IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CIVIL APPEAL NO. 50 OF 2017

GENERAL MANAGER
AFRICAN BARRICK GOLD MINE LTD.....APPELLANT

VERSUS

CHACHA KIGUHA.....1ST RESPONDENT
NEEMA CHACHA.....2ND RESPONDENT
BHOKE CHACHA (a minor by his next friend
CHACHA KIGUHA).....3RD RESPONDENT
KIGUHA CHACHA (a minor by his next friend
CHACHA KIGUHA) .....4TH RESPONDENT
MOTONGORI CHACHA (a minor by his next friend
NEEMA CHACHA).....5TH RESPONDENT
SURATI CHACHA (a minor by his next friend
NEEMA CHACHA).....6TH RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mlacha, J.)

Dated the 3rd day of August, 2016
in
Civil Case No. 9 of 2013

.....

RULING OF THE COURT

4th & 12th December, 2017.

LUANDA, J. A.:

In the High Court of Tanzania at Mwanza, Chacha Kiguha and five others (the respondents) successfully sued the General Manager of African Barrick Gold Mine Ltd. (the appellant) for damages arising from negligence. It was the case for the respondent at the trial that the appellant failed to

take care when carrying mining activities as a result the respondents suffered pain, respiratory infection and permanent disabilities.

At the end of the trial, as we have said earlier on, the respondents emerged the winners. The appellant is not satisfied with the finding of the trial High Court, he has preferred this appeal.

Somehow, it would appear the respondents separately engaged two advocates to represent them and they did not disclose that information to the advocates concerned so that they could join forces so to speak. We are saying so because on 16/10/2017 Mr. Ndurumah Majembe, learned advocate filed a notice of change of advocate as well as the notice of preliminary objection. Meaning from that day he was the sole advocate representing the respondents. But on 29/11/2017 Mr. Mashaka Fadhili Tuguta from Kabonde and Magoiga Law Firm (Advocates) filed yet another notice of preliminary objection on behalf of the same respondents. Unlike Mr. Majembe, Mr. Tuguta did not file a notice of change of advocate. After a short dialogue in which Mr. Sylveri Byabusha, learned counsel for the appellant also took part the dust settled when Mr. Majembe informed the Court that both advocates were representing the respondents. Following that clarification, we allowed both advocates to represent the respondents.

Mr. Majembe then took the floor and informed the Court that they were dropping the notice of preliminary objection raised on 29/11/2017 the one filed by Mr. Tuguta and remained with that he filed on 16/10/2017. We allowed him to do that. The preliminary points raised by Mr. Majembe read as follows:-

1. *The record of appeal is incomplete for missing all the exhibits tendered in Court during the hearing of the suit contrary to Rule 96 (1) (f) of the Tanzania Court of Appeal Rules, 2009.*
2. *The record of appeal is incomplete for missing copies of the original plaint and original written statement of defence contrary to Rule 96 (1) (c) and (k) of the Tanzania Court of Appeal Rules, 2009.*

Arguing the preliminary points raised, both learned counsel for the respondents submitted to this effect. As regards the missing exhibits in the record of appeal, they said in all there were eight (8) documents which were tendered as exhibits. However, they said though they are shown as exhibits but those documents found in the record were annextures. The real exhibits were not put in the record. This is because, they went on to say, the documents lacked an endorsement as is mandatorily required by O.XIII, Rule 4 (1) of the Civil Procedure Act, Cap. 33 R.E. 2002 (the CPC).

Since the said exhibits are missing in the record of appeal, then that omission infringes Rule 96 (1) (f) of the Court of Appeal Rules, 2009 (the Rules). So, there is non-compliance with the said Rule; it renders the appeal incompetent, they submitted. They referred us to our decisions in the following cases:- **Pendo Masasi vs. Tanzania Breweries Ltd.**, Civil Appeal No. 20 of 2014 (unreported); **Mining Agriculture & Construction Service Ltd. vs. Palemon Construction Ltd,** Civil Appeal No. 79 of 2014 (unreported) and **Mazher Ltd. vs. Wajidah Ramzanali Jiwa Hirji**, Civil Appeal No. 64 of 2010 (unreported) where we said the record of appeal which does not contain one or several documents enumerated under Rule 96 (1) of the Rules will have the effect of rendering an appeal incompetent.

Turning to non-inclusion of original amended plaint and written statement of defence, the advocates for the respondents submitted that the said documents are missing in the record. This, they said infringes Rule 96 (1) (c) of the Rules. Like in the first point it makes the appeal incompetent. The appeal is liable to be struck out with costs, they concluded.

Responding, Mr. Byabusha said Rule 96 (1) (c) and (f) of the Rules, were complied with. As to the missing exhibits Mr. Byabusha said he is the one who marked annextures to read exhibits. He went on to say Court exhibits are those in the court record. In any case he said the phase "all documents put in evidence" do not refers to exhibits. If that was the intention, then the said Rule should have stated in very clear words.

Turning to the missing of original plaint and written statement of defence, Mr. Byabusha said those documents have no bearing with the appeal in question. Clarifying he said the decision of the judge did not depend on them. He referred us to our decision in the case of **Sylvia Albert vs. Adam Moshi,** Civil Appeal No. 76 of 2014 (unreported).

After Mr. Byabusha had replied to the objection raised, he informed the Court that the preliminary objection was not properly raised by citing the law properly. To amplify, he said they did not cite the Government Notice concerned as per the requirement of sections 20 (1) and 37 (1) of the Interpretation of Laws Act, Cap. 1 R.E. 2002 (the Act).

In rejoinder, the advocates for the respondents in respect of exhibits said Mr. Byabusha did not dispute that he was the one who marked the annextures as exhibits. Those annextures were not put in evidence and so

they do not form part of the record as per O. XIII, Rule 7 (1) of the CPC. As regards the preliminary objection to have not been properly raised for not citing the law properly, the advocates for the respondents said section 20 (1) of the Act was not infringed as the same provision permits short title. In this case the Rules are referred to as "Tanzania Court of Appeal Rules, 2009" as per Rule 1 (1) of the Rules. Last but not least, is about section 37 (1) of the Act. They said it talks about gazetting and not the law applicable.

We wish to start with section 20 (1) and then section 37 (1) of the Act. Section 20 (1) of the Act reads as follows:-

> *"**20.-(1)** Where a written law is referred to, it shall be sufficient **for all purposes to cite or refer to that written law by-***
>
> *(a) the **short title or the citation** (if any) by which it was made citable;*
>
> *(b) in the case of an Act, the year in which it was passed and its number among the Acts of that year; or*

(c) in the case of an Act, the Chapter number given to the Act in any revised edition of the laws."

[Emphasis Ours].

The section permits the use of a short title. According to Rule 1 (1) of the Rules, the Rules of this Court are cited "Tanzania Court of Appeal Rules, 2009." And the preliminary objection cited Rule 107 (1) of the Rules as the Rule in which objection was taken. Indeed that is the Rule in which objections are taken. The citation is proper. Section 37 (1) of the Act reads:-

*"**37.-(1)** Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall, unless the contrary intention appears-*

(a) be published in the Gazette;

(b) subject to subsection (2) and to section 39, come into operation on the day of publication, or where another day is specified or provided for in the subsidiary legislation, on that day."

This section talks about publication in the Gazette. If Mr. Byabusha intended to know the date on which they were published, the Court of Appeal Rules, 2009 were published on 29/01/2010 vide GN 36 of 2010. The complaints raised by Mr. Byabusha therefore are devoid of merits.

We now turn to the preliminary points raised. We prefer to start with the 2nd point.

It is in the record of appeal that at some stage, the original plaint was amended and so was the written statement of defence. Once amendment is effected then the portion which is left out is of no use. In other words the moment an amendment version is affected its impact is that the earlier document filed ceases to exist. It is not proper, therefore, to keep on making reference to such non-existence document. In our case the High Court did not make any reference to the original plaint and written statement of defence in arriving at the decision. Those documents have no bearing with the decision of the High Court.

In the case of **Sylvia Albert vs. Adam Moshi**, Civil Appeal No. 76 of 2014 (unreported) the Court said the following, the quote:-

> *"We must, however, add a rider here. If the omission is to have any effect on the appeal, the*

documents or proceedings must ***have a bearing with those that have generated the appeal in question.***"

[Emphasis ours].

In the case of **Morogoro Hunting Safaris Ltd. vs. Halima Mohamed Mamuya**, Civil Appeal No. 117 of 2011 (unreported) the appellant wished to rely on a 1st written statement of defence which carried a counter claim which was later amended and the counter claim was not included in the 2nd written statement of defence. The Court said *inter alia*, we quote:-

"*... upon filing the second amended WSD on 21.7.2007, all the previous WSD, including the first amended WSD of 1.9.2006 which carried the counter claim, ceased to have any effect as they were as good as if they never existed. See the case of* ***Tanga Hardware & Auto Parts Ltd. and Six Others vs. CRDB Bank Ltd.****, Civil Application No. 144 of 2005, CAT (unreported) which relied on the persuasive case of* ***Warner vs. Sampson & Another*** *[1958] 1QB 297.*"

In **Warner case** the Queen's Bench held, *inter alia* that:-

> *"...once pleadings are amended, that which stood before amendment is no longer material before the Court."*

In this case, we have seen the original plaint as well as the written statement of defence were amended and their place were taken by the amended versions. Further, the High Court did not take on board the original plaint and written statement, and rightly so, in arriving at the decision. The said documents, therefore, cannot form part and parcel of the record of appeal. We agree with Mr. Byabusha that those documents are outside the purview of Rule 96 (1) (c) of the Rules. The 2nd point of objection has no merit. The same is dismissed.

We now turn to the 1st point of objection. Mr. Byabusha himself said that he was the one who marked the annextures to read exhibits. Is the course taken by Mr. Byabusha sanctioned by law? Rule 96 (1) (f) of the Rules is clear that the record of appeal for purpose of an appeal, must contain among other documents "all documents put in evidence". It seems to us beyond argument that that phrase in their ordinary meaning refers to documents tendered or admitted as exhibits. In order for such documents

to qualify to be an exhibit it must be admitted first and then endorsed as per requirement of O.XIII R4 (1) of the CPC as correctly pointed out by the advocates for the respondents. Thereafter in terms of O.XIII, R. 7 (1) of the CPC the document forms part of the record of the trial court. Rule 7 (1) of O.XIII of the CPC reads as follows:-

> *"7 (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit."*

The need for endorsement was emphasized in the case of **A.A.R. Insurance (T) Ltd. vs. Beatus Kisusi**, Civil Appeal No. 67 of 2015 (unreported). We said:-

> *"And we think the need to endorse is to do away with tempering with admitted documentary exhibits."*

In our case, the exhibits were properly tendered. But the same were not embodied in the record of appeal. Instead, annextures were marked as exhibits and were included in the record of appeal. Those document were not exhibits; they were not "documents put in evidence." It follows

therefore that the record of appeal infringes Rule 96 (1) (f) of the Rules. The record of appeal does not contain exhibits. The omission by the appellant to put on the record of appeal the aforestated exhibits renders the appeal incompetent (See **Pendo case**, **Mazher case** cited *supra*). The objection raised has merit. The appeal is struck out with costs.

It is so ordered.

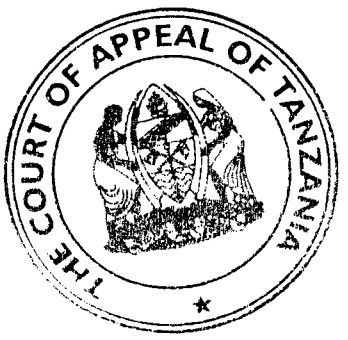
DATED at **MWANZA** this 12th day of December, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL