IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPEAL NO. 139 OF 2015

MUNICIPAL DIRECTOR
KINONDONI MUNICIPAL COUNCIL..... APPELLANT
VERSUS
N.W. BUILDERS LIMITED ..... RESPONDENT

(Appeal from the Ruling and drawn order of the High Court of Tanzania Commercial Division at Dar es Salaam)

(Makaramba, J.)

Dated 24th day of October, 2011
In
Misc. Commercial Application No. 14 of 2009

RULING OF THE COURT

21st July & 2nd August, 2016

JUMA, J.A.:

This is an appeal from the Ruling of the High Court Commercial Division (Makaramba, J.) given following an application which the respondent, N.W. BUILDERS LIMITED, made under Order XXI Rules 9 and 10 of the Civil Procedure Code, Cap. 33 (CPC) to seek an Order directing the KINONDONI MUNICIPAL DIRECTOR (the appellant herein) to pay a total of Tshs. 1,644,742,782/= as arbitral award in the execution of the decree arising from Commercial Case No. 14 of 2009.

The dispute at the background of this appeal arose from execution of construction contract covering works at Midizini in Sub-Ward of Manzese, in Kinondoni Municipality. Under the awarded contract, the appellant tasked the respondent company to build a 2.05 kilometre two-ways gravel road and a 2.20 kilometres one way road. The respondent was in addition contracted to build a 4.25 kilometres of road side drains, fabrication of 4 solid waste containers; building of 4 public toilets and provide street lights. The first signs of the dispute emerged when, after the installation of street lights and issuance to the respondent of an interim certificate for payment. The contracting parties differed on which unit of measurements should have guided the streetlights installations. As a result, the respondent declined to make payments in respect of installation of the street lights.

As required under the arbitration clause of their contract, the respondent referred the matter to the Adjudicator who ruled that the measurement for item 6.04 should be Linear Metres while that of item 6.20 should be in number. Despite the adjudication, the respondent was still aggrieved, and referred the matter to the Arbitrator. Meanwhile, the appellant took a decision to terminate the contract, citing failure of the respondent to perform. The respondent referred for arbitration not only

both its complaint over the measurement but also the termination of the contract. The respondent was still aggrieved with the Final Award (dated 8/5/2009) which Eng. Ronald A. Lyatuu, the Arbitrator issued. This Final Award was later replaced by "*FRESH AWARD REPLACING PART OF THE FINAL AWARD FOLLOWING REMISSION*" both by the same Arbitrator. Upon the orders of the trial court, the respondent filed an Amended Petition on 20/4/2010. On 10th June 2011 Makaramba, J. delivered the Ruling and issued the following orders:

> *1. The unit measure "L" as applicable to the BOQ-Bill No. 6 items 6.04 and 6.20 should be interpreted as "Linear Metres" or (M).*
>
> *2. The unit of measure on the contract price is as agreed to by the parties as per the BOQ where in item 6.04 the rate should be TZS 1000/= per metre.*
>
> *3. The computation of the entitlements should be based on the rates agreed to by the parties and stipulated in the BOQ wherein item 6.04 the rate being TZS 1,000/= per metre and since only 4,100 metres of cable were supplied the payment is TZS 4,100,000/=*

4. All the matters in the Final Award of the Arbitrator of 15th September 2008 which were not remitted shall continue to hold unchanged as directed.

5. Each party shall bear its own costs in this petition.

On 8/7/2011 the respondent lodged a tabular application for the execution of the decree by way of a Garnishee Order to attach the appellant's bank account. In the Ruling that followed on 24/10/2011, Makaramba, J. among other orders, directed the appellant (as the judgment-debtor), to pay the respondent (as the decree-holder) the arbitral award (totalling Tshs. 1,644,742,782/=) from the revenue of the Kinondoni Municipal Council. It is this Ruling on the arbitral award which prompted the instant appeal before us based on five grounds of complaints.

At the hearing of the appeal the appellant was represented by two learned Principal State Attorneys, Mr. Obadiah Kameya, assisted by Ms. Angela Lushagara. The respondent was represented by Mr. Gregory Lugaila learned advocate. At the very outset, Mr. Kameya explained that it was only yesterday when the conduct of this appeal and the entire record was

transferred from Mr. Eustace Rwebangira, learned advocate, to the Attorney General Chambers. He sought the understanding of the Court regarding the fact that he and Ms. Lushagara have so far had very little time to read the voluminous record of appeal.

But, before we allowed the learned Principal State Attorney to submit and expound on the grounds of appeal, we asked him and later Mr. Lugaila, to address us first on the whereabouts of several Rulings which were shown to have been delivered during the course of proceedings in the High Court, but which were not included in the record of this appeal. These Rulings are alluded to on page 1260 (delivered on 11/5/2012), page 1273 (delivered on 29/11/2012) and on page 1279 (delivered on 13/2/2013).

After looking at the index of all the documents in the record of appeal perusing through a total of 1486 pages divided in two volumes of the record of appeal, Mr. Kameya conceded that the mentioned Rulings were indeed not included in the record of appeal in compliance with the mandatory Rule 96 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Accordingly, the learned Principal State Attorney urged us to strike out the appeal, pointing out that an incomplete record makes the entire appeal incompetently before us.

On his part, Mr. Lugaila agreed as much about the incompleteness of the record by submitting that in so far as the record of this appeal was not accompanied with mentioned Rulings which were duly delivered, the appeal is not sustainable in law and should be struck out.

As the two learned counsel have correctly conceded, with some documents missing from the record, the appeal before us is anything but incompetent. The position of the Court is now well settled on proposition that appellants filing records of appeal in appeals from the High Court in exercise of its original jurisdiction as this appeal is, are obliged to include in the record the primary documents that are specified by Rule 96 (1) of the Rules. In so far as the duty to include Judgments or Rulings is concerned, the relevant Rule 96 (1) (g) states:

> *96 (1)- For the purposes of an appeal from the High Court in its original jurisdiction, **the record of appeal shall, subject to the provisions of sub-rule (3), contain** copies of the following documents–*
>
> ....
>
> *(g) the judgment or order;*
>
> .... [Emphasis Added].

The words "*the record of appeal shall, subject to the provisions of sub-rule (3), contain*" in above Rule 96 (1) of the Rules are couched in mandatory terms. An intending appellant who desires to exclude any mandatory record from the record of appeal must satisfy the conditions set under Rule 96 (3) of the Rules. While considering Rule 89 (1) of the Court of Appeal Rules, 1979 [which is in *pari materia* with Rule 96 (1) of the Rules the Court in NIKO Insurance (T) vs. Joseph O. Kayoma Civil Appeal Number 2 of 2008 (unreported) emphasized that:

> *"Rule 89 (1) (f) of the [1979] Rules is clear that the record of appeal must contain inter alia, all documents tendered in court during trial. The word SHALL is mandatory. So failure to include the document in the record of appeal renders the appeal incompetent."* [Emphasis Added].

In so far as documents specified under Rule 96 (1) are concerned, sub-rule (3) of Rule 96 of the Rules has insisted that it is not for the intending appellant to unilaterally opt on which documents

to include, and which to leave out. The relevant Rule 96 (3) of the Rules states:

> *(3) 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.* [Emphasis added].

In Jaluma General Supplies Ltd vs. STANBIC Bank (T) Ltd, Civil Appeal No. 77 of 2011 (unreported), while determining a preliminary objection predicated on failure to include in the record of appeal of documents referred to under Rule 96(1) (d) and (f) of the Rules, the Court was referred to an earlier decision in **Fedha Fund Limited and two Others v George T. Varghese and Another**, Civil Appeal No. 8 of 2008 (unreported) where the Court restated that:

> *"...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) (now Rule 96(3) of the Court Rules, it is either a Judge or a Registrar of the High*

Court who, on application by a party, has to direct which documents to be excluded from the record of appeal. Since the learned advocate for the appellant did not obtain such leave, it was mandatory for him to file the documents..."

In upshot, having failed to include copies of the Rulings in compliance with Rule 96 (1) (g) of the Rules, the record of this appeal is incompetently before us. This appeal is as a result struck out. Each party shall bear its own costs.

DATED at DAR ES SALAAM this 10th day of August, 2016.

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.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL