

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MKUYE, J.A, WAMBALI, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 14 OF 2017

PHOENIX OF TANZANIA ASSURANCE COMPANY LTD APPELLANT

VERSUS

JILALA JULIUS KAKENYELI RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of
Tanzania at Dar es Salaam)**

(Twaib, J.)

Dated the 25th day of May, 2015

in

Civil Cause No. 64 of 2007

RULING OF THE COURT

25th May & 11th October, 2021

WAMBALI, J.A.:

On 20th October, 2005 the respondent, Jilala Julius Kakenyeli was a passenger in a min bus Toyota Hiace (commonly known by its operational name as Daladala) with registration No. T448 AFY which was travelling along Nyerere Road towards the Airport area in Dar es Salaam. As it were, that vehicle collided with another vehicle, Toyota Land Cruiser with registration No. T124 ACY which was driven and owned by one Billy Bali. As a result of

the accident, the respondent suffered bodily injuries and consequently he was hospitalized at the Muhimbili Orthopedic Institute (MOI) for several months before he was discharged. It is noteworthy that the motor vehicle which was driven by Billy Bali was insured by the appellant, Phoenix of Tanzania Assurance Company Ltd. It is on record that following the said accident Billy Bali was prosecuted for several traffic offences involving careless driving and causing injuries to the respondent upon which he pleaded guilty and was accordingly sentenced to pay a fine or go to jail on default.

The matter did not end there as the respondent instituted Civil Case No. 64 of 2007 before the High Court of Tanzania at Dar es Salaam against the appellant and Billy Bali jointly and severally as the first and second defendants respectively. In that suit he claim a total of TZS. 106,360,700.00 being special and general damages. Notably, in their joint written statement of defence, the defendants categorically disputed the appellant's claim.

Nevertheless, at the conclusion of the hearing of the case the High Court (Twaib, J) entered judgment in favour of the respondent. Particularly, the appellant and Billy Bali (not a party to this appeal) were jointly ordered to pay: TZS. 58,315,184.00 as special damages; TZS. 25,000,000.00 as general damages; interest at the rate of 15% on special damages from the

date of the accident to the date of judgment; 12% interest per annum at court rate on the special damages and general damages; 15% interest from the date of judgment to the date of payment in full and the costs of the suit.

Aggrieved, the appellant has appealed to this Court fronting five grounds of appeal contained in the memorandum of appeal. However, for the reason to be apparent shortly, we do not intend to recite or reproduce the grounds of appeal herein below.

This is not the first time the appeal is called on for hearing before the Court. It is noteworthy that on 30th September, 2019 the appeal could not proceed to hearing due to the missing record. In the result, the Court ordered the appellant to lodge a supplementary record of appeal consisting the missing record and adjourned the hearing of the appeal to the date to be fixed by the Registrar. The appellant lodged a supplementary record of appeal. However, before the appeal was called on for hearing as ordered by the Court, the respondent through his counsel lodged two different sets of the notice of preliminary objections on 12th & 20th May, 2021 respectively premised on the following points of law:-

"1. The record of appeal is incomplete for not containing "Additional list of documents" filed by the

Respondent (plaintiff) at the trial court and marked as Exhibit P.10, during trial.

2. The appeal is incompetent for non-compliance with the order of this Court to file supplementary record of appeal within thirty days which was given on 30th September, 2019 when this appeal was first called for hearing.

3. This appeal is incompetent due to the Appellant's failure to serve Notice of Appeal to a person who was a party in the trial court in terms of Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009".

In the circumstances, we were compelled to determine the preliminary objection before considering the merits or otherwise of the appeal. This ruling is therefore in relation to the points of preliminary objection.

In disposing of the points of preliminary objection, we deem it appropriate to begin with the third point which concerns the alleged non-compliance with the provisions of Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

At the hearing, Mr. Odhiambo Kobas, learned counsel appeared for the appellant, whereas Mr. Geoffrey Geay Paul, also learned counsel appeared for the respondent.

We note that the substance of the submission of Mr. Paul in support of the third point of the preliminary objection is that though the notice of appeal filed by the appellant on 9th June, 2015 does not contain the name of the second defendant (Billy Bali) who took part in the proceedings in Civil Case No. 14 of 2007 at the High Court, no service was effected on him as an interested person. Elaborating, the learned advocate for the respondent emphasized that the inclusion and service of the notice of appeal on Billy Bali was important because the High Court entered judgment in favour of the respondent against both the appellant and Billy Bali jointly and severally and thus, compliance with Rule 84 (1) of the Rules was important. To support his submission, Mr. Paul placed reliance on the decision of the Court in **Hamis Paschal v. Sisi Kwa Sisi Panel Beating and Enterprises Limited**, Civil Appeal No. 165 of 2018 (unreported).

In the event, Mr. Paul submitted that failure of the appellant to comply with the provisions of Rule 84 (1) of the Rules renders the entire appeal incompetent liable to be struck out with costs. He therefore concluded by

urging us to sustain the objection on this point and thereby strike out the appeal with costs for being incompetent.

In response to Mr. Paul's submission, Mr. Kobas firmly argued that the failure of the appellant to serve the respondent with the notice of appeal is not fatal as the provisions of Rule 84 (1) of the Rules is not couched in mandatory terms. According to Mr. Kobas, the intending appellant is only required to serve the notice of appeal to those persons who seem to him to be directly affected by the intended appeal. Notably, the learned counsel conceded that Billy Bali was a party to the proceedings in Civil Case No. 64 of 2007 before the High Court, judgment of which is the subject of the present appeal. However, he firmly submitted that his non-inclusion and non-service of the notice of appeal will not prejudice him because the preferred grounds of appeal will benefit him if the appeal is allowed by the Court. The learned advocate therefore strongly maintained that as the appellant intends to appeal only against the respondent and not Billy Bali, it is entirely on her discretion to serve the notice of appeal on him in terms of Rule 84 (1) of the Rules. In his view, though Billy Bali will be affected if the appeal is dismissed, yet there is no substance to conclude, as submitted by the respondent's counsel, that the provisions of Rule 84 (1) has been contravened by the appellant for non-service on him with the notice of

appeal. In the premises, Mr. Kobas distinguished the decision of the Court in **Hamis Paschal v. Sisi Kwa Sisi Panel Beating and Enterprises Limited** (supra) with the circumstances of this appeal. He contended that the Court can only intervene if the person, in this case, Billy Bali, not served with the notice of appeal is directly affected by the appeal. On the contrary, he emphatically submitted, Billy Bali will not be directly affected by the appeal. To bolster his stance he referred the Court to its decision in **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] T.L.R 437. Finally, he implored the Court to overrule the objection with costs and proceed to determine the appeal on merit.

We wish to preface our deliberation in determining this point of objection by making reference to the provisions of Rule 84 (1) of the Rules, which stipulates as follows:-

"84 (1) An intended appellant shall, before or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court".

In the instant appeal, according to the record of appeal, we entertain no doubt as conceded by counsel for the parties that Billy Bali took part in the proceedings of the High Court in Civil Cause No. 64 of 2007 as the second defendant. More importantly, we note that the High Court entered judgment in favour of the respondent against both the appellant and Billy Bali jointly and severally. To this end, it cannot be concluded, as Mr. Kobas wanted to convince us, that Billy Bali is not among the persons envisaged under Rule 84 (1) of the Rules who do not seem to the appellant to be directly affected by the appeal to the extent of not being entitled to be served with the notice of appeal. Besides, according to the said provision service of the notice of appeal may be effected even to persons who did not take part in the proceedings before the High Court but they seem to be directly affected by the appeal. Thus, dispensing service on those persons can only be made by the Court upon an ex parte application by the intended appellant as clearly stipulated under that Rule. Therefore, it is not within the discretion of the intended appellant to decide not to serve the notice of appeal to the respective person who seem to him to be directly affected by the intended appeal as firmly contended by Mr. Kobas. To appreciate the stance on the settled position of the law on this matter, we think it is instructive to refresh our memory by making reference to the decision of the Court in **Kantibhai**

M. Patel v. Dahyabhai F. Mistry (supra) in which when considering the provisions of the then Rule 77 (1) of the Tanzania Court of Appeal Rules, 1979 which is currently Rule 84 (1) of the Rules the Court stated categorically thus:-

"(iv) What Rule 77 (1) means is that persons who should be served are those persons who took part in the proceedings in the High Court, and those who did not take part in the proceedings but who stand to be directly affected by the appeal; besides, there may be persons who took part in the proceedings but who need not be served if they do not seem to be directly affected by the appeal.

(v) N/A

(vi) N/A

(vii) N/A

(viii) Where a person is shown to be directly affected by an appeal, there is no discretion but to serve that person with the notice of appeal and where, as is in this case, that person took no part in the proceedings in the High Court, it is the Court of Appeal, rather than the appellant, which is vested with power to direct that service need not be effected on that person; Rule 77 (1) does not constitute the appellant to be a judge in his own cause".

It follows that in the present appeal, as it is not contested that Billy Bali was a party to the proceedings in the High Court in Civil Cause No. 64 of 2007 who was also adjudged jointly and severally with the appellant to compensate the respondent for the injury he suffered, we respectfully disagree with the learned advocate for the appellant that he is not directly affected by the appeal. In view of the material in the record of appeal, we firmly hold that the appellant was legally required to serve Billy Bali with the notice of appeal within the prescribed time. It was thus not the discretion of the appellant to opt not to comply with the clear provisions of Rule 84 (1) of the Rules as strongly contended by Mr. Kobas.

Moreover, it is not correct, with respect, to conclude as submitted by Mr. Kobas that the provisions of Rule 84 (1) of the Rules is not mandatory but discretionary because of the use of the words "who seem to him" to be directly affected by the appeal. We must emphasize that as found by the Court in **Hamis Paschal v. Sisi Kwa Sisi Panel Beating and Enterprises Ltd** (supra), compliance with the provisions of Rule 84 (1) of the Rules is mandatory. The said holding equally applies in the circumstances of this appeal and thus not distinguishable as argued by Mr. Kobas. For the sake of clarity, we deem it appropriate to reiterate what the Court stated in the **Kantibhai's** decision (supra) at page 447 on the import of the words "who

seem to him” in relation to the service of the notice of appeal to the person to be directly affected by the appeal, thus: -

“On the face of it, seems to be in the discretion of an intended appellant to decide which persons “seem to him” to be directly affected by the appeal. However, it is long established in judicial interpretation that words and expressions which prima facie appear permissive may in certain circumstances assume an imperative character. The test is whether there is anything that makes it the duty of the person on whom the power is conferred to this or that to exercise the power. When the power is coupled with duty it ceases to be discretionary and becomes imperative”.

In the final analysis, we are satisfied that in the instant appeal, failure of the appellant to serve the notice of appeal to Billy Bali, who took part in the proceedings of the High Court as the second defendant was improper. Similarly, since Billy Bali was adjudged jointly and severally with the appellant to compensate the respondent for the injury he sustained, non-service of the notice of appeal on him is fatal to the appeal as it offended the provisions of Rule 84 (1) of the Rules.

Ultimately, as we have intimated above we are satisfied that the non-compliance with the mandatory requirement of that Rule renders the appeal

incompetent. We thus uphold the respondent's third preliminary point of objection. Consequently, we do not find it necessary to consider the parties' submissions with regard to the first and second points of preliminary objection, as the third point suffices to dispose of the appeal.

In the end, we strike out the appeal with costs for being incompetent.

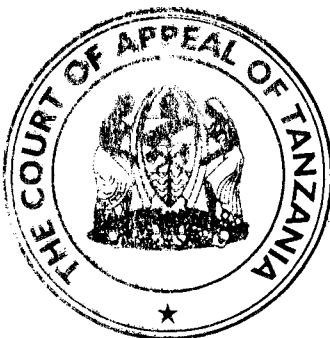
DATED at **DAR ES SALAAM** this 7th day of October, 2021.

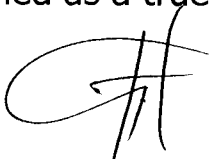
R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered this 11th day of October, 2021 in the presence of Ms. Lulu Mbinga, counsel for the appellant and Mr. Geoffrey Paul, counsel of the respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL