

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 241 OF 2019

(CORAM: MWARIJA, J.A., SEHEL, J.A. And MASHAKA, J.A.)

TANZANIA NATIONAL ROADS AGENCY (TANROADS) APPELLANT
VERSUS

PRISMO/ BADR J/V THE PARTNESHIP
BETWEEN PRISMO UNIVERSAL ITALIANA S.P.A
AND BADR EAST AFRICAN ENTERPRISES LTD RESPONDENT
[Appeal from the Judgment and Decree of the High Court
of Tanzania, at Dar es Salaam]

(Mujulizi, J.)

dated the 23rd day of June, 2015

in

Civil Case No. 90 of 2008

RULING OF THE COURT

21st September, 2022 & 24th April, 2023

MASHAKA, J.A:

This ruling is on the preliminary objection raised by the respondent PRISMO/ BADR J/V THE PARTNESHIP BETWEEN PRISMO UNIVERSAL ITALIANA S.P.A AND BADR EAST AFRICAN ENTERPRISES LTD, challenging the competence of the appeal lodged by TANROADS, the appellant. The appeal preferred by the appellant is against the order of

the High Court of Tanzania sitting in Dar es Salaam in Civil Case No. 90 of 2008.

Before the High Court, the respondent claimed for a declaration that the recommendations of the Dispute Review Expert (DRE) made on 17th August 2008 between the respondent and the appellant become binding and final. Also, that the parties must implement it; a declaration that the respondent's obligation to submit to the appellant a performance guarantee issued on 26th June, 2009 by the National Bank of Commerce was void ab initio and a permanent injunction restraining the appellant from pressing for the payment of the sum promised under the performance guarantee. The High Court decision was in favour of the respondent.

Dissatisfied, the appellant lodged Civil Appeal No. 62 of 2016 before the Court which was later withdrawn with an order to refile after it transpired that some proceedings were missing from the record of appeal. The appellant had sought before the High Court in Miscellaneous Civil Application No. 461 of 2019 for the exclusion of the missing record. The application was granted to exclude the documents from the record of appeal. Hence the present appeal.

Before the appeal could proceed with hearing, Mr. Kibatala, learned counsel representing the respondent raised two sets of notice of preliminary objection. The first notice was lodged on 26th September, 2019 comprising of two limbs which read as follows:

- 1. The appeal is incompetent for the reason that the record of appeal is incomplete as the appellant has not complied with the Court's Order dated 23rd July, 2019.*
- 2. The appeal is incompetent for the reason that the same is res sub-judice Misc. Civil Application No. 461 of 2019 between the parties herein currently (at the time the Appeal, together with these points of Preliminary Objection in Law) pending in the High Court of Tanzania (Hon. Tiganga, Deputy Registrar).*

The second set was lodged on 4th October, 2019 consisting of two limbs that:

- 3. The record of appeal including additional record of appeal is incomplete in law for being accompanied by an incompetent order of the High Court (Hon.*

Tiganga) dated 2nd October, 2019 that does not specify what documents have been excluded.

4. The additional record of appeal is incompetent in law for being filed contrary to this Court's Order dated 23rd July, 2019.

When the appeal was called on for hearing on 21st September, 2022 the appellant was represented by Messrs. Lukelo Samuel and Kenan Komba, both Principal State Attorneys, assisted by Messrs. Saddy Rashid, Charles Mtae and Salehe Manoro, all Senior State Attorneys.

On the hearing of the preliminary objection, Mr. Kibatala abandoned the 2nd limb of objection lodged on 26th September, 2019. Arguing on the 1st limb that the record of appeal is incomplete, Mr Kibatala submitted that, there is no doubt the record of appeal in the former appeal was incomplete which prompted the appellant to withdraw it. He contended that the Court marked it withdrawn in terms of rule 102(1) of the Tanzania Court of Appeal Rules, 2019 (the Rules) with a liberty to refile. He argued that, the import of rule 102 (1) of the Rules is to encapsulate the principle of overriding objectives. He further contended that, after lodging the appeal and is still incomplete, the effect of such incomplete record of appeal ought to be taken that the appellant was granted an opportunity

to file a supplementary record of appeal in which rule 96(8) of the Rules has limitation. He argued that the remedy available is for the Court at this juncture to dismiss the appeal.

Reverting to the notice of preliminary objection filed on 4th October, 2019, Mr. Kibatala argued both limbs conjointly that, rule 96(3) of the Rules allows the Deputy Registrar to grant the exclusion of documents required to be included in the record of appeal. He submitted that the additional record of appeal which included the ruling of the Registrar of the High Court to exclude the documents had no legal legs to stand as the order could not be executed. He contended that the order had stated “the documents listed in the chamber summons are hereby excluded” arguing that it was not a proper order as it did not specify and pronounce the reliefs granted by the Deputy Registrar because an order is akin to a decree. In those circumstances, he concluded that the appellant could not request the Court to lodge an additional record of appeal.

In reply, Mr. Rashid commenced with the first limb of the notice of preliminary objection dated 26th September, 2019 contending that the record of appeal as it stands is incomplete. He explained that the order of the Court dated 23rd July, 2019 was intended to give the appellant an opportunity to file a fresh appeal if still interested and it was not made

under rule 96(7) of the Rules. It was his contention that the order was made pursuant to rule 102(1) of the Rules which provides a party a right to refile. He strongly objected the prayer made by Mr. Kibatala to the Court for the dismissal of the appeal, as the appellant has not been precluded under rule 96(7) of the Rules.

On the second limb, Mr. Rashid submitted that, there is a mechanism to challenge an order of the Deputy Registrar through a reference before a judge and not by raising an objection as it was done by Mr. Kibatala. Thus, the order of the Deputy Registrar was not akin to a decree and could not be challenged as done by the learned advocate.

He further argued that, despite the fact that the record of appeal is incomplete, still the appellant has the advantage of rule 96(6) and (7) of the Rules. In the alternative, he submitted that the proper remedy is for the Court to invoke the provisions of rule 96(7) of the Rules and grant the appellant leave to lodge a supplementary record of appeal.

Re-joining, Mr. Kibatala reiterated his submission in chief and added that, the order of withdrawal recorded by the Court was a curative one to cure the anomaly which was incomplete record of appeal and that under rule 96(3) of the Rules the order of the Deputy Registrar is invalid.

The issue for our determination in the light of the submissions by both parties is whether the appeal before the Court is competent and the validity of the order by Deputy Registrar. There is no dispute as argued by both learned counsel that the record of appeal as it stands before us is incomplete. The next question is, can it be remedied or the appeal ought to be dismissed as implored by Mr. Kibatala. The arguments advanced by Mr. Kibatala is that the appeal is incomplete because the appellant failed to comply with the Court order dated 23rd July, 2019. We have gone through the said order which had marked the appeal withdrawn and granted leave to the appellant to refile in which the appellant lodged the present appeal. The previous appeal was marked withdrawn pursuant to rule 102 (1) of the Rules which states: -

"An appellant may at any time in the course of hearing, informally apply to the Court for leave to withdraw the appeal and the Court may grant the application upon such terms as to costs or other conditions as it deems fit."

The provision of the law above speaks for itself. The withdrawal of the former appeal left nothing standing in the Court. The essence of that order was a remedial measure to the appellant to lodge a fresh appeal.

Therefore, we respectfully find it improper to go along with the argument of Mr. Kibatala that rule 96 (7) of the Rules is an alternative to rule 102(1) of the Rules for the reason that, rule 102 (1) removes the said appeal completely out of the registry of the Court and as such, nothing was left in the Court, and for that reason the present appeal has a different appeal number from the former appeal. While rule 96 (7) of the Rules gives life to incompetent appeals suffering from defects in the records of appeal including, but not limited to non-inclusion of essential documents envisaged under rule 96 (1) and (2) of the Rules (See **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2018 (unreported)). Thus, the argument of Mr. Kibatala that rule 102 (1) of the Rules encapsulate the spirit of the overriding objective principle is unfounded. Under the circumstances, the appellant has not failed to comply with the order of the Court. This limb of objection fails.

We move to the second limb, whether the order of the Deputy Registrar in Misc. Civil Application No. 461 of 2019 is invalid for the reason that it did not state which documents were to be excluded. The arguments advanced by Mr. Kibatala is that, the order is invalid for the sole reason that it did not specify and provide details of the documents which ought

to be excluded. Mr. Rashid contended that this is not a proper forum to challenge the said order. We agree with Mr. Rashid's contention that if the respondent intended to challenge the order of the Deputy Registrar, then he ought to have challenged it through a different forum before a Judge of the High Court and not through a preliminary objection before the Court.

Accordingly, the two sets of notice of preliminary objection are overruled.

DATED at DAR ES SALAAM this 20th day of April, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

Ruling delivered this 24th day of April, 2023 in the presence of Mr. Urso Luoga, State Attorney for the Appellant and Mr. Alphonse Nachipyangu, learned counsel for the Respondent is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL