

TANZANIA / JUDGMENT

haidar mohamed hussein rashid another vs akbar habib hassaali 2022 tzca 370 14 june 2022

COURT
TZCADECIDED
14 June 2022

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IN THE COURT OF APPEAL OF TANZANIA AT ZANZIBAR (CORAM: LILA, 3.A.. MWANDAMBO. J.A. And MASHAKA, J.A.^ CIVIL APPEAL NO. 101 OF 2021 HAIDAR MOHAMED HUSSEIN RASHID 1ST APPELLANT FARIDA BASHIR HASSANALI..... 2nd APPELLANT VERSUS AKBAR HABIB HASSANALI RESPONDENT (Appeal from the judgment and decree of the High Court of Zanzibar at Vuga) (Mohamed. J.) dated the 13th day of August, 2019 in Civil Case No. 31 of 2018 RULING OF THE COURT 6th & 14th June, 2022 MWANDAMBO. 3.A.: The appellants Haidar Mohamed Hussein Rashid and Farida Bashir Hassanali were aggrieved by the judgment on admission entered by the High Court of Zanzibar (R.H. Mohamed, J.) for the respondent Akbar Habib Hassanali made on 13/08/2019 in a suit founded on defamation in Civil Case No. 31 of 2018. The Court is invited to quash and set aside the judgment on admission on the ground that the High Court erred in holding that the appellants made any admissions in their pleadings which would have resulted into the impugned judgment. l Ahead of the hearing of the appeal, Mr. Salim Hassan Bakar Mkonje, learned advocate for the respondent lodged a notice of preliminary objections containing three grounds believed to be consisting points of law capable of disposing the appeal in terms of rule 107 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Even though at the outset the Court's inclination was that none of the preliminary points if argued would result in disposing the appeal, the respondent's advocate was insistent that the objections would result in striking out the appeal if sustained. Mindful of the need to accord parties an opportunity to be heard, we agreed with the cause of action championed by Mr. Mkonje and heard arguments for and against the preliminary objections. In the course of the hearing, the learned advocate abandoned the third ground and argued the remaining two grounds in which the respondent contends that the appeal is incompetent for contravening the Rules for, one, omission to incorporate in the record of appeal a signed page of the impugned judgment contrary to rule 96 (1) (g) of the Rules and two, the appeal lacks certificate of records contrary to rule 96(5) of the Rules. Mr. Mkonje's contention in support of the first ground was that the appeal should be struck out for lacking a signed page of the impugned judgment; a vital document in the record of appeal is incomplete. The learned advocate was emphatic the incompleteness of the judgment was tantamount to the record of appeal lacking the impugned

judgment rendering the appeal incompetent. He cited to us our previous decision in *Good Hope Hance Mkaro v. TPB Bank Pic & Hance Rengere*, Civil Appeal No. 171 of 2017 (unreported), for the proposition that non inclusion of documents in a record of appeal renders the appeal incompetent warranting an order striking it out. For his part, Mr. Rajab Abdallah Rajab, learned advocate representing the appellants resisted the objection. Whilst admitting the unsystematic arrangement of the documents in the record of appeal, the learned advocate argued that the page complained of is part of the record of appeal as evident at page 61 which was not the same thing as the judgment missing from the record of appeal. With respect we agree with learned advocate for the appellants. Indeed, Mr. Mkonje did not dispute the existence of the page complained of. Instead, he changed stance complaining against lack of certification of the copy of the impugned judgment. Be that as it may, we find no merit in the learned advocate's submission on this point. This is so because, in the first place, from our decision in *CRDB Bank Ltd v. Issack Mwamasika and 2 Others*, Civil Appeal No. 139 of 2017 (unreported) referred in *Good Hope Hance Mkaro* (supra), the omission to include a page in a record of appeal was held not to be fatal it being curable by lodging a supplementary record of appeal. The complaint in the instant appeal does not relate to non inclusion of a page of the impugned judgment but improper or disorderly arrangement of documents such that the page showing that the judgement was signed appears at page 61 instead of page 46. Secondly, at any rate, the decisions referred to by the learned advocate for the respondent in support of the preliminary objection are no longer good law in the light of the provisions of rule 96(7) introduced in the Court's Rules with a view to giving effect to the overriding objective engraved under section 3A of the Appellate Jurisdiction Act [Cap 141 R.E. 2019]. The above notwithstanding, Mr. Mkonje was unrelenting arguing that the alleged omission could not be made good by filing a supplementary record of appeal pursuant to the provisions of rule 96 (7) of the Rules allegedly because the omission involved a vital document to the appeal. Without any disrespect to the learned advocate, rule 96 (7) of the Rules does not make any distinction between core and non core documents which are to be included in the record of appeal prescribed by rule 96 (1) and (2) of the Rules. That means that even if the whole judgment or a decree had been omitted from the record of appeal, it would not attract the harsh consequences of striking out the appeal. Such omission could be cured by filing a supplementary record of appeal. In the upshot, we find no merit in ground one in the notice of preliminary objections and overrule it. Ground two relates to lack of certificate to authenticate the record of appeal. Mr. Mkonje could not mince his words that what appears to be a certificate of the record of appeal at page one is not what is required by rule 96 (5) of the Rules. The learned advocate sought to support his arguments with the Court's decisions in *Mshamu Said v. R*, Criminal Application No. 9 of 2011 (unreported) and *M/s Benandys Company Ltd v. Balozi Abubakar Ibrahim & Bibi Sophia Ibrahim*

[2013] T.L.R. 312. From those decisions, the learned advocate impressed upon the Court that lack of certification of the record of appeal is as bad and fatal as an unsigned affidavit which rendered the application incompetent in *Mshamu Said* (supra) or noncompliance with the requirements in a notice of appeal held to be fatal in the latter decision. The Court was invited to follow suit in the instant appeal even though he was agreeable that the defect

was curable by way of amendment in terms of rule 111 of the Rules. Yet again, Mr. Rajab invited the Court to overrule the preliminary objection because the appellants' advocate had certified the record in compliance with rule 96 (5) of the Rules. Alternatively, the learned advocate argued that should the Court find the certificate wanting, it should hold that the defect is curable by amendment under the overriding objective principle. Our starting point in addressing this ground is rule 96 (5) of the Rules which provides: "Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under rule 33 to appear on his behalf." Acting under the above rule, the appellants' advocate has made the following statement in each page of the record of appeal: 'Under Rule 96 (5) of the Tanzania Court of Appeal Rules, 2009, I Nassor Khamis Mohamed, Advocate, do hereby certify that, this is true copy of the original record supplied to the Court of Appeal of Tanzania. Dated at Zanzibar this 2nd day of July, 2020 Signed Advocate for the Appellants' Whilst Mr. Rajab maintains that the above meets the essence of rule 96 (5) of the Rules, Mr. Mkonje would have us hold otherwise. Admittedly, there is no format guiding litigants and their advocates on how a certification in each record of appeal should be. We understood Mr. Mkonje submitting as he did based on practice rather than the dictates of the Rules. We take note that based on the long established practice, majority of the records of appeal reflect a certificate under rule 96 (5) of Rules thus: 7 Advocate DO HEREBY CERTIFY THAT this is a true copy of the original record of appeal" The difference between the appellants' certificate and the sample extracted from other records of appeal shown above lies in the words "supplied to the Court of Appeal of Tanzania" That is what Mr. Mkonje argues that it is offensive of rule 96 (5) of the Rules. Whilst we take note of the long established practice of certificates as shown above, we are unable to share the view taken by Mr. Mkonje that the appellant's certificate is defective vitiating the record of appeal. In our view, had there been any form under rule 96 (5) of the Rules taking the formulation in the above extracted sample, what matters would be substantial compliance with the form rather than 100% compliance. Indeed, from our examination of the relevant rules providing for forms prescribed in the first schedule to the Rules, what is required in each of them is substantial compliance and nothing more. For instance, rule 83 (6) of the Rules requires a notice of appeal to be substantially in Form D in the first schedule to the Rules to be signed by or behalf of the appellant. However, rule 83 (7) of the Rules allows amendment of the notice of appeal under rule 111 of the Rules where there is deviation from the prescribed form. Although the above relates to a notice of appeal, we think it ought to apply to other prescribed forms in the schedule to the Rules where there is a deviation. However, the impugned certificate is not faulted for deviating from the prescribed forms and so it will be hard to order an amendment had there been any deviation. In our view, the certificate in the appellants' record of appeal is in substantial compliance with the established practice and so we find nothing wrong with it. Having so held, we overrule the second preliminary objection for being devoid of merit. In fine, we overrule both points of the preliminary objections and direct that the appeal be scheduled for hearing in the next convenient sessions of the Court on a date to be fixed by the Registrar. In the meantime, the appellants are ordered to

lodge a supplementary record of appeal to cure the disorderly arrangement of documents in the record of appeal not later than 30 days from the date of this ruling. DATED at ZANZIBAR this 13th day of June, 2022. S. A. LILA JUSTICE OF APPEAL L. J. S. MWANDAMBO JUSTICE OF APPEAL L. L. MASHAKA JUSTICE OF APPEAL The Ruling delivered this 14th day of June, 2022 in the presence of the 1st & 2nd appellants in person with their learned counsel Mr. Rajab A. Rajab and Mr. Abdulkhaliq Aley, learned counsel for the respondent is hereby certified as a true c " DEPUTY REGISTRAR COURT OF APPEAL

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