold this ground resulting into striking out the appeal.

On the other hand, Mr. Kesaria marshaled the submissions of the appellant's team of advocates. He submitted that the complaint that the drawn order is defective for bearing a different date to that appearing in the ruling is not well founded on account that the drawing and signing of the order in that regard was not governed by the Code, but by Rule 38 of the Company Winding Up Rules, 1929. He relied on the old case of **Farrab Incorporated v. Official Receiver and Provisional Liquidator,** [1959] E.A. 5. According to him, Rule 38 thereof envisages the parties to appear before the Registrar on the day

next to register their documents, after which the latter (Registrar) is mandated to make an order such as the one under scrutiny. The said Rule 38 of Companies Winding Up Rules, 1929 provides that:-

> *"R. 38: It shall be the duty of the petitioner, or his solicitor or London agent, and of all other persons who have appeared on the hearing of the petition,* ***at the latest on the day following the day on which an order for winding up of a company is pronounced in Court to leave at the Registrar's office all the documents required for the purpose of enabling the Registrar to complete the order forth with.***"*[Emphasis is provided]

Mr. Kesaria submitted that in the circumstances of the present case, the documents were delivered to the Registrar 12 days later, therefore that there is nothing defective thereof. While insisting that there is no time limit under that Rule, he maintained that it could have been otherwise had these proceedings arisen from the Code. He urged the Court to overrule this ground.

We have given anxious consideration to the rival submissions of the advocates for the parties. We note that counsel for the parties agree on one thing that the ruling and the drawn order under scrutiny bear different dates.

However, they hold different views on whether or not that constitutes a defect in the circumstances of the present case.

We desire to begin by making a general observation that proceedings of civil nature are generally governed by the Code unless otherwise provided by other laws. So that, in a proper case the matter under discussion would entail that the provisions of Order XX Rule 7 of that statute, would apply.

As correctly submitted by Mr. Kesaria, the proceedings from which the present matter arose were winding up proceedings, therefore governed by the Companies Winding Up Rules, 1929. That is ***in tandem*** with the Court's expression on the point in **Farrab Incorporated** case he referred us to.

In that case, the appellant company claimed to be a creditor of Phoenix Productions Ltd., a company of which the Official Receiver was the Provisional Liquidator, and sought to prove in the winding-up for "a sum of not less than twenty-five thousand pounds". The appellant's proof was rejected by the Provisional Liquidator under Rule 141 of the English Companies (Winding-up) Rules, 1929, which then applied in Kenya. The appellant applied to the Supreme Court for an order reversing the Provisional Liquidator's decision, but his application was refused and he was ordered to pay costs. The appellant

preferred a further appeal. At the hearing the Court drew attention to the fact that no formal order embodying the decision of the Supreme Court was included in the record and the issue was whether the decision of the Supreme Court was a judgment giving rise to a decree, or was a ruling resulting in an order. If it was the latter, the appeal would be incompetent unless the formal order had been extracted. Counsel for the appellant company submitted that the Supreme Court's decision was a decision given on appeal and therefore a decision in a "suit", that is, a judgment which would result in a decree, and **further that the appeal to the Supreme Court had been brought in accordance with the Civil Procedure (Revised) Rules, 1948, and not under Rules 5 and 8 of the Winding-up Rules.** It was held that:-

> *"(i) the appeal to the Supreme Court under r. 141 of the English Winding-up Rules was brought under and in accordance with the procedure prescribed by r. 5 and r. 8 of those Rules and not in accordance with any procedure prescribed by the Civil Procedure Ordinance and Rules. . . ."*

See also the case of **Fahari Bottlers Ltd and Another v. Registrar of Companies and Another** [2000] T. L. R. 102. In this case too, the Court said winding up proceedings were governed by Company Winding Up Rules, 1929.

Admittedly, Rule 38 of the Winding Up Rules, 1929 is silent on whether or not the drawn order must bear the same date appearing in the ruling. However, it has set time limit within which the Registrar may draw the order. We are saying so because that Rule directs parties, or their counsel and /or agents, **at the latest on the day following the day on which an order for winding up of a company is pronounced in Court**, to leave at the Registrar's office all the documents required for **the purpose of enabling the Registrar to complete the order forth with**. In our considered view, those words constitute the time limit, thus connoting that if it is outside that time; it will amount to non-compliance with the Rule. For that reason, the Registrar's order ought to have been signed at the latest the day next, that is, 13.6.2003 and not 24.6.2003 as it were. However, the major issue remains whether or not the drawn order in the circumstances of this case ought to bear the date of the day on which the decision was pronounced.

The practice in our jurisdiction seems to be silent in respect of winding up proceedings. However, that is not the case in India for example in which winding up proceedings are governed by the Companies Act of 1956 and the Companies (Court) Rules, 1959 which were replicated, though with slight modifications, from the former Rules, that is, the Winding Up Rules, 1929. In

that jurisdiction for instance, a drawn order emanating from winding up proceedings becomes fatally defective if it does not bear the date on which the decision was pronounced. That is in terms of Rule 37 (1) of the 1959 Court Rules. That Rule stipulates that:-

> *"Every order, whether made in Court or in chambers, shall be drawn up by the Registrar, unless in any proceeding or class of proceedings the Judge or the Registrar, shall direct that the order need not be drawn up. Where a direction is given that no order signed or initialed by the judge making the order or by the Registrar shall be sufficient evidence of the order having been made.* ***The date of every order shall be the date on which it was actually made, notwithstanding that it is drawn up and issued on a later date."*** [Emphasis supplied].

Although the relevant Rule in our jurisdiction is silent on the point as aforesaid, we believe that theirs is good law and provides guidance to our problem at hand because it is common principle of law that a decision of the Court becomes binding upon the parties at the date it is pronounced, hence that the period of limitation of time start to run from there. We are also of the view that for the sake of completeness, there must be a link between the drawn

order and the ruling. The rationale to this was best captured in the case of **Kapinga & Company, Advocates** (supra).

In **Kapinga's** case, the Court posed a question regarding the legal status of an appeal which is accompanied by an extracted order which does not bear the date when the ruling was pronounced. While reciting several cases which dealt with the point in the past, the Court said it was evident from those decisions that if an appeal does not bear the date of the day on which the judgment or ruling was pronounced, that constitutes a fundamental irregularity which goes to the root of the matter, and renders the appeal incompetent. As to the rationale for a decree or order to bear a date of the judgment or ruling, the Court quoted with approval, Mulla on the Code of Civil Procedure (15th Edition) at page 1524 and stated that:-

> *"The date of a decree, and by extension of an order, is important not only in reckoning time for appeal but also for purposes of period of limitation in the case of an application to set aside an ex parte decree or order. Furthermore the right to execute a decree of order accrues from the date it is pronounced, not on the day it is signed.* ***We are, therefore, firmly of the view that an order which does not bear the date when the judgment or ruling***

was pronounced is not valid. It follows that an appeal to this court which does not contain a correctly dated decree or order will not have complied with the requirements of Rule 89(1) (h) of the Court Rules, 1979 ..." [Emphasis supplied].

We desire to restate the correctness of this proposition.

Even, we found nothing barring us from calling into the aid other procedural laws in our jurisdiction when dealing with decisions which result from winding up proceedings once it comes to further steps which may be preferred by the parties, for example, when any of the them decides to appeal. To the contrary, we have for example section 220 of our Companies Act which lends support to the position we have taken above. It provides that:-

"Appeals from any order or decision made or given in the matter of the winding up of a company by the court ***may be heard in same manner and subject to the same conditions as appeals from any order or decision of the court in cases within its ordinary jurisdiction."*** [Emphasis provided].

In our settled mind, the fact that this section instructs appeals from any orders or decisions given in winding up proceedings to be heard in the same

manner **and subject to the same conditions as appeals from any orders or decisions of the Court,** strengthens our position that compliance with Order XX Rule 7 of the Code is amongst such conditions contemplated by that section, therefore that the drawn order in the circumstances of the present appeal ought to bear the date on which the decision was pronounced.

On the basis of the above, we find and hold that it was imperative for the drawn order in this appeal to bear the date of the day on which the ruling was pronounced, therefore that the difference in dates thereof constituted a fundamental defect. Thus, we agree with Mr. Ngalo and Prof. Fimbo that since Rule 89 (1) of the old Rules required the record of appeal to contain, among other things, the decree or drawn order, and that the drawn order was to be proper in all respects, anything less rendered the appeal incompetent and liable to be struck out.

It is also incontrovertible that the appellant's advocates attempted to file a supplementary record to cure that defect. As already pointed out, Mr. Ngalo and Prof. Fimbo submitted that a defective decree cannot, on the basis of **Haruna Mpangaos** case (supra), be cured by filing a supplementary record.

On their part, Mr. Kesaria and his team of advocates submitted that the said supplementary record was not formally filed and was improper to refer to it.

We have taken note that the appellant filed a supplementary record. It may not have been formally filed, but it is there in the record. We also note that there is no clear direction in the Rules as to how one may lodge such a record. Be it as it may, the crucial issue would be whether or not it was appropriate for them file the said supplementary record to cure that defect.

We think that this aspect should not detain us. As correctly submitted by Mr. Ngalo and Prof. Fimbo, this point had the occasion of being discussed by the Court in, among others, the cases of **Haruna Mpangaos** and **Kapinga & Company, Advocates** (supra).

In the former case of **Haruna Mpangaos**, Haruna Mpangaos and colleagues were losers in Civil Case No. 173 of 2003 which was instituted in the High Court of Tanzania at Dar es Salaam. Upon being dissatisfied, they prepared and lodged a record of appeal in this Court. Unfortunately, the said record of appeal contained an improperly dated decree. They successfully

applied for a properly dated decree, prepared a supplementary record, and lodged it in Court.

When the appeal was called on for hearing, the advocate for the respondent raised a preliminary objection on a point of law that the appeal was incompetent on account that the decree, the subject of the appeal, was invalid.

Elaborating on the point, it was submitted for the respondent that under sub-rule (1) of Rule 92 of the old Rules, only the respondent could file a supplementary record of appeal if the record filed by the appellant was defective or insufficient. It was submitted similarly that under sub-rule (3) thereof, an appellant did not enjoy the same right, and that the appellant could only file a supplementary record of appeal containing "such other documents" as would be necessary for the further determination of the appeal as provided under item "k" of sub-rule (1) of Rule 89. A supplementary record of appeal containing a properly dated decree, it was further submitted, was not amongst the sort of "such other documents" envisaged under the item. The crucial issue for determination by the Court was whether or not the supplementary record of appeal validated the already defective record of appeal. In the end, the Court held that:-

". . . it is evident that the defect in the record of appeal filed on 1.2.2007 was not cured under Rule 92(3) by the supplementary record of appeal filed on 6.12.2007. The copy of a valid decree ought to have been filed with the record of appeal within the time prescribed under Rule 83 (1) of the Court Rules. If such time had expired the appellants ought to have resorted to Rule 8 for extension of time either for filing the copy of the decree as part of the record filed on 1.2.2007 or for filing the fresh record as the record of appeal in place of the original defective record."

For the reason of being incompetent, the Court struck out the appeal with costs. Once again, we reiterate the correctness of that conclusion.

Certainly, the circumstances which obtained in the case discussed above were similar to those facing us in the present case. As such, the consequences are supposed to be the same.

In the final analysis therefore, we uphold this ground of preliminary objection on account that the appeal was incompetent in that the drawn order bore a different date to the ruling which is the subject of appeal, and that a defective decree cannot, on the basis of **Haruna Mpangaos case** (supra), be

cured by filing a supplementary record. Thus, for reasons we have assigned the appeal is struck out with costs.

DATED at **Dar es Salaam** this 4th day of August, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL