

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

**(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And KWARIKO, J.A.)**

**CIVIL APPEAL NO. 72 OF 2015**

**DR. A. NKINI & ASSOCIATES LIMITED.....APPLICANT**

**VERSUS**

**NATIONAL HOUSING CORPORATION.....RESPONDENT**

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

**(Makaramba, J.)**

**Dated the 7<sup>th</sup> day of November, 2014**

**in**

**Commercial Case No. 40 of 2011**

.....

**RULING OF THE COURT**

**23<sup>rd</sup> February & 12<sup>th</sup> March, 2021**

**MKUYE, J.A.:**

This is an appeal emanating from a breach of a joint venture agreement between the appellant Dr. A. Nkini and Associates Ltd and the respondent, National Housing Corporation in which the parties agreed to construct a seventeen (17) storey building on Plots Nos.123 and 265/122 along Samora Avenue in the City of Dar es Salaam. The appellant had, in Commercial Case No. 40 of 2011 (Makaramba, J.), unsuccessfully sought a declaration that the said joint venture agreement between them still subsisted and that any purported termination was *void ab initio*. After a

full trial, the High Court (Commercial Division) entered a judgment in favour of the respondent.

Aggrieved, the appellant lodged this appeal on five grounds of appeal which for a reason to be apparent shortly, we shall not reproduce them.

According to the record of appeal, this appeal was on 7<sup>th</sup> day of November, 2019, placed before the Court (Mussa, Wambali and Levira, JJA) but it could not proceed for hearing because the paging of record of appeal was mixed up. The Court then adjourned the hearing and granted leave to the appellant to amend and lodge an amended record of appeal within 30 days from the date of that Order.

On 12<sup>th</sup> May, 2020, the matter was called on for hearing (Lila, Mwangesi and Sehel, JJA) but again, the same did not proceed as Mr. Rwehumbiza learned advocate for the appellant prayed to withdraw from the conduct of appeal for lack of instructions from his client. The prayer was granted and the learned advocate was discharged from the conduct of the matter with an order that the appellant be served in person.

When the matter came up for hearing on 17<sup>th</sup> August, 2020, the appellant did not enter appearance as it was reported that Dr. Abel Nkini,

the Director of the appellant Company, had passed on. This led to the adjournment of the hearing and the Court ordered the service to be effected at the appellant's physical address. Nevertheless, the matter was fixed to come up for hearing during the same session on 24<sup>th</sup> August, 2020.

When the matter was placed before the Court on the said date, Ms. Helen Abel Nkini, who was one of the Directors in the appellant's Company entered appearance and intimated to the Court that Mr. Rwehumbiza who withdrew himself from the conduct of the of the matter on their behalf had not yet handed over the record of appeal to them. She, thus, prayed for an adjournment for a period of two months to enable her engage another advocate. As there was no objection from Mr Aloyce Sekule who advocated for the respondent and his undertaking to ensure that Mr. Rwehumbiza hands over the record of appeal to the appellant, the Court issued its short Order and stated as follows:

*"On our part, we have considered the submissions from either side and we think that in the circumstances of this matter, adjournment is inevitable. Hence, hearing of this appeal is hereby adjourned to enable the appellant engage another advocate with a view to finalizing the appeal process.*

***We further order that the appellant should finalize the appeal process within the period of two months from the date of this order with the assistance of Mr. Sekule in obtaining the necessary documents from Mr. Rwehumbiza.”***

[Emphasis added]

From then, the matter was fixed for hearing on 23<sup>rd</sup> February, 2021 whereupon the appellant was represented by Mr. Killey Mwitasi, learned advocate and the respondent had the services of Mr. Aloyce Sekule, learned Principal State Attorney.

From the outset, Mr. Mwitasi intimated to the Court that he was instructed to take the conduct of this appeal on 1<sup>st</sup> February, 2021 but he was not furnished with any record of appeal as the former advocate had not yet handed over the same to the appellant. He explained that he made efforts to see the Deputy Registrar and found that there were four Orders of this Court including the Order requiring Advocate Rwehumbiza to amend the record of appeal and the one requiring the parties to jointly trace Mr. Rwehumbiza with a view of handing over the documents which were not complied with.

Mr. Mwitasi submitted further that on 2<sup>nd</sup> September, 2020, the appellant wrote to the Registrar informing him their fruitless efforts to trace Mr. Rwehumbiza and that though the Registrar promised to get in touch with the said Mr. Rwehumbiza, he equally failed. Apart from that, he explained, he contacted Mr. Sekule who also had no assistance. He stressed that the orders of the Court were not complied with because the appellant relied on the advocate who did not perform his duties. He said, though through his efforts he was able to get some documents from the Registrar, he could not lodge them as the time for their lodgment had expired.

In this regard, in terms of Rules 4 (2) and 48 (3) (a) of the Tanzania Court of Appeal Rules, (the Rules), Mr. Mwitasi prayed for leave to enable him comply with the Court's order. He also predicated his prayer on the decision in the case of **Yusufu Same & Another vs. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported).

In reply, Mr. Sekule resisted the prayer by the applicant for leave to amend the record of appeal. He challenged the appellant for not complying with the Courts' order of amending the record of appeal and for inaction from 1/2/2021 when the new advocate was engaged. To bolster his argument, he referred us to the case of **Puma Energy**

**Tanzania Ltd v. Ruby Roadways (T) Ltd**, Civil Appeal No. 3 of 2018 (unreported) where it was ruled out that where an applicant fails to comply with the order of the Court, he cannot restore it. At one stage, however, Mr. Sekule told the Court that the alleged documents were allegedly burnt at the stationery under the instructions of Mr. Rwehumbiza and that as of now he is charged before the Advocate's Committee for that conduct. In the end, he prayed to the Court to strike out the appeal with costs.

In rejoinder, Mr. Mwitasi argued that the case of **Puma Energy Tanzania Limited** (supra) was distinguishable as the amended record of appeal was found to be still incompetent. But in this case, even the advocate for the respondent declared that the documents have been burnt through Advocate Rwehumbiza's instructions. He added that, in fact, the respondent's advocate cannot shift the blame to the appellant because in the last Order of the Court he was assigned a certain task.

For that matter, the learned counsel implored us to invoke the overriding principle and allow the appellant to lodge the documents as the same were obtained after the 60 days had expired.

Having summarized the submissions from both sides, we think, the issue for our determination is whether the appellant's prayer is justifiable.

It is common ground that on 7<sup>th</sup> November, 2019, the Court granted the appellant 30 days within which to lodge an amended record of appeal as its paging was mixed up. Ideally, counting from the date of Order, the amended record of appeal ought to have been lodged by 6<sup>th</sup> December, 2019. That, however, did not happen. It is also common knowledge that in the Order of the Court issued on 24<sup>th</sup> August, 2020 the appellant was ordered to finalize the appeal process within two months as was prayed by Ms. Nkini. If things went well, the appellant was supposed to lodge the amended documents by 23<sup>rd</sup> September, 2020. Again, that did not happen. Until the matter came up for hearing on 23<sup>rd</sup> February, 2021, there was a delay of about 5 months.

The counsel for the appellant explained the sequence of events and the steps he had taken following his engagement as an advocate for the appellant. He said, the Order dated 7<sup>th</sup> November, 2019 was not complied as the previous advocate withdrew from the conduct of the case; and that the record of appeal could not be traced from Advocate Rwehumbiza even with the assistance of Mr. Sekule and the Registrar.

We have considered the submissions from either side and, we think, each case must be considered in accordance with its prevailing circumstances. There is no doubt that the matter is a bit peculiar. In this matter, all the efforts the appellant made in order to retrieve the documents proved futile. Even the assistance by Mr. Sekule and the Registrar to trace Mr. Rwehumbiza who retained the documents after his discharge from representing the appellant was fruitless. Apart from that, we take note of the information given by Mr. Sekule that the documents were burnt at the stationery under the instructions from Mr. Rwehumbiza.

Considering that the appellant had a right of representation, we think, this is a situation where the appellant cannot be blamed for being inactive. In the case of **Yusufu Same and Another** (supra) the Court refused to condone the respondent's counsels' negligence or lack of diligence to be a sufficient cause for extending time. More importantly, the Court considered some circumstances under which it cannot punish the client. The Court stated as follows:

*"... there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the advocate as was held by a single Judge of the Court Mfaliia, J.A as he then*



was) in ***Felix Tumbo Kisima v. TTC Ltd and Another***, - CAT, Civil Application No. 1 of 1997." (unreported).

The Court went on to state that:

*" in the instant case, the respondent had done all that she could, leaving the matter to the hands of her advocate who had been assigned to her on legal aid. In the circumstances, while accepting that there were some elements of negligence by her counsel, in the circumstances of the case, we join hands with our learned brother Mfalila, JA in the case cited supra, and hold that the learned counsel's negligence constituted sufficient reason for delaying in lodging the appeal between 1.8.1996 and 24.10.1996."*

In the matter at hand, as was stated by Mr. Mwitasi, the appellant had encountered hardships from the time when the Court granted the 30 days to amend the record of appeal up to 23<sup>rd</sup> February, 2021 when this matter was scheduled for hearing. What can be gathered is that from 7<sup>th</sup> November 2019, the advocate whom the appellant relied upon did not file the amended record of appeal as ordered. From then the advocate withdrew from the conduct of the case but he did not handover the documents to her. Even after the 2<sup>nd</sup> Court's Order, the efforts in

collaboration with the respondent's counsel did not bear fruit. In fact, the counsel for the respondent in a manner that supports the appellant's stance contended that the alleged documents were allegedly burnt at the stationery at the instance of advocate Rwehumbiza. Moreover, Advocate Mwitasi who was also engaged on 1<sup>st</sup> February, 2021 explained the efforts he made in vain to the extent of getting some documents from the Registrar which he could not have filed due to the expiration of the 60 days which were granted by the Court on 24<sup>th</sup> August, 2020.

Looking at the whole scenario, we agree with Mr. Mwitasi that the appellant did all what she could do but in vain. And, it would appear that the conduct depicted by the previous advocate was such serious to the extent that he was summoned to and appeared before the Advocates' Committee. It may have amounted not only to negligence but also to a gross professional misconduct which contributed to the delay in complying with the Court's Orders. In this regard, we have no hesitation to find that the appellant's prayer is justified.

Given the peculiar circumstances of the case, we think this is a fit case where the principle of overriding objective can be applied. Thus, in terms of Rules 4 (2) and 48 (3) (a) of the Rules we grant the prayer. The

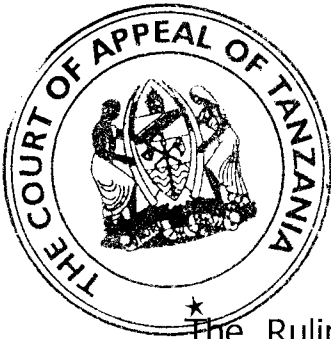
appellant is granted sixty (60) days within which to lodge the amended record of appeal.

**DATED at DAR ES SALAAM this 8<sup>th</sup> day of March, 2021.**

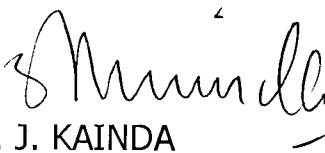
R. K. MKUYE  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

M. A. KWARIKO  
**JUSTICE OF APPEAL**



The Ruling delivered on this 12<sup>th</sup> day of March, 2021 in the presence of Mr. Killey Mwitasi, counsel for the Appellant and Ms. Ndigwako Joel, counsel for the Respondent, is hereby certified as a true copy of the original.

  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**