IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A., And KEREFU, J.A.,)

CIVIL APPEAL NO. 3 OF 2018

PUMA ENERGY TANZANIA LIMITED .....APPELLANT

AND

RUBY ROADWAYS (T) LIMITED .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam

(Songoro, J)

dated the 9th day of June, 2017

in

Commercial Case No. 86 of 2015)

RULING OF THE COURT

16th March & 15th April, 2020

MWANDAMBO, J.A.:

This ruling seeks to address a small but significant issue regarding the extent of the Court's power under rule 96(7) of the Tanzania Court of Appeal Rules, G.N. No. 368 of 2009 as amended by the Tanzania Court of Appeal (Amendment) Rules, G.N. No. 344 of 2019 ("the Rules").

To appreciate the essence of the issue in this ruling, it will be necessary to highlight the material facts. On 5th January 2018, the appellant, who had lost to the respondent before the High Court (Commercial Division), instituted an appeal against the judgment and

decree shown to have been made on 9th June 2017. As required by rule 96(5) of the Rules, the appellant's advocate certified the correctness of each copy of the record. However, it turned out later that some copies of vital documents were omitted in the record of appeal which prompted the respondent's advocates to lodge a notice of preliminary objection contending that the appeal was incompetent and liable to be struck out.

When the appeal was called on for hearing on 9th, July 2019, the respondent's learned advocate chose to abandon the preliminary objection and instead, he consented to an informal application made by the appellant's advocate under rule 96(7) of the Rules to lodge a supplementary record to cure the incompleteness of the record of appeal. In exercise of its power under rule 96(7) of the Rules, the Court ordered the appellant to lodge a supplementary record pertaining to the missing documents in the then incomplete record.

At the same time, the respondent sought and obtained leave to lodge a notice of cross appeal. The hearing of the appeal was thus adjourned pending compliance with the Court's order. Subsequently, the appellant duly complied with the Court's order and lodged the requisite

supplementary record of appeal on 1st August, 2019. Likewise, the respondent lodged her notice of cross appeal and so she became a cross appellant.

At the resumed hearing, Messrs. Gaspar Nyika and Beatus Malima both learned Advocates appeared for the appellant and respondent (cross appellant) respectively. Before the learned advocate for the appellant took the floor to address the Court, we enquired from him whether the document described as a decree under item 25 in the index in the record of appeal was indeed a decree envisaged by rule 96(1) (h) of the Rules. Mr. Nyika was man enough to concede that the document appearing at pages 845 and 846 of the record of appeal fell short of the requirements under Order XX rule 7 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the "CPC") in that the date shown in the decree does not agree with the date of the judgment from which it was extracted. However, Mr. Nyika was quick to point out that the discrepancy was a result of human error which eluded not only his eyes but also the trial court and this Court as well.

According to him, the discrepancy falls into the categories of clerical errors and mistakes which can be easily corrected by the Court under

section 96 of the CPC in the exercise of its power of revision under section 4(2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] ("the AJA"). This is so, Mr. Nyika argued, this Court has the same power with the High Court when exercising its revisional jurisdiction vested on it by section 4(2) of the AJA. As to how that power should be exercised, Mr. Nyika contended that having noticed the discrepancy, the Court can simply make an order that the date in the decree should read 9th June, 2017 instead of 25th May, 2017 and that will be in order instead of remitting the record to the trial court for correction.

Alternatively, Mr. Nyika invited the Court to invoke rule 111 of the Rules by allowing an amendment of the decree to give effect to the spirit of the overriding objective brought about by section 3A(1),(2) and 3B(i)(a),(b) and (c) of the AJA notably, dispensation of substantive justice. The learned advocate reiterated that the error in inserting a correct date in the decree was a result of a human error which cannot be punished by striking out the appeal. Whilst conceding that rule 96(8) of the Rules bars further applications for lodging supplementary records, the learned advocate argued that the current prayer is not covered by the rule because it is not similar to the previous one made on 19th July 2019. To Mr. Nyika,

Rule 96 (8) of the Rules was not intended to bar fresh applications of a different nature on lodging supplementary records. The learned advocate invited the Court to allow his application and made an express undertaking to defray the costs of the adjournment.

Not quite too common but unsurprisingly, Mr. Malima readily conceded to the submissions and the prayer made by his learned friend urging the Court to grant the prayer without any order for costs despite Mr. Nyika's express indication to the contrary.

Ordinarily, after hearing arguments in support of the unopposed prayer, we could have made a decision thereon instantly. However, we reserved our ruling in view of the issues involved in the arguments and the prayer which required our further consideration and determination which we are now about to make in this ruling.

There is no dispute that the record of appeal is still wanting notwithstanding the supplementary record lodged by the appellant pursuant to the Court's order made on 9th July 2019. As conceded by both learned advocates, the decree is defective in that it is shown to have been issued before the pronouncement of the judgment from which it should

have been extracted. That "decree" offends Order XX rule 7 of the CPC which requires the date of the decree to match with the date of judgment. There is a plethora of authorities holding that a decree whose date differs from the date of judgment is defective and that it is as good as no decree had come into existence rendering the appeal incompetent. If any authority will be required, a few of them will suffice for illustrative purpose. See for instance: **Tanzania Motor Services Ltd v. Tantrack Agencies,** Civil Appeal No. 61 of 2007 cited in **Robert Edward Hawkins & Another v. Patrice P. Mwaigomole,** Civil Appeal No. 48 of 2006 and **Kapinga & Co. Advocates v. National Bank of Commerce Ltd,** Civil Appeal No. 42 of 2007 (all unreported). In all cases where defective decrees were incorporated in the record of appeal, the Court held such appeals to be incompetent and struck them out.

Despite the law being settled as demonstrated in the cases cited above, Mr. Nyika would have us hold that the wrong dating of the decree is a mere clerical error capable of being corrected by this Court in the exercise of its revisional jurisdiction under section 4(2) of the AJA. That argument sounds attractive but with respect, we decline to go along with the learned advocates. This is so because on the authorities referred to

shortly, a defective decree is as good as no decree had come into existence and so there will be nothing for us to step into the shoes of the High Court and correct it under section 96 of the CPC. Apparently, Mr. Nyika did not cite to us any authority to back up his assertion, neither have we come across any such authority contrary to the settled legal position on the status of defective decrees incorporated in the records of appeal. With respect, those authorities remain valid until the Court decides otherwise and so we are bound to follow them in this appeal.

It follows thus that the invitation to us to invoke our revisional power under section 4(2) of the AJA falls away. We cannot exercise that power to make good an appeal which is otherwise incompetent for want of a valid decree incorporated in the record of appeal as required by rule 96(1) (h) of the Rules. Having disposed of the first argument, we are firmly of the view that the prayer for the amendment of the defective decree under rule 111 of the Rules is equally misconceived. We do not see how the appellant can amend the defective decree other than having it done by the trial court and have a proper decree find its way into the record without filing a supplementary record. Plainly, that move cannot be resorted to without offending rule 96 (8) of the Rules which precludes the Court from

entertaining further applications for rectification of incomplete record of appeal once a litigant is granted leave to do so in accordance with rule 96 (7) of the Rules. Although Mr. Nyika thinks otherwise, we will demonstrate shortly why the learned advocate's contention is factually and legally flawed.

It is common ground that this Court granted leave to the appellant to cure the defect in the otherwise incompetent appeal by reason of an incomplete record. This we did under rule 96 (7) of the Rules. The mischief behind rule 96(7) of the Rules was to put life to incompetent appeals suffering from defects in the records of appeal including, but not limited to non-inclusion of essential documents envisaged under rule 96 (1) and (2) of the Rules.

We think it will now be clear that rule 96 (7) was added with a view to giving effect to the overriding objective particularly section 3A (1) (c) of AJA and rule 2 of the Rules which enjoin the Court to handle all matters before it with a view to attaining timely disposal of the proceedings at a cost affordable by the respective parties. That explains why, instead of striking out the appeal for being incompetent which would have meant that

the appellant starting the appeal process afresh, it granted leave to lodge a supplementary record. That was perfectly done to attain not only final disposal of the appeal but also at a cost affordable to the appellant.

Concomitant with the above, it is to be noted that section 3B (2) (b) of AJA enjoins the Court to ensure efficient use of the available judicial and administrative resources. It is for this reason, rule 96 (8) was added to preclude the Court from entertaining further applications meant to cure like defects in the records of appeal. The bottom line in our view is that defects in the record of appeal attributed to the omission of essential documents required under rule 96 (1) or (2) of the Rules can only be cured once in terms of rule 96 (8) of the Rules. Unlike Mr. Nyika, we are unable to find purchase in his argument that a litigant is given a blank cheque to resort to rule 96(7) of the Rules as long as the subsequent application does not relate to the same documents for which leave to file a supplementary record was granted in a previous application. In our view, rule 96(8) couched in mandatory terms, serves as a tool to check sloppiness amongst litigants which, if not controlled may militate against the very spirit behind the overriding objective. That being the case, we do not think the learned

counsel is right in inviting the Court to invoke the overriding objective to cure yet another defect in the record of appeal.

Luckily, the Court has had occasion to pronounce itself on the extent to which it can invoke the overriding objective in **Njake Enterprises Limited v. Blue Rock Limited &Another,** Civil Appeal No. 69 of 2017 and **Mondorosi Village Council & Two Others v. Tanzania Breweries Limited 4 Others,** Civil Appeal No. 66 of 2017 (both unreported). The two cases involved failure by the appellants to institute appeals within the prescribed period contrary to rule 90(1) of the Rules. Whilst taking cognizance of the overriding objective principle, the Court made it clear that the said principle cannot be invoked blindly in disregard of the rules of procedure couched in mandatory terms. In both cases, the Court struck out the appeals upon being satisfied that the appellants had failed to comply with rule 90 (1) of the Rules. In this appeal, there is non-compliance with rule 96(1) (h) of the rules on account of omission to include a valid decree in the record of appeal. The importance of a decree in a record of appeal was stressed by the Court in **AMI (T) Limited v. OTTU on behalf of P.L Assenga & 106 Others,** Civil Appeal No.76 of 2002 (unreported) in which a wrongly dated decree was incorporated in the record of appeal. Counsel

for the appellant invited the court to have regard to Article 107 A (2) of the constitution of the United Republic of Tanzania, 1977 commanding courts to dispense justice without being unduly tied with rules of technicalities. Referring to its earlier decision in **Zuberi Mussa v. Shinyanga Town Council,** Civil Application No. 100 of 2004 and **China Henan International Cooperation Group v. Salvand K.A. Rwegasira,** Civil Reference No. 22 of 2005 (both unreported) the Court held:

> *"A decree is a vital document in appeal in terms of rule 89 (1) (2) of the Court Rules [Now rule 96 (1) (2) of the Court Rules] for without a decree there is no appeal. Such noncompliance is fundamental and goes to the root of the matter and in our humble view, article 107A (2) (e) cannot resurrect a non-existent appeal...."*

With respect, we are inclined to take a similar view in this appeal. As we held in Njake **Enterprises Limited** (supra) and **Mondorosi Village Council** (supra), we find it inappropriate to invoke the overriding objective blindly on such a non-compliance which goes to the root of the appeal and the cross appeal as well. If we may be permitted to go further, Kenya has similar provisions dealing with overriding objective and so it may not be out

of place to pick a leaf on how the principle has been applied by superior courts in the neighbouring jurisdiction. In **Nicholas Kiptoo Arap Kolil Salat v. Independent Electoral and boundaries Commission & 6 Others** [2013] EKLR the Court of Appeal of Kenya in the majority decision by Ouko, JA stated:

> *"It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without* "undue regard" *to procedural technicalities". [at page 7]*

What emerges from the above decision is that the overriding objective is not meant to overhaul the rules of procedure but facilitate their application. As the Supreme Court of Kenya stated in **Mradina Sureshi Kantaria v. Suresh Nanalal Kantaria**, Civil Appeal No. 277 of 2005 (unreported), the overriding objective is not a panacea for all ills and in every situation. A foundation of its application must be properly laid and the benefits of its application judicially ascertained.

We wish to recap that considering that the Court had granted the appellant leave to lodge a supplementary record to cure the defects in the record of appeal, rule 96 (8) of the Rules prohibits us to invoke rule 96 (7) yet again. As the learned advocates may appreciate, rule 96(8) is couched in mandatory terms which we cannot gloss over and grant leave to lodge a second supplementary record of appeal in the manner prayed by the learned advocates.

That said, we decline the invitation extended to us by the learned advocates and hold that the appeal is patently incompetent on account of an invalid decree. Such an incompetent appeal is accordingly struck out so

is the notice of cross appeal anchored on an invalid decree. Since the issue was raised by the Court *suo motu*, we make no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 9th day of April, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 15th day of April, 2020 in presence Mr. Jonathan Wangubo counsel for the appellant, and Miss. Doreen Chiwanga holding brief of Beatus Malima, counsel for the Respondent, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL