IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And LEVIRA, J.A.)

CIVIL APPLICATION NO. 207 OF 2018

JOVET TANZANIA LIMITED..... APPLICANT

VERSUS

BAVARIA N. V..... RESPONDENTS

(Appeal from the Ruling of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Philip, J.)

dated the 4th day of September, 2014
in
Misc. Commercial Cause No. 183 of 2018 arising from Commercial Case No. 94 of 2018 and Misc. Commercial Application No. 171 of 2018)

.....

RULING OF THE COURT

19th July, & 13th August, 2019

KOROSSO, J.A.:

This Ruling on the preliminary objection raised by the respondent in the appeal before the Court. In the appeal, the appellant is aggrieved by the decision of the High Court, Commercial Division at Dar es Salaam in Misc. Commercial Cause No. 183 of 2018 arising from Commercial Case No. 94 of 2018 and Misc. Commercial Application No. 171 of 2018.

The Notice of preliminary objection lodged by the respondent on the 15th of July 2019 alludes to one ground of objection that:

> *"The Appeal is bad and incompetent for being supported by an incurably defective record of appeal contravening the mandatory provisions of Rule 96(1)(k) of the Tanzania Court of Appeal Rules 2009 (the Rules)".*

The nature of the preliminary objection as amplified in the notice itself is that, the notice of appeal, memorandum and record of appeal filed by appellant challenge a non-existent Ruling of the High Court of Tanzania (Commercial Division) at Dar es Salaam dated 4th day of September 2014 in Misc. Commercial Cause No. 183 of 2018 and Misc. Commercial Application No. 171 of 2018 as revealed above. The respondent is in effect stating that the respondent's submissions filed in Misc. Commercial Cause No. 183 of 2018 which were adopted to form part of oral submissions made before the High Court of Tanzania (Commercial Division) on 29th October 2018 are missing from the record of appeal filed by the appellant in this Court and that this renders the certificate of record incorrect. The respondent submitted further that the said missing documents (skeleton submissions/arguments) are necessary and relevant for the proper determination of the appeal as they have even been referred to on pages

805, 806 and 807 of the record of appeal and the same submissions were adopted and formed part of the record of Misc. Commercial Cause No. 183 of 2018 and were used in the decision within which this appeal emanates from. Relief sought by the respondent is for the appeal to be struck out with costs.

On the day fixed for hearing, the appellant was represented by Mr. Francis Stolla learned Advocate, assisted by Mr. Bryceson Shayo and Mr. Frank Chulu, learned Advocates respectively, whereas, Mr. Gerald Nangi learned Advocate assisted by Mr. Bryan Mambasho, learned Advocate, represented the respondent.

The appellant's counsel conceded to the preliminary objection raised by the respondent's counsel, but disputed the consequence thereto including the respondent's counsel proposed remedy for the anomaly where Mr. Nangi submitted that the omission renders the appeal incompetent and the same should therefore be struck out. Mr. Stolla on the other hand arguing that first, Rule 99(1) of the Tanzania Court of Appeal Rules (the Rules) impose a duty for each of the parties, that is, the appellant and the respondent to ensure the records of appeal are proper and that it is therefore a shared responsibility and thus the remedy for

such omission is to file supplementary record of appeal as provided for under Rule 96(7) of the Rules as opposed to striking out the appeal. Second, the counsel for the appellant implored the Court to consider the import of Rule 2 of the Rules, as amended by GN 334 of 2019 and apply the principles therein in the matter before the Court and thus apply Rule 96(7) of the Rules and grant leave for the appellant to file supplementary records as prayed. Third, on the issue of costs, the counsel for the appellant stated that under the circumstances, the Court should order that each party should bear own costs.

The respondent's counsel response was that the Court should proceed to find that the omission to include the already stated documents in the record of appeal, a fact conceded by the appellant's counsel, is fatal and renders the appeal incompetent stating that this is the position set by numerous decisions of this Court. He argued further that granting leave for the appellant to provide supplementary record of appeal under Rule 96(7) of the Rules will be pre-empting the preliminary objection raised, and that in any case, the said provision (that is Rule 96(7)) is reserved for the Court itself. The respondent counsel maintained that under the circumstances, the only remedy available is for the appeal to be struck out referring the Court to the holding in **Mondorosi Village Council and 2 Others vs**

Tanzania Breweries Limited and 4 Others, Civil Appeal No. 66 of 2017 (unreported) which discussed on not pre-empting a preliminary objection raised.

The respondent's counsel when informed on the provisions of Rule 96(7) which came about with the amendments in GN 344 of 2019, argued that laws including procedural rules do not act retrospectively, and that since the appeal was filed prior to the said amendments therefore in the present appeal section 96(7) of the Rules is not applicable. On the issue of costs, the respondent's counsel prayed that it should be borne in mind that the respondent has already incurred various expenses and that at the same time as settled by various decisions of this Court including the one cited above; **Mondorosi Village Council and 2 Others vs Tanzania Breweries Limited and 4 Others** (supra), that where the appeal is struck out, the appellant is the one to meet the costs.

Having heard the rival submissions and considered the grounds expounded in the notice of preliminary objection filed, there is no doubt as stated by the learned counsel for the respondent and conceded by the learned counsel for the applicant that the record of appeal is incomplete in view of the omission of the skeleton submissions filed in Misc. Commercial

Cause No. 183 of 2018 and adopted to form part of the oral submissions before the High Court (Commercial Division). The importance and relevance of the missing documents for determination of the appeal under consideration has also been underscored by both counsel for the parties. There is also no doubt that this omission contravenes the provisions of Rule 96(1) (k) of the Rules.

This being the position, there are numerous decisions by this Court and some cited by the counsel for the respondent (see **Mondorosi Village Council and 2 Others vs. Tanzania Breweries Ltd and 4 Others** (supra); **National Bank of Commerce vs Basic Element Limited**, Civil Appeal No. 70 of 2015 (unreported); **Sylvia Albert vs Adam Moshi,** Civil Appeal No. 76 of 2014 (unreported), which in effect state that where the omitted documents are essential for determination of the appeal, the appeal becomes incompetent and the remedy is for the appeal to be struck out.

Thus, given the implication of the above decisions, ordinarily, this appeal should have ended up being struck out. Nevertheless, we have further considered the fact that the said decisions cited were decided before the coming into operation of the amendments to the Rules ushered

in by the Tanzania Court of Appeal (Amendment) Rules, 2019 GN 344 published 26th of April 2019, that introduced an amended Rule 96(7) which reads:

> *"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".*

From this Rule, it is clear that the Court *suo motu* upon discovering a document referred to in rule 96(1) and (2) is missing from the record of appeal or upon an informal application, may grant leave to the appellant to lodge supplementary record of appeal. This rule therefore provides two scenarios where the Court may grant leave to the appellant to file supplementary record of appeal. It is without doubt that this amendment has been influenced by the overriding objective principle incorporated under section 3 of the Appellate Jurisdiction Act [Cap 141 RE. 2002] and also incorporated in the amended Rule 2 of the Rules that states:

> *"In administering these Rules, the Court shall seek to give effect to the overriding objective as provided for under sections 3A and 3B of the Act"*

While it is important to understand that this principal is not supposed to blindly disregard the rules of procedures couched in mandatory terms, it is without doubt meant to expedite hearing of matters before the Court while ensuring that they are determined justly.

In the present appeal, it is also pertinent to consider the fact that ensuring records of appeal contain all necessary and relevant documents is not only left to the appellant. The Rules also expect that, in an appropriate situation, where the respondent becomes aware of the ommission to also act accordingly to ensure the anomaly is addressed. This can be inferred from the contents of Rule 99(1) which states:

> *"If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his or her case, he or she may lodge in the appropriate registry eight copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal".*

Regarding the issue raised by the respondent counsel, challenging the application of Rule 96(7) as amended in the current appeal, arguing that amendments to the law cannot act retrospectively, albeit challenged

by the learned counsel for the appellant, we find that this issue has been discussed and a position set by this Court in its previous decisions.

Undeniably, the current appeal, was lodged on 27th November 2018, which preceded the amendments under consideration, that is, Tanzania Court of Appeal (Amendment) Rules, 2019 GN 344 published 26th of April 2019, and in this case, Rule 96(7) in particular which is now the remedy addressing omissions of relevant documents in the record of appeal. Venturing into the import and applicability of this provision to the matter under scrutiny, we begin by citing with approval a holding made by the High Court (Hamlyn, J.) in **Benbros Motors Tanganyika Ltd. v. Ramanlal Haribhai Patel** [1967] HCD n. 435 that: -

"When a new enactment deals with rights of action, unless it is so expressed in the Act; an existing right of action is not taken away, ***but when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.*** "[Emphasis added].

The position was in effect subsequently taken by this Court in **Makorongo v. Consigilio** [2005] 1 EA 247. In that case, the Court quoted with approval the statement of the principle made by Newbold, J.A.

of the defunct East Africa Court of Appeal in the case of **Municipality of Mombasa v. Nyali Limited** [1963] EA 371, at 374 that:

> *"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested;* ***whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary.*** *But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.* "[Emphasis added].

The holding in **Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others,** Criminal Application No. 2 of 2018 (unreported) is also relevant, since it followed the stance in **Makorongo vs Consigilio** [2005] 1 EA 247*).* In **Jackson Sifael Mtares** (supra), the Court cemented that position by considering an excerpt from a book by A.B. Kafaltiya

entitled; *"Interpretation of statutes";* 2008 Edition, Universal Law Publishing Co., New Delhi - India, at page 237 the following passage:

> *"No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues. When the legislature alters the existing mode of procedure, the litigant can only proceed according to the altered mode. It is well settled principle that 'alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.' The rule that 'retrospective effect is not to be given to laws' does not apply to statutes which only alter the form of procedure or the admissibility of evidence.* ***Thus amendments in the civil or criminal trial procedures, law of evidence and limitation*** *etc;* ***where they are merely the matters of procedure, will apply even to pending cases.*** *Procedural amendments to a law, in the absence of anything contrary, are retrospective in the sense that* ***they apply to all actions after the date they come into force even though the action***
>
> ***may have begun earlier or the claim on which action may be based accrued on an anterior***

> ***date.*** *Where a procedural statute is passed for the purpose of supplying an omission in a former statute or for explaining a former statute, the subsequent statute relates back to the time when the prior statute was passed.* ***All procedural laws are retrospective, unless the legislature expressly says they are not."*** **(Emphasis added).**

In the premises, applying the principles enshrined in the above holding to the current matter, we are of the firm view that the amendment of Rule 96(7) are retrospective in application because first, it pertains to the procedure governing remedy where there is an omission to include part of important documents relevant to determination of an appeal and second, the amendment has no stipulation limiting the retrospective application of the new Rule.

Consequently, the preliminary objection is sustained to the extent stated herein. Pursuant to Rule 96(7) of the Rules, the appellant is granted leave to file supplementary record within thirty (30) days from the date of delivery of this ruling. Supplementary record shall be confined to the missing documents outlined in the notice of preliminary objection. Costs to abide by the outcome of the Appeal. Order Accordingly.

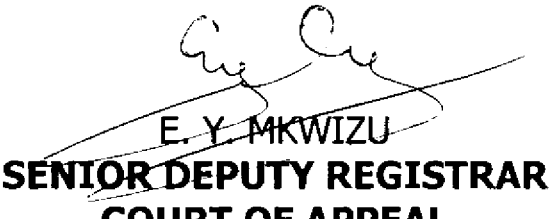
DATED at **DAR ES SALAAM** this 6th day of August, 2019

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 13th day August 2019 in the presence of Mr. Regemeleza Nchala, Counsel for the Appellant and Mr. Bryan Mambasho Counsel for the Respondent is hereby certified as a true copy of the original.



E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL