IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: WAMBALI, J.A., GALEBA, J.A., And, KAIRO, J.A.)
CIVIL APPEAL NO. 82 OF 2016

FELICIAN MUHANDIKI..... APPELLANT

VERSUS

THE MANAGING DIRECTOR
BARCLAYS BANK TANZANIA LIMITED..... RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam]
(Mkasimongwa, J.)

dated the 29th day of April, 2015
in
Civil Appeal No. 157 of 2013
.....

RULING OF THE COURT

21st September, 2022 & 13th March, 2023

KAIRO, J.A.:

The appellant, Felician Muhandiki sued the respondent at the District Court of Ilala at Samora (the trial court) for negligence. In its decision delivered on 29th October, 2013, the trial court held in favor of the appellant and ordered the respondent to pay the following to the appellant:

a) USD 5,000,000.00 as general damages or compensation for loss of respect, inconvenience, mental torture, anguish and anxiety and sickness due to rising blood pressure.
b) Payment of a total of USD 5,640.48 as specific damages.

c) Interest on the current bank rate in respect of (a) and (b) above from 15th May, 2009 to the date of judgment.
d) Interest on the decretal amount at the court's rate from the date of the judgment to the date of full payment.
e) Costs of the suit.

The respondent was aggrieved and decided to appeal to the High Court (the first appellate court) which partly allowed the appeal and ordered as follows:

1) The amount of USD 5,000,000.00 awarded by the trial court as general damages is quashed and a sum of USD which is equivalent to Tshs. 50,000,000.00 is awarded in lieu of.
2) The Appellant is entitled to a payment of USD 5,640.48 he claimed and awarded by the trial court as specific damages.
3) An order given by the trial court for payment of interest at the current bank rate as from 15th May, 2009 to the date of judgment is quashed and set aside.
4) An order given by the trial court for the payment of interest at the court's rate as from the date of judgment to the date of full payment is upheld.
5) Each party to bear his own costs.

The appellant was not satisfied with the first appellate court's decision, thus the present appeal advancing four grounds of appeal

which for the reason to be apparent shortly, we do not intend to reproduce them.

Upon being served with the record of appeal and pursuant to Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the respondent filed a Notice of Preliminary Objection comprised of the following points:

> *"1 The record of appeal is incompetent for want of duly endorsed exhibits that were tendered and received in evidence contrary to Order XIII Rule 4 of the Civil Procedure Code Cap 33 R.E. 2002 (the CPC).*
>
> *2. That the proceedings forming part of the record are incurably defective for the following reasons:*
>
> *i) The proceedings are incomplete and have not been certified.*
>
> *ii) That the proceedings do not indicate if the 1st PTC and mediation were properly conducted.*
>
> *iii) That the proceedings do not indicate that the Court framed and recorded issues contrary to Order XIV Rule 1 (5) of the CPC."*

At the hearing of the appeal, Mr. Francis Mgare and Dr. Onesmo Michael Kyauke, both learned counsel appeared for the appellant and the respondent respectively.

Considering that the respondent has filed the notice of preliminary objection, a rule of practice dictates that the Court should first determine the same before proceeding with the hearing of the appeal on merit. It is noted that Dr. Kyauke abandoned the issue of mediation contained in point No. 2 (ii) among others.

Submitting on point No.1, Dr. Kyauke contended that the record of appeal is incompetent for want of duly endorsed exhibits which omission contravenes Order XIII rule 4 of the CPC. He elaborated that, it is a legal requirement that each document tendered and admitted in court as an exhibit has to be endorsed and stamped for authenticity in order to avoid tempering with the said document. He referred us to the case of **SGS Societe Generale De Surveillance SA and Two Others vs. VIP Engineering & Marketing Limited and Another, Civil Appeal No. 124 of 2017** (unreported), to support his argument.

In further elaboration, Dr. Kyauke went on to argue that the exhibits attached to the record of appeal at pages 217 to 244 are not the ones endorsed and stamped during the trial of the case, instead the appellant attached the ones he annexed to the plaint regarding this case. As such, he argued, their authenticity cannot be verified. To substantiate his contention, he referred us to pages 12 to 28 of the record of appeal. Winding up on this point, he argued that following the

said omission, the record of appeal was rendered incomplete and consequently the respondent was prejudiced.

When asked by the Court on a way forward following the pointed-out omission, Dr. Kyauke stated that, the Court may order the appellant to file a supplementary record of appeal pursuant to rule 96 (7) of the Rules.

As regards point No. 2 (i) on incomplete proceedings and their non-certification, Dr. Kyauke pointed out that the ruling appearing at page 142 of the record of appeal is incomplete. He argued that, though the record of appeal shows that there was an order for the judgment to be pronounced on 27th September, 2013 at page 142, the same record is silent as to what transpired on the scheduled date. Instead, the record of appeal at page 266 reveals that the said judgment was delivered on 9th October, 2013 without indicating who delivered it and the coram on the delivery date. In conclusion, Dr. Kyauke suggested that, a similar way forward as in point No. 1 above be applicable in this respect for the pointed-out infraction.

Submitting in support of the preliminary objection No. 2 (ii), Dr. Kyauke stated that, Order VIII A and VIII B of the CPC R.E. 2002 were contravened as the proceedings do not indicate if the 1st pre-trial settlement and scheduling conference (1st PTC), mediation and final

settlement and scheduling conference (final PTC) were properly conducted. He elaborated that the proper conduct of the 1st and final PTC as well as the mediation are mandatory procedural requirements before the case can proceed to the hearing stage. On the contrary, he submitted, the proceedings in the case at hand do not show as to whether the pre-trial processes were indeed conducted or not. As if that is not enough, no speed truck for the case was set, he contended.

Dr. Kyauke went on submitting that according to Order XVIII rule 21 of the CPC, failure by a party to attend a PTC renders the matter concerned to suffer dismissal which means the conduct of that process is mandatory. In his conclusion, Dr. Kyauke submitted that omission to conduct PTC is fatal regardless of whether a party was prejudiced or not. He added that even the conduct of mediation is a mandatory procedural requirement which again, he stated, was not conducted in the case at hand. He referred us to page 107 of the record of appeal to back up his contention.

Arguing on point No. 2 (iii), Dr. Kyauke contended that Order XIV rule 1 (5) of the CPC was contravened by the trial court for failure to frame issues. He argued that, the omission prejudiced the parties as they ended up framing and responding to their own issues. Clarifying further, Dr. Kyauke submitted that, according to the parties' final

submissions appearing at pages 144 and 156 of the record of appeal, the appellant addressed five issues while the respondent addressed three issues. At the end, he implored the Court to sustain the points of law No. 2 (ii) and (iii), nullify the proceedings and order re-trial of the matter as a remedy.

In his rebuttal, Mr. Mgare started by giving two general observations as regards the POs raised: **one;** that what has been raised by the respondent are not pure points of law as evidence is needed to prove them. He sought reliance on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A. 696 on this point. **Two;** that the points ought to have been raised at the first appellate court and not at the Court which is a second appellate court. Mr. Mgare cited the cases of **Archard vs. Asteria Mulwani and Thobias Tegamaisho** [1992] T.L.R. 133 and **Melita Naikimininjal And Loishilaari Nakimininjal vs. Sailevo Loibanguti** [1998] T.L.R. 120 to fortify his arguments.

As a specific response to point No. 1, Mr. Mgare conceded that the documents admitted as evidence during the trial were not endorsed. However, he contended that the said documents passed all the processes before admitting them and there was no objection from the respondent. He thus submitted that, the omission was inadvertent and

not the mistake of the appellant. In elaboration, Mr. Mgare stated that, it is a statutory duty of the court to endorse the exhibits tendered and thus if the task was not properly conducted, the blame should go to the trial court and not a party who has no power to force the respective court to do so. He cited the case of **21st Century Food and Packaging Ltd vs. Tanzania Sugar Producers Association and Two Others** [2005] T.L.R.1 in support of his contention. According to Mr. Mgare, the respondent was not prejudiced in anyway by the said omission. He implored the Court to cure the flaw by invoking rule 115 of the Rules so as to give effect to the principle of overriding objective and ignore the said irregularity on non-endorsement complained of as the Court previously did in the case of **Ashraf Akber Khan vs. Ravji Govind Versan** [2019] T.L.R. 59 and proceed to hear the appeal on merit.

Regarding point No. 2 (i) on incomplete and non-certification of the proceedings, Mr. Mgare stated that though the ruling at issue is incomplete, the same has no relevance to the pending appeal before the Court. As regards the non-certification of the proceedings which also included the respondent proceedings, Mr. Mgare submitted that the respondent neither cited a particular provision of the law that was

contravened nor stated how the omission prejudiced her, and thus implored the Court to reject the point.

As an answer to PO No. 2 (ii) on an omission to conduct the 1st and final PTC, Mr. Mgare was of the view that it was unconceivable that the matter could have been assigned to the Resident Magistrte; Hon. Luhwago for mediation before the 1st PTC or scheduled for hearing before conducting the final PTC. He conceded that some records are missing in the proceedings. He however added that, if the Court would find that the first and final pre-trial conferences were not conducted or conducted improperly, he invited it to follow the stance taken previously in the case of **21st Century Food and Packaging Ltd** (supra).

As for the complained contravention of Order XIV rule 1 (5) of the CPC for non-framing of issues, Mr. Mgare submitted that the record of appeal shows that the issues were proposed by both the appellant and the respondent as can be seen on pages 85-87 respectively though it is silent as regards their consolidation. He however insisted that, the issues were all the same addressed by the trial court as the record of appeal shows on pages 260-261.

Dismissing the argument that the omission to frame the issues has made the respondent unable to argue her case properly, Mr. Mgare argued that the trial court may, after hearing the case but before

passing a decree, amend the issues framed or frame additional ones when necessary, for the proper determination of the case. He referred the Court to Order XIV rule 5 (1) of the CPC to fortify his contention. He insisted that the contention that the issues were not framed by the trial court is not supported by the record. Further to that, the respondent did not state how was he prejudiced. Thus, the framing of distinct issues by the parties was inconsequential and with no effect since it is the obligation of the trial court at the end of the day to frame them.

In his conclusion, Mr. Mgare submitted that if the Court finds that the record before it is incomplete, it should invoke the overriding objective principle and grant leave to the appellant to amend the record of appeal under rule 111 of the Rules so that the parties can proceed with the hearing on merit.

In his rejoinder, Dr. Kyauke refuted the argument that evidence is needed to prove the points of objection raised by the respondent. According to him, what is looked at is whether or not the law was contravened to which he argued it was, as he has pointed out in his submission. Thus, according to him, the cited case of **Mukisa Biscuit Manufacturing Co. Ltd** (supra) is not applicable in the case at hand.

Refuting the argument by the appellant that the pointed-out irregularities were supposed to be raised at the High Court, Dr. Kyauke

submitted that, it is the Rules which provide for what should be contained in the record of appeal. He went on to submit that, the said Rules are not applicable at the High Court, and that is the reason why the respondent did not raise the point at the High Court. He also added that, a point of law can be raised at any stage even during an appeal as in the case at hand. In the circumstances therefore, the cited case of **Archard vs. Asteria Mulwani and another** (supra) and **Melita Naikimininjal & Another** (supra) are distinguishable, argued Dr. Kyauke.

On the invitation by Mr. Mgare for the Court to invoke the overriding objective principle and ignore the omission to endorse the exhibits tendered during trial as the Court held in the case of **Ashraf Akber Khan** (supra), Dr. Kyauke argued that the cited case does not apply to an incomplete record as the one at hand. He therefore argued that the invitation should be declined.

He further submitted that it was not correct for the appellant to blame the trial court for non-certification of the proceedings as the appellant was the one to request the proceedings from the Registrar of the High Court for appeal purpose. Once received, the appellant has the obligation to go through them and ensure that they are properly endorsed and fully certified. He, therefore, argued that the case of **21st**

Century Food and Packaging Ltd (supra) referred by Mr. Mgare has no bearing in the circumstances of this case.

Refuting the argument by Mr. Mgare that the incomplete ruling at page 142 of the record of appeal is irrelevant to the appeal at hand, Dr. Kyauke argued that it is the Court's mandate to find out whether or not the said ruling is relevant and not the appellant to so determine.

Rejoining the arguments concerning non conduct of the first and final PTC together with the omission to frame issues whereby Mr. Mgare was of the view that some words were omitted in the proceedings, Dr. Kyauke dubbed the argument as speculative as the record of appeal does not support it. He went on to argue that, even if that was the case, his duty to ensure proper and complete proceedings after receiving the same from the Registrar of the High Court would have saved him. He also insisted that non framing of the issues by the Court has prejudiced the respondent as she could not bring the witnesses to prove some of the issues raised in the course of hearing at the trial court. Dr. Kyauke conceded that the trial court has a discretion to add, reduce or amend the issues after hearing the case, but maintained that in those circumstances, parties are supposed to be recalled and addressed accordingly so as to afford them right to be heard, which he argued not to be the case in the matter at hand.

As regards the question of prejudice to the respondent for the non-framing of the issues, Dr. Kyauke submitted that, each party framed her own issues and addressed them at the trial court. It was his argument that the omission goes to the root of the matter. As a conclusion, he implored the Court to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and nullify the proceedings together with the orders thereon and order re-trial with costs.

Having heard and considered the rival submissions made by the learned counsel for the parties, the issue for determination is the propriety or otherwise of the appeal before us. In other words, whether or not the POs raised have merits. We wish to state that the Court shall address the POs raised per the following order; No. 2 (ii) followed by No. 2 (iii) and lastly No. 1 and 2 (i) which shall be addressed together

Before we start addressing them, we find it imperative to address two general observations made by Mr. Mgare when replying the oral submission by Dr. Kyauke: **One;** that the POs raised cannot fall within the meaning of preliminary objection as per **Mukisa Biscuit Manufacturing Co. Ltd** case (supra) since evidence is needed to ascertain them. **Two;** that the POs were supposed to be raised at the High Court which was the 1st appellate court and not at the Court, being the 2nd appellate court. Mr. Mgare did not elaborate on the stated

general observations nor stated which POs among the four was he referring to. As rightly submitted by Dr. Kyauke when making his rejoinder that a point of law can be raised at any stage even on appeal, regardless of whether it is the 1st or 2nd appellate court. On our part, having examined the raised points, we are satisfied that they deserve consideration by the Court. We shall therefore proceed to determine the POs by considering the rival submissions by the counsel.

With regard to point No. 2 (ii) that Order VIII A and VIII B of the CPC R.E. 2002 concerning the failure to conduct proper 1st and final PTC together with the mediation, it is worth noting that Dr. Kyauke's complaint is based on what he stated to be improper conduct of the pointed-out procedures and not the omission to conduct the same. However, he did not elaborate what was improper in conducting them. We shall therefore address whether or not the procedure was abided with.

Having gone through the record of appeal from pages 105 to 111 which concerns the procedure alleged to have been improperly applied, we share the same view with Mr. Mgare that, the case would not have been scheduled for trial without passing the said procedures. Besides, the record further reveals that at the trial court, both parties were represented by learned counsel whereby Mrs. Mulebya was for the

appellant (plaintiff) and Mr. Laswai appeared for the respondent (defendant). It was expected that if any of the parties felt to have been adversely affected by any lapse if any, such a party would have raised the concern either before the trial court or particularly the High Court where the matter went on first appeal. That apart, when we probed him as to whether the respondent was prejudiced, Dr. Kyauke replied that, the requirement is a mandatory procedure to be followed, and thus it did not matter whether the respondent was prejudiced or not. With much respect, we beg to differ with Dr. Kyauke on that aspect. It is a settled jurisprudence that procedural irregularity cannot vitiate proceedings if no prejudice has been occasioned to a party [See **Cooper Motors Corporation (T) Ltd. vs. AICC** [1991] T.L.R. 165. In that regard we see no merit on PO No.2 (ii), thus we overrule it.

Next for our consideration is PO No.2 (iii), whereby the complaint is that Order XIV rule 1 (5) of the CPC was contravened by the trial court for failure to frame issues.

In addressing this contention, we wish to make reference to the record of appeal at pages 85 and 86 which clearly show that the appellant and respondent (plaintiff and defendant respectively) proposed to the trial court the issues to guide the parties during trial. Furthermore, the proceedings of 14th May, 2012 at page 110 of the

record of appeal reflects the state of what the parties submitted with regard the proposed issues as follows:

> *"**14/05/2012***
>
> *Coram – Hon. Mushi – RM*
>
> *For the Plaintiff – present*
>
> *For the defendant- present*
>
> *CC- Mwangoka*
>
> *Mrs. Mulebya for the plaintiff and Mr. Laswai for the defendant. The matter is coming for recording issues*
>
> *Mr. Laswai: I have no objection issue No.3 is straight forward.*
>
> ***Order**: Hearing on 04/07/2012. Parties to attend*
>
> *Sgd K. Mushi- RM*
>
> *14/05/2012".*

The above quoted excerpt, in our view, shows that the parties and the trial court jointly deliberated on the proposed issues by the parties and reached a consensus. In that regard, we have no doubt that the issues were picked for recording out of the ones proposed by the parties and consequently the trial court framed them in the presence of the counsel for the parties. No wonder no party and in this case, the respondent in particular, picked the alleged omission as a point of concern or complaint at the first appellate court. On that account, the contention by Dr. Kyauke that Order XIV rule 1 (5) of the CPC was

contravened for non-framing of the issues is, with much respect, not correct. In the same breath, no prejudice whatsoever has been occasioned to the respondent as claimed by Dr. Kyauke. Accordingly, this point too is without merit and we reject it.

As regards to PO No.1 and 2 (i) relating to non-endorsement of the tendered and admitted documents as evidence during trial, both counsels are at one that, the omission has contravened order VIII Rule 4 of the CPC. Further, both counsel are also in consensus that there are some pages missing in the ruling appearing at page 142 of the record of appeal.

At this juncture, we find it apposite to quote the stated contravened rule for ease of reference. It states:

> *"4 (1) subject to the provision of sub rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-*
>
> *a) The number and title of the suit*
>
> *b) The name of the person producing the document*
>
> *c) The date on which it was produced*
>
> d) *A statement of its having been admitted, and the endorsement shall be signed or initialed by the judge or magistrate".*

Applying the quoted provisions to the case at hand, it is evident that the exhibits from page 217 to 244 of the record of appeal tendered during the trial, were neither endorsed nor certified as rightly submitted by Dr. Kyauke. The rationale of the said requirement is to guard against tempering with admitted documentary exhibits as was observed in the case of **SGS Societe Generale De Surveillance SA and Two Others** (supra).

That apart, the omission has also contravened Rule 96 (1) (f) and (g) of the Rules which require the record of appeal to contain copies of the documents put in evidence at the hearing and a complete judgment or ruling if any that was delivered during the hearing of the case among other documents. Thus, in the circumstances of this appeal, the non-endorsed documents in the record of appeal cannot be verified if they are the ones admitted as evidence during the hearing of the suit under scrutiny. Likewise, the attached ruling at page 42 of the record of appeal is incomplete for lacking some pages. As such, is not clear what was the holding of the High Court. It follows therefore that the single page ruling can neither be taken as authentic nor can it be relied upon by the Court to determine the appeal together with other documents on record. On that account, it can safely be concluded that the record of appeal is

incomplete as rightly argued by Dr. Kyauke. We therefore find PO Nos.1 and 2 (i) to have merit and uphold them.

On a way forward, we note that Dr. Kyauke implored the Court to grant leave to the appellant to file a supplementary record of appeal pursuant to rule 96 (7) of the Rules, as a remedy for the P.O. No.1 and 2 (i).

On the other hand, Mr. Mgare, while admitting that the documents at issue were neither endorsed nor certified by the trial court, he shifted the blame to the trial court for what he called failure to perform its statutory duty. He thus urged the Court to find the infraction minor and ignore them as it did in the case of **Ashraf Akber Khan** (supra) and further invoke the overriding objective principle and proceed to hear the appeal. In the alternative, Mr. Mgare implored the Court to grant the appellant leave to amend the record of appeal under rule 111 of the Rules if it will find that the record of appeal is incomplete for the pointed-out omission.

There is no dispute that the record of appeal is indeed incomplete for containing the ruling which has missing pages and for the appellant's failure to include in it the endorsed and verified exhibits that were admitted in evidence during trial. In terms of rule 96 (7) of the Rules, where a record of appeal is incomplete, the appellant may be accorded

an opportunity by the Court to file a supplementary record of appeal to include the missing documents. The Court has also emphasized this position in a number of cases with akin circumstances including **Gurmit Singh vs. Meet Singh & Another**, Civil Appeal No.256 of 2018, and **Joseph Ndunguru vs. Twiga Bancorp Limited**, Civil Appeal No.204 of 2018 (both unreported), to mention but a few.

Regarding the alternative prayer by Mr. Mgare to find the lapse minor and proceed with the hearing of appeal as we earlier decided in the case of **Ashraf Akber Khan** (supra), suffice to state that we decline to take that option. This is because, in the cited case which we find distinguishable, the documents which were complained not to have been endorsed, had no effects on the determination of the appeal on merit. On the contrary, in the case at hand, the non-endorsed exhibits which were tendered during trial are important in determination of the appeal.

Consequently, while we sustain the notice of objection in points No. 1 and 2 (i), in terms of rule 96 (7) of the rules, the appellant is granted leave to file supplementary record of appeal to include the properly endorsed and certified documents tendered and admitted as exhibits at the trial court and a complete record of the ruling appearing

at page 142 within forty-five (45) days from the date of delivery of this ruling.

Meanwhile, the hearing of the appeal is adjourned to a later date to be scheduled by the Registrar. Costs to be in the cause.

DATED at **DAR ES SALAAM** this 2nd day of March, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L.G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 13th day of March, 2023 in the presence of Ms. Hamisa Nkya, learned counsel for the Respondent and also holding brief for Mr. Francis Mgale, learned counsel for the Appellant is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL