IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CIVIL APPEAL NO 146 OF 2017

BOSCO PETER TETI.....APPELLANT

Versus

1. LIFE MUSHI
2. A/INSP. ASTERIKO MAHIGA
3. D 468 D/COPL JOHNSTONE
4. E.9235 DET. COPL GODLOVE
5. THE ATTORNEY GENERAL

.....RESPONENTS

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

(Songoro, J.)

dated 5th day of June, 2015
in
Civil Case No. 10 of 2006

RULING OF THE COURT

5th September & 19th November, 2018

LILA, J.A.:

Bosco Peter Teti, the appellant, jointly and severally sued the respondents before the High Court of Tanzania sitting at Tabora claiming for Tshs. 500,000,000/= being general damages, interest at bank rate and costs he alleged to have arisen from libel, trespass and false imprisonment committed against him. As it were, the High Court (Songoro, J.) dismissed the claims with costs. That decision aggrieved him hence the present appeal.

The appellant presented a memorandum of appeal comprising eight points of grievance which we need not recite following Mr. Ildephonce Mukandara, learned State Attorney, filing in Court a notice of preliminary objection challenging the propriety of the appeal before us. The notice reads:-

> " *The appeal in (sic) incompetent for being lodged after the expiry of 60 days from the date the notice of appeal was lodged in contravention of Rule 90(1) of the Tanzania Court of Appeal Rules, 2009".*

When the appeal was called on for hearing, the appellant entered appearance in person and had the services of Mr. Masendeka Anania Ndayanse, learned counsel, the 1st respondent appeared in person and was unrepresented and the 2nd, 3rd, 4th and 5th respondents had the services of Mr. Ildephonce Mukandara who was assisted by Mr. Tumaini Pius, both learned state Attorneys.

Arguing in support of the preliminary point of objection, Mr. Mukandara stated that the memorandum of appeal was lodged in Court beyond the sixty days prescribed under Rule 90 (1) of the Court of Appeal rules, 2009 (the Rules). Elaborating, Mr. Mukandara said, according to the record of appeal, the notice of appeal was lodged in Court on 11/8/2016 and the memorandum of appeal was lodged in Court

on 11/10/2016. As there is no certificate of delay issued by the Registrar of the High Court excluding any period of time then the memorandum of appeal was lodged in Court after sixty two days (62), Mr. Mukandara asserted. Upon the Court bringing to the attention of the learned State Attorney the provisions of Rule 8 (d) of the Rules and also referring him to the 2016 calendar, he retreated and contended that even after excluding the day from which the period of sixty days is to be reckoned, the memorandum of appeal was filed on the 61st day, hence late by one day. He accordingly urged the Court to strike out the appeal with costs for being incompetent.

The 1st respondent; a layperson joined hands with the learned State Attorney and had nothing to add.

On his part, Mr.Ndayanse, at first, resisted the point of objection raised but upon a careful check of the calendar and a proper construction of Rule 8 (d) of the Rules, he readily conceded that the memorandum of appeal was lodged in Court late by one day and the appeal was therefore incompetent. He, however, urged the Court to spare his client from payment of costs alleging that the delay was contributed by the Registrar's failure to supply him with requisite documents within time so as to enable him prepare and lodge the

memorandum of appeal within the prescribed period of sixty days after lodging the notice of appeal.

Arguing on the issue of costs, Mr. Mukandara was emphatic that the respondents must be paid costs because the delay in filing the memorandum was due to inaction on the part of the appellant and that they have spent some time and resources in preparing, raising and arguing the notice of preliminary objection.

We have given a deserving consideration to the arguments by both sides. It is a common ground that the memorandum of appeal was filed in Court one day beyond the prescribed period of sixty days in terms of Rule 90(1) of the Rules. We fully associate ourselves with the arguments of the parties on that fact. The 2016 calendar vividly indicates so. We accordingly uphold the point of preliminary objection. The appeal is incompetent and is hereby struck out.

The issue before us now remains to be whether the respondents are entitled to costs of the case.

We are alive of the fact that the award of costs by the Court is guided by Rule 114 (1) of the Rules. That Rules states:-

> *"114.-(1) The Court may make such order as to the whole or any part of the costs of appeal in the court*

below as may be just, and may assess them or direct taxation of them; and in the case of a second appeal this Rule shall apply to costs in the trial court as well as in the first appellate court."

As it can be gleaned from the wording of the quoted Rule, it may seem that it applies in appeals only. That paucity inherent in the Rule was well discussed by the Court in the case of **ITEX SARL Vs. Chief Executive Tanzania Road Agency (TANROADS) and Another**, Civil Application No. 14 of 2015 (unreported). In that case what was before the Court was an application and at its conclusion the Court had to determine whether a successful party is entitled to costs of the case. After quoting in *extenso* the provisions of Rule 114 (1) of the Rules, the Court stated:-

" We know that by its wording, the Rule appears to be applicable to appeals and it may be argued that it may not apply in an application like the present one. In our view, the rule is equally applicable to applications by inspiration and by force of Rule 4(2) of the Rules which empowers this Court to give directions as to the procedure to be adopted or make any other order which it considers necessary. So long as there is no specific rule empowering this Court to order costs in applications, and so long as the application of Rule 114(1) does not work injustice to any party, we think it

is necessary in the interests of justice to apply that Rule for the time being, in applications as well."

It is apparent that the application of Rule 114 (1) of the Rules which was couched in such a way that it would apply in granting costs on appeals only was extended by the Court to also cater for grant of costs in applications. Before us is the notice of preliminary objection which, as demonstrated above, has been upheld. We are, on the same reasoning as in the case of **ITEX SARL Vs. The Chief Executive Tanzania Road Agency (TANROADS)** (supra), of the view that the same Rule is applicable in granting costs in cases where a notice of preliminary objection is successfully raised.

The award of costs in terms of Rule 114 (1) of the Rules is discretionary and the general rule and practice is that costs should normally follow the event unless the Court orders otherwise for good reason which must be based on facts- see **Njoro Furniture Mart Ltd Vs. TANESCO** [1995] TLR 205 and also **Campell Vs. Pollack** (1927) Ac. 732 cited in **ITEX SARL Vs. The Chief Executive Tanzania Roads Agency (TANROADS)** (supra). In the last case the Court went further to enumerate the acceptable reasons for depriving a successful party of costs thus:-

" One of the accepted good reasons for depriving a successful party of his costs, is when it is shown that his conduct, either prior to, or during the course of the matter, has led to litigation, which, but for his own conduct, might have been averted (see ***DEVRAM MANJI DATTANI v HARIDAS KALIDAS DAWDA*** *(1949) 16 EACA 35,* ***PREMCHAND RAICHAND LTD. AND ANOTHER v QUALITY SERVICES OR EAST AFRICA AND OTHERS*** *(NO. 3) (1972) TEA 162."*

Guided by the above principles with which we fully subscribe, the issue now is whether, in the present case, there are good reasons for the Court to deny the respondents costs of the case. The only reason advanced by Mr. Ndayanse is that the delay in lodging the memorandum of appeal was contributed by the Registrar of the High Court who supplied them with the requisite documents belatedly.

With respect, we find Mr. Ndayanse's argument unfounded. If at all the Registrar of the High Court was late in serving him with the documents he had applied, the same would have been reflected in the certificate of delay the Registrar of the High Court is mandated to issue upon request under the proviso to Rule 90 (1) of the Rules. Unfortunately and to the detriment of Mr. Ndayanse, there is no certificate of delay in the record of appeal. That aside, our serious

examination of the record did not avail us with anything suggestive of the respondents' conducts which might have led the appellant prefer this purported appeal. Neither did Mr. Ndayanse suggest any. We, therefore, see no reason to deprive the respondents of their entitlement to costs of the case. Instead, we are satisfied that the respondents devoted their time and resources in doing a legal research that enabled them come up with a successful notice of preliminary objection. The interest of justice demands that they should be fairly reimbursed for the time and resources spent.

For the foregoing reasons we strike out the appeal with costs.

DATED at **DAR ES SALAAM** this 17th day of September, 2018

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

H.S. MUSHI
DEPUTY REGISTRAR
COURT OF APPEAL