

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MJASIRI, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 87 OF 2015

**BARCLAYS BANK TANZANIA LIMITED APPELLANT
VERSUS
TANZANIA PHARMACEUTICAL INDUSTRIES LIMITED FIRST RESPONDENT
RAMADHANI MADABIDA..... SECOND RESPONDENT
SALUM SHAMTE THIRD RESPONDENT
ZARINA MADABIDA FOURTH RESPONDENT**

**(Appeal from the ruling of the High Court of Tanzania, Commercial Division at
Dar Es Salaam)**

**(Nchimbi, J.)
dated 2nd day of June 2014
in
Commercial Case No. 147 of 2012**

RULING OF THE COURT

1st August & 19th October 2017

NDIKA J.A.:

This appeal originates from Commercial Case No. 147 of 2012 that the appellant instituted against the respondents before the High Court, Commercial Division at Dar Es Salaam. The appellant's claim was essentially for recovery of loaned funds in respect of several credit facilities it availed to the first respondent whose repayment was guaranteed by the second, third and fourth respondents. As it turned out, the suit did not go through trial as

the High Court (Nchimbi, J.) dismissed it with costs on 2nd June 2014 on the ground that the appellant failed to prosecute its case when it came up for hearing on 14th May 2014. The Court took the view that the appellant's failure to comply with the mandatory provisions of rules 48 and 49 of the High Court (Commercial Division) Procedure Rules, 2012 to file witness statements as evidence in chief in support of its claim within seven days of completion of mediation amounted to want of prosecution. Aggrieved, the appellant now challenges the said dismissal.

At the hearing of the appeal, the Court had to deal, at first, with a preliminary objection taken at the instance of Mr. Dennis Michael Msafiri, learned Counsel for the respondents, notice of which was given earlier in line with the provisions of rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). The said preliminary objection is grounded on four points as follows:

*"1. That the purported appeal is misconceived in that the order dismissing the suit for default to prosecute is not appealable in terms of the provisions of sections 74, 75 and Order XL of the Civil Procedure Code and as such the order did not constitute a decree in view of the provisions of section 3 of the Civil Procedure [CAP 33 R.E. 2002] as held in the case of **Tanzania Electric Supply Company Limited v Interbest***

Investment Company Limited, Civil Appeal No. 43 of 2012 (unreported).

2. That the Certificate of Delay at page 909 of the Record of Appeal is incorrect, improper and erroneously certified consequently the appeal is time-barred and liable to be dismissed with costs. See **D.T. Dobie & Co. (T) Ltd. v N.B. Mwatebele** [1992] TLR 152 at page 154D; **National Social Security Fund v New Kilimanjaro Bazaar Limited** [2005] TLR 160 and **Kantibhai M. Patel v Dahyabhai F. Mistry** [2003] TLR 437.

3. That the appeal is incompetent for contravening the mandatory provisions of Rule 96 (1) (d), (h) and (k) of the Tanzania Court of Appeal Rules, 2009 as its record does not contain copies of the proceedings of the application for leave to appeal in Miscellaneous Civil Application No. 142 of 2014 and proceedings transcribed from electronic recording made on 14.05.2014 during the hearing of Commercial Case No. 147 of 2012 and drawn order sought to be appealed against and for non-compliance with Rule 96 (3) and 96 (6) of the Rules. See the case of **Mining Agriculture & Construction Service Ltd v Palemon Construction Limited**, Civil Appeal No. 79 of 2014 (unreported).

4. That the appeal is incompetent as the order granting leave was improperly (sic) as it contravened the mandatory provisions of Rule 46 (1) of the Tanzania Court of Appeal Rules, 2009 in that the chamber summons was filed

*contemporaneously with the Appellant's Notice of Appeal instead of being made after lodging a notice of appeal. See **Selemani Seif v Yahaya Delo and Fred Gedy**, Civil Application No. 6 of 2015 (unreported) and **Aloyce Mselle v Consolidated Holding Corporation**, Civil Appeal No. 11 of 2002 (unreported)."*

Before us, Mr. Msafiri canvassed all the four points of preliminary objection seriatim. Nonetheless, we find it convenient to deal, at first, with the third point, which, as reproduced above, contends in effect that the appeal is incompetent due to the incompleteness of the record of appeal.

It was Mr. Msafiri's argument on the third point of objection that the appeal was incompetent because the record of appeal that instituted the appeal was non-compliant with the provisions of rule 96 (1) (d), (h) and (k) of the Rules. He elaborated that the said record was deficient due to its omission of three mandatory documents: first, a copy of the proceedings of the High Court in respect of the application for leave to appeal to this Court in Miscellaneous Civil Application No. 142 of 2014; secondly, a copy of the proceedings transcribed from electronic recording made on 14.05.2014 during the hearing of the main suit between the parties (i.e., Commercial Case No. 147 of 2012); and finally, a copy of the drawn order dated 2nd June 2014 sought to be appealed against.

While acknowledging that the record of appeal contains the chamber summons, ruling and drawn order of the High Court granting leave to appeal, Mr. Msafiri maintained that the proceedings in respect of that application for leave were omitted. As regards the proceedings on the main suit, he contended that the record of appeal does not include the electronically recorded proceedings of the High Court dated 14th May 2014. It was his view that the proceedings appearing from page 900 onwards of the record of appeal, recorded by the trial Judge (Nchimbi, J.), constituted only a part, not the whole, of the proceedings. He further argued that the record of appeal contains no drawn order that dismissed the appellant's suit on 2nd June 2014, from which the present appeal arises. Although he acknowledged that the record contains, at pages 717 and 718, a copy of the purported decree of the Court dated 2nd June 2014, it was his view that the appellant ought to have included a copy of the drawn order, not a copy of a decree, because the High Court's dismissal of the suit by its ruling of 2nd June 2014 for want of prosecution did not amount to a decree but an order. Counsel cited the unreported decisions of this Court in **Tanzania Electric Supply Company Limited v Interbest Investment Company Limited**, Civil Appeal No. 43 of 2012 and **CRDB Bank Limited v George M. Kilindu and Another**, Civil

Appeal No. 137 of 2008 to support his conclusion that the appeal was incompetent due to the incompleteness of the record of appeal.

On his part, Mr. Dilip Kesaria, learned Counsel for the appellant, denied that the record of appeal was incomplete. He contended that the omitted proceedings in Miscellaneous Civil Application No. 142 of 2014 are not mandatory because they do not have any bearing on the main suit but the subsequent application for leave to appeal. It was, therefore, his view that the omitted document of proceedings was irrelevant to the matters in controversy and that it was unnecessary for the proper determination of the present appeal. As regards the proceedings dated 14th May 2014 in respect of the main suit (i.e., Commercial Case No. 147 of 2012), he said that the said proceedings were not omitted but was part of the record of appeal as shown between pages 688 and 708 of the record. He finally maintained that the order of the High Court dismissing the suit is shown at pages 717 and 718 of the record.

Rejoining, Mr. Msafiri emphasized that under rule 96 (1) (d) of the Rules, the appellant was required to file all the proceedings including those in respect of the application for leave to appeal. He said that it was not open to the appellant to choose which proceedings to file.

Before determining the points of controversy in the light of the learned submissions of the parties, we find it necessary to examine the relevant provisions of rule 96 of the Rules, which stipulate as follows:

*"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:*

(a) [Omitted]

(b) [Omitted]

(c) [Omitted]

*(d) **the record of proceedings;***

(e) [Omitted]

(f) [Omitted]

(g) [Omitted]

*(h) **the decree or order;***

(i) [Omitted]

(j) [Omitted]

*(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 paragraphs (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.

(2) [Omitted]

(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.

(4) [Omitted]

(5) [Omitted]

(6) ***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.***”[Emphasis added]

As interpreted in numerous decisions of this Court, all documents mentioned under rule 96 (1) are primary or core documents that must be included in the record of appeal in case of a first appeal to this Court. (See, for instance, the unreported decision in **Said Salim Bakhresa & Co. Ltd v**

Agro Processing and Allied Products Ltd and Another, Civil Appeal No. 51 of 2011. See also **Robert Edward Hawkins And Another v Patrice P. Mwaigomole** Civil Application No. 109 of 2007 (unreported); and **Haruna Mpangaos and 902 Others v Tanzania Portland Cement Co Ltd**, Civil Appeal No. 10 of 2007 (unreported) referred to in **Said Salim Bakhresa & Co. Ltd** (supra)). An omission of any part of a primary or core document renders the appeal incurably defective and therefore incompetent: (See, for instance, **Said Salim Bakhresa & Co. Ltd** (supra), **Jaluma General Supplies Ltd v Stanbic Bank (T) Ltd**, Civil Appeal No. 34 of 2010 (both unreported); **Fedha Fund Limited and Others v George T. Varghese and Another**, Civil Appeal No. 8 of 2008; and **Dodsal Hydrocarbons and Power Tanzania Limited PVT and Two Others v Hasmuki Bhagwanji Masran**, Civil Appeal No. 93 of 2012). It has further been held that it is not upon a party filing the record of appeal to decide which of the primary or core documents are relevant for determination of the appeal and that if that party is in doubt as to what documents or parts of the document to exclude from a record, he or she should apply to a Justice or Registrar of the High Court or Tribunal under rule 96 (3) for a direction in that regard. (See **Said Salim Bakhresa & Co. Ltd** (supra), **Jaluma General Supplies Ltd** (supra), and **Fedha Fund Limited and Others** (supra)). Alternatively, a

party, having filed a record of appeal, could act under the provisions of rule 96 (6) of the Rules by filing, without leave, the omitted documents within fourteen days of lodging the record of appeal.

In the light of the above position of the law, we are enjoined to determine whether the record of appeal lodged by the appellant is complete in terms of the requirements of rule 96 (1) of the Rules.

As already indicated, it is the respondents' argument, which is contested by the appellant, that the record of appeal is deficient for omitting three documents: first, a copy of the proceedings of the High Court in respect of the application for leave to appeal to this Court in Miscellaneous Civil Application No. 142 of 2014; secondly, a copy of the proceedings transcribed from electronic recording made on 14.05.2014 during the hearing of the main suit between the parties (i.e., Commercial Case No. 147 of 2012); and finally, a copy of the drawn order dated 2nd June 2014 sought to be appealed against.

When addressing the Court regarding the first document, Mr. Kesaria admitted that the said document was missing but claimed that it was irrelevant to the matters in controversy and that it was unnecessary for the proper determination of the appeal. With respect, we disagree with him. We

are of the view that the aforesaid proceedings in the application for leave to appeal to this Court are relevant because they have a bearing on the competence of the present appeal, which could only lie upon leave being sought and obtained according to the law. More importantly, what matters is not whether the appellant considered the said document of proceedings relevant or necessary for the determination of the appeal. For the appellant had no right to decide to exclude the proceedings in the application for leave to appeal. If it was in doubt as to what documents or parts of the document to exclude from a record, it should have applied to a Justice or Registrar of the High Court under rule 96 (3) of the Rules for a direction in that regard. We find it instructive to recall what we stated in **Said Salim Bakhresa & Co. Ltd** (supra) that the decision of the Court in an application under rule 96 (3):

"could best be made upon full arguments from the parties. The rationale is that, now that since the said documents are not before this Court it is difficult for this Court, to decide whether or not they are relevant. Besides, it is only fair that both parties should be called upon to decide as to which document are necessary or relevant, because as it is clear in the present

proceedings, what may be irrelevant to one party, may be relevant to the other, and even to the Court.”

It is upon the foregoing reasoning that we find that the record of appeal is incomplete for the omission of the proceedings in respect of the application for leave to appeal to this Court (Miscellaneous Civil Application No. 142 of 2014). That infraction is a violation of rule 96 (1) (d) of the Rules.

As regards the second document alleged to have been omitted in the record of appeal, which is a copy of the proceedings transcribed from electronic recording made on 14.05.2014 during the hearing of the main suit between the parties (i.e., Commercial Case No. 147 of 2012), we wish to express at once that we agree with Mr. Kesaria that the said document is part of the record of appeal. As rightly stated by Mr. Kesaria, the said document appears from pages 688 to 708 of the record. We thus reject the appellant's complaint in this regard.

As already indicated, the final document alleged to be omitted from the record of appeal is the order which ought to have been extracted from the ruling of the High Court that dismissed the appellant's suit on 2nd June 2014, from which the present appeal arises. Mr. Kesaria denied that allegation, claiming that the said document was part of the record of appeal. In this regard, he referred the Court to pages 717 and 718 of the record. But what

we find in that part of the record is not a copy of the drawn order but a copy of a purported decree of the High Court dated 2nd June 2014 stating in its operative part that when the said suit came up for final disposal on 2nd June 2014 “before Hon. G. Herbert, Deputy Registrar, in the presence of Mr. Kamala, Advocate for the Plaintiffs and Mr. Polycarp, Advocate for the Defendants”, it was “dismissed with costs, for want of prosecution.” We agree with Mr. Msafiri that the High Court’s dismissal of the suit by its ruling of 2nd June 2014 for want of prosecution did not amount to or result into a decree but an order. For in terms of section 3 of the Civil Procedure Code Act, Cap. 20 RE 2002 a decree is the formal expression of an adjudication that conclusively determines the rights and obligations of the parties but it does not include, *inter alia*, any order of dismissal of a suit for default. On this reasoning, we are of the view that what the appellant included in the record of appeal labeled as “Decree” was, without doubt, a wrong document. By doing so, the appellant wrongly excluded from the record of appeal a copy of the order of the High Court extracted from the ruling rendered on 2nd June 2014 from which this appeal has arisen. That sorry state of affairs amounts to a clear violation of rule 96 (1) (h) of the Rules and we so hold.

We are mindful that rule 90 (1) of the Rules provides that an appeal is instituted by lodging in the appropriate registry the record of appeal, among

other documents. As we have held that the record of appeal by which this appeal was instituted is defective on account of its incompleteness in violation of rule 96 (1) (d) and (h) of the Rules, we find that the appeal is incompetent.

As our above determination is sufficient to dispose of this matter, we do not think it is necessary beyond academic posturing to deal with the rest of the points of preliminary objection.

The appeal is accordingly struck out with costs due to its incompetence.


DATED at DAR ES SALAAM this 17th day of October 2017.

S. MJASIRI
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL