IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 132 OF 2016

SCAN-TAN TOURS LTD ..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES
OF THE CATHOLIC DIOCESE OF MBULU ..... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania at Arusha)

(Moshi, J.)

dated the 23rd day of October, 2015
in
Civil Case No. 6 of 2005

RULING OF THE COURT

26th June & 9th July, 2018

MWAMBEGELE, J.A.:

The appellant Scan-Tan Tours Ltd lost in a lawsuit she instituted in the High Court seeking a number of remedies against the respondent; the Registered Trustees of The Catholic Diocese of Mbulu. Dissatisfied, the appellant has appealed to this Court in the present appeal. Ahead of the hearing of the appeal, the respondent lodged a Notice of Preliminary objection against the appeal. The

Notice comprises three points which we take the liberty to reproduce hereunder:

1. The purported appeal is incompetent for having been preferred against the wrong party (a nonexistent legal entity);
2. The record of appeal is defective for omitting essential documents:
   (i) All annexures to the amended plaint;
   (ii) Pages 4 and 9 of the judgment; and
   (iii) A legible copy of exhibit P4 appearing on page 135 of the record.
3. Omission to indicate every tenth line in the margin on the right side of the decree at pages 126 and 127 and all exhibits from pages 128 to 178 contrary to rule 12 (5) of the Court of Appeal Rules.

As the practice of the Court has it, the preliminary objection had to be disposed of first before going into the hearing of the appeal on its merits. Thus, when the appeal was called on for hearing before us on 26.06.2018 we prompted Messrs. Paul

Nyangarika and Method Kimomogoro, the learned counsel who appeared for, respectively, the appellant and respondent, to address us on the preliminary objection notice of which was filed on 21.06.2018.

When we called upon Mr. Method Kimomogoro to argue the preliminary objection, he kicked off by abandoning grounds 2 (iii) and 3 of the preliminary objection. Having so done, the learned counsel started his onslaught by attacking the name of the respondent as appearing in the Notice of Appeal as well as the Memorandum of Appeal. He submitted that the respondent in the High Court was the Registered Trustees of the Diocese of Mbulu; not the Registered Trustees of the Catholic Diocese of Mbulu as appearing in the Notice and Memorandum of Appeal. He submitted that the word "Catholic" was removed at the trial after it was so raised by Mr. O'Haay Sang'ka who was representing the defendant; the respondent herein as appearing at p. 84 of the Record of Appeal. The High Court thus substituted the Registered Trustees of the Diocese of Mbulu for the Registered Trustees of the Catholic Diocese of Mbulu. Mr. Kimomogoro went an extra mile by stating that the

course taken by the trial court was justifiable by Order I rule 10 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter referred to as the CPC) as well as case law. The learned counsel referred us to holding (iii) of **Conrad Berege v. Registrar of Cooperative Societies and another** [1998] TLR 22, at 24 and holding (i) of **Ramadhani Kisuda and another v. Adam Nyalandu and others** [1998] TLR 68; (both are decisions of the High Court). After the Court replaced the correct name of the defendant in lieu of the previous mis-described name, both parties were bound to comply with the amendment, he argued. He thus submitted that failure to comply with the names in the judgment and decree, makes the appeal incompetent; it should be struck out.

Regarding the second point, Mr. Kimomogoro argued the two limbs one after the other. He submitted that Rule 96 (1) (c) of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules) directs that pleadings must be contained in the Record of Appeal. He added that pleadings rare not complete if the annexures thereof are not attached. In the Amended Plaint, he submitted, the annexures are omitted thereby making the Record of Appeal

incomplete. He argued that this omission goes to the root of the Record of Appeal itself which makes it unsuitable for being relied upon by the Court.

On the second limb, he submitted that there are two missing pages of the judgment; pp. 4 and 9. However, having been told that the Record of Appeal in the hands of the three justices presiding had p. 9, he opted to drop the complaint respecting p. 9; he thus remained with the complaint regarding the missing p. 4 of the judgment. The learned counsel stressed that Rule 96 (1) (g) of the Rules requires the judgment to be one of the documents to be included in the Record of Appeal; naturally, he argued, the judgment referred to must be a complete one. Failure to include page 4 of the judgment offended rule 96 (1) (g) of the Rules and makes the record incomplete and, consequently, renders the appeal incompetent.

In view of the deficiencies alluded to above, Mr. Kimomogoro prayed that the Preliminary Objection be sustained and the incompetent appeal struck out with costs.

For his part, Mr. Nyangarika started with the complaint against the Preliminary Objection that it offended Rule 107 (1) of the Rules in that it was not filed within three clear days as prescribed by the Rule. He submitted that the phrase "three clear days" has the meaning ascribed to it by Rule 34 of the Rules which uses the words "three working days". He submitted that the preliminary objection was filed on 21.06.2018 which was a Thursday; the clear days were only 22.06.2018 (a Friday) and 25.06.2018 (a Monday). He stressed that under rule 8 of the Rules, public holidays are excluded in computation of time. The words "Clear days" in Rule 107 (1) of the Rules are the same as "clear working days" in rule 34 of the Rules, he charged. "Clear days" refer to days during which a person can work on the Preliminary Objection just as is the case with respect to "clear working days". He thus argued that for offending Rule 107 (1), there was no preliminary objection before the Court. In the circumstances, he urged the Court to allow the appellant amend the Record of Appeal under Rule 111 of the Rules.

Responding against the complaint to the effect that the name of the defendant was replaced, Mr. Nyangarika submitted that the

trial judge did not make any order amending or replacing the name of the appellant as required by Order I rule 10 (2) of the CPC. That provision allows the Judge to make an order; not to just rectify as happened.

Regarding the second point of the preliminary objection, Mr. Nyangarika argued that the annexures complained of were in the Record of Appeal as exhibits. There was thus no need of appending them with the Amended Plaint in the Record of Appeal. If anything, he cast the blame upon the respondent to the effect that if she saw the Record of Appeal was deficient as complained, she ought to have filed a Supplementary Record of Appeal as required by Rule 99 of the Rules. That is to say, the respondent had a duty to file a Supplementary Record of Appeal which included page 4 of the judgment and the Amended Plaint with its Annexures. That the respondent had the duty to make the Record of Appeal elegant.

Be that as it may, Mr. Nyangarika was of the view that the omission did not occasion any miscarriage of justice. He thus reiterated the prayer that the appellant be allowed to amend the Record of Appeal under rule 111 (1) of the Rules.

In a short rejoinder, Mr. Kimomogoro argued that Rule 99 of the Rules is applicable only when the Record of Appeal is insufficient in favour of the respondent; not to assist the appellant's case. This rule is therefore inapplicable in the present circumstances, he argued. Regarding rectification of the name of the respondent, he argued that it was the responsibility of the appellant to rectify the error under Order I rule 10 (2) of the CPC at the earliest stage. That was the responsibility of the applicant; not the respondent's, he argued.

As to Rule 96 (1) (c) of the Rules, Mr. Kimomogoro submitted that annexures are part of the pleadings and that the exhibits fall under Rule 96 (1) (f) of the Rules. He argued that Rule 96 (1) of the Rules requires that both the annexures as well as the exhibits must be part of the Record of Appeal.

On the terms "three clear days" mentioned under Rule 107 (1) of the Rules and "three working days" under Rule 34 of the Rules, the learned counsel submitted that the two terms have a different imputation; while in the latter public holidays are excluded in computation, in the former they are not. In the latter, a party will

need "three working days" to read the authorities and prepare for the response but in the former it is just a notice on a point of law which will not need much time to prepare compared to the latter.

On the prayer under Rule 111 of the Rules, Mr. Kimomogoro argued that it cannot be entertained because if so entertained, it will have the effect of preempting the preliminary objection which is legally appropriate. The learned counsel did not cite any authority to buttress this stance.

Having summarized the learned rival submissions of both counsel for the parties as above, we should now be in a position to confront the determination of the preliminary objection. We start with the complaint by Mr. Nyangarika to the effect that the same was not timely filed. He argued that "three clear days" has the same meaning as "three working days". Mr. Kimomogoro had the view that the two phrases have a different meaning, arguing that "three working days" would exclude *dies non* in calculations while in "three clear days" would not.

The phrase "clear days" is not a term of art; it has a clear meaning ascribed to it. **Merriam-Webster Dictionary** defines the phrase as:

> *"Definition of clear days: days reckoned from one day to another with exclusion of both the first and the last day; from Sunday to Sunday there are six clear days".*
> [Accessed through https://www.merriam-webster.com/dictionary/clear%20days].

The **Free Dictionary** provides the following definition for the term:

> *"... days reckoned from one day to another, excluding both the first and last day; as, from Sunday to Sunday there are six clear days".*
> [Accessed through https://www.thefreedictionary.com/Clear+days].

To clinch it all **Black's Law Dictionary** describes it as follows:

"Clear day: One of many full, consecutive days between (1) the date when a period measured in days begins and (2) the date when an event that ends the period occurs. For example, if a statute or contract requires a party to give another party five clear days of notice of a hearing, and the hearing is scheduled to be held on the 31st day of the month, the party giving notice must do so by the 25th day of the month so that five full (clear) days elapse between but not including the 25th day and 31st."

In view of the above definitions, it is apparent that the maker of the Rules intended that "three clear days" should be the basis of calculations under Rule 107 (1) of the Rules as distinct from "three working days" under Rule 34 (3) of the Rules as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017 – GN No. 362 published on 22.09.2017. In the premises, we are disinclined to agree with Mr. Nyangarika that "three clear days" under Rule 107 (1) of the Rules has the same meaning with "three working" days under Rule 34 (3) of the Rules.

The Notice of Preliminary Objection in the present appeal was lodged under Rule 107 (1) of the Rules which requires that it be lodged within three clear days. It was lodged on 21.06.2018 while the appeal was slated for hearing on 26.06.2018. That gave the respondent more than three clear days as required by the Rule; that is, the respondent was given four clear working days before hearing of the appeal. There are four clear days between 21.06.2018 and 26.06.2018. Mr. Nyangarika's complaint is without merit and is dismissed.

Mr. Nyangarika's application to be allowed to rectify the record under Rule 111 of the Rules can, certainly, not be entertained. The cause of action suggested by Mr. Nyangarika cannot find purchase with us because if entertained, as stated by Mr. Kimomogoro, will have the effect of forestalling the preliminary objection. We have stated times without number that preempting a preliminary objection is a course that will not be entertained by the Court. Authorities on the point are not hard to seek. In **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd**, Civil Appeal No. 34 of 2010 (unreported) we reproduced an excerpt from our previous decision in **Minister**

for Labour and Youth Development and another v. Gaspar Swai and 67 Others [2003] TLR 239 which, we think, merits recitation here. We underscored this point at p. 243 and the reason why the course is discouraged in the following terms:

> *"Where a preliminary objection to an appeal has been lodged in accordance with Rule 100 [now 107 (1)], it is, in our view, improper for the appellant to seek to defeat the objection by acts designed to remove its basis. If such practice were allowed, rule 100 [now 107 (1)] would lose purpose and meaning and decency of proceedings would be in jeopardy"*

Likewise in **Mary John Mitchell v. Sylvester Magembe Cheyo & ors**, Civil Application No. 161 of 2008 (unreported) we referred to our previous decision in **Method Kimomogoro v. Board of Trustees of TANAPA**, Civil Application No. 1 of 2005 (unreported) and underscored the point thus:

> *"This court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary*

objection either by raising another preliminary objection or trying to rectify the error complained of."

Should we entertain Mr. Nyangarika's prayer, the preliminary objection will be preempted. That course, in the light of the fairly settled law on the point, will lack legal backing. It is for this reason we find ourselves loathe to accede to Mr. Nyangarika's prayer. We wish to remind the learned Counsel that while it is true that under Rule 111 of the Rules the Court may, at any time, allow amendment of any notice of appeal or notice of cross-appeal or memorandum of appeal, as the case may be, or any other part of the record of appeal, on such terms as it thinks fit, that right ceases to exit after a preliminary objection is lodged – see: **Jaluma General Supplies Ltd v. Stanbic Bank (T) LTD**, Civil Appeal No. 34 of 2010 and **Andrew Mseul & ors v. the National Ranching Company Ltd & anor**, Civil Appeal No. 205 of 2016 (both unreported). In the latter case, we referred ourselves to the former case in which the Court categorically stated:

"The expression 'at any time' in Rule 107 (1) [now Rule 111] means any time before an objection is taken."

In view of the above discussion, we decline Mr. Nyangarika's invitation to allow the appellant amend the Record of Appeal.

There was another point raised by Mr. Nyangarika to the effect that, under Rule 99 of the Rules, it was incumbent upon the respondent to file a supplementary Record of Appeal which would have cured the ailments complained of. This point will not detain us. It is evident that the learned counsel has misconceived the Rule. As rightly submitted by Mr. Kimomogoro, that course will be taken by the respondent if it will be in his favour. No respondent will ordinarily file a supplementary record under the Rule to build the appellant's case. The Rule reads in part:

"If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his or her case ..."

The Rule will be resorted to by a respondent only if the supplementary record will cure the ailments in the record for the

purposes of building his (the respondent's) case. This complaint by Mr. Nyangarika is also without merit.

Adverting to the gist of the preliminary objection, we wish to start with the complaint by the respondent that some of the documents are missing in the Record of Appeal; the subject of the second point. It is not disputed that the Amended Plaint in the Record of Appeal does not contain annexures which have been referred to in it. Neither is it disputed that p. 4 of the impugned Judgment is missing. These are one of the documents which Rule 96 (1) (c) and (g) of the Rules prescribe to be part of the Record of Appeal. Let the Rule speak for itself:

> *"96.-(1) For the purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3), contain copies of th*e following documents-
>
> *(a) N/A*
>
> *(b) N/A*
>
> *(c) the pleadings;*

(d) N/A

(e) N/A

(f) N/A

(g) the judgment or ruling

(h) ..."

Mr. Nyangarika admitted that the Amended Plaint was not attached with the annexures but was quick to remark that the same were not relevant to be attached as they were part of the record as exhibits. With due respect to Mr. Nyangarika, we think an answer to that was provided by Mr. Kimomogoro to the effect that both the pleadings and exhibits are mandatorily required by rule 96 (1) of the Rules to be part of the record. While pleadings are required by Rule 96 (1) (c) of the Rules, exhibits are a prerequisite under Rule 96 (1) (f) of the Rules.

The same arguments will be in respect of the missing page 4 of the judgment intended to be challenged. With the missing page, the provisions of Rule 96 (1) (g) of the Rules have been offended against.

We have held times and again that an incomplete Record of Appeal renders an appeal incompetent – see: **African Barrick Gold Mine PLC v. Commissioner General TRA**, Civil Appeal No. 77 of 2016, **Mazher Limited v. Wajidali Ramzanali Jiwa Hirji**, Civil Appeal No. 64 of 2010, **Badugu Ginning Company Limited v. Silwani Galati Mwantembe & 3 Others**, Civil Appeal No. 91 of 2012 and **Pendo Masasi v. Tanzania Breweries Ltd**, Civil Appeal No. 20 of 2014 (all unreported), to mention but a few.

In the present appeal, the Record of Appeal is short of annexures to the Amended plaint an p. 4 of the judgment thus making it incomplete which fact renders the appeal incompetent liable to being struck out.

The above discussion disposes of the matter. We do not think we need to go further than that. We understand that the first point of the preliminary objection is in respect of the correct name of the respondent. We think we will not dwell onto this point. We only wish to observe in passing that, in the Notice and Memorandum of Appeal, the appellant ought to have put the name of the respondent as appearing in the impugned judgment and decree.

For the reasons stated, we strike out the incompetent appeal with costs to the respondent.

Order accordingly.

DATED at **ARUSHA** this 6th day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL