

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 289 OF 2019

NATIONAL MICROFINANCE BANK APPELLANT

VERSUS

MUYODESO RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court of Iringa
at Iringa)**

(Ndunguru, SRM. Ext. Jur.)

dated the 12th day of May, 2015

in

(DC) Civil Appeal No. 04 of 2014

RULING OF THE COURT

21st & 28th September, 2021.

KWARIKO, J.A.:

Formerly, the respondent sued the appellant before the District Court of Mufindi at Mufindi for a declaration that the appellant was liable for tortious act of conversion of the respondent's money and gross abuse of the fiduciary trust between the customer and his bank. The appellant resisted this claim but at the end it lost the suit.

The appellant was aggrieved by that decision and appealed before the High Court of Tanzania at Iringa. The record shows that, the court transferred the appeal to the Resident Magistrate's Court of Iringa at Iringa by an order dated 19th May, 2014, in terms of section 45 of the Magistrates' Courts Act [CAP

11 R.E. 2002; now R.E. 2019] to be heard by Ndunguru, Senior Resident Magistrate with Extended Jurisdiction. The appellant's appeal was not successful. Undaunted, the appellant is before the Court on a second appeal with the following single ground:

"That the Honourable Deputy Registrar [with] Extended Jurisdiction erred in law when wrongly made a decision that the trial court was not at fault in not conducting mediation contrary to the mandatory requirements of the Civil Procedure Code, Cap. 33 Revised Edition 2002."

In response to this appeal, the respondent's counsel filed a notice of preliminary objection in terms of Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009, as amended (the Rules), to the following effect:

"That, the appellant having been served with a RECORD OF APPEAL together with written submission by the counsel for the appellant on the 10th September, 2019 from the appellant, he discovered that the appellant failed to comply with rule 90 (1), (2) and 84 (1) of the Tanzania Court of Appeal Rules, 2009. To the fact that the Notice of appeal at page 246 and the letter for request of the Judgment, Decree and Proceedings at page 218 and 247 of the record of appeal, its copy was not served or addressed to respondent to date."

When the appeal was called on for hearing, Prof. Cyriacus Binamungu, learned advocate appeared for the appellant whilst the respondent was represented by Mr. Shaba Alim Mtung'e, learned advocate.

Following the practise of the Court, we sought first to dispose of the preliminary objection. When we invited him to argue the objection, Mr. Mtung'e submitted that the respondent was not served with the notice of appeal appearing at page 246 of the record of appeal within fourteen days of its lodgement as required under rule 84 (1) of the Rules. He similarly argued that, the letter by the appellant applying for the copy of proceedings in the High Court was not served to the respondent and has not been included in the record of appeal. This is in contravention of rule 90 (2) of the Rules, he argued. In support of his arguments, Mr. Mtung'e cited the Court's decisions in the cases of **Augustino Mkalimoto (As Administrator of the Estate of Mlamsitembo Mkalimoto) v. Village Schools of Tanzania & Two Others**, Civil Appeal No. 154 of 2019; and **Hamza Ramadhan v. Abel Aloyce & Two Others**, Civil Appeal No. 190 of 2017 (both unreported). Eventually, he urged us to strike out the appeal with costs for being incompetent.

Responding, Prof. Binamungu argued that the respondent was served with the notice of appeal on 26th May, 2015 and the letter on 18th May, 2015 through his former counsel Mr. Malangalila. He contended therefore that, what Mr. Mtung'e ought to have demanded is proof of service as it was the case in **Hamza**

Ramadhan (supra) where the Court asked for proof of service to the respondent of the letter requesting for proceedings from the High Court. The learned counsel argued further that, indeed, the letter is omitted from the record of appeal but it was acknowledged in the affidavit appearing at page 206 of the record. Prof. Binamungu prayed to be granted leave to file a supplementary record of appeal to include the original letter but subject to the outcome of the issue of the notice of appeal.

In rejoinder, Mr. Mtung'e argued that the purported original notice of appeal that was allegedly served to Mr. Malangalila cannot be accepted at this stage because the record of appeal was prepared in 2019 hence there is no reason why it was not included in the record of appeal while the appellant had ample time to do so. Further, that, because Mr. Malangalila is deceased now, the allegations of service to him cannot be verified. Additionally, he distinguished the authority in **Hamza Ramadhan's** case (supra) from the case at hand such that, in that case, there was denial of the service appearing in the record of appeal, that is why the Court sought to see the original copy. The learned counsel urged us not to condone this laxity because it has the danger of opening a Pandora's Box where there will be a multitude of parties with similar excuses.

We have considered the submissions by the learned counsel of the parties. We will start our deliberation with the first point of objection in respect of the failure by the appellant to serve the copy of the notice of appeal to the

respondent. The requirement to serve the respondent with the notice of appeal is provided under Rule 84 (1) of the Rules which states thus:

"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."

Clearly, this provision imposes an imperative obligation to the appellant to serve the notice of appeal to the respondent within fourteen days of its lodgement. Indeed, the notice of appeal appearing at page 246 of the record of appeal, though copied to advocate Malangalila who was representing the respondent at that time, was not duly served to the respondent because there is no indication to that effect. There is no signature, rubber stamp or anything to prove that the addressee ever received the notice. On this, Prof. Binamungu contended that, the notice was served to the appellant's former advocate on 26th May, 2015. On our part, we would not wish to deliberate on the matter concerning a person who has been reported to be dead. What is certain here is that, if indeed Mr. Malangalila was served with the notice of appeal at that time, the copy appearing in the record of appeal would have provided proof to that effect. This is so because, while the notice of appeal was lodged on 22nd May, 2015, the record of appeal was filed on 29th July, 2019. Therefore, the appellant had ample time,

as correctly argued by Mr. Mtung'e, to include the copy of the notice duly signed by the said advocate.

In a similar situation to the instant one, in the case of **Goodhope Hance Mkaro v. TPB Bank PLC & Another**, Civil Appeal No. 171 of 2017 (unreported), the Court stated thus:

"True, as correctly formulated by Mr. Mutalemwa, the notice of appeal which appears at pages 154-155 was not endorsed against the name of the advocate for the respondent, namely, Mr. Mwanayela. It is, we so find, insufficient for the second respondent to simply allege that his advocate was served."

See also **Wilfred Rwakatare v. Hamis Kagasheki & Another**, Civil Appeal No. 118 of 2011, **National Bank of Commerce Limited & Another v. Ballast Construction Company**, Civil Appeal No. 72 of 2017 (both unreported).

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. In our earlier decision in the case of **Bank of India (Tanzania) Limited v. Y.P. Road Haulage Limited & Two Others**, Civil Appeal No. 322 of 2017 (unreported), it was stated that:

".... we are of the settled mind that the non-compliance with Rule 84 (1) of the Rules rendered the appeal incompetent. In the event the appeal is hereby struck out with costs."

Eventually, like in the decision cited above, we are enjoined to find that failure to serve the notice of appeal to the respondent renders the appeal incompetent. Since this holding suffices to dispose of the matter, we find no need to consider the issue in relation to the letter applying for the copy of proceedings in the High Court.

In the event, we sustain the first part of preliminary objection. The appeal is thus incompetent and we proceed to strike it out with costs.

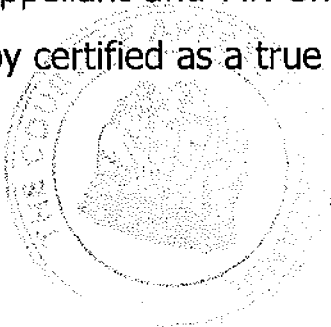
DATED at **IRINGA** this 27th day of September, 2021.

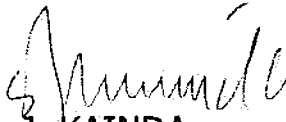
A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 28th day of September, 2021 in the presence of Mr. Jally Mongo, holding brief for Prof. Cyriacus Binamungu, learned counsel for the Appellant and Mr. Shaba Mtung'e, learned counsel for the Respondent, is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL