

TANZANIA / JUDGMENT

benita cessar torreggian inc vs tanzania tourist board another 2024 tzca 31 13 february 2024

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13 February 2024

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: WAMBALI, J.A.. FIKIRINI. J.A And ISSA. J.A.^ CIVIL APPEAL NO. 523 OF 2020 BENITA CASSAR TORREGGIANI INC.....APPELLANT VERSUS TANZANIA TOURIST BOARD..... „1ST RESPONDENT THE HON. ATTORNEY GENERrA*-..... 2nd RESPONDENT (Appeal from the Ruling and Order of the High Court of Tanzania at Arusha) (Mzuna, 3.) Dated the 7th day of February, 2020 in Civil Case No. 11 of 2018 RULING OF THE COURT 7th & 13th February, 2024 WAMBALI. J.A.: This appeal is against the decision of the High Court of Tanzania at Arusha in Civil Case No. 11 of 2018 in which the appellant's amended plaint that comprised several reliefs against the respondents was struck out with costs. Particularly, the appellant prayed for payment of USD 435,285.00, general damages for breach of agreement and costs of the suit. The claims were disputed by the respondents. For the purpose of this ruling, we do not intend to revisit the detailed facts of the case and the substance of the decision of the High Court as the appeal was not heard on merits. i It is noted that on 2nd February, 2024 the respondents lodged in Court a notice of preliminary objection comprising the following points: one, that the appeal is incompetent and incurably defective for failure by the appellant to serve the notice of appeal on the respondents contrary to the provisions of rule 84 (1) of the Tanzania Court of Appeal Rules, 2009, (the Rules). Two, that the appeal is bad in law for being preferred out of the prescribed period contrary to the provisions of rule 90 (1) and (3) of the Rules. Three, that the appeal is incompetent and incurably defective for failure of the appellant to comply with the provisions of rule 97 (1) of the Rules. In this regard, the ruling of the Court will mainly concern the determination of the preliminary points of objection raised by the respondents on the competence of the appeal. At the hearing of the preliminary points of objection, the appellant was represented by Ms. Benita Cassar Torreggiani, the Managing Director. It is noteworthy that the appellant was initially represented by Mr. Colman Mark Ngalo, learned advocate who according to the information from Ms. Torreggiani has retired from practice. We thus, upon request, granted leave for Ms. Torreggiani to appear and address the Court on behalf of the appellant. The respondents were duly represented by Ms. Jenipher Kaaya, leaned Senior State Attorney assisted by Mr. Benjamin Mihayo and Mr. Mkama

Musalama, learned State Attorneys. 2 Submitting in support of the first preliminary point of objection, Ms. Kaaya stated that though the notice of appeal contained in the record of appeal indicates that it was copied to the respondents, the same was not served on them as required by rule 84 (1) of the Rules. She submitted that the appellant was bound to include in the record of appeal the notice of appeal which was served and duly received by the respondents or their counsel. She argued that under the provisions of rule 84 (1) of the Rules, the intended appellant is required to serve a copy of the notice of appeal to all persons who would seem to be directly affected by the appeal, in this case the respondents, within fourteen days after lodging it. In the circumstances, she submitted, the appellant's failure to comply with that requirement renders the appeal incompetent before the Court. To support her contention, she made reference to the decision of the Court in *Mokiri Damas Ngoja v. National Housing Corporation and Another* (Civil Appeal No. 273 of 2018) [2021] TZCA 540 (30th September 2021, TANZLII). She concluded her submission on this point by urging the Court to strike out the appeal with costs for being incompetent on account of non-compliance by the appellant with the mandatory provisions of rule 84(1) of the Rules. 3 In response, Ms. Torreggiani contested the respondents' counsel submissions. She firstly conceded that the notice of appeal included in the record of appeal does not show that it was served on the respondents. However, she spiritedly argued that she had evidence that the said notice of appeal was served on the respondents through Tanzania Posts Corporation Expedited Mail Services (EMS) by her former advocate to their counsel, Irene Lesulie, Senior State Attorney. She produced in Court an EMS receipt for the Cash Memo paid on 11th March, 2020 and stamped by the Arusha Counter which shows that the invoice was accompanied with "EMS Domestic Documents" from Ngalo & Company Advocate (sender) of Arusha to Irene Lesulie - Senior State Attorney (addressee) of Dar es Salaam. In the circumstances, she submitted that since the notice of appeal was directed to the respondents' counsel, they were duly served with it within the prescribed period after its lodgment on 2nd March, 2020. To this end, she implored the Court to consider the said receipt as evidence of service and overrule the respondents' objection on the first point with costs and proceed to determine the appeal on merit. In rejoinder, Ms. Kaaya submitted that the appellant cannot rely on the document which is not part of the record of appeal as doing so will be equivalent to adducing evidence in response to the raised objection for purpose of correcting the omission. Besides, she submitted, it is settled law that once the preliminary objection is raised, the other party is prohibited to seek to rectify the error by adducing evidence or raising a counter objection as that will be tantamount to pre-empting the objection. The learned Senior State Attorney therefore beseeched the Court not to entertain the appellant's argument and the EMS receipt at the stage of the hearing of the raised preliminary objection. Ultimately, she prayed the Court to strike out the appeal with costs for being incompetent. We wish to begin our deliberation on this point by reproducing the provisions of rule 84 (1) of the Rules hereunder: "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". It is apparent from the reproduced provisions that the intended appellant is mandatorily required to serve the notice of appeal on those persons who will be

directly affected by the appeal within fourteen days from the date of its lodgment. 5 In the appeal under consideration, it is not doubted that the notice of appeal contained in the record of appeal does not show that it was served on the respondents or their counsel as there is no acknowledgement to that effect. Basically, where the record of appeal does not show clearly that the respondent was duly served with the notice of appeal, mere assertion that he was served cannot be of assistance to the party making the argument. In *Goodhope Hance Mkaro v. TPB Bank PLC & Another*, Civil Appeal No. 171 of 2017 (unreported), while considering an akin situation, the Court observed as follows: "True, as correctly formulated by Mr. Mutaiemwa, the notice of appeal which appears at pages 154-155 was not endorsed against the name of the advocate for the respondent, namely, Mr. Mwanaye/a. It is, we so find, insufficient for the second respondent to simply allege that his advocate was served". It is fairly settled that the omission by the intended appellant to comply with the provisions of rule 84 (1) of the Rules renders the appeal incompetent resulting in its being struck out. For this stance, see the decisions of the Court in *Wilfred Rwakatare v. Hamis Kagasheki & Another*, Civil Appeal No. 118 of 2011 (unreported) and *Bank of India (Tanzania) Limited v. Y. P. Road Haulage Limited & Two Others*, 6 (Civil Appeal No. 322 of 2017) [2021] TZCA 461 (3rd September 2021, TANZLII), among others. We are mindful of the fact that though Ms. Torreggiani agreed that it was important for the document showing service of the notice of appeal to be included in the record of appeal, she strongly urged us to be inclined to her submission that there was service on the respondents' counsel through the EMS. Nevertheless, we agree with the learned Senior State Attorney's submission that raising that point at the stage of the hearing of the preliminary objection lodged by the respondents is tantamount to pre-empting it. Without going into the discussion of whether the EMS Cash Memo document serves as a proof of service or not, we are of the considered view that if the appellant had wished to include the said document in the record of appeal, she would have done so when she lodged the appeal or later by seeking leave of the Court to lodge a supplementary record of appeal. Basically, the Court is not permitted to entertain submissions which are intended to pre-empt the preliminary objection raised by a party against another at the stage of hearing. In *Method Kimomogoro v. The Board of Trustees of TANAPA*, Civil Application No. 1 of 2005 (unreported), the Court stated thus: "The Court has said in a number of times that it will not tolerate the practice of an Advocate trying to pre-empt a preliminary objection either by raising another objection or trying to rectify the error complained of". For similar position, see also the decisions of the Court in *Dar es Salaam Institute of Technology v. Deusdedit Mugasha* (Civil Reference No. 11 of 2016) [2019] TZCA 162 (18th April 2019, TANZLII), *Almas Iddie Mwinyi v. NBC* [2001] T.L.R. 83 and *Mary John Mitchell*

- v. *Sylvester Magembe Cheyo and Others*, Civil Application No. 161 of 2008 (unreported). In the appeal at hand, it is not doubted that the appellant's submission and receipts with regard to the alleged service of the notice of appeal were brought in Court during the hearing of the preliminary objection which was filed earlier on by the respondents concerning the competence of the appeal on account of the failure by the appellant to adhere to the provisions of rule 84 (1) of the Rules. Therefore, accepting the appellant's submission and the documents at this stage will certainly pre-empt the preliminary objection raised by the

respondents. In the event, we sustain the first point of objection on non-compliance by the appellant with the provisions of rule 84 (1) of the Rules. It is noteworthy that the notice of appeal is the foundation of the appeal process in civil appeals as it mandates the Court to have jurisdiction to entertain the appeal and other applications. In this regard, having sustained the first preliminary point of objection on omission by the appellant to serve the notice of appeal on the respondents, we are settled that the appeal is incompetent. We do not therefore find it important to determine the two-remaining points of objection in which we heard submissions from the parties as their substance pre-supposes that the notice of appeal is competently before the Court. Consequently, we strike out the appeal with costs for being incompetent. DATED at ARUSHA this 12th day of February, 2024. F. L. K. WAMBALI JUSTICE OF APPEAL P. S. FIKIRINI JUSTICE OF APPEAL A. A. ISSA JUSTICE OF APPEAL The Ruling delivered this 13th day of February, 2024 in the presence of the appellant in person and Mr. Hans Mbando, learned State Attorney for the Respondents/Republic, is hereby certified as a true copy

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