IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: SEHEL, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CIVIL APPEAL NO. 306 OF 2021

MONICA ALEX..... APPELLANT

VERSUS

SERENGETI DISTRICT COUNCIL..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Musoma)

(Kisanya, J.)

dated the 24th day of August, 2020

in

Consolidated Civil Appeals No. 4 & 5 of 2020

.....

RULING OF THE COURT

23rd & 30th April, 2024

SEHEL, J.A.:

The appellant, Monica Alex, lodged an appeal to this Court to challenge the decision of the High Court of Tanzania at Musoma (the first appellate court) in Consolidated Civil Appeals No. 4 & 5 of 2020 delivered on 24th August, 2020.

The brief facts are such that; the appellant filed a suit against the respondent before the District Court of Serengeti at Mugumu (the trial court) claiming, among other things, payment of specific damages to the tune of TZS. 5,600,000.00 on account of an agency agreement which she concluded with the respondent on 3rd July, 2012.

In the plaint, the appellant alleged that, according to the terms and condition of the agreement, she was to collect hotel levy from lodges and guest houses within Serengeti District Council, particularly in the rural areas, and remit to the respondent TZS. 400,000.00 each month and retain any balance collected therefrom. The agreement was for one year commencing from 1st July, 2012 ending to 30th June, 2013. She further alleged that she paid, upfront before the signing of the agreement, a sum of TZS. 800,000.00 being two months remittance as it was a pre-condition for security for due performance of the agreement and TZS. 4,800,000.00 being the remaining ten months remittance, thus, making a total sum of TZS. 5,600,000.00 paid to the respondent. It was her allegation that, in the course of executing the agreement, she faced some obstacles from the business community who denied to pay levy arguing that it was repealed by the Tourism Act of 2008.

In her Written Statement of Defence, the respondent acknowledged to have concluded the agreement with the respondent but denied the claim contending that the appellant did not face any difficulties or challenges in executing the agreement.

After a full trial, the trial court entered judgment in favour of the appellant. Therefore, it ordered the respondent to pay the appellant:

special damages to the tune of TZS. 5,600,000.00; interest on the decretal sum of 12% per year from 2013; general damages to the tune of TZS. 10,000,000.00; punitive damages to the tune of TZS. 5,000,000.00 and interest on the decretal sum of 12% from the date of judgment till payment in full.

Dissatisfied, both parties appealed to the first appellate court. The appeals were Consolidated, thus, Consolidated Appeals No. 4 & 5 of 2020. The first appellate court dismissed the appeal on account that there was no valid agreement to warrant the award of damages and/or compensations to the appellant. At the end, it declared the agreement *void ab initio*, hence, it could not be enforced. However, it ordered the respondent to refund the appellant TZS. 5,600,000.00 which was paid and received by it. Still, aggrieved, the appellant lodged the present appeal.

However, the appeal was faced with a notice of preliminary objection which was filed by the respondent to this Court on 18th April, 2024. The notice raised two points of law that:

> *"1. The notice of appeal contained in the records of appeal, at page 174, is fatally defective for not being served to the respondent as mandatorily*

required by the law hence renders the appeal incompetent.

2. The purported written letter for the copy of proceedings in the High Court which is found at page 181 of the records of appeal was not served to the respondent in contravention to law."

At the hearing of the appeal, Mr. Leonard Elias Magwayega, learned advocate, appeared for the appellant. Mr. Gerald Njoka, learned Senior State Attorney, appeared together with Mr. Kitia Turoke, Ms. Lightness Msuya and Ms. Veronica Christopher Lukanda, all learned State Attorneys, for the respondent.

Mr. Turoke argued the points of law on behalf of the respondent. Submitting on the first ground of objection, he pointed out that rule 84 (1) of the Tanzania Court of Appeal Rules (the Rules) requires an intended appellant to lodge a notice of appeal and serve on the respondent within fourteen (14) days. However, he argued, that requirement was not complied with by the appellant. He referred us to the notice of appeal appearing at pages 174 – 175 of the record of appeal and argued that it was lodged to the Court on 23rd September, 2020 but not served on the respondent as required by the law. It was his submission that failure to serve the notice of appeal to the

respondent amounts to a failure to take essential steps in the appeal. In that regard, the learned counsel for the respondent urged the Court to strike out the notice of appeal with costs. To support his prayer, he cited to us the case of **Bank of India (Tanzania) Limited v. Y.P. Road Haulage Limited & Others** (Civil Appeal No. 322 of 2017) [2021] TZCA 461 (3 September, 2021).

On the second ground of objection, Mr. Turoke was very brief and straight to the point that the appeal was filed out of time. He pointed out that the impugned decision of the first appellate court appearing at pages 162-173 of the record of appeal was delivered on the 24th August, 2020 and the notice of appeal was lodged within time as it was filed on the 23rd September, 2020. Yet, the appeal was lodged on 14th June, 2021 which is far beyond the statutory sixty days prescribed under the provisions of Rule 90 (1) of the Rules. He added that had the appellant wished to benefit from the exclusion period provided under the proviso of Rule 90 (1) of the Rules, he ought to have served a copy of the letter requesting to be supplied with the copy of proceedings, judgment and decree on the respondent. Since the appellant has not done that, in terms of rule 90 (3) of the Rules, she is disentitled to rely on the certificate issued by the Deputy Registrar of the High Court which is

found at page 213 of the record of appeal. In that respect, he argued that the time to lodge the appeal started to run from the lodgment of the notice of appeal. As it was not filed in time, Mr. Turoke urged the Court to strike out the appeal with costs.

Mr. Magwayega admitted that both the notice of appeal and the copy of letter requesting to be supplied with the copy of proceedings, judgment and decree were not served on the respondent. Nonetheless, he beseeched the Court to invoke rule 4 (2) (b) of the Rules and to allow the appellant to proceed with the hearing of the appeal. Mr. Magwayega reasoned that, since the respondent was served with the record of appeal, it should be taken that it was within their knowledge that the appellant filed the notice of appeal and wrote a letter requesting copies of proceedings, judgment and decree. In that respect, he contended that the respondent will not be prejudiced.

In addition, Mr. Magwayega contended that the objections raised need evidence to establish on whether service was effected on the respondent or not. In that regard, he argued that the objections are not based on a pure point of law, thus, do not qualify to be termed as preliminary objections. He, therefore, urged the Court to overrule the two grounds of objections and proceed to hear and determine the

appeal on merit. To support his submission, he referred us to the cases of **Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd** [1969] 1 E.A. 696 and **Ikizu Secondary School v. Sarawe Village Council** (Civil Appeal No. 163 of 2016) [2018] TZCA 387 (13 December, 2018).

Mr. Turoke rejoined that rule 4 (2) (b) of the Rules does not apply in the present application as it can only be invoked where there is exceptional circumstance. He further responded that rules 84 (1); 90 (1) and (3) of the Rules are on a pure point of law which call for mandatory compliance. Mr. Turoke distinguished the facts in the case of **Ikizu Secondary School v. Sarawe Village Council** (supra) that the issue in that appeal was on the date of service and not whether or not the respondent was served with the notice of appeal or a letter requesting to be supplied with the copy of proceedings, judgment and decree. At the end, Mr. Turoke reiterated his earlier submission that the appeal is incompetent before the Court and out of time.

Having heard the contending submissions, we wish to start with the argument that the two grounds of objections do not qualify to be points of law to warrant the respondent to file a notice of the preliminary objection.

For a start, we wish to clear up as to what constitutes a preliminary objection. In the landmark case of **Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd** (supra), the erstwhile Court of Appeal for East Africa defined a preliminary objection that:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.* ***It cannot be raised if any fact has to be ascertained*** *or what is the exercise of judicial discretion."* [Emphasis added].

In his argument, Mr. Magwayega heavily relied on the authority of this Court in the case of **Ikizu Secondary School v. Sarawe Village Council** (supra) to support his submission that the two objections raised by the respondent were not pure point of law. With due respect to his submission, in that appeal, the discord between the parties was on the date on which the respondent was alleged to have been served with the record of appeal. The respondent claimed that he was belatedly served on 1st January, 2016 but the appellant said that the respondent was timeously served on 21st December, 2015. Since the dispute was on ascertainment of facts, that is, on the date when the respondent was

served, the Court held that the objection did not qualify to be termed as a preliminary objection in terms of the holding in **Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd** (supra). Therefore, it overruled it.

In contrast to the two grounds of objection in this appeal. They are both in the nature of demurrer as they raise pure points of law, to wit, non-compliance with mandatory provisions of rules 84 (1) and 90 of the Rules. In other words, the two grounds of objection raised by the respondent does not require any fact to ascertain them. The record of appeal lodged by the appellant's counsel and certified to be true copy of the records is crystal clear that the notice of appeal appearing at pages 174 – 175 of the record of appeal and the letter requesting for certified copies of proceedings, judgment and decree appearing at page 213 of the record of appeal were not served on the respondent, thus, contravened rules 84 (1) and 90 (1) and of the Rules. Accordingly, we find the submission is baseless.

We now turn to the grounds of objection raised. The first ground of objection is that the notice of appeal was not served on the respondent. The requirement of serving notice of appeal on the respondent is stipulated under rule 84 (1) of the Rules which states, *inter alia*:

> *"84 (1) An intended appellant shall, before or within fourteen days after lodging a 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"*

Our reading of the above provision of the law is that it mandatorily requires an appellant to serve a copy of the notice of appeal on the respondent before or within 14 days of its lodgment.

Luckily, the Court was faced with akin situation in the case of **Bank of India (Tanzania) Limited v. Y.P. Road Haulage Limited & Others** (supra). In that appeal, the appellant admitted that she failed to serve the notice of appeal on the respondent but argued that the omission was not fatal as the respondents were not prejudiced. It was reasoned that, although the respondents were not served with the notice of appeal, they were aware of the appellant's intention to appeal because they were served with a copy of the letter applying for copies of the proceedings, judgment and the decree for that purpose.

In determining the way forward following the admission by the appellant that it did not serve the notice of appeal on the respondent,

the Court travelled back to 1977 to ascertain the position as it was then before the introduction of the overriding objection, and observed that the position has always been that failure to serve the notice of appeal on the respondent renders the appeal incompetent. It further noted that, even after the coming into force of the overriding objective, the position has been the same as it was held in the case of **Hamis Paschal v. Sisi kwa Sisi Panel Beating and Enterprises Ltd** (Civil Appeal No. 165 of 2018) [2020] TZCA 1899 (17 December, 2020) that:

> *"... since in this case, by virtue of the provisions of Rule 84(1) of the Rules, compliance with the requirement of serving a notice of appeal has a timeline, in our considered view, the appeal cannot be salvaged by invocation of the oxygen principle. This is because the question of limitation is synonym with jurisdiction."*

At the end, the Court concluded that:

> *"The above stated position is in line with the effect of a failure by an intended appellant to serve a notice of appeal on the respondent within the prescribed time. Failure to do so amounts to a failure by him to take essential steps in the appeal and thus under Rule 89 (2) of the Rules, such failure warrants a striking out of the notice."*

In this appeal, it is apparent from pages 174 - 175 of the record of appeal that the notice of appeal was not served on the respondent as mandatorily required by rule 84 (1) of the Rules. Mr. Magwayega conceded that service was not effected on the respondent but urged the Court to depart from the mandatory requirement and to act in the interest of justice in terms of rule 4 (2) (b) of the Rules and proceed to hear the appeal on its merit.

Admittedly, rule 4 (2) (b) of the Rules permits the Court, either on its own motion or upon application, to act in the interest of justice and depart from the practice and procedure stipulated in the Rules when dealing with any appeal or revision or review or reference. On this, we wish to underscore that it is within the Court's power to wield and see whether a departure is necessary in the interest of justice. On the other hand, we are of the strong view that such a discretion is not applicable where the rules provide in clear terms for mandatory compliance especially when they provide for time limit. It is trite law that limitation goes to the jurisdiction of the Court. In that respect, we find that the interest of justice cannot not be used to salvage the appellant who has failed to serve a notice of appeal to respondent as mandatorily required by rule 84 (1) of the Rules. Failure to comply with rule 84 (1) of the

Rules amounts to a failure to take essential steps in proceeding with the appeal. Accordingly, we find merit and uphold the first ground of the preliminary objection.

Since the finding on this ground suffices to dispose of the entire appeal, we find that there is no need to consider the second ground of the preliminary objection.

In the end, the appeal is hereby struck out with costs.

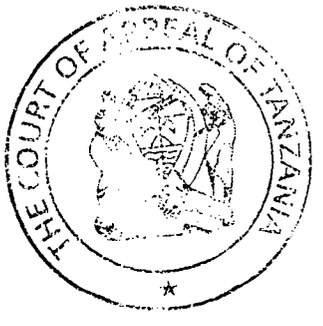
DATED at **MUSOMA** this 29th day of April, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Ruling delivered this 30th day of April, 2024 in the presence of Ms. Neema Mwaipyana, learned State Attorney for the respondent and in the absence of the Appellant dully notified, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL