IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MMILLA, J.A., MWANGESI, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 140 OF 2016

ONAUKIRO ANANDUMI ULOMI ..... APPELLANT

VERSUS

1. **STANDARD OIL COMPANY LIMITED**
2. **BANK OF AFRICA TANZNAIA LIMITED** ..... **RESPONDENTS**
3. **MABUNDA AUCTIONEER MART CO. LTD**
4. **MANINGO MUNGA LAIZER**

(Appeal from the judgment and decree of the High Court of the United Republic of Tanzania at Arusha)
(Massengi J.)

dated the 13th day of July, 2016
in
Land Case No. 85 of 2014

RULING OF THE COURT

26th Sept & 4th October, 2018

MWANGESI, J.A.:

The appellant herein was the plaintiff in Civil Case No. 85 of 2014 in the High Court of Tanzania at Arusha wherein, he contended that the respondents had trespassed onto his landed property comprised on Plot No. 222 Block 'DD' Sakina Area within the City of Arusha. In the judgment that was handed down by the learned trial Judge on the 13th day of July, 2016, it was adjudged in his disfavor, whereby it was held that, the landed property on the said plot of land, was legally sold to the fourth respondent.

The appellant felt aggrieved by the decision of the trial Court and hence, preferred this appeal to the Court premised on ten grounds of appeal namely:

1. *That, the Hon. trial court erred in law and facts in holding that there was proper notice issued to the plaintiff/appellant under article 13.0 of the mortgage Deed (exhibit PE-2)*

2. *That, the Hon. Judge erred in law in disregarding section 110 (1) of the Land Registration Act, Cap 334 R.E 2002.*

3. *That, the Hon. trial court erred in law in disregarding section 127 (1), (2) and (3) of the Land Act, 1999 (as amended).*

4. *That, the Hon. trial court erred in law and facts on relying on exhibit DE- 1 that was ineffective against the appellant.*

5. *That, the Hon, trial court erred in law and facts in disregarding the decision of the Court of Appeal of Tanzania in the case of* ***National Bank of Commerce Vs Walter T. CZURN*** *(1998) TLR 380.*

6. *That, the Hon. trial court erred in law and facts in holding that there was proof that the second defendant/respondent did demand the loan amount from the first respondent.*

7. *That, the Hon. trial court erred in law and facts in holding that the suit land Plot No. 222 Block 'D' Sakina Area Arusha, was transferred to the fourth respondent lawfully.*

8. *That, the Hon. trial court erred in law and fact for failure to properly evaluate the evidence on record.*

9. *That, the Hon. trial court erred in law in failing to enter default judgment against the second and third respondents.*

10. *That, the Hon. trial court erred in law and fact in granting costs to the respondents.*

The appeal by the appellant was confronted with a preliminary objection, which was lodged by the fourth respondent in terms of the provision of Rule 107 (1)

of the Court of Appeal Rules, 2009, (**the Rules)**, on the 10th day of September, 2018, premised on two points of law which read:

> ***One;*** *that the appeal is hopelessly time barred as the certificate of delay at page 388 of the record of appeal, is misleading and problematic, thus incurably defective.*
>
> ***Two;*** *that the appeal is incompetent and bad in law as it is supported by incomplete and erroneous record of appeal and thus offending the provisions of Rule 96 (1) of the Court of Appeal Rules, 2009.*

At the hearing of the appeal before us on the 26th September, 2018, Mr. Meinrad M. D'Souza learned counsel, entered appearance for the appellant, whereas the first respondent, had the services of Mr. Adam Jabir, also learned counsel. The fourth respondent was represented by Mr. Salim Mushi, learned counsel, who also held brief for Mr. Joseph Nuwamanya, learned counsel, for the second and third respondents.

In compliance with the common practice of the Court, we had to dispose of the preliminary point of objection which had been raised, before we could embark on the main appeal. In that regard, we invited the learned counsel for the fourth respondent, to address us on the preliminary points of objection, which he raised.

Starting with the first point, Mr. Mushi submitted that the appeal is time barred for the reason that, the certificate of delay which was issued by the Deputy Registrar in terms of Rule 90 (1) of **the Rules,** on the 1st December, 2016, reflected at page 388 of the record of appeal, is misleading and problematic. Clarifying the point, he argued that the 86 days indicated in the certificate to have been used in the preparation of the proceedings and hence to be excluded in computing the limitation period is vague. There has been no explanation as to how the said figure was arrived at. To back up his position, he referred us to the decisions in **Exim Bank (Tanzania) Limited Vs Penadael Joel Mollel**, Civil Appeal No. 116 of 2017 and

Anthony Ngoo and Another Vs Kitinda Kimaro, Civil Appeal No. 33 of 2013 (both unreported).

With regard to the second point of the preliminary objection, the learned counsel submitted that, the appeal is incompetent on two limbs. In the first limb, it is incompetent for the reason that it is incomplete and thereby, infringing the provisions of Rule 96 (1) of **the Rules.** He named the missing documents to include; **one**, the proceedings and ruling of Miscellaneous Civil Application No. 10 of 2015; **two,** notice to produce an additional list of documents and the additional list of documents, both filed by the fourth respondent on the 15th October, 2015; **three;** the written submissions reflected at page 80 of the record of appeal and the ruling thereof, which was delivered on the 18th May, 2015, as reflected at page 82 of the record of appeal; and **fou**r, written submissions reflected at page 99 of the record of appeal, of which the ruling appears at pages 100 and 101 of the record of appeal.

In view of the missing documents pointed out above, Mr. Mushi urged us to strike out the appeal with costs, placing reliance on the decisions in **Commissioner General TRA Vs JSC Atomredmetzoloto (ARMZ)**, Civil Appeal No. 101 of 2017, and **Mariam Iddi** (as administratrix of the estate of the late Mbaraka Omari) **Vs Abdulrazack Omari Laizer** (as administrator of the estate of the late Abubakar Omari) **and Another**, Civil Appeal No. 20 of 2013 (both unreported).

In respect of the second limb of the preliminary objection, the incompetence of the appeal was said to be occasioned by the fact that, the appeal has been supported by an erroneous document. He mentioned the document to be the one appearing at pages 77 to 89 of the record of appeal, where it has been indicated that, the learned Judge, who presided over the proceeding was Madam Judge Maghimbi, while the very Judge, was the one who mediated the suit, as reflected at pages 88 to 91 of the record of appeal.

On the basis of the anomalies which he pointed out above, the learned counsel for the fourth respondent, implored us to find merit in the preliminary point of objection which he raised, and as such, he urged us to strike out the appeal with costs.

On his part, Mr. Jabir, on behalf of the first respondent, was in disagreement with his learned friend, on both points of the preliminary objection which he raised. He submitted that the first point, has failed to meet the requirement stipulated under the provision of Rule 107 (1) of **the Rules,** in that, it is too general. According to him, it is the requirement of the Rule that, the ground of the preliminary objection has to be specific, which was not the case here. His learned friend just averred that, the certificate of delay is problematic and misleading without elaborating. He therefore, requested us to throw away the first ground of the preliminary objection.

Mr. Jabir argued further that, the position in the second ground of the preliminary objection was not different from the first ground for the reason that, it was also vague. This was from that, the provision of Rule 96 (1) of **the Rules**, under which his learned friend pegged his second ground of the preliminary objection, has got a number of paragraphs ranging from (a) to (k). Nonetheless, his learned friend failed to particularize as to which paragraph of sub-rule (1), was offended. Additionally, he argued, even if the alleged defects were to exist, are curable under the provision of Rule 99 (1) of **the Rules.** To that end, he prayed this ground of preliminary objection, to be also thrown away.

In rebuttal to the arguments in support of the preliminary objection, the learned counsel for the appellant was at one with the learned counsel for the first respondent that, the preliminary objection is misconceived in both grounds. Starting with the second limb of the second ground of the preliminary objection, he argued that, there was nothing erroneous in the proceedings of the trial court in the pages pointed out by his learned friend. What transpired was that, Madam Judge

Maghimbi, handled the matter during the preliminaries stage where upon failure to mediate, the trial of the case was shifted to another Judge that is, Madam Judge Massengi.

With regard to the validity of the certificate of delay which constitutes the first ground of the preliminary objection, Mr. D'Souza conceded to the fact that, the same was indeed vague in that, the basis under which the 86 days indicated to be the ones that had to be excluded in computing the limitation period, was not disclosed. In his view, the anomaly was occasioned by mere miscalculation because it is clear from its content that, the application by the appellant for the typed proceedings and other documents was made on the 14th July, 2016 and that, the same were supplied to the appellant on the 1st December, 2016. That being the case, the running of the sixty days started from then. And the fact that the appeal was lodged on the 22nd December, 2016, it was timeously lodged, he concluded.

The learned counsel distinguished the circumstances in the case of **Exim Bank (T) LTD** (supra), which was relied upon by his learned friend from the case at hand in that, in the said case, there were some extra 30 days which had no explanation. He also argued that, the circumstances in the case of **Anthony Ngoo** (supra), also relied upon by his learned friend, was distinguishable for the reason that, in the said case, the certificate of delay had been issued under improper provision of law. Mr. D'Souza therefore, invited us to find that the anomaly occasioned in the certificate of delay in the matter at hand was inconsequential and hence, urged us to reject the first ground of the preliminary objection.

Furthermore, Mr. D'Souza averred that, the fact that the complained of anomaly was occasioned by the court, in the light of the holding of a single Judge of the Court of Appeal of Tanzania in **Tanzania Revenue Authority Vs Tango Transport Company Limited,** Civil Application No. 5 of 2006 (unreported), it

would be unfair to penalize the appellant for the mistake which was done by the Court.

Arguing on the first limb of the second ground of the preliminary objection, the learned counsel for the appellant conceded to the fact that, there were some documents as named by his learned friend, which were not incorporated in the record of appeal. He however submitted that, he omitted to include them in the record of appeal, because he found them to be not relevant to the appeal which he lodged. Placing reliance on the decision in **Ngerengere Estate Company Limited Vs Edina William Sitta,** Civil Appeal No. 206 of 2016 (unreported), he submitted that, where inconsequential documents are missing in a record of appeal, the said anomaly is not fatal.

Alternatively, Mr. D'Souza shifted the burden of blame to his learned friend that, if he was of the view that, the missing documents were crucial in the determination of the appeal on the part of the fourth respondent, he ought to have resorted to the provisions of Rule 99 (1) of **the Rules,** by filing a supplementary record of appeal in which, he could have included the missing documents. In so asserting, he sought refuge from the decision in the case of **CRDB Bank Limited Vs Issack B. Mwamasika and Two Others,** Civil Appeal No. 139 of 2017 (unreported). He distinguished the holding in **Mariam Iddi's** case (supra), wherein, the document which had been omitted in the record of appeal, had formed part of the decision.

When the learned counsel was prompted by the Court as to why he did not resort to the provision of sub-rule (3) of Rule 96 (1) of **the Rules**, if he was of the view that the missing documents were not crucial to the determination of the appeal, his response was to the effect that, the provision of Rule 99 (1) of **the Rules,** overrides that of Rule 96 (3) of the same Rules. He thus concluded his submission by

asking us to reject the entire preliminary objection which was raised by his learned friend with costs.

The brief rejoinder of Mr. Mushi was to the effect that, the contention by his learned friends that, his preliminary objection was vague was unfounded because both grounds were very elaborative. He further challenged the assertion by Mr. D'Souza to the effect that, the provision of Rule 99 (1) was superior to that of Rule 96 (3) of the same Rules. He thus reiterated his previous prayer by urging us to sustain the preliminary objection and strike out the appeal with costs.

In the light of the rival arguments from learned counsel of either side above, three issues stand for our determination namely **first**, whether or not, there was erroneous document which was incorporated in the record of appeal by the appellant. **Second,** whether or not, the defect in the certificate of delay comprised in the record of appeal, was fatal. And **third,** whether or not, the anomaly on the missing documents in the record of appeal, was inconsequential.

We propose to discuss the three issues seriatim starting with the first one. From what we could discern from the proceedings of the trial court, we do not think the first issue has to detain us much. As submitted by the learned counsel for the appellant, the record is clear that, learned Madam Judge Maghimbi, dealt with the matter at the preliminary stage until when the mediation of the suit between the parties was marked to have failed. This is verified by the proceedings of the 11th day of September, 2015, which reads in part that:

> *"**Mr. D'Souza:** Madam Judge, the circumstances I think it is best that we mark mediation as failed and go back to trial,*
>
> ***Mr. Jabir**: Madam Judge, there is no way we can proceed hence, I pray we mark the mediation as failed.*

***Ms Mahuma**: Madam Judge, basing on the development I have no objection that we mark the mediation as failed.*

***Court**: Mention before trial Judge on 21/9/2015*

***Signed**; S. M. Maghimbi, Judge*

11/09/2015"

Thereafter, the matter was placed before Madam Judge Massengi, who presided over the matter from the final pre-trial stage of the suit to its conclusion, when she composed the judgment which is the subject of this appeal. Things being as they were, we find the complaint by the learned counsel for the fourth respondent that, there was anything erroneous, to be without merit. We therefore answer the first issue which was posed above in the negative.

The second issue, is whether or not, the defect on the certificate of delay was fatal. The provisions of Rule 90 (1) of **the Rules**, under which the certificate of delay was issued bears the following wording:

> *"Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with:*
>
> *(a)a memorandum of appeal in quintuplicate:*
> *(b)the record of appeal in quintuplicate:*
> *(c) security for costs of the appeal.*
>
> *Save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the*

High Court as having been required for the preparation and delivery of that copy to the appellant."

In the instant appeal, the appellant also applied to the Registrar of the High Court to be supplied with the proceedings and other necessary documents, so as to process his appeal. The application was made on the 14th July, 2014. After the requested documents had been prepared, the Registrar issued a certificate of delay to the appellant in the following wording:

CERTIFICATE OF DELAY

"Made under Rule 90 (1) of the Court of Appeal Rules, 2009.

This is to certify that an aggregate of 86 days, were required for the preparation and delivery of copies of proceedings and other documents applied for the plaintiff's advocate in his letter dated 14th day of July, 2016.

The said documents were supplied to the plaintiff on 1st day of December, 2016."

It was the submission of the learned counsel for the appellant that, the contents of the above quoted certificate was sufficient enough to convey the envisaged intention in the provision of Rule 90 (1) of **the Rules.** His learned friend on the other hand, was of the different opinion that, in the way it stands, it was vague, and failed to meet the requirement of being termed a certificate of delay. On our part, after earnestly considering the anomaly in the said certificate of delay, and being guided by our previous decisions, we are of the view that, it was invalid. See: **Yazidi Kassim T/A Yazidi Auto Electric Repairs Vs the Attorney General,** Civil Appeal No. 215 of 2017, **Andrew Mseul and Five Others Vs the National Ranching Company Limited and the Attorney General,** Civil Appeal No. 205 of

2016 (both unreported), and **Exim Bank (Tanzania) Limited Vs Pendael Mollel** (supra).

In **Exim Bank's case** (supra), we referred to our previous decision in **Kantibhai M. Patel Vs Dahyabhai F. Mistry** [2003] TLR 437, where we held that:

> *"The very nature of anything termed a certificate requires that it be free from error and should an error crop into it, the certificate is vitiated. It cannot be used for any purpose because it is not better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over but it goes to the very root of the document. You cannot sever the erroneous part from it and expect the remaining part to be a perfect certificate; you can only amend it or replace it altogether as by law provided."*

And, with regard to the further submission by Mr. D'Souza, where he relied on the decision of a single Judge of the Court, in **Tanzania Revenue Authority Vs Tango Transport Company Limited** (supra), of shifting the blame to the court which occasioned the anomaly, we wish at this juncture to remind the learned counsel, on the duty of diligence imposed on the parties and their learned counsel under the provisions of Rule 96 (5) of **the Rules,** that:

> *"Each copy of the record of appeal **shall be certified to be correct** by the appellant or by any person entitled under Rule 33 to appear on his behalf."* [Emphasis supplied]

The Court has on several occasions, reminded learned counsel, that before they certify the papers which they lodge in Court, they have to ensure that, they do not contain errors. See: **Anthony Ngoo and Another Vs Kitinda Kimaro** (supra), **the Attorney General Vs Jackson Ole Nemeteni @ Ole Saibul @ Mjomba and**

19 Others, Consolidated Civil Appeals No. 35 and 41 of 2010 (unreported), and **Umoja Garage Vs National Bank of Commerce** [1997] TLR 109.

The Court held in **Anthony Ngoo's** case (supra), that:

> *"Had the learned counsel taken time to verify on the correctness of the certificate of delay or any other documents for that matter before incorporating them in the record of appeal, the conspicuous defects in the certificate of delay would have been attended to before certifying on the correctness of the record, in terms of rule 96 (5) of the Rules."*

In the same vein, the fact that in the instant matter the defect on the certificate of delay was occasioned by the court, was not an excuse for the learned counsel for the appellant, to fail to exercise his due diligence in verifying the documents which he lodged in Court on the 22nd, 2016. That said, we answer the second issue in the affirmative.

The omission of some documents in the record of appeal constitutes the third issue. This fact was not disputed by the appellant, who nonetheless, raised a defence that, the documents which were not included in the record of appeal, were not crucial for the determination of the appeal. The question which cropped from the said assertion by the learned counsel, was whether the appellant possessed that liberty, to opt on the type of documents which he had to incorporate in the record of appeal.

In view of the wording of the provision of Rule 90 (1) of **the Rules**, which has been couched in mandatory terms, our answer to the question posed above, is in the negative. In its own words the provision reads:

> *"For the purpose of an appeal from the High Court or 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) n/a

(b) n/a

(c) n/a

(d) n/a

(e) n/a

(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 translations;

(g) n/a

(h) n/a

(i) n/a

(j) n/a

(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 copies referred 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."

[Emphasis supplied]

We note that under the proviso to Rule 96 (1) above, documents deemed not relevant to the determination of appeal, may be excluded from the record of appeal. However, that option can only be exercised by a party or his advocate, after he has sought and obtained directions so to do, in terms of sub-rule (3) of the same Rule which stipulates thus:

"A Justice or Registrar of the High Court or tribunal, may on the application of any party, direct which documents or part of documents should be excluded from the record ..."

Time and again, the Court has insisted that, the application of the proviso under Rule 96 (1) of opting as to which documents have to be incorporated in the record of appeal and which are not, cannot be availed by a party, without first applying for directions under paragraph (3) of the said Rule. See: **Commissioner General TRA Vs JSC ATOMREDMETZOLOTO** (supra), **Jalum General Supplies Vs Stanbic Bank (T) Ltd and Two Others Vs Hasmukh Bhagwanji Masrani,** Civil Appeal 93 of 2012 and **Mariam Idd** (as administratrix of Mbaraka Omari) **Vs Abdulrazack Omary Laizer** (administrator of Abubakar Omari) **and Another** (supra), just to mention but a few.

In **the Commissioner General of TRA's** case (supra), the Court referred to its previous decision in **Fedha Fund Limited and Others Vs George Varghese and Another,** Civil Appeal No. 8 of 2008 (unreported), where while considering the provision of Rule 89 (3) of the repealed Court of Appeal Rules, 1979, which is *pari materia* to Rule 96 (3) of **the Rules,** it stated that:

"... the decision to choose documents relevant for the determination of the appeal is not optional on the part of the party filing the record of appeal. Under Rule 89 (3) (now 96 (3)), of the Court Rules, it is either a Judge or a Registrar of the High Court who, on an application by a party, has to direct which documents to be excluded from the record of appeal."

Either, the contention by the learned counsel for the appellant that, if the fourth respondent was of the opinion that the missing documents were relevant on his part, then he ought to have lodged a supplementary record in terms of Rule 99 (1) of the Rules, is without basis. Since the appellant was the one who lodged the

appeal, he was the one with obligation to lodge complete and competent record in Court, so as to move the Court to properly determine the appeal. He could not lodge an incompetent record, and expect his adversary to salvage it under Rule 99 (1) of **the Rules**. See: **Tanzania Breweries Limited Vs Jonathan Kalaze**, Civil Appeal No. 52 of 2014 (unreported). To that end, we find merit in the preliminary objection which was raised by the fourth respondent of which we sustain. We therefore, strike out the appeal with costs to the fourth respondent.

Order accordingly.

DATED at **ARUSHA** this 2nd day of October, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL