

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CIVIL APPEAL NO. 72 OF 2017

**1. NATIONAL BANK OF COMMERCE LIMITED
2. STEVEN R. K. SHILETIWA** } **APPELLANTS**

VERSUS

BALLAST CONSTRUCTION COMPANY LTD.....RESPONDENT

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

Tanga)

(Msuya, J.)

dated the 9th day of September, 2015

in

Civil Case No. 10 of 2009

RULING OF THE COURT

18th & 22nd February, 2019

LILA, J.A.:

The respondent successfully sued the appellants before the High Court for breach of trust, confidentiality and divulgence. He claimed for payment of Tzs. 500,000,000/= (say Tanzania Shillings Five Hundred Million) as general damages, interest on the principal sum at 23% per annum from the date of filling the suit to the date of judgment, interest at

Court rate from date of judgment to date of full payment, other reliefs as the court may deem fit and just to grant and costs. The High Court (Msuya, J.) was satisfied that the claims were proved and she awarded the respondent Tzs. 300,000,000/= as general damages, interest on the decretal sum at 23% as per banking practice from the date of filing the suit to the date of judgment and interest on the decretal amount at 7% from the date of judgment to the date of full payment. Dissatisfied, the appellants preferred the present appeal.

The appellants lodged a joint notice of appeal and a joint memorandum of appeal comprised of 6 grounds seeking to impugn the High Court decision. Subsequent to the filing of the appeal, the respondent filed a two point notice of preliminary objection challenging the competence of the appeal before the Court. The notice reads thus:

"(a) That in terms of Rule 90(2) of the Court of Appeal Rules, the Appeal by the 2nd Appellant is hopelessly time barred consequently under the doctrine of vicarious liability the 1st Appellant's appeal is rendered a nugatory.

(b) That the Appellants failed to take an essential step for failure to serve the Respondent with the Copy of the Notice of Appeal as required by Rule 84 (1) of the Court of Appeal Rules.

Before us, Mr. Limbent Rwazo, learned advocate, represented the appellants. On the rival side, Mr. Shukuru Banzi, Director of the respondent company, entered appearance on its behalf.

Mr. Banzi's submission in support of the points of objection raised was brief but focused. Arguing in respect of the first point of objection, he contended that in terms of Rule 90(1) of the Tanzania Court of Appeal Rules, 2009 (Henceforth the Rules), the appeal by the 2nd appellant ought to have been filed within 60 days of the lodging of the notice of appeal. But, in the present case the notice of appeal was lodged on 17/9/2015 and the appeal by the 2nd appellant was filed on 26/10/2016 hence outside 60 days, he asserted. Amplifying his argument, Mr. Banzi, contended that since there is completely no letter by the 2nd appellant to the Registrar of the High Court requesting for copies of proceedings a copy of which ought to have been served on the respondent, then the 2nd appellant is, in terms of Rule 90(2) of the Rules, not entitled to rely on the exception to sub-rule

(1). He was emphatic that all that is on record is the letter by IMMMA ADVOCATES acting for and on behalf of the 2nd Defendant (now 1st appellant) dated 14/9/2015 requesting for copies of the High Court proceedings. He also faulted the certificate of delay issued by the Registrar of the High Court on account of covering both appellants. He stated that the 2nd appellant was not entitled to it because he did not apply for the High Court proceedings. He, further, contended that since the certificate of delay referred to the letter by the 1st appellant, it was invalid for it to be issued for both appellants. He concluded that the 2nd appellant cannot therefore benefit from the exclusion made in the certificate of delay and his appeal is thereby time barred. He urged the Court to strike out the 2nd appellant's appeal. In respect of the 1st appellant's appeal, he contended that the same is properly before the Court. He, however, was of the view that since the 1st appellant was held vicariously liable for the acts of the 2nd appellant, the 1st appellant's appeal cannot stand on its own. He urged the same also be struck out. To buttress his assertion he referred us to decision in the case of **D. P. Valambia Vs. Transport Equipment Ltd** [1992] TLR.246 and **Salim Sunderji and Capital Development Authority Vs. Sadrudin Shariff Jamal** [1993] TLR 224.

Arguing on the 2nd point of objection, Mr. Banzi contended that the respondent was not served with the notice of appeal by the appellants hence contravening the provisions of Rule 84(1) of the Rules. For that reason he urged the Court to strike out the appeal.

Mr. Rwazo's response was equally brief. In respect of the 1st point of objection, he conceded that the letter applying for copies of proceedings shows that IMMMA ADVOCATES were acting for the 2nd defendant (now 1st appellant). He contended that it was a mere slip of the pen and that exclusion of the 2nd appellant was inadvertently done. He impressed on us to believe and accept that it is a minor error as the record shows that they all along appeared for both appellants. To substantiate his assertion, he referred us to the notice of appeal which indicates that it is by both appellants. He, in the alternative, argued that if the Court is to find that the appeal by the 2nd appellant is incompetent, the Court should proceed with the hearing of the appeal by the 1st appellant which is properly before the Court.

In his response in respect of the 2nd point of objection, Mr. Rwazo firmly maintained that they served the respondent with a copy of the notice of appeal. When he was prompted by the Court to show a copy of it showing that the same was served and the respondent admitted receiving it by impressing on it a signature and office stamp on it, he retreated and replied that he had no proof. He, otherwise, left the matter for the Court to decide on the way forward. As a last resort, relying on the principle of overriding objective, he implored on us to ignore the infraction and let the appeal be heard on merit.

The central issue raised in the preliminary points of objection revolves around the competence of the appeal. In resolve, we propose to first consider the second point of objection.

We need not be delayed in this point. It is settled that the procedure governing the conduct of proceedings in the Court is as provided by the Rules. In terms of Rule 84(1) of the Rules, an intended appellant is required to serve all persons against whom the appeal lie copies of the notice of appeal before or within fourteen days after lodging the notice of appeal. That Rule is couched in mandatory terms. That Rule states that:

"An intended appellant shall, before or within fourteen days after lodging the notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court."

From the above excerpt, it is clear that the Rule gives a right to one party and imposes an obligation to the other party. While it is the respondent's right to be served with the copy of the notice of appeal, the intended appellant is, on the other side, obliged to ensure that he serves the notice on the respondent. The purpose of serving the respondent with the notice of appeal is not far to seek. The notice is intended to make the respondent aware that an appeal is being preferred hence be able to marshal his arsenals properly.

In the instant case, it is indeed clear that the notice of appeal in the record indicates that it was copied to the respondent. There is, however, no indication whatsoever that the same was served to the respondent. It cannot therefore be said, with certainty, it was served on the respondent.

The allegation by Mr. Rwazo is not thereby backed by the record. An identical infraction was considered by the Court in the case of **Salim Sunderji and Capital Development Authority Vs. Sadrudin Shariff Jamal** (supra) and it was stated that a bare assertion by the respondent that he served the applicant with a copy of the notice of appeal without a signature on it signifying acknowledgement of receipt is not convincing and that non-compliance with Rule 77(1) of the Court of Appeal Rules 1979 (now Rule 84(1) of the Rules) nullifies the notice of appeal or an appeal. The Court was, again, faced with an identical situation in the case of **Goodhope Hance Mkaro Vs. TPB Bank PLC and another**, Civil Appeal No. 171 of 2017 (unreported) and apart from categorically stating that service of a notice of appeal to the respondent is a mandatory requirement, it agreed with the stance taken by the Court in the case of **Wilfred Rwakatare Vs. Hamisi Kagasheki and another**, Civil Appeal No. 118 of 2011 (unreported) on how service to the other party can sufficiently be proved. In that case the Court stated that:

"There is no indication by signature, rubber stamp or whatever to prove that the 1st Respondent ever received the Notice of Appeal. We are of the view

that if the 1st Respondent had been duly served with the Notice of Appeal in person or through his advocate, whoever received the Notice of Appeal would have signed and such signature would be apparent to prove service...”

We fully subscribe ourselves with the above position. In our case, it is evident that the notice under consideration bears neither the signature nor the stamp of the person whom it was served. We are, therefore, inclined to agree with Mr. Banzi that the copy of the notice of appeal was not served on the respondent hence contravening the mandatory provisions of Rule 84(1) of the Rules. This being a mandatory requirement, we don't think that the overriding principle applies. So, like in **Wilfred Rwakatare's case** (supra), we are enjoined to find that the appeal is, in view of the above irregularity, incompetent.

Our finding in the above point of objection is sufficient to dispose of the matter. We shall not, therefore, indulge ourselves in considering the other point of objection.

For the foregoing reason, we sustain the 2nd point of objection. The appeal is incompetent and it is hereby struck out with costs.

DATED at **TANGA** this 21st day of February, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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




E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL