

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MWARIJA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 322/2017

BANK OF INDIA (TANZANIA) LIMITED..... APPELLANT

VERSUS

Y.P. ROAD HAULAGE LIMITED 1ST RESPONDENT

LALIT RATILAL KANABAR 2ND RESPONDENT

KIRAN LALIT KANABAR 3RD RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania, Commercial
Division at Dar es Salaam)**

(Mansoor, J.)

dated the 23rd day of December, 2016

in

Commercial Case No. 90 of 2015

.....

RULING OF THE COURT

12th Jul, 2021 & 3rd Sept,2021

MWARIJA, J.A.:

This ruling is on the preliminary objection raised by the respondents; Y.P. Road Haulage Limited, Lalit Ratilal Kanabar and Kiran Lalit Kanabar (the 1st to 3rd respondents respectively).The objection is against the appeal in which the appellant, Bank of India (Tanzania) Limited, is challenging the decision of the High Court of Tanzania (Mansoor, J.) in Commercial Case No. 90 of 2015 delivered on 22/03/2017.

In that case, the appellant sued the respondent claiming a total amount of TZS 616,479,447.22 and USD 5,984.83. The claim arose from a loan agreement upon which, on several dates between 04/07/2008 and 23/01/2010 the 1st respondent was advanced overdraft facilities by the appellant in Tanzania Shillings and US Dollars. The loans were guaranteed by the 2nd and 3rd respondents and secured by mortgage of the 1st respondent's fleet of motor vehicles, including Scania trucks and trailers. The respondents defaulted to repay the loan and as a result, as at 15/06/2015, the outstanding amount together with interest and penalties was to the tune of the claimed sum of TZS 616,479,447.22 and USD 5,984.83. The appellant claimed also for damages and costs of the suit.

The claim was disputed by the respondents. They contended that all the amounts of the loans advanced to the 1st respondent were settled. They claimed further that without any colour of right, the appellant forcefully took the 1st respondent's trucks and trailers and sold them thus incapacitating it from generating any income from those motor vehicles.

In its decision, the High Court found that the appellant was entitled to be paid by the respondents, TZS 616,479,447.22 and USD 386,000.00 as outstanding amounts of loans. It found further that the appellant was entitled to costs. The court found however, that the appellant was not

entitled to any interest or damages because in September 2014, it took possession of the 1st respondent's mortgaged motor vehicles and sold them thus recovering the entire amount of the loan.

The appellant was dissatisfied with the decision of the High Court and thus preferred this appeal, the competence of which has been challenged by the respondent through their preliminary objection filed on 21/03/2018. The objection is predicated on the following two grounds:

*"(i) The Appeal is incompetent and incurably defective for failure to comply with the mandatory provisions of Rule 84 (1) of the Court of Appeal Rules, 2009 regarding service of the notice of appeal. The respondents were not served with the notice of appeal. (see pp 799 – 800 of the Record of Appeal). It is now the position of the Court that when an appellant defaults to serve a notice of appeal to the respondent(s), the intended appeal is rendered incompetent (see for instance **Machano Hamis and 17 Others**; Civil Appeal No. 43 of 2010 Court of Appeal of Tanzania at Zanzibar (unreported).*

(ii) That, the appellant has not attached with the record copies of indorsed exhibits admitted by the court."

At the hearing of the appeal, Mr. Fredrick Mbise, learned counsel appeared for the appellant while Dr. Onesmo Michael who was being assisted by Mr. Gulam Hussain Hasam, learned advocates, represented the respondents. As the rule of practice demands, the preliminary objection had to be determined first.

At the outset, Mr. Mbise conceded to the two grounds of the preliminary objection but argued that the defects are not fatal and therefore, do not have the effect of rendering the appeal incompetent. Dr. Michael opposed that argument. With regard to ground (i) of the preliminary objection, the respondents' counsel argued that the omission by the appellant to serve a notice of appeal to the respondents as required by Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), denied them the opportunity to lodge in the appropriate registry, their address for service and serve that address to the appellant in terms of Rule 86 (1) (a) of the Rules.

According to Dr. Michael, compliance with Rule 84 (1) of the Rules is a mandatory requirement and thus the omission renders the appeal incompetent. To bolster his argument, the learned counsel cited the case of **Machano Hamisi and 17 others v. Commissioner of Police and 2 others**, Civil Appeal No. 43 of 2010 (unreported).

On ground (ii) of the objection, the respondents' counsel argued that the record does not contain certified copies of the exhibits which were admitted in evidence during the trial. What are contained in the record, he said, are the documents which were annexed to the plaint. In the circumstances, Dr. Michael argued, the record is incomplete, the effect of which is to render the appeal incompetent. The learned counsel conceded however, that the defect may be cured by granting the appellant leave to file a supplementary record of appeal containing the omitted documents.

In reply, Mr. Mbise maintained his stance that non-compliance with Rule 84 (1) of the Rules is not a fatal irregularity because the respondents were not prejudiced. According to the learned counsel, although the respondents were not served with a copy of the notice of appeal, they were aware of the appellant's intention to appeal because they were served with a copy the letter applying for copies of the proceedings, judgment and the decree for that purpose.

As to ground (ii) of the preliminary objection, the appellant's counsel supported Dr. Michael's argument that the omission is curable because, in terms of Rule 96 (7) of the Rules, the Court may, on its own motion or upon an informal application, grant leave to the appellant to lodge a supplementary record of appeal containing the omitted documents.

In rejoinder, the respondents' counsel stressed his argument that the appellant's failure to comply with Rule 84 (1) of the Rules nullified the notice of appeal and as a result, the appeal is rendered incompetent. He disagreed with the submission of Mr. Mbise that the respondents were not prejudiced. It was Dr. Michael's argument that the letter applying for a copy of the proceedings, judgment and decree does not serve the purpose for which Rule 84 (1) of the Rules is intended. He thus prayed that this ground of the preliminary objection be upheld and the appeal be struck out for being incompetent.

We have considered the arguments made by the learned counsel for the parties. To begin with ground (ii) of the preliminary objection, we agree that the defect in the record of appeal, brought about by the omission to include the copies of the exhibits, is a curable irregularity. The documents may be included in the record by lodgement of a supplementary record of appeal pursuant to Rule 96 (7) of the Rules. That Rule provides as follows:-

"96 – (1) to (6) ...N/A

(7) Where the case is called on for hearing, the Court is of opinion that document referred to in rule 96 (1) and (2) is omitted from the record of appeal, it may on its own motion or upon an

informal application grant leave to the appellant to lodge a supplementary record of appeal."

It is our finding therefore, that the omission does not render the appeal incompetent.

With regard to ground (i) of the objection, it is clear from the wording of Rule 84 (1) of the Rules that the appellant was required to serve a copy of a notice of appeal on the respondent before or within 14 days of its lodgement. That provision is couched in mandatory terms. It provides as follows:-

"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".

From their submissions, the counsel for the parties are not at issue as regards the appellant's non-compliance with that mandatory requirement of Rule 84(1) of the Rules. The discord between them is on the effect of the non-compliance. Whereas Mr. Mbise did not cite any authority to support his argument that the non - compliance is not fatal on account that the

same has not occasion injustice to the respondents, Dr. Michael cited the case of **Machano Hamisi and 17 Other** (supra) to support his argument that the irregularity is fatal. In that case, the Court held that non-compliance with Rule 77(1) of the revoked Tanzania Court of Appeal Rules, 1979 (now Rule 84 (1) of the Rules), nullifies the notice of appeal. Relying on its previous decision in the case of **Salim Sunderji and Capital Development Authority v. Sudrudin Shariff Jamal** [1993] T.L.R 223, the Court held as follows:

"In this appeal it is apparent that the appellant did not comply with rules of service of the notice of appeal as given by Rule 77 (1) of the Court of Appeal Rules, 1979. We have shown that the 1st and 3^d respondents were not served, and the 2nd respondent was served out of the prescribed time. The appeal before the court is incompetent".

We have considered the fact that the above cited case was decided before the introduction of the overriding objective principle vide the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018. Since then however, the position has been the same, that the breach of the dictates of Rule 84 (1) of the Rules, renders the appeal incompetent – see for example, the cases of **National Bank of Commerce Limited and Another v. Ballast Construction Company Ltd**, Civil Appeal No. 72 of

2017 and **Hamis Paschal v. Sisi Kwa Sisi Panel Beating and Enterprises Ltd**, Civil Appeal No. 165 of 2018 (both unreported). In the latter case, the Court observed as follows:-

"We wish to emphasize that, since in this case, by virtues 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".

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 – see the cases of **Oliver Murembo v. The Registered Trustees of Benjamin Mkapa Foundation**, Civil Application No. 489/18 of 2018 and **John Nyakimwi v. The Registered Trustees of Catholic Dioceses of Musoma**, Civil Application No. 85/08 of 2017 (both unreported).

On the basis of the foregoing, 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.

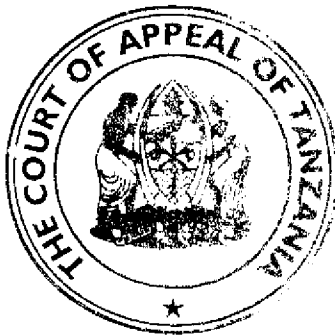
DATED at DAR ES SALAAM this 2nd day of September, 2021.


A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The ruling delivered on this 3rd day September, 2021, in the presence of Ms. Mariam Ismail, learned counsel for the Respondent also holding brief of Mr. Fredrick Mbise, learned counsel for the Appellant is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL