

TANZANIA / JUDGMENT

gurmit singh vs meet singh another 2021 tzca 729 3 december 2021

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA fCORAM: MWARI3A. J.A.. KEREFU. J.A., And KENTE, J.A.^ CIVIL APPEAL NO. 256 OF 2018 GURMIT SINGH APPELLANT VERSUS MEET SINGH 1st RESPONDENT ARJAN CONSTRUCTION CO. LTD 2 nd RESPONDENT (Appeal from the decision of the High Court of Tanzania at Arusha) (Moshi, J.) dated the 17th day of September, 2014 in Civil Case No. 17 of 1998 RULING OF THE COURT 29th Nov. & 3rd Dec, 2021 MWARIJA. J.A.: This ruling is on the preliminary objection raised by the 1st respondent, Meet Singh challenging the competence of the appeal brought by the appellant, Gurmit Singh. The appeal is against the order of the High Court (Moshi, J) made in Civil Case No. 17 of 1998. In that case, the appellant had sued the respondents, Meet Singh and Arjan Construction Co. Ltd (the 1st and 2nd respondents respectively) claiming for inter alia, TZS 318,240,000.00 being the value of the shares which he claimed to have contributed in the form of materials and other properties to the 2nd respondent, the company to which he claimed, was one of its shareholders. The suit proceeded to mediation which, according to the proceedings dated 4/9/2014, was marked to have failed. When the case was called on for Final Pre-Trial Conference on 17/9/2014, the learned trial Judge raised suo motu the issue concerning existence of a pending Probate and Administration Cause involving a deceased person whose properties form part of the shares which are the subject of dispute in the suit. On the basis of that pending Probate and Administration Cause, the learned Judge found that the suit was filed pre-maturely and therefore, proceeded to dismiss it with costs. The appellant was aggrieved by that order and thus filed this appeal after he had sought and obtained, under s.5 (1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002, now R.E. 2019], leave to appeal to this Court. He was granted leave by the High Court (Opiyo, J.) in Miscellaneous Civil Application No. 14 of 2017. As stated above, the 1st respondent has challenged the competence of the appeal by raising a preliminary objection, the notice of which was lodged on 3/2/2021. In the said objection, the 1st respondent contends that the 2 record of appeal is incomplete for the appellant's failure to incorporate the following documents: "(i) A drawn order that is appealed against■ contrary to Rule 96 (1) (h) o f the Tanzania Court o f appeal Rules, 2009 as amended. (ii) A drawn order that gave the appellant leave to appeal, contrary to Rule 96 (1)

- (i) of the Tanzania Court of appeal Rules, 2009 as amended. " When the appeal was called on for hearing on 29/11/2021, the appellant was represented by Ms. Aziza Shakale assisted by Mr. Emmanuel Sood, both learned advocates. On their part, whereas the 1st respondent was represented by Mr. Alute Mughwai, learned counsel, the 2nd respondent who was served through substituted service published in the Daily News and Mwananchi News Papers of 17/11/2021 and 10/11/2021 respectively, did not enter appearance. As the practice dictates, the preliminary objection had to be disposed of first and therefore, the learned counsel for the parties were called upon to argue the same. Since as indicated above, the 2nd respondent who was served through substituted service did not appear, hearing proceeded in its absence in terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). Submitting in support of the two grounds of the preliminary objection, Mr. Mughwai argued that the appellant has not included in the record of appeal, drawn orders which ought to have been extracted from the two decisions the order dated 17/9/2014 (the impugned order) in which Moshi, J. dismissed the suit and the order of Opiyo, J., dated 10/7/2017 in which the appellant was granted leave to appeal. According to the learned counsel, the two orders are core documents and the omission to include them in the record of appeal offends the provisions of Rule 96 (1) (h) and (i) of the Rules respectively and thus renders the record of appeal incomplete. To bolster his argument that inclusion of a drawn order extracted from the impugned decision is a mandatory requirement, Mr. Mughwai cited the case of Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited, Civil Appeal No. 3 of 2018 (unreported). He also cited the case of National Bank of Commerce v. Methusela Magongo [1996] T.L.R. 394 to buttress his argument that the omission to include a copy of any of the documents listed under Rule 96 (1) of the Rules in the record of appeal renders the appeal incompetent. The respondent's counsel thus prayed that the appeal be struck out with costs for the appellant's failure to comply with the provisions of Rule 96
- (1) (h) and (i) of the Rules, the effect of which, he argued, the appeal has been rendered incompetent. Submitting in reply to the arguments made by Mr. Mughwai, Mr. Sood conceded that the appellant has not included the two documents, the subject matters of the preliminary objection. It was his argument however, that the omission is not fatal such as to preclude the Court from proceeding to hear the appeal, more so because, according to him, the omission was caused by the trial court's failure to extract the two drawn orders. Relying on the decisions of the Court in the cases of Yakobo Magoiga Kichere v. Peniah Yusuf, Civil Appeal No. 55 of 2017 and Charles Bode v. Republic, Criminal Appeal No. 46 of 2016 (both unreported), the learned counsel urged us to invoke the overriding objective principle and proceed to hear the appeal despite the non-compliance to which he had conceded. In rejoinder, though admitting that by virtue of the operation of the overriding objective principle, despite the omission by the appellant to include the two documents in the record of appeal, the Court may order the same to be included by way of a supplementary record of appeal containing the omitted documents, Mr. Mughwai contended that, although the Court has that discretion, such power has to be exercised judicially. He argued that the appellant had sufficient time to file a supplementary record of appeal but failed to do so until the 1st

respondent had decided to lodge the preliminary objection. With regard to the attribution by the appellant's counsel of the omission to the court's failure to extract the drawn orders, the 1st respondent's counsel argued that, the appellant ought to have moved the Registrar of the High Court to extract and supply the documents for inclusion in the record of appeal. Furthermore, as to the application of the overriding objective principle, Mr Mughwai cited the case of Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited, Civil Appeal No. 66 of 2017 (unreported) and argued that, the principle is not a panacea for every omission. He thus reiterated his prayer that the appeal be struck out. From the submissions by the learned counsel for the parties, it is common ground that the record of appeal is incomplete because of the appellant's failure to include the two drawn orders, the omission which, as submitted by Mr. Mughwai, contravenes the provisions of Rule 96 (1) (h) and (i) of the Rules which provides as follows: 6 "96 -(1) For the purposes of an appeal from the High Court or 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) - (g) . . . N/A
- (h) the decree or order;
- (i) the order, if any giving leave to appeal. " There is no gainsaying that the two documents are necessary for determination of the appeal and ought therefore, to have been included in the record of appeal as per the requirement of the above quoted paragraphs of Rule 96 (1) of the Rules. We do not thus, with respect, agree with Mr. Sood that the Court can invoke the overriding objective principle to do away with the documents and proceed to hear the appeal. The reason is that the drawn orders in question, being essential documents, are necessary for determination of the appeal and must therefore, be contained in the record of appeal as mandatorily required by Rule 96 (1) (h) and (i) of the Rules. The issue thus is whether the Court may exercise its discretion with the intention of allowing the appellant to include the missing documents in the record of appeal. Rule 96 (7) of the Rules vests the Court with that discretion and may do so by granting the appellant leave to file a supplementary record of appeal containing the documents which may have been omitted from the record. That provision states as follows: "96 (1) - (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 supplementary record of appeal." The rationale behind that Rule is to enable an appeal which would otherwise be struck out on the ground of incompleteness of the record of appeal to be expeditiously heard and determined after including by way of a supplementary record, the omitted documents. That, in our view, is in line with the spirit of the overriding objective principle. With respect to Mr. Mughwai therefore, we think the exercise by the Court of its discretion under Rule 96 (7) of the Rules, would be proper because, in the first place, the 1st respondent will not be prejudiced. Secondly, to do so would enable the parties' dispute to be determined expeditiously and on merit. On the basis of the above stated considerations we exercise our

discretion under Rule 96 (7) of the Rules and hereby grant leave to the appellant to file a supplementary record of appeal consisting of the two drawn orders arising from the impugned decision and the decision granting the appellant leave to appeal. The same to be filed within sixty days from the date of delivery of this ruling. Costs to abide the outcome of the appeal. DATED at ARUSHA this 3rd day of December, 2021 A. G. MWARIJA JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL The Ruling delivered this 3rd day of December, 2021 in the presence of Mr. Emmanuel Sood assisted by Ms. AzizaShakale, both learned counsel for the Appellant and Mr. Alute Mughwai, learned counsel for the 1st Respondent and in the absence of the 2nd Respondents tym ty certified as a true copy of the original, ;,n li (' '':" E. G. 'M'RAN DEPUTY REGI COURT OF APPEAL

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