

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

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

CIVIL APPEAL NO. 175 OF 2017

ATTORNEY GENERAL, ZANZIBARAPPELLANT

VERSUS

ALGHUBRA MARINE SERVICES LTDRESPONDENT

(Appeal from the decision of the High Court
of Zanzibar at Vuga)

(Makungu C.J.)

dated the 10th day of April, 2017

in

Civil Case No. 36 of 2016

RULING OF THE COURT

7th & 12th day of December, 2017

MZIRAY, J.A.:

There is before us an appeal from the ruling of the High Court of Zanzibar at Vuga (Makungu,C.J.) , in Civil Case No. 36 of 2016 dated 10th day of April, 2017 where the court made a decision in favour of the respondent, following the appellant's failure to

produce discovery documents as ordered by the court on 17/1/2017.

In this appeal, Mr. Ali Ali Hassan, learned Principal State Attorney, who was assisted by Mr. Juma Msafiri and Mohamed Suleiman, learned Senior State Attorneys, appeared for the appellant whereas, the respondent was represented by Mr. Othman Masoud Othman, learned advocate.

When the appeal was called on for hearing, the Court, *suo motu*, drew the attention of the learned counsel to the patent defects discovered in the record of appeal as lodged. The parties were therefore asked to address the Court on the following issues:-

- (1) *Whether the affidavit in support of the application at page 6 of the record is complete, given the fact that the said affidavit lacks the page that contains the verification clause and the jurat of attestation.*

(2) Whether or not the appellant was supposed to attach a decree to the ruling appealed against, instead of a drawn order.

Responding to the defect pointed out to them, both learned counsel conceded that the record is incomplete as the affidavit on the record lacks the page containing the verification clause. However, Mr. Ali Ali Hassan, learned Principal State Attorney, stated that non-inclusion of the part of the supporting affidavit containing the verification clause was out of human error and that the omission should not be taken seriously, because the defect is curable under Rule 2 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and Article 107 A of the Constitution of The United Republic of Tanzania, 1977 as amended from time to time (herein after referred to as the Constitution).

As to the issue of attaching a copy of the decree instead of a copy of the drawn order to the ruling appealed against, the learned Principal State Attorney submitted that it is the trial court that is to

blame for issuing the appellant with a decree instead of a drawn order and that the appellant cannot in any manner whatsoever be prejudiced by the mistake committed by the court. From the foregoing submission, the learned Principal State Attorney urged the Court to ignore the points raised and proceed with the hearing of the appeal on merit.

Mr. Othman Masoud Othman, learned counsel for the respondent, while acknowledging that the affidavit on the record is without the page containing the verification clause, he vehemently disputed the prayer for invoking the provision of Rule 2 of the Rules and Article 107 A of the Constitution to cure the anomaly, as there is no peculiar circumstances established in the case to warrant the Court to depart from the precedent set for the cases found to have incomplete record.

There is no doubt, as rightly conceded by both counsel, that the record of appeal before us is incomplete. As reflected on the record, the affidavit in support of the application lacks the page that

contains the verification clause and the jurat of attestation. This contravenes Rule 96 (1) of the Rules which provides:-

"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 the following documents-

(a)

(b).....

(c)

(d).....

(e).....

(f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in English language, their certified translations;

(g).....

(h).....

(i).....

(j).....

(k)....."

It is settled law that an appellant has an obligation to file a complete record of appeal. There have been many decisions on this, among others – **Tanzania Air Services Ltd versus Registered Trustees of the Precious Blood Fathers**, Civil Appeal No. 90 of 2008, **Dominic Mbalamula and 23 Others versus Tanzania Breweries Ltd**, Civil Appeal No. 62 of 2004 (Both unreported), **Kiboro versus Ports and Telecommunications** (1974) E.A. 155, and **The National Bank of Commerce versus Methusela Magongo** (1996) TLR 394.

We wish also to touch on the point raised by the learned Principal State Attorney that the appeal should not be rendered incompetent on account of non-inclusion of the verification part in the supporting affidavit, as the omission was out of human error, curable under Rule 2 of the Article 107 A(2)(e) of the Constitution.

We are aware that the provision of Article 107 A(2)(e) of the Constitution and Rule 2, connotes the same message, as both are aimed at achieving substantive justice.

Article 107A(2)(e) of the Constitution provides:-

*107 A (2)-Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama itafuata kanuni zifuatazo, yaani;-
(e) kutenda haki bila ya kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka.*

This can be translated as follows:-

(2) In the determination of civil and criminal matters according to law, the courts shall have regard to the following principle, that is to say:

(e) administering justice without being constrained unduly by technical requirements which are capable of preventing justice from being done.

In this case, as already indicated, we can hardly glean any element of technicalities involved. In our view, the omission to

incorporate the page containing the verification clause and the jurat of attestation in the supporting affidavit cannot be taken as a technicality envisaged under **Article 107 A (2) (e)** of the Constitution. In the instant case, a fundamental rule of procedure was flouted. Indeed, the role of rules of procedure in the administration of justice is fundamental. In underscoring this point, the Court in **China Henan International Cooperation Group v Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005 (unreported), citing Collins in **Re Coles and Ravenshear** (1970) 1 KB 1, stated:-

"...rules of procedure are intended to be that of handmaids of justice rather than mistresses. That is, their function is to facilitate the administration of justice..."

Yet, in the case of **Zuberi Mussa v Shinyanga Town Council**, Civil Application No. 100 of 2004, (unreported), this Court observed that :-

"... article 107 A (2) (e) is so couched that in itself is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered. It recognizes the importance of such rules in the orderly and predictable administration of justice. The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word "unduly" here should be taken to mean "more than is right or reasonable; excessively or wrongfully; See CHAMBERS CENTURY DICTIONARY, at page 1469. One cannot be said to be acting wrongfully or unreasonably when he is executing the dictates of the law."

So, from the above cases of **China Henan International Cooperation Group** and **Zuberi Mussa** (supra), it is clear that not every procedural rule is outlawed by **Article 107 A (2) (e)** of the Constitution. The provisions of this Article cannot be used to defeat the established procedural rules. Like the case in hand, the appellant had an obligation to file a complete record. It is a fundamental rule of procedure. So, failure to file complete record would not therefore, be a technicality in which **Article 107 (A) (2) (e)** of the Constitution could be invoked in favour of the appellant.

That said, we conclude that the record of appeal as lodged is definitely defective and violative of Rule 96(1) (f) of the Rules. Since a defective record of appeal cannot validly institute an appeal, and the fact that the appellant attached on record a decree instead of a drawn order, we find that the present appeal is incompetent. The appeal is consequently struck out.

The appeal having been struck out on a point raised by the Court, *suo motu*, there will be no order as to costs.

It is so ordered.


DATED at ZANZIBAR this 11th day of December, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S MZIRAY
JUSTICE OF APPEAL

G. A.M NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL