

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUSSA, J. A., MWARIJA, J. A., And MWANGESI, J. A.)

CIVIL APPEAL NO.55 OF 2016

BABITO LTD ----- APPELLANT

VERSUS

FREIGHT AFRICA NV - BELGIUM -----1ST RESPONDENT

TAHIT/SO MURTZA VALJI-----2ND RESPONDENT

TOTAL FREIGHT SERVICES (T) LTD -----3RD RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania

At Moshi)

(Sumari, J.)

Date the 12th day of November, 2015

In

High Court Civil Case No. 2 of 2015

RULING OF THE COURT

26th Febr. & 9th March, 2018

MUSSA, J. A.:

In the High Court of Tanzania, at Arusha registry, the appellant sued the respondents for payment of a sum of USD 71,400 or its equivalent in local currency. Ahead of the hearing of the suit, the respondents raised two preliminary points of objection to the effect that the suit was

hopelessly time barred and that the court lacked jurisdiction to entertain the matter.

Having heard either side on the raised issues, the presiding Judge (Sumari, J.) upheld the first preliminary point of objection and, consequently, the suit was dismissed for being filed outside the time prescribed by the law. The appellant is presently aggrieved upon a memorandum of appeal which is comprised of seven points of grievance.

At the very outset, the respondents greeted the appeal with a Notice of preliminary points of objection to the following effect:

"1. The Record of Appeal is grossly incomplete and incurably defective for the following reasons:-

a. Contrary to Rules 3 and 7 of Order XX of the Civil Procedure Code [Cap 33 R.E 2002] and contrary to Rule 96 (1) (g) and (f) of the Tanzania Court of Appeal Rules, 2009, the Record of Appeal does not contain valid copies of the Ruling, the Decree and Proceedings of the trial court.

b. Contrary to Rule 96(1) (c) of the Tanzania Court of Appeal Rules, 2009, the Record of Appeal does not contain the true copies of the pleadings filed in the trial court.

c. The Record of Appeal is defective for incorrect nomenclature of the parties to the appeal whereas the Respondents to the Appeal are erroneously and inconsistently referred to as Defendants.

2. That the appeal is incompetent such that contrary to Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009, the appellant has not filed submissions in support of the Appeal.”

At the hearing before us, the appellant was represented by Mr. Barak Chadha, learned Advocate, whereas the respondents had the services of three learned Advocates, namely, Messrs Nduruma Majembe, John Mhozya and George Njooka. We impressed upon learned counsel from either side to first address us on the preliminary points of objection and, as they did

so, the respondents abandoned the second limb of preliminary points of objection which complained of non-filing of written, submissions.

Elaborating on paragraph 1(a) and (b) of the preliminary points of objection, Mr. Mhozya submitted that the record of appeal is, in the main, wholly comprised of re-typed proceedings of the high Court as distinguished from copies of those proceedings. The learned counsel submitted that in lieu of obtaining and constituting the record with "*copies*" of the required documents from the High Court record, the appellant ventured into the exercise of retyping the documents which is contrary to the stipulation of Rule 96(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). To fortify the contention that the documents were of the appellant's own making, the learned counsel drew our attention to the fact that the proceedings as well as the Ruling and decree of the High Court are not certified, just as the signature of the presiding Judge is no show, contrary to Rules 3 and 7 of Oder XXX of the Civil Procedure Code. In the upshot, Mr. Mhozya urged that in the absence of valid documents, the record of the appeal has been rendered incomplete and, for that matter, incompetent.

As regards paragraph 1(c) of the preliminary points of objection, Mr. Mhozya submitted that the record of Appeal is just as well defective for incorrectly naming the respondents as "DEFENDANTS". The learned counsel had reference to the cover page and the index of the record wherein the respondents are, as such, named as the 1st, 2nd and 3rd defendants. Mr. Mhozya impressed upon us to find the misdescription to be fatal to the extent of vitiating the entire record of appeal.

In reply, Mr. Chadha conceded to the respondent's contention comprised in paragraph 1(a) and (b) of the preliminary points of objection to the effect that he, indeed, retyped the pleadings of the parties as well as the proceedings, ruling and the decree of the trial court. Nonetheless, the learned counsel for the appellant was quick to rejoin that such was a common and permissible practice which the appellants have repeatedly and regularly practiced throughout the years. Mr. Chadha did not, however, fortify his contention with any judicial authority but he submitted that the practice is sanctioned by Rule 12(1) of the Rules which stipulates:-

"Except where the nature of the document renders it impracticable, every document prepared for use in the Court shall be on paper of durable quality, shall be clear and easily legible and may be

produced by computer, printing, lithography, stencil duplicating photography, typewriting electronically generated or any combination of these media.” -

The learned counsel for the appellant urged that the provisions of Rule 96(1) of the Rules should not be read in isolation with the foregoing extracted provisions of Rule 12(1) of the Rules which, according to him, undoubtedly sanctions re-typed documents in a record of appeal.

Addressing us on paragraph 1(c) of the preliminary point of objection Mr. Chadha, conceded that the respondents were, indeed, incorrectly named as defendants in the cover page as well as the index of the record of appeal. But the learned counsel for the appellant, again, quickly rejoined that the misdescription is innocuous and that it did not work to the prejudice of the respondents, the more so as in the memorandum, as well as the Notice of Appeal, the respondents are correctly named.

Having heard counsel from either side, we propose to first address the complaint relating to the record of appeal being constituted by invalid documents. Our starting point should be Rule 96(1) which provides in part:

*"For the purposes of an appeal from the High Court or a tribunal, in its original Jurisdiction, the record of appeal shall, subject to the provisions of sub-rule(3) contain **copies** of the following documents-"*

[Emphasis added]

The required "**copies**" of documents are itemized immediately below the provision and, these include pleadings, the record of proceedings, the judgment or ruling and the decree or order.

If we may cull from the extracted portion of Rule 96(1) of the Rules, the specific requirement of the provision is for the record of appeal to contain "**copies**" of the itemized documents. Rule 12(1) which is being relied upon by Mr. Chadha does not make provision for documents to be contained in a record of appeal, rather, the same generally relates to the form of documents for use in the proceedings of the Court. Besides, if the authors of the Rules had desired that Rule 96(1) of the Rules be subjected to or complemented by Rule 12(1) of the Rules they could have easily expressed so as they did with respect to sub-rule 3 of Rule 96 of the Rules. To us, Rule 96(1) of the Rules is the requisite provision as to what should be contained in a record of appeal.

In the unreported Civil Appeal No. 60 of 2013, **Swisley Julius vs Vicent George and Two Others** the Court was confronted with a similar situation where Mr. Nyangarika, counsel for the appellants (as he then was) just as well contended that re-typing documents to contain a record of appeal was a common practice. Addressing the situation, the Court observed:-

"The issue is whether the appeal is competent. With due respect to Mr. Nyangarika, notwithstanding what he has been doing throughout the years, we are settled in our minds that the appeal is incompetent for want of authentic copies of documents necessary to form part of the Record of Appeal in terms of Rule 96(1) of the Rules. 'Retyping' a document is not making a copy of the document and we do not think that 'retyping' is what was envisaged in the drafting of the Rule. When we talk of a copy we are referring to such as duplicate, a photocopy, a replica and the like. (See synonyms in Thesaurus). The Black's Law Dictionary, 9th edition, describes a copy as an "imitation or reproduction of an original" when you 'retype' a document (like Mr. Nyangarika did in this case), you become the author of the document".

To say the least, we are minded of the same view and, in the result, this appeal has been rendered incompetent for non-compliance with the specifications of Rule 96(1) of the Rule. The appeal is, accordingly, struck out and, having so found, we need not decide this matter more than is necessary for its disposal. We, thus, refrain from a determination of the merits of paragraph 1(c) of the preliminary points of objection. Costs to the respondents. It is so ordered.

DATED at DAR ES SALAAM this 9th day of March, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

I certify that this is a true copy of the Original.



E. Y. Mkwizu
E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL