IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 15 OF 2017

TANZANIA PORT AUTHORITY.....APPELLANT

VERSUS

M/S TRICON INVESTMENT LIMITED.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)

(Mansoor, J.)

dated the 21st day of October, 2016
in
Commercial Case No. 180 of 2013

RULING OF THE COURT

10th & 31st August, 2017

MUSSA, J.A.:

In the High Court of Tanzania (Commercial Division), the respondent successfully sued the appellant for breach of contract. In a judgment and decree that were handed down on the 21st October, 2016 the High Court (Mansoor, J.) ordered thus: -

> *"1. A declaration that the defendant has breached the terms of the contract;*

2. *In lieu of an order of specific performance of the contract, and for the reasons given above, the plaintiff is awarded specific damages of Tshs. 133,632,000 and Tshs. 54,956,160;*
3. *Payments of Tshs. 1,615,109,760 as loss of income occasioned by TPA;*
4. *Costs of the suit;*
5. *TPA counter claim is dismissed with costs."*

Dissatisfied, the appellant presently seeks to impugn the verdict of the High Court in a verbose memorandum which is comprised of fifteen (15) points of grievance. For reasons that will shortly come to light, we need not reflect the details of the points of complaint.

As it turns out, the respondent greeted the appeal with a Notice of preliminary objection which is couched as follows: -

"(a). That the appeal is hopelessly time-barred;
(b). That the appeal is incompetent for failure to comply with Rule 96(5) of the Tanzania Court of Appeal Rules, 2009; and
(c) That the appeal is incompetent for failure to comply with Rule 96(1)(k) of the Tanzania Court of Appeal Rules, 2009."

When the appeal was placed before us for hearing, the appellant entered appearance through Mr. Kilei Mwitasi, learned Senior State Attorney, whereas the respondent had the services of Mr. Gasper Nyika, learned Advocate.

At the commencement of the hearing, Mr. Nyika abandoned the first point of preliminary objection. As regards the second point of preliminary objection, the learned counsel for the respondent was very brief: There is no certification by the appellant as to the correctness of the record of appeal which is a requirement under Rule 96(5) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Mr. Nyika submitted that under the referred Rule the certification requirement is expressed imperatively and, on that account, he urged us to find the record of appeal incomplete for want of the certification.

With respect to the second point of objection, the learned counsel for the respondent referred us to page 463 of the record of the appeal wherein the appellant's answers to the respondent's interrogatories and discoveries are comprised. Mr. Nyika then submitted that, whereas the appellant's answers are as such reflected in the record, the respondent's application

for leave to file the interrogatories and the court's leave are amiss just as the list of the respondent's interrogatories is itself no show. The learned counsel for the respondent urged that the non-inclusion of the referred documents contravenes the imperative requirement of Rule 96(1) (k) of the Rules. In the result, he concluded that this appeal has been rendered incompetent on account of an incomplete record and, thus, he impressed on us to strike it out with costs.

In reply, Mr. Mwitasi hesitated long before he, eventually, conceded that the certification as to the correctness of the record as well as the documents referred to by Mr. Nyika are amiss from the record of appeal. But, even as he did so, the learned Senior State Attorney urged us not to strike out the appeal and, instead, he pleaded with us to allow the appellant to amend the record by putting in place the omitted documents through a supplementary record. Mr. Mwitasi impressed upon us that in addressing the ailment of non-inclusion of relevant documents, the initial approach of the Court should not be to automatically strike out an appeal but to first adjudge whether there are alternative ways of dealing with the shortcoming other than striking out. Such a consideration, he insisted, will augur well with the overriding objective set out under Rule 2 of the Rules

of having at heart due regard to the need to achieve substantive justice in the particular case. To fortify his position, Mr. Mwitasi referred us to the decision of the Court of Appeal of Kenya in **Deepak ChamanlalKamani**and **Another Vs Kenya Anti-Corruption Commission** and **Three Others** [2010] eKLR.

In a brief rejoinder, Mr. Nyika countered that upon numerous decisions of this Court, it is now settled that the omission to include, in the record of appeal, any of the items enumerated under Rule 96(1) of the Rule is fatal and carries the consequence of rendering the particular appeal incompetent. In the premises, the learned counsel for the respondent reiterated his prayer of having the appeal struck out for incompetence with costs.

Having heard counsel from either side, we dispassionately weighed the respective learned rival submissions against the sole issue of contention as to the missing certificate of correctness as well as the documents referred by the learned counsel for the respondent which were apparently put upon record at the hearing but, as it turns out, the same are not included in the record of appeal. Quite aside from the raised

shortcomings, upon our own accord, we intimated to both counsel that the record of appeal is additionally fraught by two ailments, that is: **First**, the judgment of the trial court which is appended at pages 977 to 998 of the record is seemingly incomplete in that the ninth page of the judgment is amiss. **Second**, it is discernible from page 976 of the record that the proceedings of the trial court which were held on the 22nd August, 2016 are not featured in the record of appeal. The shortcomings, so to speak, respectively infringe Rule 96(1) (g) and (d) of the Rules.

Speaking of Rule 96(1) of the Rules, the same imperatively prescribe the documents which must be contained in a record of appeal originating from the High Court or Tribunal in its original jurisdiction. On account of the imperative manner in which the Rule is couched, this Court has insistently ruled, time without number,that the consequence which follows when either of the enumerated documents is left out of the record is that an appeal is rendered incurably defective and can only be struck out. The judicial authorities on that proposition are numerous but, just to cite a few, it was so held in Civil Appeal No. 8 of 2008 – **Fedha Fund** and **Two Others Vs. George Varghese** and **Another;** Civil Appeal No. 77 of 2011 – **Jaluma General Supplies Vs. Stanbic Bank (T) Limited;** Civil

Appeal No. 93 of 2012 – **Dodsal Hydrocarbons** and **Power (T) Limited Vs. Hasmukh Masrani;** and Civil Appeal No. 110 of 2012 – **Jamal Tamim Vs. Felix Mkosamali and Another** – (All unreported).In the referred case of **Dosdal**, the Court made the following observation –

> *"It is significant to note here that the provisions of Rule 96(1)(d) are couched in mandatory terms. Under this Rule, the record of proceedings is a vital document which must mandatorily form part of the record of appeal and omission to include it in the record renders it incompetent."*

Corresponding remarks have been made with respect to the other documents which are enumerated under Rule 96(1) of the Rules. Despite the apparent consistent stance of the Court on this Rule, as we have already intimated, Mr. Mwitasi courageously pleaded with us not to strike out the appeal. As it were, the learned Senior State Attorney urged us to take a leaf from the referred Kenyan decision and allow the appellant to put in place the missing documents by way of a supplementary record. In **Deepak***(supra)*, the Court of Appeal of Kenya made the following observation: -

> *"We think that in the circumstances of this appeal, striking it out would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal. There is an alternative available and, while we refuse to strike out the appeal as requested in the motion, we order, under rule 89(3) of the Courts rules, the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of the two judges left out in the record of appeal."*

With respect, as we shall shortly demonstrate, to us, there is a material distinction between the Court's rules of Kenya and the Rules. More particularly rule 85(2A) of the former, which was referred in **Deepak***(supra),* has a rider which makes specific provision for inclusion of a missing document by way of a supplementary record as follows: -

> *"Where a document referred to in paragraph (a), (b) (e), (ı) or (k) of sub-rule(1) is omitted from the record,* ***the appellant may, with leave of the Court, include the document in a supplementary record filed under rule 89(3).***"
> [Emphasis supplied.]

It is noteworthy that the Rules do not make any corresponding provision for including of a missing document by way of a supplementary record. On the contrary, Rule 99(1) which deals with the preparation and service of a supplementary record only accords such privilege to a respondent thus: -

> *"If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his or her case, he or she may lodge in the appropriate registry, eight copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal."*

In this regard, we need do no more than reiterate the observation which we made in the case of **Jamal Tamim** *(supra)*:-

> *"Supplementary records in Civil Appeals have a specific rule governing them. Rule 99(1) permits only the respondent to lodge supplementary records*

upon satisfying necessary conditions specified there under. We thus decline to grant to the appellant that which the law does not permit"

To say the least, in similar vein, we find ourselves disinclined to leap over the Rules and permit the appellant herein to remedy the missing documents with a supplementary record. That would amount to a distortion of the clear and mandatory requirements of Rule 96(1).

It seems to us that had the appellant exercised a minimum degree of diligence she could have taken the option under Rule 96(6) of the Rules which provides:-

"Where a document referred to in Rule 96(1) and (2) is omitted from the record, the appellant may within 14 days of lodging the record of appeal, without leave, include the document in the record".

The appellant did not take this option and, upon the elapse of the fourteen days, neither did she apply for the requisite leave.To this end, the appellant has herself to blame for the consequences of the omission to

include the referred documents in the record of appeal. Thus, in sum, we entirely subscribe to the preliminary points of object and, accordingly, we so find that this appeal is incompetent on account of an incomplete record. The same is, hereby struck out with costs.

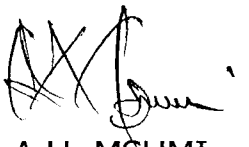
DATED at **DAR ES SALAAM** this 25th day of August, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL