

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL No. 280 OF 2017

SIMBA PAPERS CONVERTERS LIMITEDAPPELLANT

VERSUS

PACKAGING AND STATIONERY MANUFACTURERS LTD.....RESPONDENT

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

(Nyangarika, J.)

dated the 3rd day of December, 2013

in

Commercial Case No. 52 OF 2010

RULING OF THE COURT

17th August & 8th November, 2021

KIHWELO, J.A.:

The controversy in this matter is in respect of two sale agreements which were prepared by the same advocate and attested by the same advocate as notary public having different purchase prices for the sale of the respondent's machine christened "Bielomatik P-590" ("machine") which is alleged to have been sold to the appellant by one Dr. Steve K. Mworira who was the first defendant and co-judgment debtor before the High Court but not a party to the present appeal ("the first defendant"). The appellant was the second defendant. Apparently, the first defendant is one of the shareholders and director of the respondent. It was alleged that the

appellant and the first defendant entered into the said sale agreement without involving the respondent company. It was on account of that the respondent filed a suit before the High Court, Commercial Division for the following reliefs:

- i. An order that the purported sale of Bielomatic P- 590 machine by the 1st Defendant to the 2nd Defendant is null and void.*
- ii. Permanent injunction against the 2nd Defendant from entering into the Plaintiff's factory.*
- iii. General damages of Tshs. 30,000,000.00 for trespass.*
- iv. Costs of this suit.*
- v. Any other and further relief(s) that the court may deem fit and just to grant.*

Upon full trial, the High Court, (Nyangarika, J.) believed the proposition put forward by the respondent herein and, therefore, entered judgment against the appellant and the first defendant.

Disgruntled with the decision of the High Court, the appellant filed the present appeal with nine points of grievance which for the reason to be apparent soon, we wish not to reproduce them.

When the appeal was placed before us for hearing on 17th August, 2021, Mr. Audax Kahendaguza Vedasto together with Dr. Onesmo Michael, both learned advocates appeared for the appellant while Mr. Danstan Kaijage, learned counsel appeared for the respondent.

From the very outset, we prompted the counsel for the parties to address us on whether the appeal was properly filed without including the first defendant.

For his part, Mr. Vedasto contended that, the appellant did not include the first defendant because it was not practical to treat him as a respondent because the orders granted by the High Court were jointly and severally against the appellant and the first defendant. The learned counsel submitted further that, there is no way the appellant could have made the first defendant a co-appellant because that would have consequences in the event that the appeal is not successful and there are costs involved. He contended that, the only option available would have been to serve the first defendant with the notice of appeal in terms of Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 as amended ("the Rules") but he was of the view that the Court may with leave, dispense with that requirement. It was

Mr. Vedasto's contention that, since the first defendant had an opportunity to appeal but did not do so, it is not upon the appellant to join him in the instant appeal.

Mr. Kaijage on the other hand, did not have much to submit but in principle he argued that it would be impracticable to pursue the appeal in the absence of the first defendant who is mentioned severally in the memorandum of appeal. He contended that, the first defendant had earlier on lodged a notice of appeal but did not pursue it further. He argued that all in all, a party cannot be condemned unheard.

When prompted further by the Court on the best way forward upon which the first defendant can be involved in the instant appeal, Mr. Kaijage argued that since the notice of appeal which was lodged by the first defendant is still pending in Court, the best approach is to serve him with the record of appeal so that he can appear and observe the proceedings even-if he is not made a party at this juncture.

We have dispassionately considered the submissions by the learned counsel for both parties in response to the question raised by the Court and we find it appropriate to digress a bit the relevant provisions governing

appeal to this Court and we will start with Rule 84 (1) of the Rules which deals with service of notice of appeal on a person affected:

"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 order to answer the question on whether the appellant ought to have served the notice of appeal upon the first defendant, and whether that service would have sufficed we wish to let the record of appeal at page 381 and 382 speak by itself:

"DECREE

The Plaintiff filed a suit against the Defendants praying for Judgment and decree as follows:

- vi. An order that the purported sale of Bielomatic P- 590 machine by the 1st Defendant to the 2nd Defendant is null and void.*
- vii. Permanent injunction against the 2nd Defendant from entering into the Plaintiff's factory.*

- viii. *General damages of Tshs. 30,000,000.00 for trespass.*
- ix. *Costs of this suit.*
- x. *Any other and further relief(s) that this Honourable Court may deem fit and just to grant.*

The matter coming up for Judgment on this 3rd day of December, 2013 before Hon. K.M. Nyangarika-Judge, in the presence of Mr. Kaijage, Counsel for the 2nd Defendant, who is also holding brief of Mr. Kaijage (sic), Counsel for the Plaintiff and Mr. Issa Rajabu, Advocate appearing for 1st Defendant.

THIS COURT DOTH HEREBY DECREE and Order as follows:

Judgment is hereby entered in favour of the Plaintiff as follows:

- a) *The purchase price of the Bielomatic P-590 machine being US\$ 315,000.00, that said amount, must be deposited with the Plaintiff's Bank account, by the defendants, both jointly and severally, within a period of 30 days from the date of delivery of this judgment.*

b) If the above-mentioned amount in (a) is not deposited by the defendants as ordered, the Plaintiff will charge the defendants, both jointly and severally, a compound interest on the whole amount or balance thereof, as the case may be, at the interest rate of 2% every day of default up to full and final payment.

c) The defendants jointly and severally shall pay the Plaintiff's costs of the suit.

Given under my hand and the seal of the court this 3rd day of December, 2013.

*Signed
Judge*

Extracted on 3/12/2013"

Indeed, the record of appeal bears out that the judgment and decree were against both the first defendant and the appellant in this case jointly and severally. Undoubtedly, the first defendant who is also a judgment debtor was entitled to lodge the notice of appeal and in fact we have been able to trace a notice of appeal which he lodged at the High Court (Commercial Division) at Dar es Salaam on 12th December, 2013. This implies that he had an intention to appeal on this matter.

Next, we will digress rule 97 (1) and (2) of the Rules which deals with service of memorandum of appeal and record of appeal:

"(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of rule 86.

*(2) The appellant shall also serve copies of the memorandum of appeal and the record of appeal **on such other parties to the original proceedings as the Court may at any time on application or on its own motion direct and within such time as the Court may appoint.**" [Emphasis added]*

It is, we think, appropriate in the circumstances of the present case that, the first defendant who is mentioned severally in the memorandum of appeal be served with copies of the record of appeal in terms of rule 97 (2) of the Rules which will enable him make a logical choice whether to apply to be joined in the instant appeal or to apply for consolidation of the appeals, if any or not and limit possibility of multiplicity of appeals before the Court or complaint of being condemned unheard.

In view of the aforesaid, we accordingly order that the appellant serve upon the first defendant copies of the record of appeal within thirty days from the date of this ruling. In the meantime, the hearing of appeal is adjourned to a convenient date to be fixed by the Registrar.

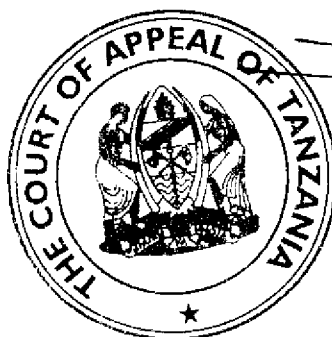
DATED at DAR ES SALAAM this 8th day of November, 2021.


R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 8th day of November, 2021 in the presence of Mr. Pascal Mshanga, learned counsel for the appellant and Mr. Abdon Rwegasira, learned counsel for the respondent is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL