

IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 334 OF 2019

GRUMETI RESERVES LIMITED APPELLANT

VERSUS

MORICE AKIRI RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
(Labour Division) at Musoma)**

(Galeba, J.)

dated the 20th day of September, 2019

in

Revision No. 07 of 2016

RULING OF THE COURT

27th October & 3rd November, 2021

KITUSI, J.A.:

Six days before the date fixed for the hearing of this appeal, counsel for the respondent lodged a notice of Preliminary Objection (PO) raising two twin points of law which are:-

- "1. The appeal is incompetent for failure of the appellant to serve the respondent or his advocate with a copy of the notice of intention to appeal contrary to Rule 84(1) of the Court of Appeal Rules, Cap. 141 R.E 2019 subsidiary.*

2. The appeal is incompetent for failure of the appellant to serve the respondent with a copy of the memorandum of appeal and record of appeal in time contrary to Rule 97(1) of the Court of Appeal Rules, Cap 141 R.E 2019 subsidiary.”

The notice of PO further informed that in arguing it the respondent would rely on the case of **National Microfinance Bank v. Muyodeso**, Criminal Appeal No. 289 of 2019 CAT (unreported).

On the date of the scheduled hearing, Mr. Evod Mushi, learned advocate and Mr. Deya Paul Outa, also learned advocate, appeared for the appellant and respondent, respectively. Immediately, Mr. Outa informed the Court that he would abandon the second ground of objection and only argue the first ground, which he did that very briefly.

The learned counsel submitted that the appellant did not comply with rule 84 (1) of the Tanzania Court of Rules, 2009 (the Rules) for its failure to serve the notice of appeal either on the respondent in person or his advocate, within 14 days.

He pointed out that the copy of notice of appeal on page 358 – 359 of the record of appeal was served on one Edson Philipo, an advocate who is on record as having entered appearance on behalf of the appellant’s advocate on the date of delivery of the judgment by the High Court. Relying

on the case of **National Microfinance Bank** (supra) as promised, Mr. Outa submitted that the appeal is incompetent and prayed for an order striking it out.

Mr. Mushi countered that submission by arguing that service was done on Mr. Philipo upon instructions issued by Mr. Godfrey Kalaka. He submitted that he called Mr. Kalaka to know his whereabouts for purposes of service and Mr. Kalaka told him to give the notice to Mr. Philipo who was then in Musoma with him. He went on to submit that as Mr. Kalaka has not denied issuing such instructions nor receiving of the notice, there is no basis for concluding that rule 84(1) of the Rules was not complied with.

He then argued, we think alternatively, that after all, the point whether a party was served or not, is a factual issue requiring evidence, which disqualifies it from being a point of law. The learned counsel cited the case of **Gaspar Peter vs Mtwara Urban Water Supply Authority**, Civil Appeal No. 35 of 2017 (unreported). He prayed for dismissal of the point of objection.

In a short rejoinder, Mr. Outa sought to distinguish this case from the case of **Gaspar Peter** (supra) on the ground that in that case, service was effected on the respondent's last advocate whereas in this case, service was done on a stranger.

With respect, rule 84(1) and (e) of the Rules is very clear on the point under discussion. It provides: -

*"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.*

2. Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the High Court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.

We will therefore resolve if that rule was complied with or not, but before that we are invited to resolve the question whether the point of Preliminary Objection raised qualifies to be treated as such or not. The appellant's counsel has relied on the case of **Gaspar Peter** (supra) to argue

that the point raised by the respondent's counsel does not qualify because it requires evidence.

However, it is clear to us and we agree with Mr. Outa that the circumstances in the case of **Gaspar Peter** (supra) differ from this case. In **Gaspar Peter** (supra) service was effected through the address of the advocate who had represented the respondent at the High Court, but there is no such contention in this case.

Besides, our reading of the case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd (1969)** E. A. C. A 696 leads us to conclude that this is a point of law because it raises an issue of competence of the appeal and it may dispose of the matter. For clarity, in **Mukisa Biscuits** (supra), the erstwhile East African Court of Appeal said in part: -

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argue as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

In the case of **Karata Ernest and Others vs The Attorney General**, Civil Revision No.10 of 2010 (unreported), the list of the examples was extended to cover situations where there is no notice of appeal, or leave to appeal or certificate on point of law where one is required. Our conclusion is that the point raised in this instance qualifies to be a point of law.

On the merits, the issue is whether or not service was effected in compliance with rule 84(1) and (2) of the Rules, not whether service was effected in any other manner even though it was so done in honestly and good faith.

In determining this issue, it is important to read sub rule (2) of rule 84 together with rule 32(1) of the Rules, which provides: -

"32. (1) Where any party to an application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person engages an advocate, he shall, as soon as practicable, lodge with the Registrar notice of the change and shall serve a copy of the notice on the other party appearing in person or separately represented, as the case may be".

Nowhere does the counsel for the applicant suggest that he served the notice of appeal to the respondent in person or on the advocate who acted for him at the High Court. The unambiguous catch word in sub-rule (2) of rule 84 of the Rules is that service on a party's advocate should be at that advocate's "address" whether old or new.

What is missing here is proof of the service which Mr. Mushi contends that it was effected. In **Salim Sunderji and Capital Development Authority vs Sadrudin Shariff Jamal** [1993] T.L.R. 224 and **Stephen Wasira vs Joseph Warioba** [1997] T.L.R. 205, the Court insisted on proof of service as opposed to bare assertion by a party. Likewise, in this case, we cannot act on Mr. Mushi's bare statement from the bar that service was done on Mr. Kalaka through Mr. Philipo who received and signed it on his behalf.

Therefore, since there is no proof of service of a copy of notice of appeal on the respondent in person nor on his advocate at his address, rule 84 (1) and (2) of the Rules was not complied with. Consequently, the appeal is incompetent. The rationale for this rule and the consequences of non-compliance has been stated in various cases, such as **National Microfinance Bank vs Muyodeso** (supra) where we stated: -

“It is our considered view therefore that, the importance of serving the respondent with the notice of appeal is to alert him that an appeal is being preferred thus enable him to prepare for it. Failure of which is fatal to the appeal”.

Accordingly, for those reasons, we sustain the sole point of preliminary objection, and strike out the appeal with no order as to costs, this being a labour matter.

DATED at MUSOMA this 2nd day of November, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of November, 2021 in the Presence of Mr. Edson Philipo who holding brief for Mr. Evod Moshi, learned counsel for the Appellant and Mr. Deya Paul Outa, learned counsel for the Respondent is hereby certified as a true copy of the original.

