IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., LILA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 70 OF 2010

ABUBAKAR ALI HIMID.....APPELLANT

VERSUS

EDWARD NYELUSYE.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Longway, J)

dated 22nd day of May, 2006
in
Land Case No. 42 of 2005

RULING OF THE COURT

22nd June & 28th July, 2017

LILA, J.A.:

Before us for hearing, there are three matters involving the appellant. These are Civil Appeal No. 70 of 2010, Civil Application No. 196 of 2013 and Civil Application No. 240 of 2013. The two applications are intended to move the Court to amend the record of appeal which was filed on 30th September, 2010.

Of the duo applications, Civil Application No 196 of 2013 was the first to be lodged in Court as it was lodged on 15th November 2013. In it, Abubakar

Ali Himid, the applicant, is moving the Court under Rules 10, 48(1), 48(2), 49(1), 106(1) and 111 of the Tanzania Court of Appeal Rules, 2009 (the Rules) to exercise its discretionary powers and grant the following order

> *"(a) An order for enlargement of time to file submission under the provisions of Rule 106(1) of the Tanzania Court of Appeal Rules, 2009 to such time as will be determined by this Honourable Court,*
>
> *(b) An order for enlargement of time to amend the memorandum of appeal under the provision of Rule 111 of the Tanzania Court of Appeal Rules, 2009 to add CONSOLIDATED HOLDINGS CORPORATION, THE 2ND Respondent and MAJEMBE AUCTION MART LTD, THE 3RD Respondent to be parties to Civil Appeal No. 70 of 2010;*
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> *(c) An order adding CONSOLIDATED HOLDING CORPORATION and MAJEMBE AUCTION MART LTD to be parties to Civil Appeal No. 70 of 2010 as 2nd and 3rd Respondents respectively."*

In the second application (Civil Application No. 240 of 2013) which was filed on 31st December, 2013, the same applicant is seeking to move the Court under Rules 10, 48(1), 48(2), 49(1) and 111 of the Rules to grant the following orders:

"(a) An order for enlargement of time to amend the record of appeal under the provisions of Rule 111 of the Tanzania Court of Appeal Rules, 2009 by substituting a properly signed drawn order for the drawn order appearing at pages 170-171 and 291-298 of the record of appeal;

(b) An order for enlargement of time to amend the memorandum of appeal under the provisions of Rule 111 of the Tanzania Court of Appeal Rules, 2009 to specify the nature of the orders which it is proposed to ask the Court to make;

(c) An order for amendment of the record of appeal under the provision of Rule 111 of the Tanzania Court of Appeal Rules, 2009 by substituting a properly signed drawn order for the drawn order appearing at pages 170-171 and 297-298 of the record of appeal.

(d) An order for amendment of the memorandum of appeal under the provisions of Rule 111 of the Tanzania Court of Appeal Rules, 2009 to specify the nature of the orders which it is proposed to ask the Court to make."

It is thus apparent that the aforesaid applications are aimed at improving the record of appeal in Civil Appeal No. 70 of 2010 by effecting the amendments sought. That is to say, in case the prayers sought are

granted and such amendments are effected then the record of appeal will be complete and the appeal will be ready for hearing.

We had the opportunity of thoroughly going through the record of appeal sought to be amended and we found that it contains certain anomalies that cannot be rectified by the amendments sought. That is to say even if the amendments sought are effected the record of appeal will still remain incomplete and therefore liable to be struck out for incompetence. On that account we were inclined to start with the consideration of the competence. The Court, thus, raised *suo motu* the issue whether the record of appeal would be complete even if we allow him amend it. We are saying so because there are missing documents and improper constitution of the record of appeal which may render the record of appeal incompetent. For instance the missing link between the proceedings at pages 171 and 172, 182 and 183 as well as between pages 235 and 236. We also raised the attention of learned counsel of the parties that in between such pages there are materials quite irrelevant which distort the sequence of information in the record of appeal. Such materials inserted in between the above pages, to make things worse, also miss links with the subsequent pages. We

accordingly invited counsel for the parties to address us on that and the inevitable consequences. Following such move by the Court the hearing of the two applications, whose fate depends on the competence of the record of appeal, was adjourned to await the ruling on whether the record of appeal would be competent even after we allow the amendments sought.

Before us Prof. Gamaliel Mgongo Fimbo and Mr. Godwin Muganyizi, learned advocates, advocated for the applicant and respondent, respectively.

In his submissions, Prof. Fimbo was quick to concede that there are missing links in the materials at the pages identified by the Court and also that there are materials that have been misplaced. He, however, was not ready to accept the contention that the said anomalies rendered the record of appeal incompetent. To him such misplacement of documents was innocuous contending that arrangement of documents is a procedural matter which in case of non-compliance should not be used to defeat the ends of justice. To bolster his arguments he referred us to the Court decision in the case of **Lushoto Tea Estates** in which the Court, after verifying in the original record that the judgment was signed, dismissed the objection that the judgment contained in the record of appeal was not signed by the trial

judge and proceeded to hear the appeal. He, however, neither furnished the Court with a copy nor provided sufficient citation. We could not, for that reason, trace it. Based on the above authority, Prof. Fimbo urged the Court to use the original record to hear and determine the appeal.

In the alternative, Prof. Fimbo urged the Court to order the record of appeal be amended within a specified period of time. He contended that by so doing the Court will be able to dispense substantive justice to the parties. He, in support of his argument, referred the Court to the decision in **Cropper v Smith** (1884) 26 Ch. D. 700 (CA) where it was held that the object of the courts is to decide the rights of the parties and not to punish them for the mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights and that courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and amendment is not a favour or grace.

Prof. Fimbo further argued that the current jurisprudence following the insertion of Rule 2 in the Tanzania Court of Appeal Rules, 2009 (the Rules) which was not there in the Court of Appeal Rules of 1979 (the old Rules) is

that the Court has to dispense justice without being too much tied with legal technicalities. To cement his assertion he cited to us the case of **Samson Ngwalida Vs. Commissioner General TRA**, Civil Appeal No. 86 of 2008 in which the Court held that courts have to dispense justice without due regard to procedural rules. He also cited this Court's decision in the case of **Maisha Muchunguzi vs. Saab-Scania Tanzania Branch**, Civil Appeal No. 41 of 1998 (unreported) in which Ramadhan JA, (as then was) stated that the Rules are there for guidance and in certain circumstances, under Rule 2 of the Rules, they can be departed.

In opposition, Mr. Muganyizi contended that the record of appeal is incomplete and as Prof. Fimbo concedes then the same ought to be struck out.

In his short rejoinder, Prof. Fimbo, reiterated his earlier submissions and added that if the respondent had realized that the record of appeal was incomplete he ought to have had prepared and filed a supplementary record of appeal under Rule 99(1) and (2) of the Rules. As the respondent did not do so he could not be heard complaining about the insufficiency of the record of appeal at the stage of hearing, Prof. Fimbo concluded.

We have given due consideration to the arguments by both sides. In all fairness we would have straight away struck out the appeal for being incompetent following concession by Prof. Fimbo to that effect. But, Prof Fimbo urged the Court not to do so and in its stead either hear and determine the appeal basing on the contents of the original record or order the record of appeal be amended. He relied on Rule 2 of the Rules and case law authorities indicated above.

On our part, we are of the considered view that the issue before us for determination is whether this is a fit case for the Court to invoke Rule 2 of the Rules to salvage the present appeal. That Rule provides:-

> ***"In administering these rules, the Court shall have due regards to the need to do substantive justice in the particular case."***

It should be remembered that the above provision is significantly in line with the provisions of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania which provides:-

"107A (2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sharia, mahakama zitafuata kanuni zifuatazo, yaani

(a) Kutenda haki bila kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka."

This can literally be translated thus;

" 107A (2): In delivering decisions in matters of civil and criminal nature in accordance with the laws the court shall observe the following principles, that is to say-

(a) to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice."

The need to observe the Rules in the conduct of cases in our Court has been considered in a number of cases wherein the Court's position was made apparent. We will, for the purpose of this case, cite a few.

The first one is **Zuberi Musa v. Shinyanga** Town Council, Civil Application No. 100 of 2004 (unreported). In this case this Court, in relation to the provisions of Article 107 A (2) (e) and the Rules, stated that:-

> "*.... Article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation.* ***A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice. It recognizes the importance of such rules in the orderly and predictable administration of justice.*** *The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word "unduly" here should only be taken to mean "more than is right or reasonable, excessively or wrongfully.* (Emphasis supplied.)

The second case is that of **China Henan International Corporation Group v. Salvand K.A. Rwegasira,** Civil Reference No. 22 of 2005 (unreported). With certainty, this Court insisted that:-

> *"... In this case, as already indicated, the circumstances are such that we can hardly glean any element of technicalities involved.* ***The role of rules of procedure in the administration of justice is fundamental.*** *As stated by Collins, in Re Coles and Ravenshear (1907) 1 KB 1, rules of procedure are intended to be that of handmaids rather than mistresses. That is, their function is to facilitate the administration of justice..."*
>
> (Emphasis supplied.)

Regarding the need to do substantial justice and observance of the rules of procedure, this Court had this to say in **Ami (Tanzania) Limited v Ottu on behalf of P. L. Assenga and Others,** Civil Application No. 76 of 2002 (unreported):-

"....***Article 107 A (2) (e) of the Constitution does not in any way command that procedural rules should be done away with in order to advance substantial justice.*** *Each case will be considered on its own peculiar facts and circumstances..."* (Emphasis supplied.)

As to whether a party who does not comply with the Rules can seek refuge under Article 107 A (2) (e) or Rules 2 or 4 of the Rules, this Court in **Quality Group Limited v Tanzania Building Agency,** Civil Application No. 120 of 2013 (unreported), categorically stated:-

"... Therefore a party who is under obligation to comply with certain requirements of the law (i.e. in the instant application to effect service "as soon as possible" or within a prescribed period) cannot flout them and expect to rely on Article 107 A (2) (e) or Rules 2 or 4 of the Rules to get his way. Better interests of justice or substantive justice, and the like, cannot be met by violating the very laws and rules that are maidens of justice and the rule of law...."

A similar position was enunciated in the case of **Uledi Hassani Abdallah v Murji Hasnein Mohamed and two Others,** Civil Appeal No. 2 of 2012 (unreported). In that case this Court, in unambiguous terms, stated:-

> *" In our considered view therefore, Art, 107 A (2) (e) or Rule 2 of the Rules do not in any way, command that procedural rules be done away with in order to advance substantive justice. Not at all. Each case must be considered on its own merits..."*

The Court went further to state that:-

> *'It should be, therefore, be noted that better interests or "substantive justice" and the like, cannot be met by violating the very laws and rules that are the maidens of the rule of law.'*

The above legal position was followed in the case of **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd**, Civil Appeal No. 77 of 2011 (unreported).

In view of the above consistent Court decisions it is now settled that rules of procedure need be observed in the orderly and predictable administration of justice. To do otherwise is to invite chaos in the administration of justice.

In the present case the appellant was under obligation to prepare and file a complete record of appeal in terms of Rule 96 (1) of the Rules. That Rule enumerates documents which must be contained in a record of appeal for it to be complete. With the exception of documents directed to be excluded by a Justice or Registrar of the High Court under Rule 96 (3) of the Rules, all other documents should be contained in the record of appeal.

Apart from the above, documents contained in the record of appeal ought to be arranged in the manner stipulated under Rule 96 (4) of the Rules. That Rule states:-

> *"The documents mentioned in sub-rule (1) shall be bound in the order in which they are specified in that sub-rule and documents produced in evidence; shall be put in order of the dates they*

bear or, where they are undated, the dates when they are believed to have been made, without regard to the order in which they were produced in evidence but an affidavit filed in support of a chamber summons or notice of motion shall be bound immediately following the summons or notice, as the case may be".

In the present record of appeal there are missing links between the documents filed as indicated above which is a clear indication that there are missing documents. And, more seriously, there are misplaced documents which makes it difficult for us to follow the sequence of events that happened at the trial court. The documents are haphazardly arranged. Prof. Fimbo conceded to all these anomalies.

With respect to Prof. Fimbo, we have read the cases he referred us but we were unable to find that the Court, in any of those cases, expressly stated that other rules of procedure should be ignored at the expense of Rule 2 of the Rules. In fact, in the case of **Maisha Muchunguzi** (supra) the Court

refused to strike out the appeal for being incompetent on the ground that the presiding judge had not determined the crucial issue. Instead, the Court stated that:-

> *"The appeal has complied with all the rules of this Court. An appeal can only be incompetent if a rule of this Court has been contravened."*

The above observation cemented the need to respect the rules of procedure.

Relying on the authorities above cited, we are therefore not ready to accept Prof. Fimbo's invitation to order that the record of appeal be amended. We are not ready to resort to the use of the original record in hearing the appeal, either. Besides, in hearing appeals the Court consists of three Justices (collegial Court) (see Rules 27 and 28 of the Rules) hence it would be very inconvenient for the Justices to use the original record simultaneously. Such record is reserved for reference by the Court in case of any uncertainty in the contents of the record of appeal.

All said, the record of appeal is incompetent for contravening the requirements of Rules 96 (1) and (4) of the Rules. It is hereby struck out. As the record of appeal sought to be amended is struck out, then the duo applications (Civil Application No. 196 of 2013 and Civil Application No.240 of 2013) now pending in Court miss legs to stand on. We, therefore, strike them out. Since the issue of competence of the appeal was raised by the Court *suo motu* we hereby order each party to bear own costs in both the appeal and applications.

DATED at **DAR ES SALAAM** this 24th day of July, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

G. A.M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL