IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MWARIJA, J.A.)

CIVIL APPEAL NO. 168 OF 2016

FBME BANK LIMITED .....APPELLANT

VERSUS

CRISTAL RESORT LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Zanzibar at Vuga)

(Sepetu, J.)

dated the 19th day of April, 2016
in
Civil Case No. 36 of 2015

.....

RULING OF THE COURT

23rd & 29th November, 2016.

MWARIJA, J. A.:

The appellant FBME Bank Ltd. was the defendant in the High Court of Zanzibar at Vuga in Civil Case No. 36 of 2015. The plaintiff, in whose favour the case was decided, was Cristal Resort Limited. Aggrieved by the decision of the High Court (Sepetu, J.), the appellant filed this appeal citing the respondent wrongly as Cristal Bank Limited. Realizing that mistake, by a notice of motion filed on 13/9/2016, the learned counsel for the appellant applied for leave to amend the name of the respondent

so as to read Cristal Resort Limited instead of the wrongly cited name of Cristal Bank limited. The application which was brought under Rules 50 (1) and 111 of the Court of Appeal Rules, 2009 (the Rules) was granted on 21/11/2016.

On 23/11/2016 when the appeal was called on for hearing, the appellant was represented by Mr. Daniel Welwel, learned counsel while the respondent had the services of Mr. Salim Hassan Bakari Mnkonje assisted by Mr. Omar Mmad Mwarab, learned advocates.

Before the appeal proceeded to hearing, Mr. Mnkonje raised an issue concerning compliance by the appellant, of the Court order which granted the appellant leave to amend the name of the respondent (the Court order). The learned counsel informed the Court that the learned counsel for the appellant had not effected the amendment. Relying on the provisions of Rule 50(1) of the Rules, Mr. Mnkonje argued that since in granting leave, the Court did not fix the time within which the amendment was to be made, the appellant was bound to do so within forty-eight hours from the time when the Court order was given. He argued that the consequence of the appellant's failure to effect the amendment within the prescribed time is to render the appeal not maintainable in law. To bolster his argument, the learned counsel cited

the case of **Hamed Rashid Hamed v. Mwanasheria Mkuu wa Serikali** [1997] TLR 53.

In reply Mr. Welwel admitted that he had not effected the amendment. He argued however that he was not time barred because the period of forty– eight hours prescribed under Rule 50(1) of the Rules had not elapsed. This, he said, is because the Court order was given on 21/11/2016 and that at the time when the appeal was called on for hearing, that period had not elapsed. He prayed to be allowed to effect the amendment.

In rejoinder, Mr. Mnkonje maintained that the appellant had failed to comply with the Court order by effecting the amendment which should have been done in accordance with Rule 20(1) of the Rules. He prayed that the appeal be struck out for being unmaintainable in law.

Having heard the learned counsel for the parties on that point, we allowed the learned counsel for the appellant to make the sought amendment. We reserved the reasons for our decision and promised to incorporate them in our decision in appeal as we now hereby do. As pointed out above, the Court order was given on 21/11/2016. According to this sessions' cause list in which the granted application was one of the cases fixed for hearing on that date (21/11/2016), the same was the third in the list. Its hearing was preceded by two appeals. Obviously

therefore, the order was, for this reason, given at later hours after 9.00 am, the time at which, in compliance with the Court practice, the Court started to hear the cases.

Under the circumstances, since the appeal was fixed for hearing on 23/11/2016, the result of which, the records of the appeal had to be in Court at 9.00 am before the expiry of forty– eight hours from the time when the order was given, the learned counsel for the appellant could not make the amendment although he still had time to do so. It was for these reasons that we adjourned the hearing and allowed Mr. Welwel to effect the amendment.

At the resumption of proceedings, and before the appeal had proceeded for hearing, the Court raised suo *motu the* issue whether or not the appeal was competent. The Court was prompted to raise that issue because the appellant has omitted to include in the record of appeal, a copy of an extracted order from the ruling of the trial court on the preliminary objection decided on 11/3/2016. In the ruling, the appellant's written statement of defence was "dismissed" on the grounds *inter alia,* that the same was wrongly signed and verified by a person whose authority to act for the appellant was not expressly disclosed.

Although in his submission, Mr. Welwel did not dispute that in this appeal, which is against the decree, an extracted or drawn order arising

from the ruling is one of the documents which, by virtue of the provisions of Rule 96(1) (k) of the Rules, are supposed to be included in the record of appeal, it was his argument that the omission does not render the appeal incompetent because the same is not necessary for determination of the appeal.

In reply, Mr. Mnkonje argued that the omission renders the appeal defective because it contravenes Rule 96(1) (k) of the Rules. According to the learned counsel, the document is necessary and important, more so because in the 1st ground of appeal, the appellant challenges the ruling from which the order should have been extracted.

In rejoinder, the learned counsel for the appellant reiterated his stand that since the appeal is against the judgment not the ruling, it was not necessary to include in the record of appeal, an extracted order. On the necessity or otherwise of the document in the determination of the 1st ground of appeal, the learned counsel rejoined that, since a copy of the ruling is contained in the record of appeal, the copy suffices without an extracted order.

As a starting point, in determining the issue, we think it is apposite to state that in an appeal originating from the High Court or a tribunal in its original jurisdiction, it is a mandatory requirement that the record of appeal must contain the documents stated under Rule 96(I) (a) - (j) of

the Rules and all such other documents which may be necessary for determination of the appeal as described under item (k) of Rule 96(I) of the Rules which states as follows:-

> *" 96-(I) For the purpose 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) –(j)....*
>
> *(k) such other documents, if any as may be necessary for the determination of the appeal, including any interlocutory proceedings which may be directly relevant..."*

In our considered view, the interlocutory proceedings include the ruling and an extracted order. As defined in the case of **Alibai v. Raichura** 20 EACA 24 (quoted by the Court of Appeal of Kenya in **Chege v. Suleiman** [1986-1989] I E.A. 72), an extracted order is:-

> *"...a formal expression of any decision of a civil court which is not a decree...."*

We subscribe to that definition and hold a view that any interlocutory proceedings which have been concluded cannot be complete without that order.

That said, we now turn to consider Mr. Welwel's argument that he did not include an extracted order in the record of appeal because he was of the view that the same was not necessary for the determination of the appeal. He was of that view notwithstanding the fact that in the 1st ground of appeal, the appellant is challenging the ruling from which the order ought to have been extracted. That ground of appeal reads as follows:-

> *"...The trial court erred in law and facts in holding that the Appellant's written statement of defence was not properly signed and verified by the authorized person..."*

The position of the law as regards exclusion or otherwise of the documents required by Rule 96(I) (a) – (k) of the Rules to be included in the record of appeal is as provided under Rule 96(3) of the Rules. The Rule states as follows:-

> *"... A Justice or Registrar of the High Court or tribunal may, on the application of any party, direct which documents or parts of documents should be*

excluded from the record, application for which direction may be made informally..."

Interpreting that provision, which was formerly Rule 89 (3) of the Court of Appeal Rules, 1979, the Court stated as follows in the case of **Fedha Fund Limited and 2 Others v. George T. Verghese and Another**, Civil Appeal No. 8 of 2008 (unreported):

"...the decision to choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal. Under rule 89(3) of the Court Rules, it is either a Judge or a Registrar of the High Court who, on an application by a party, has to direct which documents to be excluded from the record of appeal..."

On the basis of the above stated position of the law, the argument by the learned counsel for the appellant that the document was omitted because he did not find it to be necessary for the determination of the appeal is with respect; unfounded in law. If he wanted it to be excluded, he should have sought leave under the above quoted provision of the Rules.

In the event, we find that the omission renders the appeal incompetent. The same is therefore hereby struck out. Since the issue which has disposed of the appeal was raised by the Court suo *motu,* we order that each party shall bear its own costs.

DATED at ZANZIBAR this 28th day of November, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL