IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., KOROSSO, J.A. And KITUSI, J. A.)

CIVIL APPEAL NO. 260 OF 2017

JEREMIAH L. KUNSINDAH ..... APPLICANT

VERSUS

LEILA JOHN KUNSINDAH ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(Sumari, J.)

dated the 11th day of March, 2014
in
HC. Appeal No. 09 of 2010

.....

RULING OF THE COURT

8th & 15th June, 2020

KITUSI, J.A.:

The estate of Leah L. Kunsindah who died on 28th January, 2007 is yet to be administered to date, because litigation over it has not come to an end. Presently there is this appeal for our disposal, in relation to the same.

However, when the appeal was called for hearing there were points of preliminary objection, raised earlier by a notice in terms of rule 107 (1) of the Tanzania Court of Appeal Rules 2019,

(the Rules) challenging the competence of that appeal for one or the other reason. The points are:-

"1. *That, the appeal before the court is incurably incompetent for being lodged without a proper notice of appeal contrary to the mandatory provisions of Rule 83 (6) of the Rules.*

2. *That, the appeal is incompetent on the reason that the record of appeal is incurably defective for failure to properly and precisely specify the impugned judgment and/ or for specifying a non-existent judgment of the High Court.*

3. *That, the record of appeal is incurably defective for omission to include the judgment of the High Court in HC Probate Appeal No. 9 of 2010 from which the Decree appearing at page 172 of the record was drawn up hence contravening the*

Mandatory provisions of Rule 96 (2) of the Rules."

We had to hear the parties address these points first, and they did. Mr. Mashaka Fadhili Tuguta, learned advocate for the respondent argued the points first. In respect of the first point of objection, the learned counsel submitted that the appeal seeks to challenge the decision of Sumari, J. dated 11th March, 2014 but the Notice of Appeal purports to challenge a decision of Sumari, J. dated 29th October, 2014.

The learned counsel urged us to find that there is no notice of appeal, and the omission renders the record of appeal incomplete, offending Rule 96 (1) (3) of the Rules. The learned counsel prayed that we should strike out the appeal because even the overriding objective principle cannot help out the appellant in this case. He cited cases to give legitimacy to his arguments, these are; **Dr Abrahama Islael Shumo Muro v. National Institute for Medical Research,** Civil Appeal No. 52 of 2017, **Martine Issack v. Simeo Issack,** Civil Appeal No. 57 of 2010 (both unreported).

Mr. Tuguta appreciated the fact that we have powers under Rule 111 of the Rules to order a party to amend a Notice of Appeal but he would not have us take that option, for two reasons. He submitted that the provision is not couched in mandatory terms so we "may" order amendment of the record of appeal but also, we may not. Secondly, he submitted that we should not use that power to give benefit to a negligent party as the appellant in this case.

On the second point, Mr. Tuguta made similar arguments, but this time in relation to the Memorandum of Appeal. The learned counsel pointed out that the said Memorandum of Appeal offends Rule 93 (3) of the Rules as it refers to a wrong or non-existent judgment of Sumari, J. dated 29th October, 2014.

Thirdly, the learned counsel submitted that the record of appeal is incomplete for not including a copy of the impugned judgment. This is because, he submitted, the copy which is included in the record is in respect of Civil Application No. 89 of 2010 instead of HC. Probate Appeal No. 9 of 2010.

On the other hand, Mr. James Njelwa, learned advocate, who appeared for the appellant conceded to the points raised in

the notice. He however put his foot down as regards the consequences. He implored us to make use of Rule 111 of the Rules to order amendment even if it will mean the appellant being condemned to pay the costs.

After receiving those learned arguments, we have decided to commence our deliberation by discussing the point raised by Mr. Tuguta that we should not generously invoke the overriding objective principle because, he submitted, it is not a panacea for all ailments. We readily agree with the learned counsel that the introduction of the overriding objective principle into our laws through section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E 2002, (the Act), did not replace the duty of the parties, especially learned advocates, to observe the rules of the game set in the Rules. The overriding objective principle was not meant to be a magic wand for those who disregard procedural rules. And we have previously said so in many a case, such as; **Njake Enterprises Limited v. Blue Rock Limited and Another,** Civil Appeal No. 69 of 2017; **District Executive Director Kiiwa District Council v. Begota Engineering Limited,** Civil Appeal No. 37 of 2017 and; **Puma Energy Tanzania Limited v. Ruby**

Roadways (T) Limited, Civil Appeal No. 3 of 2018 (all unreported). So, at a later stage we are going to have to decide whether this is a case that calls for our resort to the principle of overriding objective, or not.

Then there is also Rule 111 of the Rules which provides:

> *"111. 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 and other part of the record of appeal, on such terms as it thinks fit."*

Let us decide whether we should accept the invitation by Mr. Njelwa to use this provision or we should heed to Mr. Tuguta's caution that the provision is neither mandatory nor meant for the negligent. Without endorsing Mr. Tuguta's attack on Mr. Njelwa as negligent, we think the learned counsel for the appellant takes a big share of the blame. With the exception of the wrong numbering of the Probate Appeal No. 9 of 2010 which cannot be blamed on the appellant, the remaining ailments are, in our view, self-inflicted injuries. In an ideal situation this is not a

case where Rule 111 of the rules would be invoked, because we have previously dealt with an almost similar scenario in **Njake Enterprises Limited v. Blue Rock Limited & Another,** (supra) where we said;

> *"This principal is now enshrined in the Act. It enjoins the courts to do away with technicalities and decide cases justly. He therefore prayed for the court to allow the appellant to amend the record of appeal in terms of Rule 111 of the Rules. We are further in agreement with Mr. Kamwara that, the said option was available before the preliminary objection was raised by the respondents."*

In the instant appeal, the submission inviting us to invoke Rule 111 of the Rules has been made in response to points of preliminary objection, like in the case referred to above. However, every case has to be decided upon its own facts. In another case; **Issa N. S. Marombe v. Abderehman S. Mbwana,** Civil Appeal No. 46 of 2018 (unreported) despite there being a number

of documents missing, we declined to strike out the appeal saying:-

> *"Nonetheless, with due respect to the stance taken by the respondent, of recent, the shortcoming does not necessarily render an appeal incompetent and, on occasion, the Court may, instead, grant leave to an appellant to lodge appeal in terms of Rules 96 (7) of the Rules."*

So from the above position, an incomplete record does not necessarily render an appeal incompetent where the occasion is appropriate. Is the occasion obtaining in this case fit for us to invoke Rule 96 (7) of the Rules? We propose to discuss this along with the overriding objective principle which we had promised to deal with at a later stage.

As we said at the very beginning of our ruling, this appeal is from probate proceedings that are over a decade old, so determination of this matter is long overdue by any standards. We think that any step that will mitigate on further delay of this matter should be resorted to. We are resolved that the overriding objective principle is quite handy on this and must be

applied along with Rule 96(7) of the Rules, to order the appellant to file a supplementary record of appeal to cure the cited incompleteness of the record.

Thus, we order the appellant to file a supplementary record to cure the three defects discussed in this ruling, and that should be done within 60 days of the delivery of this ruling.

It is so ordered with costs.

DATED at **MWANZA** this 12th day of June, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 15th day of June, 2020 in the presence of Mr. Elias Hezron holding brief of Mr. James Njelwa, counsel for the Appellant and Mr. Venance Kibulika, learned counsel for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL