

**IN THE COURT OF APPEAL OF TANZANIA
AT SUMBAWANGA**

(CORAM: JUMA, C.J., WAMBALI, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 57 OF 2019

**HERITAGE INSURANCE COMPANY (T) LTD APPELLANT
VERSUS**

SABIANS MCHAU 1ST RESPONDENT

**THE PERMANENT SECRETARY
MINISTRY OF HEALTH 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Sumbawanga)**

(Sambo, J.)

**Dated the 29th day of April, 2016
in
Civil Case No. 1 of 2009**

RULING OF THE COURT

18th & 22nd September, 2023

WAMBALI, J.A.:

The appellant, Heritage Insurance Company (T) Ltd was joined as a third party in Civil Case No. 1 of 2009 which was lodged before the High Court of Tanzania at Sumbawanga by the first respondent, Sabians Mchau. The suit was against Said Kassembo (not party to this appeal), the driver of the motor vehicle with registration No. DFP 762 formerly TZP 8233, together with the current second and third respondents. The suit emanated from the fact that on 10th December, 2004, the first respondent

while on duty together with six others were travelling with the vehicle stated above to Mpanda from Sumbawanga being driven by Said Kassembo. Unfortunately, the vehicle was involved in a serious accident at Mwai Village before it reached Mpanda. As a result, one person died on the spot while the first respondent and six others were seriously injured. At the High Court, the first respondent claimed several reliefs including payment of a total of TZS. 200,000,000/= being special, general and exemplary damages together with interests and costs of the suit.

It is on record that Said Kassembo, the second and third respondents lodged the written statements of defence to contest the first respondent's claim. However, Said Kassembo did not show up during the trial and as a result, the case proceeded in his absence.

At the conclusion of the case, the High Court found in favour of the first respondent against the second and third respondents jointly and awarded TZS. 80,000,000.00 as general damages with interests of 7% per annum from the date of judgment to the date of full satisfaction. However, it ordered that the appellant was liable to indemnify the second and third respondents and to bear costs of the suit for all the respondents.

Dissatisfied, the appellant lodged the instant appeal against the respondents through a memorandum of appeal consisting six grounds of appeal.

It is noteworthy that before the appeal was called on for hearing, on 12th March, 2020, the first respondent lodged a notice of preliminary objection comprising four points concerning: failure of the appellant to comply with the provisions of rules 90 (1) (c), 97 (1), 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and the inclusion in the record of appeal a defective certificate of delay. On 18th March, 2020, the Court adjourned the hearing of the preliminary points of objection as the appellant's counsel, Ms. Mary L. Mgaya, notified it that there was a pending Civil Application No. 284/09 of 2019 seeking extension of time to serve the respondents with the memorandum of appeal and record of appeal, the subject of the second point of preliminary objection on non-compliance with rule 97 (1) of the Rules.

Considering the nature of the preliminary points of objection, we required counsel for the parties who appeared before us to submit on the second preliminary point of objection. We also required them to submit on the propriety of the appellant's non - compliance with rule 84 (1) of the Rules with regard to service of the notice of appeal to Said Kassembo,

the driver of the motor vehicle which was involved in the accident who was the first defendant before the High Court as per judgment and decree in Civil Case No. 1 of 2009.

Submitting with regard to non – compliance with rule 97 (1) of the Rules, Mr. Mathias Budodi, learned advocate for the first respondent argued that though the appellant lodged the record of appeal and memorandum of appeal on 24th August, 2018, the same was served on his office on behalf of the first respondent on 12th March, 2019 after a lapse of over 200 days beyond the prescribed period of seven days. He added that unfortunately, even Civil Application No. 284/09 of 2019 which was lodged by the appellant seeking extension of time to serve the record of appeal and memorandum of appeal was dismissed by the Single Justice of the Court on 27th September, 2021. In this regard, Mr. Budodi argued that since there is no reference against that decision, the Court should sustain the preliminary point on non – compliance with rule 97 (1) of the Rules by the appellant.

With regard to the failure of the appellant to serve the notice of appeal to Said Kassembo, Mr. Budodi submitted that the omission is fatal as he is an interested party who might be affected by the decision of the Court because he was properly sued at the High Court as a tortfeasor. He

argued further that the appellant had no discretion not to serve him with the notice of appeal because rule 84 (1) of the Rules requires that an ex parte application must be made to the Court in order to dispense with the service on the person to be affected by the appeal. In the circumstances, he concluded that non – compliance with rule 84 (1) of the Rules by appellant makes the appeal incompetent and thus, it should be struck out with costs.

Mr. Francis Rodgers, learned Principal State Attorney assisted by Mr. Mjahidi Kamugisha, learned State Attorney who appeared for the second and third respondents entirely supported the submissions of Mr. Budodi on two preliminary points. With regard to the first point on non – compliance with rule 97 (1) of the Rules, Mr. Rodgers added that even the application for extension of time was an afterthought because it was lodged in May, 2019 after the appellant served the second and third respondents the record of appeal and memorandum of appeal in January, 2019, which was beyond 7 days prescribed by the Rules. In the event, he implored us to sustain the two points of law and to strike out the appeal with costs for being incompetent.

In response, though, Mr. Karoli Valerian Tarimo, learned advocate for the appellant conceded that the respondents were served with the

memorandum of appeal and record of appeal out of the prescribed period of seven days under rule 97 (1) of the Rules, the omission is not fatal because the respondents in this appeal did not lodge the addresses of service within fourteen days after service on them with the notice of appeal as required under rule 86 (1) (a) of the Rules. In his view, the respondents were therefore not entitled to the service of the respective documents within seven days though they were still served belatedly. In the circumstances, he emphasized that despite the fact that Civil Application No. 284/09 of 2019 for extension of time to serve the respondents was dismissed by the Single Justice of the Court and no reference has been lodged to contest it, that decision has no assistance to the first respondent's preliminary point on non - compliance with rule 97 (1) of the Rules. This is because, he submitted, the application was misconceived as the respondents had not lodged in Court the addresses of service as required by rule 86 (1) (a) of the Rules.

On the issue of non – compliance with rule 84 (1) of the Rules, Mr. Tarimo conceded that Said Kassembo was not served with the notice of appeal nor included in this appeal. However, he argued that Said Kassembo is not a person who can be directly affected by the current appeal as the case was decided in his absence at the High Court and thus, the appellant had a discretion not to serve him with the requisite notice

of appeal. To this end, Mr. Tarimo pressed us to find that the point on this issue has no merit.

On the other hand, the learned advocate submitted that should the Court find that the appellant had obligation to serve Said Kassembo with the notice of appeal because he might be directly affected by the appeal, we should invoke the overriding objective principle enshrined under the provisions of section 3A (1) and (2) of the Appellate Jurisdiction Act, Cap 141 (the AJA) to dispense with the requirement under the provisions of rule 84 (1) and proceed to hear and determine the appeal on merit.

Having heard the submissions of the counsel for the parties for and against on the two preliminary points, we propose to start our deliberation with the issue of non – compliance by the appellant with rule 84 (1) of the Rules. For clarity, the respective rule provides:

"An intended appellant shall, before, or within fourteen days after lodging the 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."

Basically, the appellant's counsel readily agreed that Said Kassembo was not served with the notice of appeal and that he was not included as

a party in this appeal. Mr. Tarimo however, strongly contended that Said Kassembo cannot be directly affected by the appeal and that though he lodged the written statement of defence, he did not participate in the proceedings during the trial at the High Court.

For our part, having closely perused the record of appeal, there is no doubt that though Said Kassembo did not take part during the trial, he lodged the written statement of defence to contest the suit that was lodged by the first respondent. Indeed, as correctly submitted by Mr. Budodi, since the first respondent's claim was based on the alleged negligence of Said Kassembo who was the driver at the time of the accident, and being the employee of the second respondent, it cannot be said that he had no right to be served with the notice of appeal as argued by Mr. Tarimo. It is for that reason that the judgment and decree of the High Court in Civil case No. 1 of 2009 retained the name of Said Kassembo as the first defendant. More importantly, part of the appellant's grounds of appeal is premised on the fact that the first respondent's claim for damages was wrongly awarded by the trial court because Said Kassembo was acquitted in a criminal case in which he was charged for negligence in causing the accident.

To be specific, ground 3 of the memorandum of appeal states:

"That the trial judge erred both in law and in fact in holding that the 2nd and 3^d defendants are liable to compensate the plaintiff whilst there was no proof of negligence on the part of the first defendant which would bring in the applicability of the doctrine of vicarious liability."

In the circumstances of this appeal, therefore, Said Kassembo cannot be taken as a person who might not be directly affected by the outcome of the appeal.

The Court has on several occasions emphasized on the need for the intending appellant to comply with the provisions of rule 84 (1) of the Rules. For instance, in **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] T.L.R. 437, the Court dealt with rule 77 (1) of the Tanzania Court of Appeal Rules, 1979, which currently is rule 84 (1) of the Rules and held thus:

- i) "N/A
- ii) N/A
- iii) N/A
- iv) *What rule 77 (1) means is that persons who should be served are those persons who took part in the proceedings in the High Court, and those who did not take part in the proceedings*

but who stand to be directly affected by the appeal; besides, there may be persons who took part in the proceedings but who need not be served if they do not seem to be directly affected by the appeal.

- v) Since one of the prayers in the appeal was to nullify the transfers of landed properties, Mini Millers Limited was directly affected by the appeal;*
- vi) On the wording of rule 77 (1), on the face of it, the matter seems to lie in the discretion of the appellant to decide which persons "seemed to him" to be directly affected by the appeal, but it is established in judicial interpretation that words and expressions which, prima facie, appear permissive may in certain circumstances assume an imperative character; the test is whether there is anything that makes it a duty of the person on whom power is conferred to exercise that power, and when power is coupled with a*

duty it ceases to be discretionary and becomes imperative;

vii) Failure to serve the Notice of Appeal on Mini Millers Limited amounted to an attempt to condemn it unheard, which is contrary to the rules of natural justice and Article 13 (6) (a) of the Constitution.

viii) Where a person is shown to be directly affected by an appeal, there is no discretion but to serve that person with the Notice of Appeal and where, as in this case, that person took no part in the proceedings in the High Court, it is the Court of Appeal, rather than the appellant, which is vested with power to direct that service need not be effected on that person; rule 77 (1) does not constitute the appellant to be a judge in his own cause;

ix) Omission to serve a copy of the Notice of Appeal on a respondent is fatal to an appeal; it is similarly fatal to omit to serve a person who

*appears to be directly affected by the appeal
although he took no part in the High Court”.*

(Emphasis added)

Moreover, in **Grumeti Reserves Limited v. Morice Akiri**, (Civil Appeal No. 334 of 2019) [2021] TZCA 636 (3 November 2021, TANZLII) the Court stated that:

"Therefore, since there is no proof of service of a copy of a notice of appeal on the respondent in person nor on his advocate at his address, rule 84 (1) and (2) of the Rules was not complied with consequently, the appeal is incompetent.

Indeed, in **National Bank of Commerce Limited and Another v. Ballast Construction Company Ltd**, (Civil Appeal No. 72 of 2017) [2019] TZCA 17 (6 March 2019, TANZLII), the Court held:

"We are therefore, inclined to agree with Mr. Banzi that the copy of the notice of appeal was not served on the respondent hence contravening the mandatory provisions of Rule 84 (1) of the Rules. This being a mandatory requirement, we do not think that the overriding objective principle applies."

In the appeal at hand, there is no dispute as readily conceded by Mr. Tarimo that no service of the notice of appeal was effected to Said Kassembo.

Indeed, since Said Kassembo was a party in Civil Case No. 1 of 2009 at the High Court and taking into account that ground 3 in the memorandum of appeal reproduced above concerns the issue whether the second and third respondents were vicariously liable despite the acquittal of Said Kassembo in a criminal case on the charge of the alleged negligence, we are of the view that service of the notice on him was necessary. We thus hold, as it was the case in the **Khantibhai Patel** case, that failure to serve the notice on him amounted to an attempt to condemn him unheard contrary to the rules of natural justice. Besides, even though Said Kassembo did not enter appearance during the trial at the High Court, he was accorded the right to be informed of the pending trial as the notice to appear was served on him through substituted service by publication but he waived that right. We therefore respectfully disagree with Mr. Tarimo that Said Kassembo is not one of the persons who might not directly affected by the appeal.

On the other hand, we are mindful of Mr. Tarimo's prayer that considering the overriding objective principle, we should assume the

power of the Court under rule 84 (1) of the Rules to dispense with the service of the notice of appeal and proceed to hear and determine the appeal. It is noteworthy that a similar prayer was made by the appellant's counsel in the case of **Savings and Finance Commercial Bank (now known as NIC Bank (T) Ltd v. Dr. Abubakar Msafiri Swalehe and Three Others**, Civil Appeal No. 129 of 2020 (unreported). The Court stated thus:

"On the same point, we have been asked to assume the powers conferred to the Court by the provision to rule 84 (1) and dispense with the requirement which provide that, "the Court may, on application by the appellant, direct that service needs not be affected on any person who took no part in the proceedings at the High Court." From its express provision, the provision in our view, applies where there is a formal application in place... It cannot, as in the current case, apply where the appellant without procuring such a direction filed a record of appeal without complying with such a requirement. The reason being that, the filing of an appeal without complying with such a mandatory requirement, renders the appeal fatally incompetent."

In the event, considering the circumstances of this appeal, we decline the invitation by the appellant's counsel and hold that failure of the appellant to comply with the provisions of rule 84 (1) of the Rules

goes to the root of the appeal and renders it incompetent. We thus, agree with the respondents' counsel that the appeal is incompetent. We are thus of the view that this is not a proper appeal in which we should invoke the overriding objective principle.

We must emphasize that while section 3A (1) and (2) of the AJA enjoins the Court to facilitate the just and expeditious resolution of disputes and seek to give effect to overriding objective, section 3B (a) and (2) of the same Act enjoins it to ensure fair determination of the proceedings, including the right to be heard. On the other hand, parties and advocates are also required to assist the Court to further the overriding objective by ensuring that proceedings before it is proper. For avoidance of doubt, section 3B provides:

"3B (1) For the purpose of furthering objectives specified in section 3A the Court shall handle all matters presented before it with a view to attaining the following-

(a) just determination of the proceedings;

(2) A party to the proceedings before the Court or an advocate for such a party shall have the duty to assist the Court to further the overriding objective and to that effect, participate in the process of the Court and comply with directions and orders of the Court".

In this regard, since the point on non-compliance with rule 84 (1) of the Rules suffices to dispose of the appeal, we do not think it is necessary to deal with the objection on non-compliance with rule 97 (1) of the Rules which concerns the service of the memorandum of appeal and record of appeal.

In the result, we strike out the appeal with costs for being incompetent.

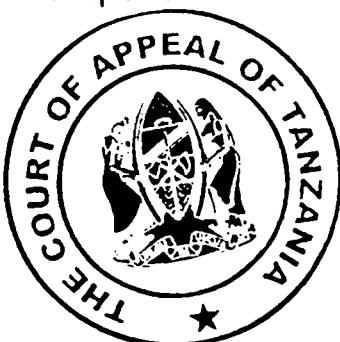
DATED at SUMBAWANGA this 21st day of September, 2023.

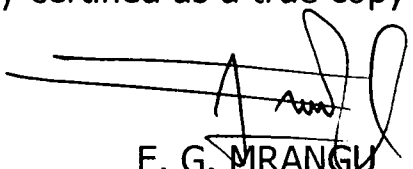
I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of September, 2023 in the presence of Mr. Mathias Budodi, learned counsel for the 1st respondent who also holding brief for Mr. Karoli Valerian Tarimo, learned counsel for the appellant and Mr. Mjahidi Kamugisha, learned State Attorney for the respondents is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL