

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: MUSSA, J.A., KOROSSO, J.A., And KITUSI, J.A.)**

**CIVIL APPEAL NO. 260 OF 2018**

**MOUNT MERU FLOWERS TANZANIA LIMITED .....APPELLANT**

**VERSUS**

**BOX BOARD TANZANIA LIMITED.....RESPONDENT**

**(Appeal from the Ruling of the High Court of Tanzania  
at Arusha)**

**(Opiyo, J.)**

**dated the 10<sup>th</sup> day of May, 2016**

**in**

**Civil Case No. 8 of 2016**

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**RULING OF THE COURT**

**27<sup>th</sup> Nov & 3<sup>rd</sup> December, 2019**

**KITUSI, J.A.:**

This is an appeal against the decision of the High Court (Dr. Opiyo, J) sustaining the respondent's preliminary objection premised on the point that, the appellant had filed its written Statement of Defence (WSD) out of time. At the core of the matter before the trial High Court was the issue; whether the summons issued and served on the appellant (defendant at the trial) was one that required it to appear and file a WSD within 21 days as per Order VIII Rule 1 (2) of the Civil Procedure Code [Cap 33 R.E 2002] (the CPC), or one that required the appellant to appear as per Order V.

Rule 1(a) and Order VIII Rule 1(2), CPC. In the latter case, applicable to the High Court, the defendant would only enter appearance and file a WSD if so required by the Court.

Based on the analysis of the above law and the arguments made by counsel for the parties, the High Court concluded that the appellant (defendant) was supposed to file its WSD within 21 days, which it did not. Thus, the WSD filed by the appellant was struck out and it was ordered for the matter to proceed ex parte.

The appellant was aggrieved by the decision so it has appealed to the Court. However, at the hearing of the appeal, our attention was drawn to a Notice of Preliminary Objection which had earlier been filed as per rule 107(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Notice raises two points, to wit:

1. The appeal is incompetent before the Court for noncompliance with Rule 96 (1) (k) of the Court of Appeal Rules, 2009, for record of appeal being incomplete by not containing the exact summons to appear and file the Written Statement of Defence with a proof of service by Court Process Server, Mr. Zakaria Meleiya, in Civil Case No. 8 of

2016, the High Court of Tanzania at Arusha, which is the main subject to this Appeal.

2. As per order of this Court dated 20<sup>th</sup> August, 2019 and the provisions of Rule 96(8) of the Court of Appeal Rules, 2009 this appeal is incompetent before the Court for failure to comply with the Court order and Rule 96(1)(k) of the Court of Appeal Rules, 2009.

Before us, Messrs. Michael Rugaiya and Robert Roghat, learned counsel, appeared for the appellant, whereas Mr. Robert Mgoha, also learned counsel, appeared for the respondent. Counsel were ready to address the points of preliminary objection first, as is always the case when such point has been raised.

In essence, Mr. Mgoha's submission was that, during the previous hearing of the matter before Lila, Kwariko and Mwandambo, JJA on 20<sup>th</sup> August, 2019, he raised a point similar to the first point being raised instantly, complaining that the record of appeal was incomplete for omitting the exact summons and proof of service thereof. He submitted that the Court sustained the point and ordered filing of a supplementary record to cure the defect.

Mr. Mgoha has submitted further that the supplementary record that has been filed does not cure the omission that was earlier complained of, because the affidavit of proof of service has not been included. Counsel argued that since on 20<sup>th</sup> August, 2019 we ordered, under Rule 96(8) of the Rules, that a supplementary record be filed to cure the incompleteness of the record, and since the said supplementary record has not complied with our previous order fully, we should strike out this appeal because Rule 96(8) of the Rules cannot be brought into play again. A list of authorities containing 5 cases had been filed by the learned counsel to support his submissions and he prayed to adopt them, specifically referring to us the case of **Kasanzu & Lusasula (Administrator of Estate of the late Lusasula Lubigi Versus Lugito Bulay**, Civil Appeal No. 26 of 2015 (unreported).

We note that in the said earlier proceedings dated 20<sup>th</sup> August, 2019, Mr. Rugaiya learned advocate for the appellant, had conceded to the P.O and that the order directing filing of a supplementary record proceeded on that basis. This time around however, Mr. Rugaiya is contesting the P.O on two grounds; **One**, that the supplementary record contains an affidavit of proof of service and that although it appears blank, that is the one he

obtained from the court original record and there is no other. **Two**, that the point that has been raised does not qualify to be a point of preliminary objection.

In support of his second point, Mr. Rugaiya drew our attention to the cases in the list of authorities filed by him, these include the famous **Mukisa Biscuit Manufacturing Co. Ltd Versus West End Distributors Ltd** [1969] E.A 696 and **Karata Ernest and others Versus the Attorney General**, Civil Revision No. 10 of 2010 (unreported).

In a short rejoinder Mr. Mgoha submitted that the document in question is within the original court record and that what has been included in the supplementary record of appeal is not the correct one. He maintained that this point qualifies to be one of preliminary objection.

Having listened to the counsel for the parties, we think in order for us to remain within a safe zone, we should begin by determining whether the points raised in the Notice of Preliminary Objection qualify to be points of preliminary objection or not. As our take off, we shall restate the principle in the case of **Mukisa Biscuits** (supra) which, in our view, not only

defines what a preliminary objection is, but also prescribes when it can be raised and when it should not be raised.

The relevant excerpt goes thus;

*"A preliminary objection is in the nature of what used to be a **demurrer**. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion".*  
*(the underlining is ours)*

From the above statement, a preliminary objection is like a demurrer. The latter word comes from the word "demur" which is defined in Black's Law Dictionary, 8<sup>th</sup> Edn at pg 465, as;

*"3. To object to the legal sufficiency of a claim alleged in a pleading **while admitting the truth of the facts stated**". (emphasis ours).*

And "demurrer" which in some jurisdiction is termed as "a motion to dismiss" has been defined in Black's Law Dictionary as;

*"A pleading stating that although the fact alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer."*

The same definition is given by STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES, 6<sup>TH</sup> Edition, Sweet and Maxwell, 2000, page 645.

It is therefore expected that a matter raised as a point of preliminary objection should conform to and have qualities of what used to be a demurrer. The foregoing definition even gives us an instance of a preliminary objection, in our view, such as when a plaint does not disclose a cause of action to enable the plaintiff state his claim and the defendant prepare his defence. In **Karata Ernest and Others** (supra) more examples were listed down, and we reproduce the relevant part;

*"At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arise by clear implication out of*

*the pleadings". Obvious examples include, objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal has been lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from etc".*

With that principle and examples in mind, can it be said that the first point of preliminary objection raised by the respondent in the notice, meets the definition and requirements stated above? Certainly, it does not, because there is still a dispute as regards factual matters, specifically, whether or not the affidavit of proof included in the supplementary record is the correct one and the only one available at the court registry. What we have is one's word against the other's, and it needs ascertainment of the facts to decide this point.



Turning to the second point, we take the view that it is more of an argument in support of the first point, than a point of preliminary objection. If the first point of objection had been sustained it would be correctly argued that the appellant cannot benefit from the provisions of Rule 96 (8) of the Rules. However, in view of the position we have taken in respect of the first point, the second point of preliminary objection becomes redundant.

As we are about to conclude, we must remind counsel that the decision in **Mukisa Biscuits** (supra) came as it occurred to the court that increasingly, parties had taken to raising as points of preliminary objection, issues that could be argued in a normal course of hearing substantive matters. With respect, we are of the view that unlike in the previous hearing before Lila, Kwariko, and Mwandambo, JJA the points now being raised by Mr. Magoha in this matter, are on details which can be argued in the course of hearing the appeal. On the other hand, we are in agreement with Mr. Rugaiya that the points raised by the respondent do not qualify as points of preliminary objection.

For those reasons, we dismiss the points of preliminary objection, with costs.

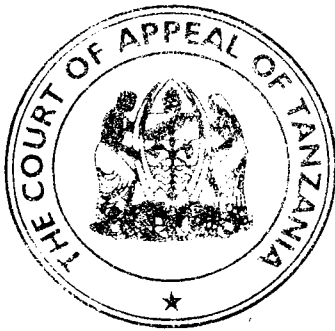
**DATED** at **ARUSHA** this 3<sup>rd</sup> day of December, 2019

K. M. MUSSA  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

The Ruling delivered this 3<sup>rd</sup> day of December, 2019 in the presence of Mr. Michael Rugaiya counsel for the Appellant and Mr. Robert Mgoha counsel for the Respondent is hereby certified as a true copy of the original.



  
G. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**