IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 280 OF 2019

ZEN CLIFF TRADERS LIMITED ..... 1ST APPELLANT
GIDEON MAKUNJA MKAMA ..... 2ND APPELLANT

VERSUS

COCA COLA KWANZA LIMITED ..... 1ST RESPONDENT
NATIONAL MICROFINANCE BANK ..... 2ND RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Philip, J.)

dated the 14th day of August, 2019

in

Commercial Case No. 39 of 2018

.....

RULING OF THE COURT

31st May & 23rd November, 2023

MWARIJA, J.A.:

The 1st respondent, Coca Cola Kwanza Limited, a registered company dealing in bottling, supply and selling of Coca Cola products, instituted a suit in the High Court of Tanzania, Commercial Division, Commercial Case No. 39 of 2018. The suit was against the appellants, Zen Cliff Traders Limited, Gideon Makuja Mkama (the 1st and the 2nd appellants) respectively and the 2nd respondent, National Microfinance Bank, a Commercial banking institution. The 1st appellant, a limited

liability company, was carrying out the business of distributing beverages including the 1st respondent's products. The 2nd appellant was the Executive Director of the 1st appellant.

On 29/7/2016, the 1st appellant entered into a two years' agreement with the 1st respondent to purchase on credit, the latter's beverage products and supply the same within Kidatu, Mahenge, Mlimba, Malinyi and Ifakara areas in Morogoro Region. To secure the payment of the products which were to be supplied on credit, the appellants obtained a bank guarantee of TZS 150,000,000.00 from the 2nd respondent vide the Performance Bond Agreement Number 101 GULC 162020005.

After the signing of the Performance Bond Agreement, the 1st respondent went on to supply its products to the 1st appellant as and when it requested by use of special documents; that is, Credit Facility Request Forms. However, on 30/6/2017, the 1st respondent notified the 1st appellant that the payment for the guaranteed amount was due and thus demanded to be paid the sum of TZS 150,000,000. Following the appellant's failure to effect the payment, the 1st respondent filed the suit against the appellants and the 2nd respondent which, as shown above, was the appellants' guarantor. In the suit, the 1st respondent claimed for the following reliefs;

(i) *A declaration that the first defendant [the 1st appellant] had breached the Performance Bond Guarantee that was executed between he plaintiff [the 1st respondent] and the first and second defendants [the appellants] on 29th July, 2016.*

(ii) *A declaration that the second and third defendants had unlawfully terminated and/or breached the distribution agreement with the plaintiff.*

(iii) *That, the first defendant be ordered to pay the plaintiff the sum of shillings One Hundred Fifty Million (Shs. 150,000,000/=) being the guaranteed amount as per the relevant Performance Bond Guarantee executed by the second defendant on 29th July, 2016 following [the] default.*

(iv) *That, the first defendant be ordered to pay the plaintiff general damages as shall be assessed by the honourable court for breach of the Performance Bond Guarantee.*

(v) *That, the second and third defendants be ordered to pay general damages to the plaintiff as pleaded under paragraphs 18 and 19 for the breaches and wrongful termination of the distribution agreement."*

The 1st respondent prayed also for interests, costs of the suit and any other reliefs which the court would deem fit to grant.

Whereas the appellants filed a joint written statement of defence, the 2nd respondent filed a separate defence. In their defence, the appellants denied the claims by the 1st respondent that they defaulted to pay for the supplied products. They contended that, payments were made in cash, funds transfers and by return of stock. They also denied the claims arising from the performance of the distribution agreement between them and the 1st respondent, such as acquisition of motor vehicles for transportation of the supplied products contending that, they did not fall within the Performance Bond Agreement as that agreement operated only in the case of failure by the appellants to pay for the beverages which were supplied on credit.

On its part, the 2nd respondent also denied the 1st respondent's claims. It contended that, as admitted by the 1st respondent in paragraph 6 of its plaint, the outstanding amount was TZS 87,622,692.00 not TZS 150,000,000.00 which it sought to be paid. The 2nd respondent went on to state as follows in paragraph 5(c) of its written statement of defence:

> *"5-*
>
> *(a)....N/A.*

(b)....N/A.

(c) The Bank Guarantee was only operative when there was a specified default by the 2nd defendant and did not cover any other liability arising from any other set of actions or circumstances arising out of the commercial relationship between the plaintiff and the 2nd defendant."

Having considered the evidence tendered by two witnesses for each of the parties as well as the tendered exhibits, the learned trial Judge found that the 1st appellant had breached the terms of the Performance Bond Guarantee by failing to pay TZS 87,622,929.00. With regard to the claim for general damages alleged to have been occasioned by the 1st and 2nd appellants as a result of termination of the distributorship agreement, the learned Judge was of the view that, such a claim had not been proved. She consequently dismissed that claim and proceeded to award the reliefs which she found to have resulted from the breach by the appellants and the 2nd respondent, of the Performance Bond Agreement.

The 1st respondent was awarded TZS 87,622,692.00 being the outstanding amount for the products supplied to the 1st appellant. It was also awarded TZS 4,000,000.00 being general damages for the 2nd

respondent's breach of the Performance Bond Agreement. The 2nd respondent was also ordered to pay interest on the decreed amount of TZS 87,622,692.00 and the costs of the suit.

The appellants were dissatisfied with the decision of the High Court and thus preferred this appeal which is predicated on seven grounds of complaint. On its part, the 2nd respondent filed a cross-appeal based on three grounds, seeking variation or reversal of the impugned decision.

When the appeal was called on for hearing on 8/2/2023, the Court dealt with the issue whether or not the same was competent. The issue arose as a result of the appellants' failure to include, by way of a supplementary record, some of the necessary documents in the record of appeal after the Court had, on 1/11/2022, granted leave to do so in terms of rule 97 (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The missing documents were; (i) The plaintiff's reply to the first defendant's written statement of defence, (ii) The plaintiff's reply to the second and third defendants' joint written statement of defence and (iii) the endorsed copies of the documents which were admitted in evidence as exhibit P3.

The Court considered the omission by the appellant and the import of rule 96 (8) of the Rules which bars a party who fails to file a

supplementary record after it had obtained leave, from making a second application. It held that, since the missing documents were not included in the record of appeal, the appeal was incompetent. As a result, the same was struck out with costs and the cross-appeal was adjourned for hearing on the date to be fixed by the Registrar. It was later fixed for hearing on 31/5/2023.

At the hearing of the cross-appeal, on the above stated date, the appellant (the 2nd respondent in the struck out appeal) was represented by Ms. Josephine Safiel, learned counsel while the 1st and 2nd respondents (the appellants in the struck out appeal) were represented by Mr. Augustine Kusalika, learned counsel. On its part, the 3rd respondent (the 1st respondent in the struck out appeal) was represented by Mr. Atlay Thawe, also learned counsel.

At the outset, Mr. Thawe raised a pertinent issue concerning the status of the cross-appeal after the striking out of the appeal. According to the learned counsel, the effect of the order striking out the appeal is to render the cross-appeal incompetent for want of the record of appeal.

Ms. Safiel opposed the argument of the counsel for the appellant that the cross-apeal was rendered incompetent. He argued that, the order striking out the appeal did not have any effect on the cross-appeal

because the same was properly filed under rule 94 of the Rules at the time when the appeal was in existence. She argued further that, despite the striking out of the appeal, the record remained and the cross-appeal can proceed to be heard on the basis of that record. To bolster her argument, she cited, among others, the case of **ABSA Bank Tanzania Limited and Another v. Hjordis John Nanyaro**, civil Appeal No. 30 of 2020 (unreported).

As for the missing documents, which caused the appeal to be struck out, she prayed to be granted leave to file a supplementary record consisting of those documents. Casting her nets wider, Ms. Safiel prayed, in the alternative, to be allowed to file the record of appeal, should the Court find that the order striking out the appeal had the effect of also striking out the record of appeal.

Mr. Kusalika supported the submission of the appellant's counsel. He stressed that, the cross-appeal did not become incompetent because the appeal was struck out. He also agreed with Ms. Safiel's prayer for leave to file a supplementary record of appeal containing the documents which were missing from the record of appeal, the omission which led to the striking out of the appeal.

We have considered the submissions of the learned counsel for the parties. The issue which arises for our determination is whether the order striking out the appeal rendered the cross-appeal incompetent as argued by Mr. Thawe. With respect to the learned counsel, in our considered view, that argument is without merit. A cross-appeal is an independent appeal standing on the already filed record of appeal. According to the **Black's Law Dictionary**, 9th Ed, "appeal" means:

> *"A proceeding undertaken to have a decision reconsidered by higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal..."*

Under rule 90 (1) of the Rules, an appeal, which must be preceded by a notice of appeal, is instituted by lodgment of among other documents, a memorandum of appeal and the record of appeal. A record of appeal from the decision of the High Court made in its original jurisdiction or in its appellate jurisdiction must, in terms of rule 96 (1) and (2) of the Rules, contain the pleadings, proceedings, judgment or ruling and all the exhibits and documents which were tendered in the case. All these documents and those which have to be prepared and filed

by the appellant to bring an appeal to existence including a notice and a memorandum of appeal, form the record of appeal.

When therefore, an appeal is struck out, it is the documents prepared and filed by the appellant which are obliterated not any of the documents obtained from the record of the case. The omission to include in the record of appeal some of the documents thus affects the appeal not the filed copy of the record of the case. In this case therefore, although the appeal was struck out, the record remained intact and the cross-appeal may proceed upon it. We are supported in that finding by our recent decision in the case of **ABSA Tanzania Limited** (Supra) cited by Ms. Safiel. Confronted with a similar issue in that case, we relied on the case of **Attorney General v. Morogoro Autospares** [2007] T.L.R 315 and held as follows:

> *"Finally, it is on the argument in regard to the status of the cross-appeal in the event the appeal is struck out... we find the argument by the counsel for the appellants that once the appeal is struck out then the respondent's cross-appeal flops for lack of legs to stand on, to be misconceived. Fortunately, this is not the first time that the Court is faced with an akin situation. In*

> ***Attorney General v. Morogoro Autospares*** *(supra) cited by Mr. Mushi where the same argument was raised, it was firmly held that a cross-appeal in a struck out appeal stands on its own like a cross-appeal in a withdrawn appeal and therefore, that it can proceed for hearing. It was further insisted by the Court that a cross-appeal is an appeal of its own kind just like a counterclaim in a suit."*

On the basis of the above stated reasons, our answer to the issue is in the negative; that the striking of the appeal did not have the effect of rendering the cross-appeal incompetent. The same may thus be proceeded with in the record of appeal earlier on filed in respect of the struck out appeal.

With regard to Ms. Safiel's prayer for leave to file a supplementary record of appeal consisting of the documents which were omitted to be included in the record of appeal, we have no reason to decline that prayer. The documents are necessary and without then, the record will remain to be incomplete. We thus allow the prayer and grant the present appellant in the cross appeal a period of sixty (60) days to file a

supplementary record so as to include in the record, the missing documents mentioned above.

Given the particular circumstances of this case, we make no order as to costs.

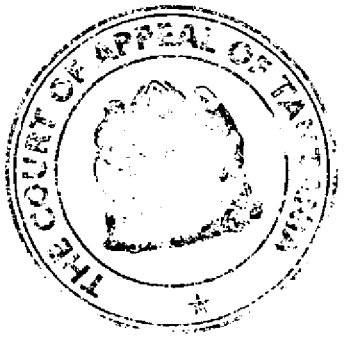
DATED at **DAR ES SALAAM** this 22nd day of November, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2023 in the presence of Mr. Augustine Kusalika, learned counsel for the appellants, Mr. Atlay Esao Thawe, learned counsel for the 1st Respondent and Ms. Josephine Safiel, learned counsel for the 2nd respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL