IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CIVIL APPEAL NO. 354 OF 2020

NOVATUS WILLIAMS NKWAMA..... APPELLANT

VERSUS

TUGHE.....RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Sumbawanga]

(Mashauri, J.)

dated the 21st day of August 2019
in
Application for Labour Revision No. 03 of 2017

.....

RULING OF THE COURT

14th and 21st February 2022

GALEBA, J.A.:

This appeal has origins in an industrial dispute that has been live between the parties for about nine years. The appellant, Novatus Williams Nkwama was employed by the respondent until 3rd May 2013, when their employment relationship fell apart. The employment came to an end at the instance of the appellant who wrote a letter of the above date, resigning from the relation for reasons contained in the letter. At that time, the appellant was the respondent's Regional Secretary for Rukwa Region. All was well until around one and a half years later on 16th February 2015, to be exact, when

the appellant signed CMA F1 and lodged it in the Commission for Mediation and Arbitration (the CMA) thereby commencing Labour Dispute No. RK/CMA/SBA/11/2015. In that form the appellant was complaining of constructive termination and was seeking for reinstatement or payment by the respondent of Tanzania Shillings 450,000,000/= and general damages. There were several other rulings in relation to the preliminary objections and applications before the CMA was to decide the main dispute, including the one for condonation and another seeking to transfer the dispute to the headquarters in Dar es salaam. Nonetheless, those interlocutory matters are not of immediate relevance to this ruling. Of importance is that, on 24th June 2016 the CMA passed an award dismissing the appellant's claim of being constructively and unfairly terminated. It further ordered the appellant to pay the respondent Tanzania Shillings 18,666,116/= being refund of the respondent's financial resources she had spent in liquidating the appellant's pecuniary indebtedness in favour of various financial institutions and the respondent herself, after he had left employment.

The appellant was aggrieved by that award. He lodged Labour Revision No. 03 of 2017 in the High Court to challenge the CMA award. Nonetheless, he was not successful, for his appeal was dismissed on 21st August 2019. This appeal is seeking to challenge that decision of the High Court, and to do that

the appellant predicated this appeal on seven grounds of appeal. However, for reasons that will become obvious shortly, we do not intend to refer to or discuss the merits of any of the said grounds, in this ruling.

When the appeal was called on for hearing on 29th November 2021, before delving into hearing parties, the Court sought from Mr. Ladislaus Rwekaza and Ms. Juliana Marunda both learned advocates for the appellant, to know whether the letter requesting for certified copies of the proceedings included in the record of appeal at page 667 was served on the respondent. Although Mr. Rwekaza submitted that the respondent was served with the letter, he still prayed for leave to lodge a supplementary record of appeal under Rule 96(7) of the Tanzania Court of Appeal Rules 2009, as amended (hereinafter the Rules), in order to furnish proof of service of the said letter to the respondent. As Mr. David Alexander Ntonge, learned advocate acting for the respondent had no objection to the prayer by Mr. Rwekaza, the Court granted it, ordering the appellant's advocates to lodge the said supplementary record comprising a document that would provide proof of service of the said letter to the respondent. The supplementary record was to be lodged in thirty days from the date of that order. The Court too, adjourned hearing of the appeal to a future session as it could be scheduled by the Registrar.

Later, on 29th December 2021, Mr. Rwekaza lodged the supplementary record of appeal. One more development that ensued as this appeal was pending, is that on 1st February 2022, Mr. Ntonge, under Rule 107(1) of the Rules, lodged with the Court, a notice of preliminary objection complaining that the appeal is both defective and incompetent because it is offensive of Rule 84(1) of the Rules.

Eventually, the adjourned hearing was scheduled to take place on 8th February 2022, on which day, Ms. Marunda appeared for the appellant and Mr. Ntonge for the respondent.

Mr. Ntonge raised to inform the Court that its order dated 29th November 2021 of lodging a supplementary record of appeal comprising evidence of service of the letter requesting for certified proceedings from the Registrar of the High Court for appeal purposes, was not complied with. Elaborating his point, he contended that the document contained in the supplementary record of appeal which is alleged to be evidence of service of the letter, is not evidence of service of the said letter. He argued that the document submitted in the supplementary record cannot be supplementary to the existing record, for it has always been part of the record of appeal. He referred us to page 669 of the record, where the identical document is contained. He contended that in any event, that document cannot be proof of service of the letter

requesting for certified proceedings because at item 68 of the index to the record of appeal, the appellant indicates that the document at page 669 is evidence of service of the notice of appeal to the respondent. In the alternative, Mr. Ntonge argued, even if that document was to be assumed that it was evidence of service of the said letter, still the same would have been served onto the respondent well out of time. In support of that point, he submitted that whereas the letter was lodged with the Registrar of the High Court on 17th September 2019, the document at page 669 shows that whatever document was delivered, it was sent on 11th November 2019, well out of time. Based on those points, Mr. Ntonge moved the Court to strike out the appeal with costs.

In reply to the above arguments, Ms. Marunda was of the view that the document at item 68 of the index in volume III of the record of appeal is mistakenly indicated as evidence of service of the notice of appeal on the respondent. She submitted that the intention was to indicate in that item of the index that the document was evidence of service of the letter that they had lodged with the Registrar of the High Court and not the notice of appeal. Essentially, she beseeched us to take it that indeed the document at page 669 was evidence of service of the letter.

On the issue that even if the document was to be taken as evidence of service of the said letter still, the letter would have been served out of time, Ms. Marunda submitted that there is no deadline for effecting service of such a letter because Rule 90(3) of the Rules does not set any time limit within which to serve the letter. Her submission was therefore, that the letter cannot be said to have been served out time. She implored the Court, to hold that the order dated 29th November 2021 was complied with and that we go ahead to hear the main appeal as it has remained pending for several years, without getting to its finality.

As there was also the notice of preliminary objection on record, we required Mr. Ntonge, to submit on it. However, it transpired that Ms. Marunda had not properly been served with the notice of preliminary objection. In the interest of justice, we adjourned hearing of the preliminary objection to 14th February 2022, in order to afford Mr. Ntonge time to properly effect service of the notice to his counterpart Ms, Marunda. The other objective for adjourning the hearing of the objection, was to afford Ms. Marunda ample opportunity to sufficiently prepare for hearing of the objection.

When the Court convened for hearing of the preliminary objection on 14th February 2022, in supporting his objection, Mr. Ntonge submitted that there was nowhere on record where it is indicated that the notice of appeal

was served onto the respondent. He submitted that although Ms. Marunda submitted that the document at page 669 of the record of appeal was evidence of service of the notice of appeal to the respondent, the document showed that transmission of the document, was on 11th November 2019, in which case, he argued the appellant would still have offended Rule 84(1) of the Rules which requires the notice of appeal to be served on the respondent in 14 days of lodging it in court. In short, the point that Mr. Ntonge was seeking to drive home was that, in the record of appeal, there was no evidence of service of the notice of appeal to the respondent.

In reply to Mr. Ntonge's arguments, Ms. Marunda had three points to make. **One,** that the notice of appeal was served on the respondent by leaving it physically at its sub-office in Sumbawanga on 24th September 2019. So, the notice was served in time within the meaning of Rule 84(1) of the Rules. **Two,** as Mr. Ntonge who had argued in the alternative that, even if it was to be assumed that the document at page 669 was evidence of service of the notice of appeal still the notice would have been served out of time, Ms. Marunda sought to turn tables against her counterpart, blaming him for not producing any document indicating the date on which the respondent was served. **Three**, the respondent was served with the notice of appeal in time and that is why she has always been filing all her documents in Court timely and has

always attended Court on all the sessions. The respondent's prompt response in lodging and entering appearance in Court, according to Ms. Marunda was evidence that she was served with the notice of appeal. Before she was to close her reply, she confirmed to us that, other than the submissions she made before us, throughout the record of appeal there is no evidence of service of the notice of appeal on the respondent. She, nonetheless prayed that the preliminary objection be overruled with costs.

In rejoinder, Mr. Ntonge objected to the points raised by counsel for the appellant, particularly that, he did not at any point state that the respondent received any notice of appeal. He finally, reiterated his earlier prayer that the appeal be struck out with costs.

In this appeal two issues have been raised. One is that the appellant did not comply with the Order of the Court dated 29th November 2021 by filing a document of proof of service of the letter and the other is that the appellant did not serve the notice of appeal to the respondent within fourteen days as required by Rule 84(1) of the Rules.

We propose to start with the first point concerning the supplementary record of appeal which was supposed to contain an omitted document which is the evidence of service of the letter to the respondent. Rule 96(7) of the

Rules, under which leave to file the disputed supplementary record of appeal was sought, provides as follows:

> *"(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."*
>
> [Emphasis added]

In this case, on 29th November 2021, the appellant's counsel prayed for leave to present to the Court a supplementary record of appeal containing a document evidencing service to the respondent, of the letter requesting for certified proceedings from the Registrar of the High Court. The issues for determination in this aspect are two; **one**, whether the supplementary record of appeal constituted a document evidencing service of the letter to the respondent, which evidence had been omitted in the original record of appeal, and **two** whether the evidence, if any, was effected on the respondent within the appropriate time limit.

In resolving the first issue we will have to thoroughly analyse the document contained at page 669 which was also contained in the supplementary record as evidence of service of the latter in question. The

exact text of that document which was issued by Tanzania Posts Corporation on 11th November 2019 is reproduced hereunder:

"TANZANIA POSTS CORPORATION
DAR ES SALAAM GPO
CASH MENU

"Invoice Number 3201-1119615770
Date: 11/11/2019 10:30
Emp. & Counter: ASIA MHAGAMA (110)

EMS Domestic Documents
Destination Kibaha [3209]
Item Weight: 30GMS
Item No.: EE217896333TZ

Details	*Amount*	*VAT*
Postage	*12,711.86*	*2,288.14*
Total	*12,711.86*	*2,288.14*

Amount Payable *15,000.00*

Payment Details

Cash *TSH 15,000.00*

Sender: NOVATUS W. NKWAMA
Address: BOX 37 BUKOBA
Phone: 0754393731

Addressee: KATIBU MKUU
Address: TUGHE MAKAO MAKUU BOX 4669 KIBAHA

TIN: 10-009045-V
Ahsante kwa kutumia huduma POSTA."

In determining whether the above document satisfied both the order of 29th November 2021 and the law, particularly Rule 96(7) of the Rules also quoted above, we have carefully and very closely dissected the above quoted document and upon a thorough review of the document, we have noted the following:

First, the document shows that, the sender of the documents that were sent is NOVATUS W. NKWAMA of P. O. BOX 37 BUKOBA, the appellant and the addressee is KATIBU MKUU of TUGHE MAKAO MAKUU, BOX 4569 KIBAHA.

Second, the document does not indicate anywhere across its text that what was sent by the sender to the addressee was a copy of the letter from the appellant to the Registrar of the High Court requesting for certified proceedings for appeal purposes. That is to say, the document in the supplementary record of appeal does not disclose the distinctive character or nature of the documents it evidences to have been sent by the appellant to the respondent. For clarity of this point, in the 7th line from the top of the document reproduced above specifies the documents that were sent to be "*EMS Domestic Documents*".

Third, the other strange or unusual feature of the above copied document is that, whereas Rule 96(7) of the Rules expressly provides that a

document or documents to be brought by way of a supplementary record of appeal must be a document or documents that are not part of the record of appeal at the time the order is made, the above document, although brought as a supplementary record of appeal, was and it is presently in the record of appeal at page 669. That is to say, the supplementary record of appeal does not contain anything that was omitted or that was not included in the main record of appeal.

Analysis of the above three points, particularly the second, indicates without doubt that there is no evidence in that document that what was sent by the appellant to the respondent was a copy of the letter he sent to the Registrar of the High Court. That document is clear as to what was sent. It says the documents sent were *"EMS Domestic Documents"*. We fail to equate the EMS Domestic Documents and the letter we are discussing. The argument by Ms. Marunda, that at Tanzania Posts Corporation, they do not write the name of the documents contained in the parcel, but they just write *"EMS Domestic Documents"* does not in any way change the fact that the document issued to her client does not mention that what was couriered is the letter subject of this discussion.

It is further our observation that the supplementary record of appeal lodged by the appellant, in so far as it brings to the existing record a document

which is already in the original record of appeal, in the context of Rule 96(7) of the Rules quoted above, the supplementary record is not supplementary at all. The law (Rule 96(7) of the Rules) is that for a supplementary record to be valid and of supplementary or additional value, it must contain a document or documents which was or were omitted in the existing record of appeal.

The above discussion enables us answer the first issue we earlier framed, in that the supplementary record of appeal constituted no document evidencing service of the letter to the respondent, which had been omitted in the original record of appeal.

That gives us space to procced to the second issue, in the context of Mr. Ntonge's argument that assuming, for the sake of argument, that the evidence of service was the document in the supplementary record of appeal as contended by Ms. Marunda, still service of the letter would have been effected out of time. Ms. Marunda's position was that there is no time limit for effecting service of letters requesting for certified copies of proceedings to the respondents in Rule 90(3) of the Rules. This is the aspect to which we will now turn for discussion.

According to the letter subject of this ruling, contained at page 667 of the record of appeal, it was written on 10th September 2019 and it was served

to the deputy Registrar of the High Court on 17th September 2019. However, the document (quoted above) alleged to be evidence of service of the letter to the respondent is dated 11th November 2019 which is 55 days between the two dates. The question we have to resolve is whether there is any maximum time set to serve the letter to the respondent or there is not such time limit.

Admittedly, Rule 90(3) of the Rules, which Ms. Marunda referred us to, provide for no time frame to serve the letter to the respondent, for it provides that:

> *"(3) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent."*

However, in the case of the **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 387, the Court held as follows:

> *"There must be a time limit within which the appellant is to serve the respondent with a copy of the letter to the Registrar. We think that the period of 30 days within which the appellant is required under rule 83(1) [now Rule 90(1) of the Rules] to apply to the Registrar for a copy of the proceedings should be construed to be co-extensive with the period within which the*

appellant has to send a copy of that letter to the respondent."

We are aware that when the **Valambhia** case above was being decided, the Rules in place were the Tanzania Court of Appeal Rules 1979, the revoked Rules, nonetheless the substance of the above quoted part of that decision has recently been adopted in many decisions made under the present 2009 Rules including this Court's decision in **Elizabeth Jerome Mmassy v. Edward Jerome Mmassy and Six Others,** Civil Appeal No. 390 of 2019 (unreported). In the circumstances, we therefore do not agree with Ms. Marunda that because Rule 90(3) of the Rules does not set a definite time frame within which to effect service of the letter to the respondent, then there is no such time period under the law. The time period is there and it is thirty days. That said, it does mean that service of the letter, even if it was to be inferred, as Ms. Marunda submitted, that it was served, the same having been so served after 55 days from when it's original was delivered to the Registrar of the High Court, the same would still be beyond 30 days, the period legally permitted. This part of the ruling resolves the second issue we had framed on whether or not there is a specific time limit to serve the letter.

Next for discussion is the legal consequences of the finding we have made above, the finding that both the order of this Court dated 29th November

2021 and Rule 96(7) of the Rules, were breached. The law is that where a party obtains leave to lodge a document or documents omitted in the original record of appeal by way of a supplementary record under Rule 96(7) of the Rules and fails to comply with the order, like it happened in this case, the consequences were stated in the case of **Nakomolwa Matepeli Shila v. Mwanahamisi Ally Nongwa (Legal Representative of Kidawa Seif (the Deceased),** Civil Appeal No. 21 of 2016 (unreported). In that case, this Court stated that:

> *"Therefore, in the current appeal, having found that the appellant failed to comply with the order of this Court to enable the Court to properly determine the appeal before us on merit, and there being no room to allow the appellant another chance to file the same by virtue of Rule 96(8) of the Rules, as such, the record of appeal before us is incomplete and consequently incompetent. ...In any case, our hands are tied by various decisions of the Court and we are thus compelled upon our finding that the appeal is incomplete hence incompetent, we proceed to strike out the appeal."*

The point we gather from the above quotation, is that where there is an order of the Court to lodge a supplementary record of appeal, but the order is not complied with such that the supplementary record is not lodged, the

original record of appeal is deemed incomplete and accordingly, incompetent. Legally, and as per the above authority an incompetent appeal is a defective appeal and it is liable to be struck out.

In conclusion therefore, **one**, as there was no evidence of service of the letter to the Registrar requesting for certified copies of proceedings in the alleged supplementary record of appeal, it means the appellant failed to comply with this Court's order dated 29th November 2021. **Two**, as the document which was lodged in the supplementary record of appeal had not been omitted in the original record of appeal as observed in this ruling, the appellant offended the provisions of Rule 96(7) of the Rules which require a supplementary record to contain a document which is not part of the original record of appeal. **Three,** we also indicated that even if we were to assume that service was effected on 11th November 2019, the same would have been effected out of time. All these multiple maladies from which this appeal suffer, attract one common remedy, to strike out the appeal.

In the event, and for the above reasons, this appeal is hereby struck out.

As the order we have made above has the effect of completely winding up this appeal, we find any attempts to seek to determine the second issue

that the appeal is incompetent for offending Rule 84(1) of the Rules, to be a worthless and a futile venture with no possibility of yielding any functional results. It is for that reason that we have paid no heed to determine the issue relating to the notice of appeal.

Finally, we make no orders as to costs because, we indicated at the beginning of this ruling that this appeal arose from a labour dispute.

It is so ordered.

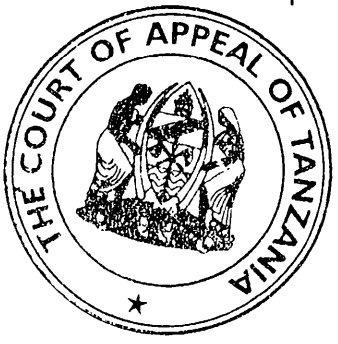
DATED at **MBEYA**, this 17th day of February, 2022

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 21st day of February, 2022 in the presence of Mr. Ibrahim Idd Athuman, learned advocate holding brief for Ms. Juliana Marunda, learned advocate for appellant and Mr. David Alexander Ntonge, learned advocate for the respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL