

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A. And KWARIKO, J.A.)

CIVIL APPEAL NO. 179 OF 2016

R. S. A. LIMITED APPELLANT

VERSUS

HANSPAUL AUTOMECHS LIMITED 1ST RESPONDENT

GOVINDERAJAN SENTHIL KUMAR..... 2ND RESPONDENT

**(Appeal from the decision of the High Court of Tanzania,
Commercial Division, at Dar es Salaam)**

(Songoro, J.)

dated the 20th day of April, 2016

in

Commercial Case No. 160 of 2014

.....

RULING OF THE COURT

17th March & 8th June, 2020

MWARIJA, J.A.:

The appellant, R.S.A. Limited, a Company dealing in the manufacture of converted bodies of motor vehicles used in tourism safaris, was the plaintiff in the High Court of Tanzania (Commercial Division) at Dar es Salaam. It instituted Commercial Case No. 160 of 2014 against Hanspaul Automechs Limited and Govinderajan Senthil Kumar (the 1st and 2nd

respondents respectively). The appellant claimed that the respondents had infringed the latter's copyright by manufacturing similar motor vehicles' bodies using the drawings designed and used by the appellant, that is; the R. S. A. Car Model bodies. It claimed that the infringement has caused it to suffer specific damages by way of business and good will. As a result, the appellant prayed for the following reliefs against the respondents jointly and severally.

"(a) A declaratory order that the defendants have infringed the plaintiff's copyright in the engineering drawings used to make RSA Safari Cruiser 7X; Safari Cruiser 5X; RSA Safari Cruiser 5XE; Safari Wagon N7X; and RSA Safari Wagon N5X.

(b) A perpetual injunctive order to restrain the first defendant (whether acting by its directors officers, servants or agents, or any of them or otherwise howsoever) from infringing the plaintiff's copyright in the engineering drawings used to make RSA Safari Cruiser 7X; Safari Cruiser 5X; RSA Safari Cruiser 5XE; RSA Safari Wagon N7X and RSA Safari Wagon N5X.

(c) An order to prohibit the first Defendant from producing Hanspaul Land Cruiser 7SX,

Hanspaul Land Cruiser 5SRX; Hanspaul Land Cruiser 5SX; Hanspaul Nissan 7SX and Hanspaul 5SRX Nissan Y61.

- (d) Delivery up to the Plaintiff, or in the alternative, obliteration upon oath of all infringing copies of the Plaintiff's copyright works in the possession, custody and control of the first defendant.*
- (e) An order restraining the first defendant from manufacturing, fabrication, sale and offering for sale safari converted vehicles using or reproducing in any manner the plaintiff's engineering drawings.*
- (f) An order against the second defendant prohibiting him from passing over and/or disclosing the plaintiff's drawings to the first defendant.*
- (g) Payment of the sum of US\$ 1,689,352.31 being specific damages for the loss suffered as a result of loss of business occasioned by the defendant's act of infringement of the plaintiff's engineering drawings.*
- (h) Payment of the sum of US\$ 1,000,000 being loss of goodwill occasioned by the defendant's infringement of the plaintiff's engineering drawings.*

- (i) Payment of the sum of US\$ 1,000,000; being general damages for the deliberate infringement of the plaintiff's copyright in the engineering drawings.*
- (j) Costs of this suit.*
- (k) Any other relief(s) that this Honourable Court may deem fit and just to grant."*

The respondents denied the claims raised by the appellant. Having heard the case, the High Court (Songoro, J.) found that the appellant had failed to prove ownership of the alleged copyright. He dismissed the suit with costs hence this appeal.

When the appeal was called on for hearing on 17/3/2020, Mr. Mpaya Kamara, learned counsel appeared for the appellant while Mr. Salim Mushi, also learned counsel, appeared for the respondents. The respondents' counsel had earlier on 12/3/2020, filed a notice of preliminary objection and since the same was to be disposed of first, we proceeded to hear the parties' advocates on that preliminary point of law, which is to the effect that:

- "(i) The Notice of Appeal is incurably defective and thus touches the jurisdiction of the Court for it is making reference to the Judgment and*

Decree delivered on 12th April, 2016 while the Judgment in the said Commercial Case No. 160 of 2014 was pronounced on 20th April, 2016;

(ii) From what is stated above; consequently the Certificate of Delay dated 19th August, 2016, is incurably defective for it is making reference to an abortive Notice of Appeal.”

Submitting on the first ground of the preliminary objection, Mr. Mushi argued that the notice of appeal filed by the appellant under Rule 83 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) is invalid because the same refers to a wrong date of the judgment thus offending the requirements stipulated in Form 'D' of the First Schedule to the Rules. To bolster his argument, the learned counsel cited the cases of **Bosco Peter Teti v. Life Mushi and 4 others**, Civil Appeal No. 147 of 2015 and **China Railway Jianchang Engineering v. Continental Services Limited**, Civil Application No. 187 of 2015 (both unreported).

Mr. Mushi argued further that, the appeal is incompetent on account that the decree does not bear the date of the judgment. He pointed out that, whereas the judgment is shown to be dated on 12/4/2016 and

pronounced on 20/4/2016, the decree refers to 12/4/2016 as the date of impugned judgment.

It was Mr. Mushi's submission that the defects render the appeal incompetent because the same are not curable. He relied on the cases of **Martin D. Kumaliya & 117 Others v. Iron and Steel Limited**, Civil Application No. 70/18 of 2018, **Frank Benson Msongole v. The Republic**, Criminal Appeal No. 36 of 2013 and **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017 (all unreported).

On the 2nd ground of the preliminary objection, the respondents' counsel argued that, since the certificate of delay was based on a defective notice of appeal, the same is invalid and thus the appeal is time barred.

In response to the submission made by the counsel for the respondents, Mr. Kamara started by opposing the contention that the notice of appeal is incurably defective. He argued that, even though at page 1457 of the record of appeal, it is shown that the judgment was delivered on 20/4/2016, the reality is that the same was pronounced on 12/4/2016 as shown at page 1167 of the record of appeal. This, he said, is

evident from the sequence of the proceedings as can be gleaned from the record of the trial court. He pointed out for example, that the appellant filed the notice of appeal on 13/4/2016 and a copy thereof was served on the respondents on 18/4/2016 (according to page 1461 of the record of appeal). He added that, from the said record, on the same date on which the notice of appeal was filed, the appellant applied for a certified copy of the judgment and proceedings.

Mr. Kamara pointed out further that, on 4/4/2016 the last date when the case was adjourned, the trial court fixed it for judgment on 12/4/2016. He thus argued that, since all the stated events which took place before 20/4/2016 are consistent with the date of delivery of the judgment as shown at page 1167 of the record of appeal, the contention that the notice of appeal refers to a wrong date of pronouncement of the judgment is devoid of merit.

The appellant's counsel argued however, in the alternative, that since the defect relied upon by the respondents' counsel concerns existence of two dates as regards the day on which the judgment was pronounced, the preliminary objection does not raise a pure point of law. He relied on the

principle stated in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] E.A. 696.

With regard to the two dates shown in the record of appeal as the dates on which the judgment was pronounced, Mr. Kamara argued that the same are a result of confusion caused by the trial court. He stated that, from the record, after becoming aware that the decree which was extracted on 10/4/2016 bore a date which was different from the date of pronouncement of the judgment, the learned trial Judge summoned the learned counsel for the parties with a view of consulting them on the date which the record should reflect as the proper day on which the judgment was pronounced. He thereupon recorded that the parties had agreed that the 20th April, 2016 was the proper date. According to the learned counsel, that move was improper because the trial court had become *functus officio*.

Mr. Kamara conceded however that with or without the move taken by the learned trial Judge, the decree is defective for contravening the provisions of Order XX r. 7 of the Civil Procedure Code [Cap. 33 R.E. 2019] (the CPC) because according to his submission, the judgment was pronounced on 12/4/2016. Under the above stated provision of the CPC,

the decree must bear the date on which the judgment was pronounced. He prayed however, that instead of striking out the appeal, the Court should invoke the overriding objective principle and grant the appellant time to obtain and file a supplementary record of appeal consisting of a properly drawn decree. According to the learned counsel, allowing the appellant to rectify the irregularity which was caused by the court would not prejudice the respondents. He relied on the cases of **Yakobo Magoiga Kichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 and **Shear Illusions Limited v. Christina Ulawe Umiro**, Civil Appeal No. 144 of 2014 (both unreported).

In his rejoinder submission, Mr. Mushi reiterated his stance that the appeal lacks a valid notice of appeal. He argued that there is no confusion as regards the date of pronouncement of the judgment. It was his submission further that the defect on the notice of appeal is not curable as the overriding objective principle and the cases cited by the appellant's counsel are not applicable under the particular circumstances of this case.

Having considered the arguments made by the learned counsel for the parties, the immediate issue for our determination is whether the notice of appeal is defective for making reference to a wrong date of the

impugned judgment. From the record, it is clear at page 1167 that the judgment was delivered on 12/4/2016. The proceedings on that date read as follows:-

"Date: 12/4/2016

Coram: Hon. H. T. Songoro, J.

For the Plaintiff: Mr. Nuwamanya, Advocate

For the 1st Defendant } *Hussein Mlinga, Advocate for both*
For the 2nd Defendant } *Defendants*

Court Clerk: Kanyochole, S. H.

Court Order:

The case is coming for judgment and it is ready and has been delivered today.

Sgd.

H. T. Songoro
Judge

12/4/2016"

As submitted by Mr. Kamara, the date on which the judgment was delivered was fixed on 4/4/2016. On that date the High Court ordered as follows:-

"Court order:

The suit was coming for judgment today but unfortunately I did not complete to compile (sic) the judgment. So the judgment is adjourned to 12/4/2016 at 2:30 p.m.

Sgd.

H. T. Songoro
Judge

4/4/2016"

On the basis of the sequence of the proceedings, we agree with Mr. Kamara that, although at page 1457 of the record of appeal the judgment which is dated the 12th day of April, 2016 is shown to have been delivered on 20/4/2016, the proper date of its pronouncement is 12/4/2016. This is also clear from the fact that the appellant filed a notice of appeal on 13/4/2016 and served a copy of it to the respondents on 18/4/2016. Those steps could not have been taken before the pronouncement of the judgment. In the circumstances, we do not find merit in the first ground of the preliminary objection.

On the 2nd ground of the preliminary objection, since its success depended on a finding that the notice of appeal is defective, having

answered the underlying issue in the negative, it follows that this ground must also fail.

As found above, the date of pronouncement of the judgment was wrongly shown to be 20/4/2016 instead of 12/4/2016. It is clear from the record that the problem arose after extraction of the decree. Following a concern raised by one of the parties as regards the proper date of delivery of the judgment the trial court reconvened the parties on 14/7/2016 and made the following order:-

Court order: *In view of a letter Reference MA/RSA/01/29/6/2016 dated 26th June, 2016, I have called counsel for both sides and after consulting them they have agreed that the judgment and decree bears (sic) the date which the judgment was delivered..."*

It is obvious that since from pages 1461 – 1464 of the record of appeal, the appellant's letter of application for certified copies of proceedings, judgment and the decree were received by the trial court on 13/4/2016, the judgment could not have been pronounced on 20/4/2016.

The effect therefore is that the decree does not bear the date on which the judgment was pronounced thus contravening the provisions of Order XX rule 7 of the CPC which provides that:-

"7. The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge or Magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree."

Mr. Kamara conceded to the irregularity. He however, prayed to be allowed to obtain and file a properly drawn decree. That prayer was objected by the respondents' counsel.

Having given due consideration to the prayer, we accede to the submission made by Mr. Kamara that under the circumstances of this case, where the mishap was caused by the trial court, instead of striking out the appeal, we should find it appropriate to invoke the overriding objective principle to allow the appellant to seek and file a properly drawn decree. We agree further that, such a decision which is intended to expedite determination of the appeal on merit, will not prejudice the respondents.

In the event, we grant the prayer by the appellant to obtain a properly drawn decree and file a supplementary record of appeal accordingly within 45 days of the date of delivery of this ruling. Meanwhile, hearing of the appeal is adjourned to the next convenient sessions of the Court to be fixed by the Registrar. Costs to abide the outcome of the appeal.

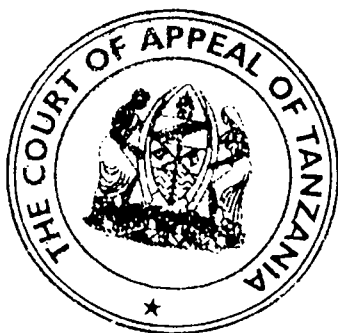
DATED at DAR ES SALAAM this 2nd day of June, 2020.

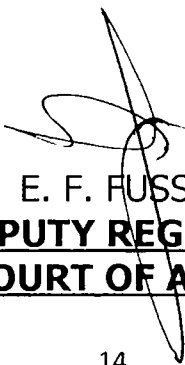
A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Ruling delivered this 8th day of June, 2020 in the presence of Mr. Mpaya Kamara, learned counsel appeared for the Appellant and Mr. Heriel Mushi holding brief of Mr. Salim Mushi, learned counsel for the Respondents is hereby certified as a true copy of the original.




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL