IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 196 OF 2016

1. JOHN NGOSHA
2. MICHAEL JOHN ..... **APPELLANTS**

VERSUS

THE ATTORNEY GENERAL ..... **RESPONDENT**

(Appeal from the judgment of the High Court of Tanzania at Dodoma)

(Kwariko, J.)

dated the 2nd day of December, 2010
in
Civil Case No 1 of 2007

RULING OF THE COURT

2nd & 13th March, 2018

MWAMBEGELE, J. A.:

The two appellants in the present appeal lost in a suit of malicious prosecution they sued the respondent in the High Court. The appellants alleged that, without justification, policemen maliciously prosecuted them in the District Court of Dodoma vide Criminal Case No. 386 of 2005 in which they were acquitted on a no case to answer. They thus claimed in the High Court for general

damages they quantified at the rate of Tshs. 100,000,000/=. The High Court (Kwariko, J.) dismissed the plaintiffs' claims stating that all the ingredients which were relevant for proof of the tort of malicious prosecution were not met. Each party was ordered to bear its own costs.

Dissatisfied, the appellants preferred the present appeal seeking to reverse the decision of the High Court. When the appeal was called on for hearing before us on 02.03.2018, Mr. Deus Nyabiri, learned advocate, who also represented the plaintiffs in the High Court, appeared for the appellants. Mr. Morice Sarara, learned State Attorney, appeared for and on behalf of the respondent Attorney General.

We prompted the parties at the very outset to satisfy us on the competence of the appeal before us. We raised such a concern because on perusal of the record of appeal before we convened in court for hearing, we had realized that the decree the subject of the appeal appearing at pp 135 – 136 of the record was neither dated nor signed.

But before we go into the submissions of the parties on the point, we feel pressed to state at this juncture that Mr. Sarara for the respondent had filed a notice of preliminary objection which he was prepared to argue. However, after a tripartite dialogue by the appellant, the respondent and the Court, the learned State Attorney sought to withdraw the notice of the preliminary objection to pave way for the hearing of the point raised by the Court on its own motion. The Court accordingly marked the notice of preliminary objection filed by the Attorney General withdrawn.

Adverting to the alleged defective decree, Mr. Nyabiri for the appellants admitted that, indeed, the decree at the pages referred to was neither dated nor signed. However, Mr. Nyabiri was quick to submit that that was not a fatal irregularity given that the original file of the Court had a perfect decree; that is, which was dated and signed. The learned counsel thus urged the Court to fill the gap and cure the ailment by referring to the correct decree in the original court file. He urged the Court not to be tied up with technicalities to the detriment of interests of justice obtaining in the case. For this proposition, he cited to us the case of **VIP Engineering &**

Marketing Ltd v. Said Salim Bakhresa, Civil Application No. 47 of 1996 (unreported). Mr. Nyabiri told the Court that there were a plethora of authorities of the Court which supported the view that once a record of appeal is deficient of some documents, in the interest of justice, a resort should be made to the original record of the court. The learned counsel promised to supply us with the authorities by Monday 05.03.2018 and indeed he walked the talk. He supplied us with two decisions: **Saggu v. Roadmaster Cycles (U) Ltd** [2002] 1 EA 258 and **DT Dobie (Tanzania) Limited v. Phantom Modern Transport**, Civil Application No. 141 of 2001 (CAT unreported).

On his part, Mr. Sarara was of the view that the ailment is incurable. He submitted that the ailment offends against Rule 96 (1) (h) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He thus beckoned the Court to strike out the appeal.

We must state at the very outset of determination that it is now settled that an incomplete record of appeal makes an appeal incompetent. That this is the law has been held in a number of decisions of the Court which are cited hereinbelow. We start our determination by reproducing Rule 96 (1) of the Rules. It reads:

"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) an index of all documents in the record with the numbers of the pages at which they appear;

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not 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 translations;

(g) the judgment or ruling;

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

(ı) 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 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 ours].

In **Said Salim Bakhresa & Co. Ltd v. Agro Processing and Allied Products Ltd & Another**, Civil Appeal No. 51 of 2011 (unreported), we relied on several decisions of the Court to observe

that Rule 96 of the Rules plays a central role in the administration of civil appeals to this Court. We stated that the Rule governs the preparation and contents of a record of appeal. The Court observed that Rule 96 (1) has received a strict interpretation by the Court.

Under Rule 96 (1) (h) of the Rules, the decree of the impugned decision is one of the documents which must be part of the record of appeal. In the case at hand, Mr. Nyabiri did not seem to oppose this fact. What the learned counsel urged the Court to do was to go to the original record where he said there was the proper decree. He argued that there were decisions which provided for that course in the interests of justice. We have read the decisions supplied to us by the learned counsel. Having so done, we are afraid, they do not support his proposition. What the learned counsel promised to avail us with were authorities requiring us to resort to the original court file to cure an ailment in the record of appeal. He has supplied us with none on the point.

Perhaps to be fair to Mr. Nyabiri, we propose to unveil what came out after our reading of the two cases. The **Saggu** case (supra) was not decided by the Supreme Court of Uganda as he indicated in

his letter to the Deputy Registrar bearing Ref. RCA/CIV. APP.196/2016 of 05.03.2016 through which he supplied those decisions. That is the decision of the Court of Appeal of Uganda. Moreover, that case does not bind us. And as if to clinch the matter, some of its verdicts contradict with settled positions of the law in our jurisdiction. For instance, it holds that:

> *"A defect in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit"*

And that:

> *"Where an application omits to cite any law at all or cites the wrong law but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the correct law inserted."*

The law on defects in the *jurat* and wrong or non-citation is well settled in our jurisdiction. The authority does not persuade us. We therefore would urge learned advocates in our jurisdiction to read the **Saggu** case askance.

Regarding the **DT Dobie** case (supra), the learned counsel referred us to p. 7 where the Court referred to the English cases of **Re Coles and Ravensheer** [1907] QB 1 and **Cropper v. Smith** (1884) 26 Ch. D 700, 710. At that page, the Court was grappling with a verification in the affidavit which was not headed. The Court, relying on **Re Coles** and **Cropper** in which it was held that rules of procedure are handmaids of justice meant to facilitate rather than impede decisions on substantive justice, found that to be a triviality that could be taken care of by an amendment.

With due respect to the learned counsel, we think the **DT Dobie** case is distinguishable from the present case. Omission to include a proper decree in the record of appeal is not only not a triviality but also one that cannot be overlooked or cured by seeking assistance from the original court file. Neither is it an irregularity that can be cured by an amendment. If the practice suggested by Mr. Nyabiri is allowed, we are afraid, the provisions of Rule 96 (1) of the Rules will be rendered meaningless. As was stated in **Ratnam v. Cumarasamy and Another** [1964] 3 All ER 933 and followed in **Godwin Ndewesi and Karoli Ishengoma v. Tanzania Audit**

Corporation [1995] TLR 200, the rules of court must prima facie be obeyed.

It seems we have sufficiently digressed in an endeavour to provide answers why the authorities supplied to us by the learned counsel for the appellant are not applicable to the present case.

Adverting to the case at hand, it is no gainsaying that the purported decree appearing at pp. 135 - 136 of the record is neither signed nor dated. In the circumstances, it is as if there is no decree at all in the record of appeal. This offends against Rule 96 (1) (h) of the Rules. There is an unbroken chain of authorities which hold the position that failure to include in the record of appeal documents mentioned in Rule 96 (1) of the Rules makes the record incomplete and renders the appeal incompetent – see: **Kiboro v. Posts & Telecommunications Corporation** [1974] 1 EA 155, **Said Salim Bakhresa** (supra) and **Fedha Fund Limited and Others v. George T. Varghese and Another**, Civil Appeal No. 8 of 2008 (unreported) and **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd**, Civil Appeal No. 34 of 2010, **Joseph Onaukiro Ngiloi v. The Permanent Secretary, Central Establishment & 3 Others**, Civil Appeal No. 78

of 2011 and **Mangenyula Irumbila & Another v. Dar es Salaam City Council**, Civil Appeal No. 80 of 2014 (all unreported), to mention but a few.

In the light of the foregoing, we do not accept the invitation extended to us by Mr. Nyabiri to resort to the original court file to cure the ailment. If anything, that course signifies that the record of appeal is incomplete. An incomplete record of appeal renders the appeal incompetent prone to be struck out.

Before we pen off, we wish to state as a postmortem that when we retreated to deliberate and write this Ruling, we also discovered that the appeal was filed after an application for extension of time was made by the appellant. The High Court (Makuru, J.) extended time on 29.10.2015 as appearing at p. 138 of the record of appeal after the respondent had no objection to it. However, the chamber summons and affidavit to that effect; that is, for extension of time, are also missing in the record of appeal. However, as the parties did not address the Court on this aspect, we are not going to make any determination on it.

For reasons stated earlier, we strike out the incompetent appeal with no order as to costs.

Order accordingly.

DATED at **DODOMA** this 12th day of March, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL