IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: NDIKA, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CIVIL APPEAL NO. 271 OF 2020

CRDB BANK LIMITED.....APPELLANT

VERSUS

FINN W. PETERSEN.....1st RESPONDENT
MILIMANI FARMERS LIMITED.....2nd RESPONDENT
NOOR'S FARM LIMITED.....3rd RESPONDENT
ELIZABETH KALUNGA & DEBORAH KALUNGA
(Legal Personal Representative of the Late
LEOPARD KALUNGA).....4th RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania Land Division at Dar es Salaam)

(Mgaya, J.)

dated the 26th day of August, 2016
in
Land Case No. 255 of 2006

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RULING OF THE COURT

15th March & 18th April, 2024

FIKIRINI, J.A.:

Finn W. Petersen, Milimani Farmers Limited, and Noor's Farm Limited, hereinafter referred to as the 1st, 2nd, and 3rd respondents respectively, were plaintiffs in Land Case No. 255 of 2006, suing the appellant, CRDB Bank Limited, who was the 2nd defendant and from whom the 1st respondent secured an overdraft facility. A debenture deed over all non-fixed assets of the 2nd and 3rd respondents was signed, and the landed properties of the

2nd and 3rd respondents were mortgaged as a guarantee for the overdraft facility obtained.

After a full trial, the court entered judgment in favor of the 1st, 2nd, and 3rd respondents, as reflected in the court decree issued on 26th August, 2016, and extracted on 20th October, 2016. Dissatisfied with the decision, the appellant lodged her notice of appeal on 6th September, 2016, along with a letter requesting to be furnished with the necessary documents dated 30th August, 2016. By 9th July, 2020, the requested documents were ready, and a certificate of delay was issued, excluding a total of 1409 days. The present appeal was duly filed on 11th August, 2020, well within the sixty days prescribed by the law and registered as Civil Appeal No. 271 of 2020.

However, by operation of the law, the appellant's name changed to CRDB Bank Plc. Through Civil Application No. 102/17 of 2022. Mr. Deogratias Lyimo Kiritta, learned advocate, appearing for the appellant moved the Court in terms of rule 111 of the Tanzania Court of Appeal Rules, 2009 (the Rules), seeking leave to amend the record of appeal by replacing the appellant's name from CRDB Bank Limited to CRDB Bank Plc. The uncontested application, supported by an affidavit deponed by Mgisha Mboneko, the applicant's Principal Legal Officer, was granted pursuant to rules 50 (2) and

111 of the Rules on 3rd October, 2023, and ordered the appellant to lodge the amended documents within sixty days from the date of the ruling. The time within which the amended documents should be served on the respondents was not prescribed, and that is the essence of the present ruling stemming from the notice of preliminary objection filed on 6th March, 2024, among the grounds being that:-

> *4. The amended record of appeal by the appellant was served on the 1st, 2nd, and 3rd respondents beyond the prescribed time.*

On 15th March, 2024, when the appeal was called for hearing, the hearing of the appeal was preceded by the hearing of the notice of preliminary objection, as is the practice. Present before the Court were Messrs. Deogratias Lyimo Kiritta, Innocent Frank Mwanga, Frank Ntuta, Meswin Masinga and Peter Nyangi, all learned advocates appearing for their respective parties.

Mr. Mwanga introduced the discussion, contending that according to the Court order dated 3rd October, 2023, the amended record of appeal had to be filed within sixty days from the date of the order. While the appellant lodged the amended record of appeal on 1st December, 2023, which was the

last day, the respondents could not be served until 24th January, 2024, which was a month and a couple of days from the filing of the said amended record of appeal. Disapproving the service effected on the respondents, Mr. Mwanga submitted that the provision of rule 97(1) of the Rules was to be adhered to, and parties should not be allowed to apply it at whims. Supporting his position, he referred the Court to the case of **Gideon Wasonga & 3 Others v. The Attorney General & Two Others**, (Civil Appeal No. 37 of 2018) [2021] TZCA 3534 (23rd December, 2021; TANZLII), in which the Court maintained that the appeal becomes incompetent if service of the memorandum and record of appeal is made outside the prescribed time.

Anticipating the invitation to the Court to invoke the Overriding Objective Principle (Oxygen Principle) by the other party, Mr. Mwanga argued that since the requirement was mandatory, refuge could not be taken under the principle. Fortifying his submissions, he equally referred us to the **Mondorosi Village Council & Others v. Tanzania Breweries Limited & Others,** (Civil Appeal No. 66 of 2017) [2018] TZCA 303 (13th December, 2018; TANZLII) and **Gideon Wasonga** (supra).

In addition to his submission, Mr. Mwanga filed a list of authorities on 6th March, 2024, comprising the following cases: **Eveline J. Ndyetabula v. Star General Insurance (T) Limited**, (Civil Appeal No. 189 of 2019) [2022] TZCA 538 (7th September, 2022; TANZLII); **Tanzania Telecommunications Company Limited v. Stanley S. Mwabulambo,** Civil Appeal No. 26 of 2017 (unreported); **Filon Felicia Kwesiga v. Board of Trustees of NSSF,** (Civil Appeal No. 136 of 2020) [2021]TZCA 424 (27th August, 2021; TANZLII); **National Social Security Fund v. New Kilimanjaro Bazaar Limited,** (Civil Appeal No. 16 of 2004) [2004] TZCA 6 (27th October, 2004; TANZLII); **Emmanuel Funga v. Halmashauri ya Kijiji cha Mvumi Mission,** (Civil Appeal No. 350 of 2019) [2020] TZCA 1898 (7th October, 2020; TANZLII); **Dhow Mercantile (EA) Ltd and Two Others v. Registrar of Companies and Four Others,** (Civil Appeal No. 56 of 2005) [2005] TZCA 4 (15th November, 2005; TANZLII); **William Loitame v. Asheri Naftali** [2003] T. L. R 320; and **Peter Wegesa Chacha Timasi and Two Others v. North Mara Gold Mine Limited,** (Civil Appeal No. 66 of 2017) [2023] TZCA 30 (17th February, 2023; TANZLII), in which the Court upon conclusion that either the notice of appeal was lodged out of time or a certificate of delay or a decree filed was defective sustained the

preliminary point of objection and proceeded to strike out the appeal for being incompetent.

Mr. Mwanga concluded his submission by emphasizing that non-compliance with rule 97 (1) of the Rules rendered the appeal before the Court incompetent and thus deserved striking out. Mr. Ntuta, supporting Mr. Mwanga's submission, also urged for the appeal to be struck out.

On his part, Mr. Kiritta, upon taking the floor, based his submission on the fact that the application subject to the notice of preliminary objection was according to rule 111 of the Rules, which did not specify or prescribe a time within which service can be effected. Therefore, what matters is that service is made within a reasonable time. The reason was, according to him not far-fetched, that the respondents had the original version of the record of appeal. Distinguishing **Gideon Wasonga's** case (supra) from the situation at hand, he contended that in that case, the issue was filing and service of a notice of appeal, which was not the case presently.

Illustrating the measures taken after the filing of the amended record of appeal, Mr. Kiritta argued that the amendment, which only touched the names of the parties, was effected on the 1st, 2nd, and 3rd respondents' counsel via WhatsApp and later email messages containing the amended

version of the record of appeal. Eventually, the actual amended record of appeal was served. Considering that the essence of service is to put the other party on notice or be aware, he found service through WhatsApp and emails before the actual service, which was accompanied by a letter, sufficient.

Mr. Kiritta went on contending that even if it were to be taken that Mr. Mwanga was served on 24th January, 2024, as alleged, still he has not been able to show that he was prejudiced by that late service or that injustice was caused. Dismissing the submission that the appeal be struck out for being incompetent, Mr. Kiritta submitted that the Court should not strike out the appeal already lodged simply because the service, though a requirement, did not specify the time within which it should be effected. He further submitted that since huge sums of money are involved, it would be uncalled for to act on the notice of preliminary objection filed, posing as a stumbling block. Persuading that no prejudice or injustice had been occasioned, he urged us to invoke the Oxygen Principle in terms of sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (AJA), and overrule the preliminary point of objection raised.

Mr. Kiritta also intimated to the Court that he had copies of the letter and proof of the WhatsApp message that Mr. Mwanga was served on 6th December, 2023. Asked if rule 50 (2) of the Rules had any impact on the submissions he made, he answered that it did not since his issue involved lodging an appeal, which is governed by rule 97 (1) of the Rules. Moreover, the Court on 3rd October, 2023, only instructed that filing be done within sixty days but said nothing on service, insisted the counsel.

Fortifying his preposition, the counsel filed a list of authorities consisting of the cases **Ardhi University v. Kiundo Enterprises (T) Limited,** (Civil Appeal No. 58 of 2018) [2021] TZCA 545 (September 21, 2021; TANZLII) and **Geita Gold Mining Ltd v. Jumanne Mtafuni** (Civil Appeal No. 30 of 2019) [2021] TZCA 157 (May 3, 2021; TANZLII), in which besides the appellant's counsel conceding to the preliminary point of objection that the appeal was incompetent for being accompanied with a defective certificate of delay, the counsel invited the Court to invoke section 3A and 3B of the AJA and rules 4 (2) and 96 (7) of the Rules, praying that the appellant be permitted to file a supplementary record of appeal. The prayer for leave to file a supplementary record of appeal was granted. Relying on the referred decisions, Mr. Kiritta beseeched us to take the same

route and consider that the amended memorandum and record of appeal served on the respondents on 24th January, 2024, were proper, making the intended appeal competent before the Court.

In response, to Mr. Kiritta's submission, Mr. Mwanga resisted the assertion, that since he had the original record and the amendment pertained only to names, service anticipated under rule 97 (1) of the Rules was inconsequential. This is because the moment the prayer to amend is granted, the validity of the existing documents ceases automatically, maintained the counsel. To support his argument, he cited the case of **Ashraf Akber Khan v. Ravji Govind Varsan** (Civil Appeal No. 5 of 2017) [2019] TZCA 86 (9th April, 2019; TANZLII), in which the Court concluded that reference to the original record becomes redundant after the amendment order.

Mr. Mwanga, while acknowledging that there is no prescribed time to effect service in the application lodged under rule 111 of the Rules, he nonetheless, argued that service should be within the seven days prescribed under rule 97 (1) of the Rules. He stressed that the essence of service is to put the other party on notice and that such service should not be done in piecemeal. Furthering his rejoinder, he urged us to decline to apply the

Oxygen Principle, as the Court did in the **Mondorosi Village Council** and **Gideon Wasonga** cases (supra). In those cases, the Court settled that the Oxygen Principle is not a panacea for all ailments. Once mandatory provisions of procedural law, which go to the foundation of the case, have been offended, the principle cannot be applied to salvage the situation.

Having heard the submissions from the counsel for the parties, we conveniently revert to rule 97 (1) and (2) of the Rules, which relate to the service of the memorandum and record of appeal. The rule states as follows:

> *"97.-(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of Rule 86.*
>
> *(2) The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint."*

What we can ascertain from the provision is that the appellant is mandatorily tasked with serving the respondent before or within seven days after the lodgment of the memorandum and record of appeal.

According to Mr. Mwanga, this is what has precipitated the present application, whereby he challenged the appellant's move to serve the respondent on 24th January, 2024, which was beyond the seven days prescribed by rule 97 (1) of the Rules. On his part, Mr. Kiritta maintains that in terms of rule 111 of the Rules, under which the application for the amendment of the memorandum and record of appeal was made, there is no specific time within which service should be effected. What matters is that the respondent was served within a reasonable time.

In light of the rival submissions and referred cases, we are tasked to determine whether the service of the amended memorandum and record of appeal on 24th January, 2024, a month and a few days later, rendered the intended appeal before the Court incompetent.

It is undisputed that the appellant was granted leave to amend the memorandum and record of appeal under rule 111, with a requirement to lodge the same within sixty days from 3rd October, 2023, the day of the ruling. It is evident, as reflected on page 370 of the record of appeal, that the notice of appeal was lodged on 23rd November, 2023, and the amended memorandum and record of appeal were lodged on 1st December, 2023, well within the sixty-days timeframe. However, the record is silent on the

timeframe within which service of the amended documents should be effected. And this is where the crux of the contention lies: whether the service should be completed "within a reasonable time," as argued by Mr. Kiritta, or within seven days, as advocated by Mr. Mwanga. Failure to effect service within seven days timeframe, according to Mr. Mwanga, rendered the appeal incompetent. Besides, submissions supporting their respective stance, both counsel have each invited us to invoke the Oxygen Principle, albeit from different perspectives.

We are aware from previous cases that the Court has been confronted with similar scenarios where it had to consider applying the Oxygen Principle. For example, in the case of **Geita Gold Mining Ltd** (supra), the Court identified a defective certificate of delay, and upon the appellant's acknowledgement of the defect, the Court applied the Oxygen Principle and allowed the filing of a supplementary record of appeal under section 3A and 3B of AJA and rules 4 (2) (a) of the Rules to rectify the defect.

There are however instances where the Court declined to invoke the Oxygen Principle, stating that it cannot be applied nonsensically without considering the mandatory provisions of procedural law. Cases such as **Mondorosi Village Council**, **Gideon Wasonga**, and **Filon Kwesiga**

(supra) have clarified the limitations of the principle. Based on this analysis, we align ourselves with Mr. Mwanga's submissions that after the grant of leave to lodge the amended memorandum and record of appeal on 3rd October, 2023, the previously lodged documents legally ceased to exist. This stance is supported by previous decisions of this Court, such as in the case of **Ashraf Akbar Khan** (supra); **General Manager African Barrick Gold Mine Ltd v. Chacha Kiguha & 5 Others**, (Civil Appeal No. 50 of 2017) [2017] TZCA 211 (December 12, 2017; TANZLII); and **Morogoro Hunting Safaris Ltd v. Halima Mohamed Mamuya, Civil Appeal No. 117 of 2011**. In all these cases, it was unequivocally stated that once pleadings are amended, the previously lodged documents before the amendment no longer validly exist. Similarly, in Civil Appeal No. 271 of 2020, the previously lodged memorandum and record of appeal ceased to exist right after the order granting the prayer for amendment was made on 3rd October, 2023.

Since the documents to be filed concerned the amendments of the notice of appeal, memorandum, and record of appeal, Mr. Kiritta's assertion that the reasonableness of the time within which service could be effected should be the yardstick due to the absence of a specified timeframe under rule 111 of the Rules is unsound. The rationale behind our assertion is that

the amended documents to be lodged were intended for appeal purposes. Despite the application being submitted under rule 111 of the Rules, the governing provision for service remained unchanged unless the Court explicitly stipulated a timeframe within which the service should occur. In the absence of such an order, it follows logically that the amended memorandum and record of appeal should have been served within seven days, as mandated by rule 97 (1) of the Rules. Therefore, the amended memorandum and record of appeal served on 24th January, 2024, were unquestionably served beyond the specified seven-day period outlined in rule 97 (1) of the Rules.

Our next issue for determination is whether the Oxygen Principle is applicable under the circumstances as envisaged by Mr. Kiritta. In the cases cited to support his position, namely **Ardhi University** and **Geita Gold Mining Ltd** (supra), are distinguishable in the sense that, in both those cases the issue revolved around an invalid certificate of delay, unlike the scenario in the present appeal, where the appellant applied to be allowed to amend the memorandum and record of appeal. Whereas the application to amend was prompted by the operation of the law, the omission to serve the respondents as required rested solely with the appellant and their counsel.

We are therefore confident in stating that the Oxygen Principle cannot apply to the present situation. While we appreciate the stance that procedural rules should not override substantive justice, disregarding the very laws and rules that uphold the rule of law, as we are enticed to do in the current situation, would defeat their purpose. As highlighted in **Mondorosi Village Council, Gideon Wasonga**, and **Filon Kwesiga's** cases (supra), the Oxygen Principle was not established to rectify every omission or inadvertence by a party in complying with procedural requirements. Hence, we are not persuaded by Mr. Kiritta's invitation to apply the Oxygen Principle, knowing that generally, the service of the memorandum and record of appeal are governed by rule 97 (1) of the Rules and therefore its amended versions should have been considered within the ambit of the said rule. By effecting service on 24thJanuary, 2024 the appellant contravened rule 97 (1) of the Rules.

Even under his argument of the reasonability test, a month-plus delay, in our view, does not make sense as reasonable in the circumstances of this appeal, if the alleged WhatsApp and email messages were promptly effected. We thus sustain the preliminary point of objection raised that the respondents were served with the amended memorandum and record of

appeal out of the prescribed time provided under Rule 97 (1) of the Rules. This omission rendered the appeal incompetent.

Consequently, we are compelled to strike it out for being incompetent for the failure to serve the respondents as prescribed under rule 97 (1) of the Rules, with costs.

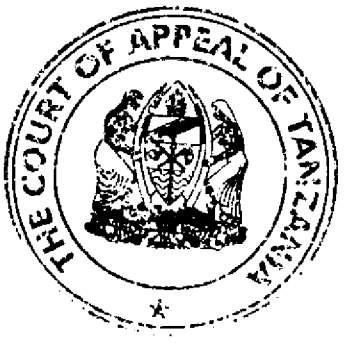
DATED at **DAR ES SALAAM** this 17th day of April, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Ruling delivered this 18th day of April, 2024 in the presence of the Mr. Deogratias Lyimo Kiritta, learned counsel, Mr. Alfred Kiritta, learned counsel for the appellant and Mr. Innocent Mwanga, learned counsel for the 1st, 2nd and 3rd respondents via Video Conference linked from High Court Arusha and Mr. Meswin Masinga, learned counsel for the 4th respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL