IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 114 OF 2014

SHEAR ILLUSIONS LIMITED .....APPELLANT

VERSUS

CHRISTINA ULAWE UMIRO ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court (Commercial Division) at Dar e salaam)

(Makaramba, J.)

dated the 18th day of November, 2013
in
Commercial Case No. 32 of 2012

RULING OF THE COURT

7th November, 2018 & 8th February, 2019

MKUYE, J.A.:

The appellant, Shear Illusions Limited, instituted this appeal on 12/12/2014 challenging the judgment and decree of the High Court (Makaramba, J.) dated 18/12/2013 in Commercial Case No. 32 of 2012 which was entered in favour of the respondent. On the other hand, the respondent filed two notices of preliminary objection, one on 2/2/2018 and the other one on 31/10/2018.

When the appeal was called on for hearing the appellant was represented by Mr. Gaspar Nyika learned counsel; whereas the respondent enjoyed the services of Mr. George Mushumba also learned counsel.

From the outset, Mr. Mushumba prayed and was granted leave to abandon the notice of preliminary objection filed on 2/2/2018 and proceed with the one filed on 31/10/2018 which is on the following grounds:-

"1. *That, the record of appeal is vitiated for want of valid and proper* ***NOTICE OF APPEAL*** *as the one contained in the record of appeal is not signed by or on behalf of the appellant contrary to Rule 83(6) of the Tanzania Court of Appeal Rules, 2009.*

2. *That, the appeal is incompetent for non-inclusion of Exh. "P1", an invoice No. 0040 dated 11/06/2011 for shillings 12,032,000/= in the record of appeal which was produced and admitted at the trial in the lower court in contravention of Rule 96(1) (f) of the Tanzania Court of Appeal Rules, 2009.*

3. *That, the appeal is incompetent for containing unendorsed exhibits contrary to Order XIII Rule 4(1) (a), (b), (c) and (d) of the Civil Procedure Code, Cap 33 R.E. 2002."*

Submitting in support of points Nos. 2 and 3 of the preliminary objection, Mr. Mushumba contended that the appeal is incompetent for want of a valid notice of appeal and non-inclusion of Exh. P1- the invoice No. 0040 for shillings 12,032,000/=. He pointed out that the purported notice of appeal at pages 95 and 96 of the record of appeal was not signed by either the appellant or his advocate as it is mandatorily required under Rule 83(6) of the Tanzania Court of Appeal Rules, 2009 (the Rules) together with Form B set out in the First Schedule to the Rules. He added, as the notice of appeal which is a necessary document in terms of Rule 96(1) (j) of the Rules is invalid, it renders the record of appeal incomplete and hence, an incompetent appeal liable to be struck out.

As for non-inclusion of part of Exhibit P1 in the record of appeal, he assailed the appellant for her failure to include an invoice No. 0040 dated 11/6/2011 of shillings 12,032,000/= which was collectively admitted together with invoice No. 0047 as Exhibit P1. He pointed out that, since invoice No. 0040 was not included as per Rule 96(1) (f) of the Rules, it also renders the record incomplete and, consequently,

incompetent appeal liable to be struck out. On account of those defects, he prayed to the Court to strike out the appeal for being incompetent with costs.

It is noteworthy that Mr. Mushumba did not submit on the first point of preliminary objection regarding unendorsed Exhibits following Mr. Nyika's observation that he would be prepared to concede if the original file contains Exhibits which are endorsed differently from the ones he had included in the record of appeal.

In response, Mr. Nyika readily conceded to the defect that the notice of appeal included in the record of appeal was not signed. He, however, brought to the attention of the Court that the notice of appeal that is in the copy of the record of appeal he has, was signed. It is worth mentioning here that when the Court perused the original file, it found that it had a signed notice of appeal. For that reason, Mr. Nyika urged the Court to take judicial notice that the proper notice of appeal was filed but by sheer inadvertence, it was not included in the record of appeal for the use by the Court. Besides that, while relying on the overriding objective principle introduced by Written Laws (Miscellaneous

Amendments) (No. 3), Act 2018, (Act No. 8 of 2018), he implored the Court not to strike out the appeal but to strive on meeting the ends of justice.

Mr. Nyika also conceded that Invoice No. 0040 was not included in the record of appeal. However, while relying on the case of **CRDB Bank Limited V. Issack B. Mwamasika and 2 Others**, Civil Appeal No. 139 of 2017 (unreported), he contended that as the preparation of the record of appeal was a shared responsibility, the Court should order the respondent to file a supplementary record which includes the said document so as to cure the anomaly. At any rate, he said, invoice No. 0040 was not relevant to the appeal.

Rejoining, Mr. Mushumba argued that the overriding objective principle cannot apply to the matter lodged in 2014 while the amendment of the law was made in this year. He said, the case of **CRDB Bank Limited** (supra) was distinguishable because all documents were included in the record of appeal except Exh. P11 in which some missing pages were brought by the respondent through a supplementary record. He stressed that, since invoices Nos. 0040 and

0047 with different dates and amounts of money were admitted collectively as Exh. P1, and moreso when taking into account that in ground of appeal No. 5 the appellant seeks to challenge those documents, it was important to be included in the record of appeal. In any case, he added, it was not a question of the party to choose documents to be included in the record of appeal. In that regard he contended that failure to include the said document contravened Rule 96(1) (f) of the Rules. At the end, he reiterated for the appeal to be struck out with costs.

Our close examination of the notice of appeal contained in the record of appeal at pages 95-96 has shown that the same was not signed by either the appellant or his advocate. Rule 83(6) of the Rules requires notice of appeal among other things to be signed by or on behalf of the appellant. The said provision stipulates as follows:

> *"A notice of appeal shall be substantially in Form D in the First Schedule to these Rules* ***and shall be signed by or on behalf of the appellant.***
> [Emphasis added]

The manner Rule 83(6) is couched, it provides for a mandatory requirement for the appellant or his advocate to sign the notice of appeal. Besides that, Form D in the First Schedule to the Rules referred to in the above provision, provides for a space for a signature by the appellant or the advocate for the appellant. The notice of appeal contained in the record of appeal, as have been conceded by both counsel, was not signed as the space earmarked for signatures is blank. Interestingly enough, as already hinted earlier on, the original file and the copy of the record of appeal which the counsel for the appellant has, each contains a notice of appeal which is signed. It is not clear as to why the signed notice of appeal was not included in the record of appeal for the use of the Court.

Under Rule 96(1)(j) of the Rules, the record of appeal is mandatorily required to contain a valid notice of appeal. Since the notice of appeal included in the record of appeal did not comply with the provisions of Rule 86(6) of the Rules, it was defective. Hence, it renders the appeal incompetent liable to be struck out.

As regards non-inclusion of invoice No. 0040, we are equally settled in our mind that the same was not included in the record of appeal. Indeed, the record of appeal at page 83 shows that invoice No. 0040 dated 11/6/2011 for shillings 12,032,000/= together with invoice No. 0047 dated 1/8/2011 for shillings 48,473,000/= were admitted and marked as Exhibit P1 collectively. However, in order for an appeal to be competent before the Court it has to be accompanied by among other documents, **all documents which were put in evidence** in the record of appeal as per Rule 96, (1) (f) of the Rules.

Though Mr. Nyika argued that the said Exhibit was not necessary for the determination of the appeal and prayed to abandon the ground of appeal in that regard, we do not agree with him for three reasons. **One,** it is not within a mandate of the party to determine which documents are necessary and which are not, or rather to choose documents for inclusion in the record of appeal and those not to be included. This is so because these are powers vested to the Justice or Registrar of the High Court in accordance with the provisions of Rule 96 (3) of the Rules.- See also **African Barrick Gold Mine Plc v.**

Commissioner General (TRA) Civil Appeal No. 77 of 2016 (unreported). **Two,** in ground No. 5 of the appeal the appellant seeks to challenge the evidence relating to those documents. **Three,** the move to abandon the said ground at this stage, in our view, would not only be improper since the appeal has not reached the hearing stage but also allowing it would amount to preempting the preliminary objection raised by the other party. On our part, we find that it was an important document to be included in the record of appeal.

We have also considered the case of **CRDB Bank Limited** (supra) cited by Mr. Nyika. However, we think that case is distinguishable from the one under consideration. We say so because, in that case Exh P11 which was included in the record of appeal prepared by the appellant lacked pages 2, 3, 6 and 8. But the respondents filed a supplementary record of appeal which included such missing pages. Then the Court while relying on the case of **Doris M. Wanjiru Kinuthia & 2 Others v. Purity Ndirangu** [2015] eKLR, made an *orbiter dictum* that preparation of the record of appeal was a shared responsibility. In this case Exh. P1 invoice 0040 as a whole was not

included unlike in that case where some pages in Exh. P11 went missing. On top of that the appellant intends to challenge it in ground No.5 of the appeal. In those circumstances, we still maintain that the appellant ought to include it in the record of appeal rather than banking on the respondent to include it.

Consequently, we fully agree with Mr. Mushumba that failure to include in the record of appeal a valid notice of appeal and the invoice No. 0040 renders the record of appeal incomplete.

Under normal circumstances, with these irregularities the appeal could have been struck out. However, with the wake of the overriding objectives as propounded through the Written Laws (Miscellaneous Amendments)(No. 3) Act, 2018 (Act No. 8 of 2018) which amended among other laws, the Appellate Jurisdiction Act, Cap 141 R.E 2002, (the AJA), we are hesitant to do so. Section 3A and 3B of the AJA as amended, have introduced the concept of overriding objective which is geared towards facilitating the just, expeditious, proportionate and affordable resolution of all matters.

But before proceeding further, we need to answer first the issue raised by Mr. Mushumba as to whether the said amendments have a retrospective effect so as to take on board the matter at hand. To begin with, we wish to point out here that as a general rule, every act or enactment is mandatorily required to come into force on a date of publication in the *Gazette* or on some other date if it is so provided in the same Act or any other written laws. This is a requirement under section 14 of the Interpretation of Laws Act, Cap. 1 R.E. 2002 which states as hereunder:

> *"Every Act shall come into operation on the date of its publication in the Gazette or if it is provided either in that Act or in any other written law, that it shall come into operation on some other date, on that date."*

Under the above cited provision, the enactment is not expected to **operate retrospectively** except where the said piece of legislation so provides. This is even stricter on the laws affecting substantive justice. This position was also taken in the case of **The Director of Public**

Prosecutions v. Jackson Sifael Mtares and 3 Others, Criminal Appeal No. 2 of 2018 at page 27 (unreported) where the Court stated as hereunder:

> *"Normally, it may not be made to apply retrospectively where the said legislation affects the substantive rights of the potential victims of that new law. On the other hand however, if* ***it affects procedure only primafacie it operates retrospectively*** *unless there is good reason to the contrary – see the case of* ***Makongoro v. Consigilio, [2005] 1 EA 247(CAT).***"
>
> [Emphasis added]

In the same case of **Jackson Sifael Mtares and 3 Others** (supra) the Court cited with approval theory taken by A.B. Kafaltiya, M.A., L.L.M., Ph. D. in his book which is titled *"Interpretation of Statutes"* 2008 Edition, Universal Law Publishing 6., New Delhi – India page 237 where it was propounded as follows:-

> *"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 of evidence. ***Thus amendments in the civil or criminal trial procedure, 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 came 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]

Even in this case, as the amendments are geared towards relaxing the procedure to enable the Court to achieve the end of justice and do not touch the substantive rights of the parties, we are settled in our mind that they squarely cover the matter at hand no matter that it was lodged in 2014 long before the new enactment.

In the matter at hand as we have alluded to earlier on, the appeal is tainted with shortcomings of having been preceded by an unsigned notice of appeal also non-inclusion of part of Exh. P1 – invoice No. 0040 in the record of appeal. However, with what we have already endeavored to demonstrate above, we think that the respondent has not been prejudiced with the anomalies; and since the original file contains the signed notice of appeal, the appellant should be given a chance to rectify the record of appeal.

In the event, we exercise the powers conferred in the Court by Rule 4(2)(a) and (b) of the Rules and order that the appellant should

include in record of appeal the properly signed notice of appeal and the invoice No. 0040 contained in Exh. P1. We further direct that she should do so within 30 days from the date of the order. We make no order as to costs.

DATED at **DAR ES SALAAM** this 5th day of February, 2019.

A. G. MWARIJA
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.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL