IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 6/16 OF 2019

DAVID JOSEPH MAHENDE..... APPLICANT

VERSUS

AFRISCAN GROUP TANZANIA LTD ..... RESPONDENT

(Application for extension of time to file proceedings, ruling and drawn order dated 17th August 2015, in Misc. Commercial Case No. 190 of 2015 as part of the record in Civil Appeal No. 200 of 2016)

RULING

15th July & 7th August, 2019

MWANDAMBO, J.A.:

Before me is an application by way of Notice of Motion preferred under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) for extension of time to include certain documents in a record of appeal in Civil Appeal No. 200 of 2016 pending before this Court. The application is supported by an affidavit sworn by the applicant amplifying the grounds in the Notice of Motion as will become apparent a little later. Apparently, the respondent did not make use of rule 56 of the Rules by filing an affidavit in reply opposing the application. However, that did not deter the respondent from contesting the application during the hearing.

A brief background to the application runs as follows: The applicant lost to the respondent in a suit before the High Court (Commercial Division) at Dar es Salaam in Commercial Case No. 86 of 2013 in a judgment delivered on 15th December 2015. Aggrieved, the applicant appealed against that decree vide Civil Appeal No. 200 of 2016 instituted on 16th December, 2016. I shall henceforth be referring to it as the appeal. However, subsequently, on 14th November, 2017 to be exact, the applicant's advocates realized that some documents were missing in the record of appeal, that is to say; proceedings, ruling and drawn order in Miscellaneous Commercial application No. 190 of 2016 which was interlocutory to the main suit.

At the time of filing the application, rule 96(6) of the Rules allowed a party who found himself in such a situation, without any leave, to include the missing documents within fourteen (14) days from the date of institution of the appeal. This luxury was no longer available to the applicant, for his advocates discovered the omission in the record of appeal sometime in December 2017 one year after the institution of the appeal. It is common ground that the applicant's advocate made a request for the supply of the missing documents upon the discovery and, the Deputy

Registrar, Commercial Court acted on the request by supplying the missing documents on 6th March, 2018 as evident in para 6 of the supporting affidavit. Some ten months later, that is; on 10th January 2019, the applicant acting through a law firm going by the name of Mbamba & Co. Advocates, lodged the instant application on the grounds set out in the Notice of Motion, that is to say:-

> *"1.The record of Civil Appeal No. 200 of 2016 does not incorporate into it the said proceedings, ruling and the extracted drawn order in respect of Misc. Commercial Case No. 190 of 2015 dated 17th August 2015 enlarging the life span of Commercial Case No. 86 of 2013 for four months.*
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> *2. At the time when the record of the High Court Commercial Division in Commercial Case No. 86 of 2013 was supplied to the applicant (appellant in Civil Appeal No. 200 of 2016), the proceedings, ruling and extracted drawn orders in Miscellaneous Commercial Case No. 190 of 2015 were not supplied to the applicant and the drawn order was not extracted.*

3. *The documents have now been applied for from the High Court, Commercial Division and have been obtained."*

Apart from the sequence of events from the date the applicant lodged the appeal and the date of filing of the instant application in the supporting affidavit (which facts are not disputed by the respondent), paragraph 7 avers:-

> *"That the non-inclusion of the proceedings, ruling and exacted drawn order in Misc. Commercial Case No. 190 of 2015 were (sic!) inadvertent due to the fact they were not available at the time of filing Civil Appeal No 200 of 2016. They have been typed and drawn order extracted and available after the appeal had been filed and currently there is no preliminary objection and the appeal has not been cause listed for hearing."*

As shown earlier, the respondent did not file any affidavit in reply opposing the application. Instead, Mr. Joseph Rutabingwa, learned Advocate filed a list of authorities prior to the hearing of the application and entered appearance on the date the application was called on for

hearing urging the Court to dismiss the application on the sole ground that the applicant has not accounted for the delay.

Mr. Samson Mbamba learned Advocate who has acted for the applicant in the High Court, does so in the instant application. During the hearing, the learned Advocate adopted the submissions he had filed earlier on in pursuance of rule 106(1) of the Rules as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017, GN. No, 362 of 2017.

Essentially, the written submissions by the learned Advocate provide a chronology of the events behind the omission to include certain documents in the record of appeal. To bolster his submissions, the learned Advocate made reference to two unreported decisions of this Court in **Gabriel Mathias Michael vs Halima Mzee and 2 Others,** Civil Application No. 186/17 of 2017 and **Mwatex (2002) Limited vs Registered Trustees of K.K.K.T,** Civil Appeal No. 51 of 2014. In his oral address, Mr. Mbamba contended that an application for the inclusion of the omitted documents in the record of appeal was akin to an amendment of a record of appeal in pursuance of rule 111 of the Rules which could be done at any time. The learned Advocate sought refuge for his proposition from the decision of this Court in **Dismas K.B. Francis vs. Tabora Municipal**

Director, Civil Application No. 177/11 of 2017 (unreported) to dislodge the authorities referred to by the respondent's learned Advocate on the requirement to account for each day of delay. On that basis, the Court was urged to grant the application regardless of whether the applicant had not stated facts accounting for each day of delay.

Mr. Rutabingwa's reply was brief. At the outset, he informed the Court that the respondent had no dispute on the reason for the non inclusion deposed in the affidavit except for the fact that, contrary to the established principles on applications for extension of time, the applicant has failed to account for each day of delay. On that account he implored the Court to dismiss the application with costs. The learned Advocate brought to his aid **Wambele Mtumwa Shahame vs Mohamed Hamis,** Civil Application No. 138 of 2016 (unreported) from of a thick wall of authorities of this Court stressing the requirement to account for each day of delay. In that case, an application for extension of time to lodge a reference before the full Court was dismissed by a single Justice of Appeal because the applicant had failed to account for each day of delay.

With regard to the contention made by his learned friend based on **Dismas K.B. Francis** case (supra), the learned Advocate argued that the

decision could have been relevant had the application been preferred under rule 111 of the Rules. On the contrary, since this application is for extension of time under rule 10 of the Rules, the learned Advocate argued, it is governed by the authorities he cited and so the applicant was bound to account for each day of delay consistent with the settled law in tis jurisdiction. Before resting his submission, the learned Advocate was asked to respond to an issue whether rule 96(7) of the Rules as amended by the Tanzania Court of Appeal (Amendments) Rules, 2019 (G.N. No. 344 of 2019) had any bearing on the instant application. The learned Advocate had two arguments. **One**, in so far as the application was filed before the promulgation of GN. No. 344 of 2019 with no retrospective operation, it is not affected by the amendment to rule 96 of the Rules. **Two**, at any rate, he argued, the applicant cannot ride the two horses at one and the same time that is to say; he cannot resort to rule 96(7) of the Rules and at the same time pursue this application under rule 10 of the Rules. I understood Mr. Rutabingwa touting for the withdrawal of the instant application to pave way for the invocation of rule 96(7) of the Rules during the hearing of the appeal.

Mr. Mbamba's submission in rejoinder was that; first, the applicant has explained the lapse of time in para 7 of his affidavit but in any case, there is no requirement to show the cause of the delay more so when there is no preliminary objection in the appeal. Secondly, the learned Advocate urged the Court to hold that in view of the amendments to rule 96 of the Rules, the opposition to the application was farfetched. He urged the Court to grant the order as prayed in the Notice of Motion.

I have closely followed the submissions for and against the application. Considering that no dispute exists regarding the omission to include certain documents in the record of appeal as well as the cause of delay in including the same without leave within the time prescribed by rule 96(6) of the Rules, the issue falling for my consideration turns on the failure to account for the delay in lodging this application canvassed by Mr. Rutabingwa. Going by the averments in the affidavit, there is no dispute that the applicant could not incorporate the omitted documents in the record of appeal in the appeal because the same were not available at the time the said appeal was instituted.

It is understandable that the said documents were in respect of an interlocutory application which did not, strictly, form part of the record of

proceedings in Commercial Case No. 86 of 2013. That perhaps explains the failure by the Deputy Registrar, Commercial Court, to prepare and make them available to the applicant along with the documents in the said case from which the appeal emanated. Mr. Rutabingwa had no qualms with the period up to 6th March 2018 when the said documents were supplied to the applicant's advocate.

Mr. Mbamba believes that para 7 of the affidavit reproduced earlier on addresses the concern in sufficient details. However, para 7 only explains the reason for the delay rather than explaining the failure to file the application for extension of time immediately after obtaining copies of the documents now sought to be included in the appeal. I am tempted to believe that this is why Mr. Mbamba sought to persuade the Court to treat his client's application as one for amendment of the record of appeal as if it was made under rule 111 of the Rules in line with **Dismas K.B. Francis** (supra) and in the process diluting the principle in **Wambele Mtumwa Shahame's** case (supra) and a host of other decisions by this court on the requirements to account for each day of delay. I will revert to that argument a little later but I must point out quickly that his reliance on **Gabriel Mathias Michael vs Halima Mzee and 2 Others** (supra) hardly

advances the applicant's cause because the application in that case was granted by consent rather than on the basis of rival arguments as it were in this application.

On the other hand, in **Mwatex (2002) Limited vs Registered Trustees of K.K.K.T** (supra) the appeal was struck out for being incompetent on account of an omission to include certain documents in the record of appeal. The Court arrived at that decision upon being satisfied that notwithstanding the unconditional leave to include in the record of appeal documents which ought to have been incorporated without leave within fourteen (14) days, the appellant had failed to seize that opportunity in pursuance of rule 96(6) of the Rules in force at that time. It is for this reason I respectfully agree with Mr. Rutabingwa learned Advocate, that the two decisions are irrelevant to the instant application.

I will now revert to the argument canvassed by Mr. Mbamba regarding the treatment of an application for leave to include the omitted documents in a record of appeal relying on the **Dismas K.B. Francis** case (supra). Rule 111 of the Rules stipulates:-

> *"The Court may at any time allow amendment of any notice of appeal or notice of cross-appeal or*

memorandum of appeal, as the case may be, or any other part of the record of appeal, on such terms as it thinks fit."

On the other hand, rule 96(6) of the Rules before amendment vide GN No. 344 of 2019 provided thus:

"Where a document referred to in rule 96 (1) and (2) is omitted from the record, the appellant may within 14 days of lodging the record of appeal without leave include the document in the record."

Rule 96(6) of the Rules before the amendment is too plain to require further interpretation. It simply means that whilst a litigant has a right to include in his record of appeal within fourteen days of lodging his appeal without leave, he is not prohibited from applying for leave to include the said documents after expiry of fourteen days. On the other hand, Rule 111 is equally plain in its meaning and purpose, namely; amendment of any notice of appeal, memorandum of appeal, notice of cross of appeal or any record of appeal at any time before an appeal is called for hearing. In **Dismas K.B. Francis** (supra), an application was made under rules 48(1), 50(1) and 111 of the Rules for leave to amend a notice of appeal by inserting the correct date of a of the impugned judgment. Although a

copy of the judgment sought to be appealed was not annexed to the affidavit and an incorrect notice of appeal sought to be amended was annexed, the Court held that unlike rule 10 of the Rules which requires an applicant to show good cause for the delay, rule 111 of the Rules does not prescribe any conditions. The instant application was preferred under rule 10 of the Rules for extension of time for the purpose of including the omitted copies of documents which must be done with leave in terms of rule 96(6) of the Rules. Whilst I am prepared to accept that the ultimate objective in this application would, to an extent, be akin to seeking leave for the amendment of the record of appeal, I do not think that Mr. Mbamba is necessarily correct in arguing as he does, that the application falls within the ambit if rule 111 of the Rules in the same manner discussed in **Dismas K.B Francis** case (supra). I say so being alive to the dictates of rule 96(6) and (7) of the Rules which are specifically devoted to making good the record of appeal where, as is the case here, the same is found to be incomplete in terms of the documents rather than the contents of the documents in the record which is what is envisaged by rule 111 of the Rules. In other words, whilst rule 96(6) and (7) aim at curing inadequacies in a record of appeal, rule 111 cures inadequacies in a complete record. I

entertain no slightest doubt that Mr. Mbamba will appreciate that the two are not one and the same. It is for this reason I take the view that the case cited by Mr. Mbamba is, with respect, distinguishable as submitted by Mr. Rutabingwa. It follows thus, that before the latest amendments to the Rules, a party whose record of appeal was inadequate as it were ought to resort to the old rule 96(6) by including the omitted documents without leave within fourteen (14) days of institution of the appeal. In case of the failure to do so within the prescribed time, he had to resort to rule 10 of the Rules which is what the applicant did in this application. Following the amendment of rule 96 by GN. No. 344 of 2019, the position is different and that is why I asked the learned Advocates whether it was necessary any more for me to deal with this application. Not surprisingly, the learned Advocates had different answers to the question. To appreciate the essence of the question, I take the liberty to reproduce rule 96(6) and (7) of the Rules (as amended) thus:

> *"(6). Where a document referred to in rule 96(1) and (2) is omitted from the record of appeal the appellant may within fourteen days of lodging the record of appeal, without prior permission and thereafter, informally, with the permission of the*

registrar, include the document in the record of appeal by lodging an additional record of appeal.";
and (b) adding the following sub rules-

"(7) Where the case is called on for hearing, the Court is of opinion that document referred to in rule 96(1) and (2) is omitted from the record of appeal, it may on its own motion or upon an informal application grant leave to the appellant to lodge a supplementary record of appeal.

Mr. Rutabingwa had misgivings about the operation of the amendments to the application filed before the effective date of the amendments but in any case, the learned Advocate argued that it will require the applicant to withdraw the application if he has to benefit from the amnesty provided under rule 96(6) of the Rules. Mr. Mbamba stood to his guns for an amendment of the record of appeal in pursuance of rule 111 which I have already discussed above.

There is no dispute that GN No. 344 of 2019 came into force on 26th April, 2019 post the filing of the application. The amended rule 96(6) of the Rules allows a party who fails to include omitted documents in the record of appeal without prior permission of the Registrar to do so any time thereafter with the Registrar's permission by lodging an additional record of

appeal. Apparently, the sub-rule does not prescribe any time limit beyond which a party cannot be permitted to make good the incomplete record provided the same is done prior to the date of hearing of the appeal. Better still, rule 96(7) of the Rules as amended empowers the Court on its own motion or any informal application when an appeal is called on for hearing to allow the filing of a supplementary record. The cumulative effect is that the inclusion of omitted documents in the record of appeal can be done at any time without the party doing so whether under Rule 96(6) or (7) being required to account for the delayed inclusion or filing of an additional/supplementary record, as the case may be.

Mr. Rutabingwa's argument regarding the application of the amended Rules is attractive but falls on the face of **Freeman Aikaeli Mbowe & Another vs Alex O. Lema,** Civil Appeal No. 84 of 2001 and **S.S.Makorongo vs Severine Consiglio**, Civil Application No. 6 of 2003 (both unreported). What is discerned from the two cases is that procedural statutes run retrospectively unless it is clearly shown to the contrary. There is no contrary intention against GN. No. 344 of 2019 running retroactively and so the procedure introduced in the Rules post the filing of the application applies squarely to it.

I appreciate the argument by Mr. Rutabingwa that in view of the provisions of rule 96(6) of the Rules the applicant should withdraw the application and pursue the amendment under that rule by seeking permission from the Registrar. That is one way of looking at the issue but certainly it is not the only way out considering that the learned Advocate for the applicant did not find purchase in that option. I am inclined to take the view that on the advent of the amended Rules, this application has been rendered superfluous and thus unnecessary. This is, as shown above, the power to include the omitted documents in a record of appeal is now vested in the Registrar with his permission if the applicant did not do so within the 14 days of lodging the appeal. It is also true that when that cannot be done before the hearing date, it is the Court itself (rather than a single Justice of Appeal) which is vested with the power to order the filing of a supplementary record on its own motion or on informal application by a party to an appeal. I am not hearing an appeal and so rule 96(7) of the Rules cannot be invoked. That means that the option available to the applicant is to resort to rule 96(6) of the Rules by seeking permission to file an additional record of appeal comprising the omitted documents in the original record.

In the upshot, considering that I have found that the application is superfluous, the same is hereby struck out with no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 26th day of July, 2019.

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

The ruling delivered this 7th day of August, 2019 in the presence of Mr. Samson Mbamba, learned counsel for the applicant and Mr. Joseph Rutabingwa, learned counsel for the respondent is hereby certified as a true copy of the original.

E.Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL