

TANZANIA / JUDGMENT

20170905 TZCA Dar es Salaam

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: MJASIRI, J.A.,
MWARIJA, J.A., And MWAMBEGELE, J.A.) CIVIL APPEAL NO. 39 OF 2014

1. PROSPER PAUL MASSAWE -]
2. HILDA JOHN MUSHI r" APPELLANTS
3. WILERICK PAUL MASSAWE _j VERSUS ACCESS BANK TANZANIA
LTD RESPONDENT (Appeal from the Ruling, Order and Decree
of the the High Court of Tanzania at Dar es Salaam) (Nchimbi, J.) Date the 26 th day of
February, 2014 In Commercial Case No. 79 of 2013 RULING OF THE COURT 16th June, & 8th
September 2017 MWARIJA, J.A.: This appeal originates from the decision of the High Court
of Tanzania, Commercial Division (Nchimbi, J.) in Commercial Case No. 79 of 2013. The
impugned decision arose from a summary suit filed by the respondent claiming for Shs.
560,000,000/= being an outstanding amount of the loan advanced to the 1st and 2nd
appellants or in the alternative, an order directing attachment and sale of the mortgaged
properties. The loan was guaranteed 1 by the 3rd appellant. Apart from the principal sum,
the respondent claimed .. (- , ' for interest and costs of the suit. In the trial court, the
appellants had unsuccessfully applied, under 0. XXXV r. 3 of the Civil Procedure Code [Cap.
33 R.E. 2002] (the CPC), to defend the suit. The learned trial judge declined to grant the
application on account that the appellants had failed to show that they had substantial
defence to make. He dismissed the application and proceeded to enter judgment for the
respondent. The appellants were aggrieved by the decision hence this appeal. When the
appeal was called on for hearing on 16/7/2017, the appellants were represented by Mr.
Thomas Rwebangira, learned counsel while the respondent had the services of Mr. Slyvatus
Mayenga, learned counsel. Since by a notice filed on 26/5/2017, the learned counsel for the
respondent had raised a preliminary objection, we proceeded to hear it first. The objection
consists of 5 grounds, that: "1. The appeal is incompetent for being accompanied with
uncertified exhibits and defective pleadings contrary to Rule 96 {1} (f) and (2) of the Court of
Appeal Rules G.N. No 360 of 6h Novembe0 2009/ 2 page 246 of the record contains the
affidavit with the c:- defective Jurat.

2. The appeal is incompetent for being at variance with the Notice of Appeal earlier filed in this court on 2Jth February, 2014. While the Notice of Appeal intends to appeal against the ruling, drawn order and Decree, the Memorandum of Appeal appeals against the Decree alone. . 3. The appeal is incompetent for failure by the Appellant . .to apply for proceedings of the impugned decision to the proper registry of the High Court rendered the decision (sic) while the impugned decision was delivered by the High Court Commercial Division, the letter requesting for proceedings was filed and lodged at the High [Court] of Tanzania, Land Division, contrary to rule 90 (2) of the Court of Appeal Rules G.N. No. 368 of the (1h November, 2009).
4. The record of appeal is incurably defective for not containing a copy of the letter from the Registrar of 3 the High Court Commercial Division/ informing the Appellant that the proceedings requested for are ready for collection.
5. The appeal is incompetent for containing defective certificate of delay. While the letter applying for proceedings applied for Ruling/ Orde0 Decree and Proceedings/ the certificate of de/a¹/₂ subject of time computation refers to copies of Judgment Decree and Proceedings/ the documents which were not asked for are does not form part of the record of appeal (sic).// Arguing in support of 1st ground of the preliminary objection which has two limbs, Mr. Mayenga submitted that the appeal is incompetent firstly, because the documents which have been included in the record of appeal at pages 15-368 are not certified by the Registrar and secondly, because a copy of the affidavit appearing at pages 246-250 of the record has a defective jurat. He argued that although the documents forming the annextures to the plaint were not admitted in evidence, they should have been certified by the Registrar. As for the copy of the affidavit, it was his submission that the same is not from the original copy which was filed in support of the application. 4 According to the learned counsel, the explained defects contravene Rule (96(1) (f) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He cited as authorities the cases of Foreign Mission Board of Southern Baptist Convention v. Alexander Panomaritis [1984] TLR 146 and African Barrick Gold Mines PLC v. Commissioner General (TRA), Civil Appeal No. 77 of 2016 (unreported). On the 2nd ground, Mr. Mayenga submitted that the memorandum of appeal is defective for failure to comply with Rule 93 (3) of the Rules. He argued that whereas in the notice of appeal, the appellant intended to appeal against the "Ruling/ Order and the Decree' in the memorandum of appeal, the appeal is against the Decree. Relying on the cases of Marwa Kachang'a v The Republic, Criminal Appeal No. 84 of 2015 and Khadija Mlebya v. Mohamed Amri, Civil Appeal No. 4 of 2013 (both unreported), the learned counsel submitted that the defects render the appeal incompetent. With regard to the 3rd - 5th grounds, the respondent's counsel contended that the correspondence documents pertaining to the process by the appellant of seeking exemption under Rule 90 (2) of the Rules are tainted with irregularities. He argued firstly, that the letter applying for the copies was addressed to the Registrar of the High Court, Land Division instead of 5 the High Court, Commercial Division, the Court which made the impugned decision. Secondly, he argued that the letter of the Registrar informing the appellant that the copies were ready for collection has not been included in the record and thirdly, that

whereas the appellant had applied for copies of the ruling, proceedings and the decree, in excluding the period required for preparation of the copies, the Registrar indicated in the certificate of delay that the excluded period was necessary for preparation of the copies of judgment, proceedings and decree, the certificate is defective because no judgment was composed and delivered. In response, Mr. Rwebangira submitted that the objection is misconceived as the points raised do not qualify as preliminary objections. On the first ground, he argued in reply that the stated requirements under Rule 96 (1) (f) of the Rules were complied with. He submitted that the documents in question were properly included in the record because they are the ones which were contained in the record of the High Court. Furthermore, with regard to the argument that the documents were not certified, the appellants' counsel contended that there is no law which requires that the same must be certified. On the cited cases of Foreign Mission and African Barrick (*supra*), he submitted that they concerned the requirement of certifying a record of appeal, not annexures to the (pleadings or documents contained in the record of an appeal. On the submission made in support of the 2nd ground, Mr. Rwebangira stated in reply that the submission touches on the appellants' 1st ground of appeal and therefore its determination may pre-empt that ground of appeal which states as follows:- "The Honourable High Court Judge erred in law and fact by entering Judgment through Miscellaneous Application No. 69 of 2013 whereas there was no proceedings/ order or judgment in the main suit Commercial case No. 79 of 2009 out of which the decree was extracted. // He argued however, that the memorandum of appeal complies with Rule 93 (3) of the Rules. Expounding, he submitted that under S. 5 (a) of the Appellate Jurisdiction Act [Cap. 141 R. E. 2002], it is provided that an appeal shall lie to the Court against any decree of the High Court made under the CPC in its original jurisdiction. He stressed that since a decree was issued, it was proper for the appellant to appeal against it. He added that in the 7 memorandum of appeal, the appellants have indicated that they are appealing against the whole decision. Arguing further in reply to the submission made in support of that ground, Mr. Rwebangira contended that even if for the reason of being at variance with the memorandum of appeal, the notice of appeal is defective, the remedy would be not to strike it out but to order its amendment. To bolster his argument on that point, he cited *inter alia*, the cases of National Insurance Corporation (T) and *Anr. v. Johannes Jeremiah and Others*; Civil Application No. 8 of 2013 and *Jaluma General Supplies v. Stanbic Bank (T) Limited*; Civil Appeal No. 77 of 2011 (both unreported). With regard to the submission in support of the 3rd - 5th grounds, the appellants' counsel responded by arguing that there were no defects having the effect of rendering the appeal incompetent. On the appellant's letter of application for the copies, he submitted that although it was wrongly addressed to the Registrar of the High Court (Land Division), the letter was acted upon by the Registrar of the High Court (Commercial Division) and the appellants were supplied with the relevant copies. As for the contention that the appeal is defective for the appellants' failure to include in the record, the Registrar's letter informing them that the 8 copies were ready for collection, Mr. Rwebangira argued that the Registrar did not issue such a letter and for that reason, there was no omission as alleged by the respondent's counsel. Concerning the certificate of delay, Mr. Rwebangira submitted that

since in the ruling on the application for leave to defend, judgment was entered, the appellants rightly indicated in the memorandum of appeal that they were appealing against the judgment. On the contention that the certificate of delay is defective, the learned counsel opposed the submission stating that there is no prescribed format for preparing a certificate of delay. He argued that the certificate served the purpose envisaged under Rule 90 (2) of the Rules because it shows the case details and the excluded period, which are essential matters required to be contained in the certificate. We have duly considered the submissions of the learned counsel for the parties. The points raised in the 1st and 2nd grounds of the preliminary objection are based on Rule 96 (1) (f) of the Rules. The provision states as follows:- "96- (1) For the purpose of an appeal from the High Court or a tribunal in its original jurisdiction/ the record of appeal/ shall subject to the provisions 9 of sub-rule (3) contain copies of the following documents-

- (a) - (e) {f) the affidavits read and all documents put in evidence at the hearing or if such documents are not in the English language/ their certified translation. " [Emphasis added]. It is clear from its wording that the above quoted provision refers to affidavits and all the documents which were used during hearing of the case in the trial court. The provision does not refer to the documents which were annexed to the pleadings. Mr. Mayenga argued that the documents which were annexed to the plaint and a copy of the affidavit (the Documents) must have been certified by the Registrar. With respect to the learned counsel, that requirement is not imposed by Rule 96 (1) (f) of the Rules. Indeed, as submitted by Mr. Rwebangira, what is provided by the Rules is that the record of appeal must be certified by the appellant. That is in accordance with Rule 96 (5) of the Rules. With regard to the ground that the appellants included in the record, a defective copy which is not from the affidavit filed in the trial court, we find that this ground raises a matter which requires evidence to establish. It (does not therefore qualify as a preliminary objection - See for example, the case of National Insurance Corporation of (T) and Anr. V. Shengena Limited, Civil Application No. 20 of 2007 (unreported). For these reasons, we do not find merit in the 1st ground of the preliminary objection. We also find no merit in the 2nd ground of the preliminary objection concerning the contention that the memorandum of appeal is in variance with the notice of appeal. We hold that view for the following reasons. In the first place, the nature of variance between the notice and the memorandum of appeal based on the difference of Ruling and Judgment is minor. Secondly, it is not a condition that in the heading of the memorandum of appeal, an appellant must reproduce what was stated in the notice of appeal. Rule 93 (3) of the Rules provides as follows:- "93 - (1). ... (2). ... (3). ... A memorandum of appeal shall be substantially in Form F in the first schedule to these Rules and signed by or on behalf of the appellant. // 11 The relevant part as regards the heading of a memorandum of appeal in (form F provides as hereunder:- Appeal from a ... of the High Court of Tanzania at ... (Mr. Justice..) Dated the . .. day of .. / 20... in Civil Case or Civil Appeal/Bankruptcy Cause/Matrimonial Cause/Miscellaneous Cause No... of ... 20..) In their memorandum of appeal, the appellants complied with that format. The heading reads:- "Appeal from the decree of the High Court of Tanzania (Commercial Division) at Dar es

Salaam (Mr. Justice Nchimbi J.) dated 21st day of February 2014 in Commercial Case No. 79 of 2013/~ The contention by the learned counsel for the respondent that the memorandum of appeal is defective because it varies with the notice of appeal is therefore, in our view, not correct. The fact that in the memorandum of appeal the appellants state that they are appealing against the Decree while in the notice of appeal they state that their appeal is against the ruling, order and decree raises the issue of substance than the format 12 . < which the appellant's have complied with in their memorandum of appeal. (For these reasons, this ground is equally found to be lacking in merit With regard to the 3rd - 5th grounds, we are of the considered view that the points raised by the respondent's counsel are trivial. Firstly, although the letter was wrongly addressed,. the mistake did not prejudice the respondent. Furthermore, despite being wrongly addressed to the Registrar of the High Court (Land Division), the letter contained the details of the case and the same was acted upon and the appellants were supplied with the copies and the requisite certificate. As for the ground that the appellants did not include in the record, the letter informing them that the copies were ready for collection, from the reply by the appellants that they were not issued with such a letter, it is obvious that this ground is based on an unascertained facts and as a result, does not qualify as a preliminary objection. Similarly, the point concerning the copies which were asked and supplied to the appellant, although it is true that they applied for the copies of the "Ruling, Order, Decree and the proceedings", the fact that in the certificate of delay, the Registrar stated that he excluded the period which was necessary for preparation of "Judgment, Decree and Proceedings", in our view, does not render the 13 • certificate "incompetent" as submitted by the respondent's counsel. Firstly, as argued by the appellants' counsel, there is no specific format for preparing a certificate of delay and secondly, if there would be any defect in the certificate, that would go to its validity rather than its competence. These grounds are for these reasons also lacking in merit. Having found all the grounds devoid of merit, we hereby overrule the preliminary objection with costs. DATED at DAR ES SALAAM this 5th day of September, 2017. S. MJASIRI JUSTICE OF APPEAL A.G. MWARIJA JUSTICE OF APPEAL J. C. M. MWAMBEGELE JUSTICE OF APPEAL I certify that this is a true copy of the original. -::--1 Q ' ' A.H. M UMI DEPUTY REGISTRAR COURT OF APPEAL 14

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