IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And LILA, J.A.)

CONSOLIDATED CIVIL APPEAL NO. 78 OF 2018 & NO. 79 OF 2018

COMMISSIONER GENERAL TANZANIA
REVENUE AUTHORITY ..... APPELLANT

VERSUS

JSC ATOMREDMETZOLOTO (ARMZ) ..... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Mataka, Vice Chairman)

Dated the 6th day of December, 2013
in
Tax Appeal No. 17 of 2013
.....

RULING OF THE COURT

25th March & 29th April, 2019

MUSSA, J.A.:

The referred two appeals involve the same parties just as they arose out of the same transaction. When the appeals were separately placed before us, the respective appellants were represented by Messrs Salvatory Switi and Haspis Maswanyia, learned Advocates, whereas the respondents

had the services of Messrs Gaudiosis Ishengoma and FAyaz Bhojani, also learned Advocates.

It is noteworthy that both appeals are greeted by identical notices of preliminary points of objection. For instance, following some adjustments the notice in Civil Appeal No. 79 goes thus:-

> *"(i) That the appellant's appeal is incompetent for contravening Rule 96 (2) read together with Rule 96 (1) (k) of the Court of Appeal Rules, 2009 (as amended). The appellant has not included, the appellant's and the respondents written submissions filed at the Tribunal which were the basis of the decision in respect of Tax Appeal No. 16 of 2013.*
>
> *(ii) The appellant's appeal is incompetent for including an incorrect copy of the proceedings of the Tribunal. The purported proceedings appearing at pages 508 to 557 of the record of appeal are different or contain different matters from which were transacted during the proceedings at the Tribunal."*

The notice in Civil Appeal No. 78 is, as we said, identical to the foregoing notice save that, in item (i) reference is to *"Tax Appeal No. 17 of*

2013", whereas in item (ii), reference is to *"pages 692 to 761 and 763 to 773"*.

Given the identical nature of the preliminary points of objection in the two appeals, by consensus, counsel from either side were agreed and it was ordered that the hearing of the preliminary points of objection with respect to both appeals be consolidated.

Addressing us on the first limb of the notice of preliminary points of objection with respect to both appeals, Mr. Bhojani submitted that the appellant omitted to include, in the record of appeal, copies of the written submissions which were lodged by the parties at the Tribunal. In that regard, in an effort to underscore the relevancy of the documents, the learned counsel painstakingly referred to instances in which the Tribunal referred the submissions in its decision. In sum, Mr. Bhojani argued that the omitted documents are relevant for the proper determination of the appeal. In the premises, the learned counsel for the respondent concluded that, upon numerous decisions, it is now settled that an incomplete record has the effect of invalidating an appeal and he, accordingly, urged us to strike out the appeal for incompetence.

To buttress his stance, the learned counsel for the respondent brought to our attention the unreported decisions of the Court in Civil Appeal No. 8 of 2008 – **Fedha Fund Limited and Others vs George Vargese and Another**; Civil Appeal No. 26 of 2015 – **Kasanzu Lusasula vs Lugito Bulayi**; Civil Appeal No. 140 of 2016 – **Ona ukiro Ulomi vs Standard Oil Company Ltd and Others**; and Civil Appeal No. 188 of 2016 – **Ali Vuai Ali vs Sued Mzee Sued**. More particularly, in the referred case of **Fedha Fund Limited** the Court held that the decision to choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal. It is common ground that in terms of Rule 96 (3) of the Rules, it is either a Judge or Registrar of the High Court or Tribunal who, on application by a party, has to direct which documents be excluded from the record of appeal.

In reply, Mr. Switi for the appellant informed the Court that it is an established practice of the Tax Appeals Tribunal for it to reprint the written submissions of the parties and consequently append the same in the record of proceeding. Thus, the written submissions which are reflected in the two records of appeal were duly reprinted by the Tribunal upon being filed by the parties. That being so, it was, to him, quite unnecessary for

the appellant to additionally append copies of the submission in addition to the available versions which were reprinted by the Tribunal. In sum, the learned counsel for the appellant contended that the available reprinted versions of the submissions sufficiently meet the requirements of Rule 96 (1) (k) of the Rules.

According to Mr. Bhojani, the second limb of the preliminary points of objection is intrinsically related to the first limb in that they both boil down to the complaint on the non-inclusion of the written submissions in the record of appeal. To appreciate the gist of his contention, it is necessary to revisit what transpired at the hearing of the two appeals before the Tribunal.

To begin with Civil Appeal No. 79 of 2018, the same originated from the Tribunal's Tax Appeal No. 16 of 2013 in which the appellant and the respondent herein appeared in that capacity. By consensus, counsel from either side agreed that the hearing of the appeal should proceed by way of written submissions, whereupon the Tribunal prescribed a time frame for the presentation of the written submissions which was duly complied by the parties. As it turns out, the written submissions of both parties were

subsequently regenerated and appended to the Tribunal's record of proceedings. The regenerated written submissions are reflected at pages 508 to 557 of the record of Civil Appeal No. 79 of 2018.

A corresponding process was done with respect to Civil Appeal No. 78 of 2018 which originated from the Tribunal's Tax Appeal No. 17 of 2013. The regenerated written submissions were posted in the Tribunal's record of proceedings and the same are reflected at pages 692 to 761 of the record of Civil Appeal No. 78 of 2018.

Mr. Bhojani urged us to discount the written submissions appended to the Tribunal's record of proceedings on account that, apart from contravening Rule 96 (1) of the Rules which imperatively require the record of appeal to contain "*copies*" of the enumerated documents, the appended regenerated submissions are also fraught by mistakes and, above all, they do not contain the documents which were annexed to the submissions. In the premises, the learned counsel for the respondent submitted that the regenerated submissions fall short and, as a result, the record of appeal is invalidated for being incomplete.

In reply, Mr. Switi reiterated his contention that the appellant found no cause to append copies of the written submissions in the record of the two appeals much as the same were regenerated by the Tribunal and posted in the Tribunal's record of proceedings. To him the requirements of Rules 96 (1) and (2) were fully met. In the alternative, the learned counsel for the appellant invited us to invoke the up and coming overriding objective principle and direct the appellant to file a complete record. To fortify this prayer, Mr. Switi sought reliance in the unreported Civil Appeal No. 139 of 2017 – **CRDB Bank Limited vs Issack Mwamasika and Two Others**.

The alternative prayer was promptly faulted by Mr. Bhojani who, in the first place, sought to distinguish **CRDB Bank Limited** (supra) with the situation at hand. In the referred case, he said, the concern was over missing pages of a document that was already part of the record of appeal, whereas in the matter at hand, the concern is over the written submissions which are completely missing. The learned counsel for the respondent further submitted that the situation at hand is closer to the one obtaining in the unreported Civil Appeal No. 66 of 2017 – **Mondorosi Village Council and Two Others vs Tanzania Breweries Limited and Four**

Others. In that case, the concern was over the non-inclusion, in the record of appeal, of a letter of an application for a copy of proceedings in terms of the proviso to Rule 90 (1) of the Rules. As it were, the respondent took a preliminary point of objection urging the Court to strike out the appeal on account of the missing letter. For the appellants, an argument was taken, *inter alia*, inviting the Court to invoke the principle of overriding objective and dispense with the necessity of having the letter in the record of appeal. In the upshot, the Court made the following observation:-

> *Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle under section 3 of the Appellate Jurisdiction Act [Cap 141 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, which enjoins the Courts to do*

away with technicalities and instead, should determine cases justly. According to the Bill to the amending Act, it was said thus:-

"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms..." [Emphasis supplied].

In the result, the appeal was struck out. Mr. Bhojani has urged us not to depart from our decision in the referred foregoing case and to similarly strike out the two appeals under our consideration for incompetence.

We have dispassionately considered and weighed the learned rival contentions of both counsel. Speaking of the raised preliminary points of objection, we entirely subscribe to the respondent's complaint that the appellant did not meet the requirements of Rule 96 (1) (k) of the Rules. It is noteworthy that instead of appending copies of the written submissions made by the parties to the Tribunal, the appellant sought to rely upon versions of the submissions which were reprinted and appended to the

Tribunal's record of proceedings. It is beyond question that the requirement of Rule 96 (1) which imperatively requires that the record of appeal should contain *"copies"* of the enumerated documents was not met. The vexing issue is whether or not the overriding objective principle can be called into play to cure the shortcoming as urged by counsel for the appellant.

To begin with, we entirely subscribe to the observation of the Court in the referred case of **Mondorosi Village Council** (supra). Nevertheless, we would wish to distinguish the details obtaining in that case from the particulars at hand. As we have already intimated, in the former case, the concern was over a copy of a letter which was completely missing from the record. Conversely, in the situation at hand, the impugned written submissions are actually reflected in the records of the two appeals but the raised concern is, rather, that the same fall short on account that the same do not meet the specific requirements of Rule 96 (1) of the Rules and, additionally, that the submissions are incomplete for want of its annextures.

Upon our mature consideration, we think that this is a case where the Court should have due regard to the need to achieve substantive justice in line with Rule 2 of the Rules as it is our well considered view that the shortcomings we have pointed out should not lead to the drastic action of invalidating the entire record of appeal. Thus, in the spirit of the overriding objectives of the Court we, accordingly, grant leave to the appellant to lodge the omitted copies of written submission under Rule 96 (6) within twenty one (21) days from the date of this Ruling. In the meantime, the two appeals stand adjourned to a date to be fixed by the Registrar. It is so ordered.

DATED at **DAR ES SALAAM** this 16th day of April, 2019

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL