IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 64 OF 2010

MAZHER LIMITED.....APPELLANT

VERSUS

WAJIDALI RAMZANALI JIWA HIRJI.....RESPONDENT

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

(Kimaro, J.)

dated the 26th day of May, 2004

in

Commercial Case No. 89 of 2002

RULING OF THE COURT

7th & 21st February, 2017

MUSSA, J.A.:

In the High Court of Tanzania (Commercial Division), the appellant, a limited liability company, instituted Commercial Case No. 89 of 2002 against the respondent and another over registered premises on plot No. 486 which are situated at Upanga area Dar es Salaam.

During the pendency of the suit, the appellant instituted several ancillary applications which were heard and determined by the trial Court. More particularly, the application giving rise to this appeal was lodged on 4th March, 2004 through which the appellant sought a litany of injunctive orders

against the respondent. At the height of the hearing on the 26th May, 2004 the High Court (Kimaro, J., as she then was,) dismissed the application on account that the trial Court had previously determined the matter and was, therefore, *functus officio*.

The appellant was aggrieved and she initially lodged Civil Appeal No. 160 of 2004 which was, however, struck out by this Court (Rutakangwa, J.A., Mjasiri, J.A., and Mandia, J.A.) on the 9th March, 2010 for not being accompanied with the impugned drawn order. To remedy the shortcoming, on the 17th May, 2010 the appellant instituted an application before the trial court seeking extension of time within which to lodge a fresh Notice of Appeal to this Court. A little later, on the 31st July, 2010 she wrote the trial court requesting to be furnished with a copy of the drawn order. As to whether or not the application for extension of time was heard and determined by the High Court is anybody's guess much as neither the High Court proceedings nor its decision, if there was any, are annexed to the record of appeal.

Be what may have happened to the application for extension of time before the High Court, it is upon record that the appellant actually lodged a

fresh Notice of Appeal on the 17th June, 2010 and she, eventually, filed the memorandum and record of appeal on the 20th August, 2010.

Thus, against the foregoing backdrop, the appellant seeks to impugn the referred Ruling of the High Court in a verbose memorandum of appeal which is comprised of thirty seven (37) points of grievance. Nonetheless, for reasons that will shortly come to light, we need not reflect on the grounds of appeal. Suffice it to say that the respondent confronts the appeal with a Notice of preliminary points of objections which is couched thus:-

> *"1. In terms of Rule 90(1) of the Tanzania Court of Appeal Rules, 2009 this appeal is hopelessly time barred.*
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> *2. The record of Appeal lacks important documents such as Ruling and Drawn Order in respect of chamber summons for extension of time to file Notice of appeal found at page 290 of the record and hence in violation of Rule 96(1) of the Tanzania Court of Appeal Rules, 2009.*

3. *The Chamber summons and affidavit (which start from page 179 of the record of appeal) which this Appeal is intended to challenge its Ruling (sic) are defective for containing arguments opinion etc."*

At the hearing before us, the appellant entered appearance through Mr. Stemius Salvatory, a Principal Officer of the Company who was specifically appointed to represent the appellant in this matter by a resolution of the Board of Directors. It is noteworthy that such mode of entering appearance before this Court is sanctioned by Rule 30(3) of the Tanzania Court of Appeal Rules, 2009 hereinafter simply referred as "the Rules.". On the adversary side, the respondent had the services of Mr. Bernard Shirima, learned Advocate

To begin with, the learned counsel for the respondent abandoned the third preliminary point of objection. As regards the first preliminary point of objection, Mr. Shirima reminded us that the decision which is desired to be impugned was handed down on the 26th May, 2004. He submitted further that it is not apparent upon the record of appeal that the appellant obtained the requisite extension of time before lodging the memorandum and record

of appeal. In the circumstances and, going by the date of delivery of the decision which is desired to be impugned, he concluded, the appeal is hopelessly out of time.

Coming to the second preliminary point of objection, the learned counsel for the respondent urged that if the appellant obtained the requisite extension, it was imperative upon her to put upon the record of appeal the proceedings, Ruling and drawn order of the High Court as required by Rule 96(1) of the Rules. Mr. Shirima submitted that an account of the fact that the appellant omitted to put upon record the referred documents, the record of appeal is incomplete and, as a result, the appeal has been rendered incompetent.

In rebuttal, Mr. Salvatory contended that the requisite extension of time was, infact, obtained from the High Court ahead of lodging the memorandum and record of appeal. He, however, submitted that the non-inclusion of the proceedings, Ruling and drawn order of the High Court with respect to extension of time is a mishap which results from the fact that the record of appeal was compiled by a lay person. On that score, Mr. Salvatory urged us to pay homage to article 107A (2) (e) of the Constitution and allow the appellant to cure the shortcoming with a supplementary record.

For our part, we have given due consideration to the rival learned submissions from both counsel. We propose to first address the second preliminary point of objection which raises the issue of incompleteness of the record of appeal. To begin with, it is beyond question that the proceedings, Ruling and drawn order of the High Court with respect to the appellant's application for extension of time are not included in the record of appeal. Mr. Salvatory concedes that much and the only issue for our consideration is as to the consequences of the non-inclusion. In this regard, Rule 96(1) of the Rules clearly stipulates:-

> *" 96. – (1) For the purposes 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:-*
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> *a) an index of all the documents in the record with the numbers of the pages at which they appear'*
>
> *b) a statement showing the address for service furnished by the respondent and, as regards any respondent who has furnished an address for service*

as required by Rule 86, his last known address and proof of service on him of the notice of appeal;

c) the pleadings;

d) the record of proceedings;

e) the transcript of any shorthand notes taken at the trial;

f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, their certified translation;

g) the judgment or ruling;

h) the decree or order;

i) the order, if any giving leave to appeal;

j) the notice of appeal; and

k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant,

Save that the copies referred to in paragraph (d), (e) and (f) shall exclude copies of any documents

or any of their parts that are not relevant to the matters in controversy on the appeal."

It is discernible from paragraphs (d) and (h) of the extracted Rule that copies of ancillary proceedings as well as the resultant Ruling and drawn order must be contained in the record of appeal. Upon numerous decisions, this Court has held that compliance with Rules 96(1) and (2) constitutes a condition precedent to the propriety of the record of appeal at the time of lodging the same. This has, consistently, been taken to mean that the omission to include in the record of appeal, copies of documents enumerated under Rule 96(1) or (2) is fatal and renders the appeal incompetent. In similar vein, the Court has insistently held that it is not upon a party to decide which of the enumerated documents are relevant and qualify to the proviso of the Rule; rather, if a party is in doubt as to what to exclude from the record, he/she should apply for directions from a Justice or Registrar of the High Court in terms of Rule 96(3) of the Rules (see the unreported decisions of the Court in Civil Appeal No. 8 of 2008 – **Fedha Fund Ltd Vs George Varghese and Another;** Civil Appeal No. 34 of 2010 – **Jaluma General Supplies Ltd Vs Stanbic Bank Ltd** and Civil Appeal No. 11o of 2012 – **Jamal Tamim Vs Felix Mkosamali and Another).**

As hinted upon, Mr. Salvatory contended that the non-inclusion of the documents is a mere technicality that may be cured by a supplementary record. In this regard, he sought reliance in the provisions of Article 107(A) (2) (e) of the Constitution which reads in Kiswahili thus:-

> *" (2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama zitafuata kanuni zifuatazo, yaani:*
> *a) .....*
> *b) .....*
> *c) .....*
> *d) .....*
> *e) Kutenda haki* ***bila kufungwa kupita kiasi na masharti ya kiufundi*** *yanayooweza kukwamisha haki kutendeka."*
>
> [Emphasis supplied]

Rendered in English, the Article enjoines courts to administer justice according to law without being unduly constrained by technical requirements which may operate as a hindrance to justice.

With respect to Mr. Salvatory, while we reaffirm the maxim that the rules of procedure are intended to be handmaids rather than mistresses of justice, but as was observed in the unreported Civil Application No. 3 of 2003 – **The Registered Trustees of Joy in the Harvest Vs Hamza Sungura**, Article 107A(2) (e) of the Constitution is not meant to thwart all rules of

procedure in the administration of justice in the country. As to what the Article stands for, another unreported decision in Civil Application No. 100 of 2004 – **Zuberi Mussa Vs. Shinyanga Town Council** is instructive

> *"... A purposive interpretation makes plain that it should be taken as guidelines 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 recognises the importance of such rules in the orderly and predicable 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 /technical requirements."*

Again, with respect to the appellant's legal representative, there is more to the non-inclusion of the documents than a mere technical nicety. As already intimated, on a parity of authorities, the omission to put upon record the documents enumerated under Rule 96(1) dents the propriety of the record and, for that matter, goes to the root of the appeal itself.

Furthermore, as already seen, once the record of appeal is adjudged incomplete, the appeal itself is rendered incompetent and it is so rendered irrespective of the fact that the record of appeal was compiled by a lay person.

We need not decide this matter more than is necessary for its disposal and having found that the appeal is incompetent on account of an incomplete record, we refrain from reflecting on the merits of the first preliminary point of objection. Thus, in fine, the appeal is struck out with costs. Order accordingly.

DATED at **DAR ES SALAAM** this 15th day of February, 2017

B.M. LUANDA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL