

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 31 OF 2018

THE JUBILEE INSURANCE COMPANY

(T) LIMITED (the Third Party)..... APPELLANT

VERSUS

SOPHIA MLAY.....1ST RESPONDENT

NEEMA OSCAR.....2ND RESPONDENT

RUKIA JOHN MSUNGU.....3RD RESPONDENT

SEILIA MLAY.....4TH RESPONDENT

NEEMA OSCAR MAWOLE.....5TH RESPONDENT

**RUKIA JOHN MSUNGU (as a next friend
of Sebastian Msungu Jennifer Msungu and**

Gloria Msungu6TH, 7TH & 8TH RESPONDENTS

GIFT ELIANGIRINGA.....9TH RESPONDENT

GIFT ELIANGIRINGA (As a next friend of Emmanuel

& Ruth Eliangiringa).....10TH & 11TH RESPONDENTS

SOPHIA MLAY (As a next friend of Raymond

Mlay & Sesilia/Hilda Mlay).....12TH & 13TH RESPONDENTS

DOREEN ALBERT TEMU14TH RESPONDENT

PHILIP MLAY.....15TH RESPONDENT

**[Appeal from the ruling and drawn orders of the High Court of Tanzania
(District Registry) at Dar es Salaam]**

(Kibela, J.)

Civil Case No. 67 of 2007

.....

RULING OF THE COURT

22nd October, & 22nd November, 2021

MKUYE, J.A.:

This appeal originates from a Ruling and drawn order of the High Court of Tanzania at Dar es Salaam in Civil Case No. 67 of 2007 in which the respondents herein (former plaintiffs) instituted a suit against the

14th and 15th respondents for specific damages arising from the injuries, the respondents and their families suffered as a result of a motor vehicle accident which occurred at Makanya area within Same District and the Region of Kilimanjaro involving a Toyota Prado Station Wagon with Reg. No. T 237 AEG, the property of Anna Mlay (deceased). The car was comprehensively insured with policy No. TBA with interim cover note No.012344939 issued on 20th September, 2004 through an insurance broker trading by the name of Astra Insurance Brokers (T) Ltd. The appellant herein was joined in the suit by way of Third Party Notice that was applied for by the 14th and 15th respondents (the administratrix and administrator of the estate of Anna Mlay) who were the defendants by then.

Before the trial could commence in earnest, the respondents through their counsel applied for a default judgment against the appellant on account of her failure to enter appearance and file her Written Statement of Defence. The trial judge acceded to the prayer and an *ex-parte* judgment in default was entered and the entire suit ended there.

However, when the respondents wanted to execute the *ex-parte* decree resulting from the default judgment, they bounced as the third party's name and the particulars of the amount claimed in the decree

were not specified. This forced the respondents to go back to the trial court in order to rectify the anomalies. After realizing the anomaly, the trial judge purported to vacate the previous order and ordered the parties to prove their particular claim against the 14th and 15th respondents and the appellant herein. The matter proceeded before another judge (Twaib, J. as he then was) and ended in favour of the 1st to 13th respondents.

Realizing that she was unsuccessful in the suit, the appellant made an application for setting aside the *ex-parte* judgment but the same was struck out for being time barred having been lodged beyond thirty (30) days prescribed under the Law of Limitation Act, Cap 89 RE 2002 (Kibella, J. as he then was). Still aggrieved, the appellant sought and was granted leave to appeal to this Court, hence this appeal based on four grounds of appeal of which for a reason to be apparent shortly, we do not wish to reproduce them.

When the appeal was called on for hearing on 22nd October, 2021, the appellant was represented by Mr. William Mang'ena, learned advocate holding brief for Mr. Timon Vitalis with instructions to proceed; whereas the 1st to 13th respondents were represented by Ms. Nakazael Lukio Tenga assisted by Messrs. Hamis Mfinanga and Greyson Laizer all

learned advocates; and the 15th respondent was in attendance without any legal representation. The 14th respondent did not enter appearance.

Onset, we prompted the parties to address us on whether the order of this Court dated 9th August, 2021 requiring the appellant to lodge a supplementary record of appeal within thirty days from the date of order, was complied with. The said order was made by the Court in terms of Rule 96 (7) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) to lodge such supplementary record of appeal which would include valid and several documents which were missing in the record of appeal at the instance of the appellant's advocate, Mr. Timon Vitalis.

In response to the issue raised by the Court, Mr. Mang'ena readily conceded that the order of the Court was not complied with because of the difficulty in procuring the documents from the High Court. He explained that despite the fact that they have made concerted effort by writing letters to the Registrar they have not been able to get any response from the Registrar until the time which was extended expired. He added that, the Registrar directed re-typing of the proceedings as they were problematic. In the circumstances, he prayed to the Court, under Rule 4 (2) (a) of the Rules, to extend the time of 30 days for them to file a supplementary record of appeal.

When prompted by the Court whether that prayer was allowable under Rule 97 (8) of the Rules, he contended that it restricts another application for leave to lodge it. However, he was quick to state that, in essence, they are not applying for leave to lodge it but for extension of time based on the hardship in getting the documents which is not for the appellant's make.

On her part, Ms. Tenga resisted Mr. Mang'ena's prayer contending that though they were served with letters requesting for documents from the Registrar, the alleged response by the Registrar was a mere allegation as there is no reply to their letters. In other words, what was stated by Mr. Mang'ena was not supported by anything from the Registrar. While referring to the case of **Blue Pearl Hotels Ltd v. Ubungo Plaza**, Civil Appeal No. 78 of 2017 (unreported), she argued that since they were granted leave to file a supplementary record of appeal under Rule 96 (7) of the Rules, they cannot rely on Rule 96 (8) of the Rules which prohibits a similar prayer. She argued further that the appellant cannot apply for extension of time as they were given 30 days to do so. She, therefore, beseeched the Court not consider the appellant's prayer and strike out the appeal with costs.

The 15th respondent also submitted that the appellant ought to have complied with the Court's order within thirty days. He, thus,

implored the Court not to grant the appellants' prayer for extension of time.

In rejoinder, Mr. Mang'ena blamed the Registrar for having not responded to the letters they had written. He contended further that the case of **Blue Pearl Hotels Ltd** (supra) was distinguishable to the case at hand because in that case the appellants applied for leave under Rule 96 (7) to lodge supplementary record of appeal after they had failed to lodge it within 21 days which were extended earlier on. They did so after those days had expired and the Court declined to grant that prayer and struck out the appeal because the supplementary record of appeal was filed out of time.

He insisted that, in this case, failure to comply with the order of the Court was not due to sloppiness of the appellant; and that they are not applying for another leave under Rule 96 (7) of the Rules but for extension of time to lodge it under Rule 4 (2) (a) of the Rules.

We have considered the submissions by both parties in response to the issue raised by the Court and, we think, the issue for this Court's determination is whether the appellant's prayer for extension of time to lodge a supplementary record of appeal is tenable.

In dealing with this issue, we propose to start with Rule 96 of the Rules which governs lodgment of record of appeal. The said Rule deals with the record of appeal and the documents to be included in it. Sub rules (7) and (8) of the said Rule deal with supplementary record of appeal and they provide as hereunder:

"(7) Where the case is called on for hearing, the Court is of opinion that document referred to in Rule 96 (1) and (2) is omitted from the record of appeal, it may on its own motion or upon an informal application grant leave to the appellant to lodge a supplementary record of appeal.

(8) Where leave to file a supplementary record under sub rule (7), has been granted, the Court shall not entertain any similar application on the same matter."

[Emphasis added]

In the matter at hand, it is discerned from the record that when the appeal was placed before the Court on 9th August, 2021, it transpired that the record of appeal was marred with a couple of ailments including missing documents such as a garnishee order, some pages of the judgment by Hon. Twaib, J. and the Ruling of Hon. Kibella, J. and in its drawn order as they bore wrongly cited parties. Apart from that, the certificate of delay contained anomalies as it did not reflect the

actual dates when the request of copy of proceedings was made and when the notification of the readiness of the documents for collection was made.

Upon realizing such shortcomings, Mr. Vitalis, counsel for the appellant made an oral application that the appellant be allowed to lodge a supplementary record of appeal in terms of Rule 96 (7) of the Rules so as to correct such anomalies. Though Ms. Tenga and the 15th respondent resisted to the application, the Court acceded to it and ordered that the appellant should lodge the said supplementary record of appeal within thirty (30) days from the date of the Order. Of particular interest, the Court at pages 4 to 5 of its Order stated as follows:

"...we grant leave to lodge a supplementary record of appeal in terms of Rule 96 (7) of the Rules within thirty days from the date hereof to include:

- 1. A copy of omitted garnishee order referred to in paragraph 5 of the supporting affidavit it marked as Annexure JIC -2.*
- 2. A certified copy of the Ruling of Kibela, J. dated 22nd December 2015 with a proper citation of the parties.*

3. *A certified copy of the drawn order of Kibela, J. dated 22nd December 2015 with a proper citation of the parties.*
4. *Page 2 of Twaib, J.'s judgment dated 22nd September, 2011 in Civil Case No. 67 of 2007 omitted at pages 198 and 199 of the existing record of appeal.*
5. *A valid certificate of delay indicating accurately the period of time to be exempted from computation of the limitation period in terms of Rule 90 of the Rules."*

The Order of the Court was issued on 10th August, 2021. So, the appellant ought to have lodged the supplementary record of appeal before or by 9th September, 2021. However, to date, the appellant has not lodged such supplementary record contending that he has not been able to procure the relevant documents from the High Court. This is in contravention of the previous Order of the Court which in essence is not contested by the appellant's advocate.

Mr. Mang'ena has submitted that they failed to lodge the said supplementary record of appeal because they have not been able to procure the relevant documents from the High Court. He added that this is not due to their sloppiness as they had written to the Registrar

several times with no response. We have been availed with proof to that effect. It is undisputable fact that the appellant had written three letters to the Registrar which were copied to the respondents in a span of the period of about one and a half months from 18th August, 2021 to 4th October, 2021 requesting to be supplied with the missing and corrected documents as ordered by the Court. However, there is no reply from the Registrar for the request and reminder letters made by the appellant's counsel. We, think, Ms. Tenga's contention that the appellant's claim is not supported by anything might be too much demanding from the appellant in a clear proof that they had written all those letters which, were admittedly, copied to the respondents but were not responded to by the Registrar. We agree with Mr. Mang'ena that they had been diligent enough in following up the matter only that they were let down by the Registrar who did not respond to them.

Besides that, we agree with both parties that Rule 96 (8) of the Rules prohibits the Court to grant a similar leave to a party who has been already granted such leave under Rule 96 (7) of the Rules. This was also amplified in the case of **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited** Civil Appeal No. 3 of 2018 (unreported) where the Court stated:

"Concomitant with the above, it is to be noted that section 3B (2) (b) of the AJA enjoins the Court to ensure efficient use of the available judicial and administrative resource.

It is for this reason, Rule 96 (8) was added to preclude the Court from entertaining further applications meant to cure like defects in the record of appeal. The bottom line, in our view, is that defects in the record of appeal attributed to omission of essential documents required under Rule 96 (1) of (2) of the Rules can only be cured once in terms of rule 96 (7) of the Rules ... In our view, Rule 96(8) couched in mandatory terms serves as a tool to check sloppiness amongst litigants which, if not controlled may militate against the very spirit behind the overriding objective."

Also in the case of **Blue Pearl Hotels Ltd** (supra) cited by Ms. Tenga, the Court declined the appellant's invitation to invoke the provisions of Rule 96 (7) of the Rules to allow the appellant to lodge a supplementary record of appeal out of time to cure the anomaly of missing documents after the time that was granted initially had expired before lodging it. Obviously, applying the above authorities, we agree with both parties that the appellant cannot seek to utilize the provisions

of Rules 96 (8) of the Rules after being granted leave under Rule 96(7) of the Rule.

However, we agree with Mr. Mang'ena that the case of **Blue Pearl Hotels (T) Ltd** (supra) is distinguishable to this case because in that case the appellant sought another leave under Rule 96 (7) of the Rules to file supplementary record of appeal after having filed it beyond the period of 21 days which were granted to her so as to cure the anomaly of missing document.

In this case that is not the case. It is without question that the appellant was granted leave under Rule 96 (7) of the Rules to file the supplementary record within 30 days from the date of the order. As alluded to earlier on, it is obvious that she cannot apply for the same leave for the second time as it is prohibited by Rule 96 (8) of the Rules. Thus, she has premised her prayer under Rule 4 (2) (a) of the Rules which states:

“(2) Where it is necessary to make an order for the purposes of -

(a) dealing with any matter for which no provision is made by these Rules or any other written law;

.....(b) and (c) N/A.....,

the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary”.

Having considered the arguments from either side and the circumstances of this case, we are of the considered view, that the interest of justice demands that the provisions of the above Rule be invoked as there is no specific law to cater for the situation. We have considered that **one**, the appellant made concerted effort in order to comply with the Court’s order within time only that her efforts proved futile. They wrote three letters requesting for the documents but they did not receive even a single reply from the Registrar. It is our view that, the delay was not out of sloppiness by the appellant. **Two**, the appellant is applying for extension of time to lodge the supplementary record of appeal which is not covered under the law and not another application for leave to lodge it under Rule 96 (7) of the Rules as the respondents seem to suggest.

Given the circumstances, we think that the application for extension of time is tenable. Consequently, in terms of Rule 64 (2) of the Rules we vacate our previous order that was issued on 8th August, 2021. We further, under Rule 4 (2) (a) of the Rules grant the extension of time to lodge the supplementary record of appeal and order that the

same should be lodged within 60 days from the date of delivering this Ruling. Given that the issue was raised by the Court, we do not make any order as to costs.

It is so ordered.

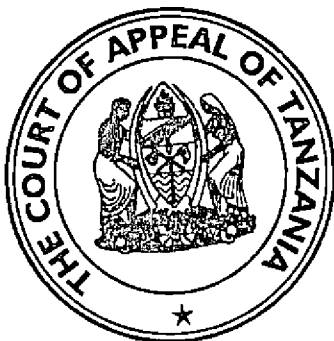
DATED at DAR ES SALAAM this 15th day of November, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of November, 2021 in the presence of Mr. Tumaini Michael counsel for the appellant and Briton Laizer counsel for the 1st to 13th for the respondents and 15 respondent appeared in person is hereby certified as a true copy of the original.




K. D. MHINA
REGISTRAR
COURT OF APPEAL