IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., KIHWELO, J.A. And MGONYA J.A.)

CIVIL APPLICATION NO. 70/01 OF 2022

MOHAN'S OSTERBAY DRINKS LIMITED ..... APPLICANT

VERSUS

BRITISH AMERICAN TOBACCO KENYA LIMITED ..... RESPONDENT

(Application arising from the judgment of the Court of Appeal of Tanzania, at Dar es Salaam)

(Wambali, Mwandambo And Kitusi, JJA.)

dated the 1st day of February, 2022
in
Civil Appeal No. 209 of 2019

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RULING OF THE COURT

14th Feb & 5th March, 2024

MWANDAMBO, J.A.:

On 1 February 2022, the Court rendered a judgment in Civil Appeal No. 209 of 2019 between British American Tobacco Kenya Limited and Mohan's Oysterbay Drinks Limited. That judgment followed a hearing of the appeal on 27 September, 2021 in the absence of the applicant who was the respondent upon default of appearance despite being duly notified of the date of hearing through its advocates. The

applicant who lost in the said appeal has now moved the Court under rule 112 (2) of the Tanzania Court of Appeal Rules,2009 (the "Rules") for a re-hearing of Civil Appeal No. 209 of 2019 ("the appeal") on its merits. The application is predicated on ground that the applicant was not aware of the date of hearing of the appeal, thereby denying her a fair opportunity to be heard. The notice of motion through which the application has been preferred is supported by an affidavit taken out by Rajesh Davda, the Managing Director of the applicant. Mr. Gaspar Nyika, learned advocate having the conduct of the matter in the appeal and in this application has sworn an affidavit in reply resisting the application.

Briefly, the facts giving rise to the instant application are not in dispute. They run as follows: The applicant was a plaintiff before the High Court (Commercial Division) in Commercial Case No. 90 of 2014 in which, judgment was entered against the respondent on 24 November 2016. The applicant was represented by two law firms in the trial court; M/s. Kesaria & Co. Advocates and D.K.M. Legal Consultants (Advocates).

Dissatisfied, on 20th November 2016, the respondent, who was and is still represented by M/s IMMMA Advocates, lodged a notice of appeal before the High Court and, on 6 December, 2016 the two law

firms which had represented the applicant in the High Court were served with a copy of the notice of appeal. Subsequently, the respondent instituted the appeal and served a memorandum and record of appeal on the applicant's erstwhile advocates followed by written submissions ahead of the hearing of the appeal.

When the appeal was called on for hearing on 27 September, 2021, neither the applicant nor her advocates entered appearance. Satisfied with evidence through an affidavit of the process server that M/s Kesaria & Co. Advocates and M/s. D.K. M. Legal Consultants Advocates had been duly served with notices of hearing, the Court proceeded with hearing in the absence of the applicant in terms of rule 112 (2) of the Rules. So much for the undisputed facts.

In the founding affidavit, the deponent who identifies himself as Managing Director avers that he never instructed erstwhile advocates to represent the applicant in the appeal; he gives two reasons for that assertions. One, the two law firms did not inform the applicant of the institution of any appeal and, two, for some time, he was outside the country on medical treatment and only returned on 1 October 2021 and, upon inquiry with the said firms, he was informed that they had no

instructions, hence, engagement of a new advocate to follow up the status of the matter in Court. He avers further that, the newly engaged advocate conducted court file perusal through which he discovered that no address for service was ever filed on the applicant's behalf neither did the erstwhile advocates file any written submissions in reply in the appeal for the Court's consideration at the hearing. It is also contended that as no notice of delivery of judgment was served, the applicant learnt of the judgment against her through Citizen newspaper.

Resisting the application, the deponent in the affidavit in reply avers that the applicant was aware of the lodging of the notice of appeal and pendency of the appeal right from the lodging of the notice of appeal to the institution of the appeal through her erstwhile advocates. Besides, it has been averred further that at some point between the lodging of the notice of appeal and institution of the appeal, M/s Kesaria & Co. Advocates took part in an application for amendment of the notice of appeal vide, Civil Application No. 47/16 of 2017. Above all, it is averred that, neither did the erstwhile advocates file any notice of change of advocate in Court nor inform the respondent's advocates of such change, if any, despite being served with several documents including written submissions on which they filed no reply. With the

foregoing, the respondent avers that the applicant has not demonstrated sufficient cause to warrant the grant of the prayers sought.

Mr. Kassim Nyangarika, learned advocate retained to prosecute the application lodged written submissions ahead of the hearing. So did Mr. Gaspar Nyika learned advocate, representing the respondent. Both learned advocates had opportunity to highlight on a few aspects in their respective submissions at the hearing of the application.

From the averments in the affidavits and the submissions, two or so issues arise for the determination of the application. The first is whether the applicant was aware of the hearing of the appeal and if so, whether she was prevented by sufficient cause from appearing. The issue has become necessary because from the founding affidavit, the deponent contends that he was outside the country attending medical treatment so he could not have been made aware of the hearing of the appeal.

Relying on the averments in the founding affidavit, Mr. Nyangarika attacked the previous advocates for failure to perform their duties properly to their client which resulted into the ex parte hearing of the appeal. While it is not disputed that the previous advocates were

served with copies of the notice of appeal and notice of hearing, counsel submitted that, the said advocates did not notify the appellant. It is his further submission that, in any case, the said advocates were yet to be instructed for the purpose of the appeal. That is so considering, non-compliance with rule 86 and 86A of the Rules; on the other hand, there is no proof of service of the notices or other court documents as required by rule 22 (6) of the Rules.

Counsel impressed upon us the obvious, that is; an advocate acts as an agent of the client and, in the absence of the latter's instructions, it could not be assumed that the previous advocates were instructed to accept service of the court process more so because, such instructions could have been given through the applicant company's board resolution in terms of rule 30 (3) of the Rules. For this proposition, Mr. Nyangarika cited the Court's decision in **Ursino Palms Estate Limited v. Kyela Valley Food Ltd & 2 Others,** Civil Application No. 28 of 2014 (unreported) and a decision of the High Court of Uganda in **Bugerere Coffee Growers Ltd v. Sebaduka & Another** [1970] 1 EA 147 for the proposition that, institution of a suit by a company requires a board resolution.

Next, Mr. Nyangarika threw blames on the previous advocates as officers of the court for their failure to send the documents received from the court to the applicant who may have made a decision to retain them or engage new counsel. In this case, he argued, since this was not done, it cannot be assumed that they were retained to represent the applicant in the appeal.

On the other hand, counsel addressed us on rule 84 (2) of the Rules which gives an option to an intending appellant to serve a copy of notice of appeal on the respondent at the address he gave in the proceedings in the High Court. Mr. Nyangarika contended that, notwithstanding the fact that the applicant had engaged two law firms through which service of documents during the proceedings in the High Court was to be affected the respondent should have served the applicant directly because the erstwhile advocates were engaged for the trial only. Mr. Nyangarika suggested that short of that, there ought to have been proof that the erstwhile advocates had served the applicant with such documents which is not the case in this application. It was contended further that, as this was not done the applicant was condemned unheard during the hearing of the appeal for no fault of

hers which was in contravention of the fundamental right to be heard under Article 13 (6) (a) of the Constitution. The learned advocate cited to us several decisions of the Court on the effect of violation of the right to be heard on the impugned decision.

Unfinished, Mr. Nyangarika argued that despite lodging a notice of change of advocate, the Court did not act upon it as a result judgment was delivered in the absence of the applicant's duly engaged advocate. On the whole, counsel contended that the applicant has made out a case for the Court to grant the application and make an order for the rehearing of the appeal.

Mr. Nyika's reply both written and oral was to the effect that the applicant has not made her case that she was prevented by any sufficient cause from appearing during the hearing of the appeal, an overriding factor under rule 112 (2) of the Rules. Mr. Nyika submitted that the argument that the applicant was not aware of the pendency of the appeal lacks merit because her erstwhile advocates who were served with a copy of notice of appeal never filed any notice of change of advocate. Instead, Mr. Nyika argued, the applicant's previous advocates took part in subsequent proceedings particularly in Civil Application No.

47/16 of 2017 for amendment of a notice of appeal by filing an affidavit in reply and a notice of preliminary objection.

Besides, it was argued that, the said advocate accepted service of the memorandum and record of appeal in the appeal as well as written submissions and notice of hearing of the appeal. Next Mr. Nyika joined issue with the applicant's counsel on the construction of rule 84 (2) of the Rules. He argued that, the said rule imposes no duty on the appellant to serve the respondent a notice of appeal where such respondent was represented by an advocate in the High Court and has not given a different address. Counsel further challenged the applicant's submissions on the claim that rule 22 (6) of the Rules on service of Court documents as irrelevant since, the applicant was aware of the pendency of the appeal through her advocates. Counsel took the view that, the claim on the failure by the applicant's former counsel to inform her is an afterthought and, if we may be permitted to say something at this stage, that was a matter between the applicant and her advocates.

Then we heard Mr. Nyika on the absence of a board resolution as required by rule 30 (3) of the Rules to which he argued that such requirement applies where a company appears through a director,

secretary or a manager excluding an advocate. As regards failure to serve the applicant with notice of delivery of judgment, Mr. Nyika argued that there was no such requirement to serve a party who did not participate during hearing. At any rate, the learned advocate contended that such failure is irrelevant for the purpose of the application. He wound up his address by inviting the Court to dismiss the application.

In his final address, Mr. Nyangarika argued that rule 30 (3) of the Rules is applicable across the board and so, since there was no board resolution from the applicant instructing the former advocates to represent her on appeal, service of notice of hearing on the former advocates, was ineffectual.

We prefer to begin our discussion with the argument on rule 30 (3) of the Rules that the requirement for a board resolution applies across the board. Rule 30 stipulates:

> *"30-(1) Subject to the provisions of rules 31 and 33, a party to any proceedings in the Court may appear in person or by advocate.*
>
> *(2) A person not resident of the United Republic may appear by lawfully authorized attorney.*

(3) A corporation may appear either by advocate or by its director or manager or secretary, who is appointed by resolution under the seal of the company, a sealed copy of which shall be lodged with the Registrar.

(4) Any person under disability may appear by advocate or by his committee, next friend or guardian ad litem as the case may be."

The above quoted rule regulates appearances before the Court by different categories of litigants. Whereas individual litigants may appear in person or by advocates, appearances by corporations are through either advocates or directors or managers or secretaries appointed by a board resolution.

Mr. Nyangarika would have us construe the rule such that a board resolution is a mandatory requirement regardless whether a corporation appears through an advocate or director, manager or secretary relying on the Court's decision in **Ursino Palms Estates Limited** (supra). With respect, we take a contrary view since we are satisfied that that decision is distinguishable from the instant application neither is it an authority for the proposition that absence of a board resolution is a fatal irregularity. We say so considering that the decision relied upon by the learned single Justice, to wit, **Bugerere Growers Ltd v. Sebaduka &**

Another [1970] IEA 147, was held to be of limited application to cases involving disputes within the company. In **Simba Papers Converters Limited vs Packaging & Stationery Manufacturers Limited & Another** (Civil Appeal No. 280 of 2017) [2023] TZCA 17273 (23 May 2023), the Court drew inspiration from the work of the distinguished authors of Pennington's Company Law, 15th Edition, London, Butterworth's; Robert Pennington summed up thus:

> *"The intention of the legislature was undoubtedly that the Court should assist the company to achieve its expressed objects by implying all powers necessary for it to do so,.... On the whole the courts have been liberal in implying powers.*
>
> *Thus, powers have been implied to do acts obviously appropriate to the carrying on of any business such as appointing agents and engaging employees; and instituting, defending and compromising legal proceedings." (at Page 28).*

The suit from which the appeal arose did not involve internal squabbles within the applicant, rather, breach of contract between herself and the respondent. Accordingly, in as much as there was need for a board resolution for that suit, there could be none for the purpose

of service of notice of appeal under rule 84 (1) of the Rules. Neither do we subscribe to the argument that appearance by a company through an advocate requires a board resolution. By parity of reasoning, in as much as no authorization is required when an advocate appears before the Court representing a natural person in terms of rule 30 (1) of the Rules, none is required when such an advocate appears representing a company under rule 30 (3).

Be it as it may, even though the Single Justice of the Court took the view that rule 30 (3) of the Rules was wide enough to cover advocates appearing for companies in **Ursino Palms Estate Ltd**, he did not find the application before him incompetent. Instead, the learned Single Justice proceeded to determine the application on merits.

What emerges from the above is that the mere absence of a board resolution does not invalidate a thing done by an advocate. Accordingly, even if we were to accept that a board resolution was indeed required, the erstwhile advocates accepted service of the notice of appeal, memorandum and record of appeal as well as notice of hearing and that, the absence of it did not have any bearing on the judgment, subject of this application. Indeed, the affidavit in reply in Civil

Application No. 47/16 of 2017 a copy of which is annexed to the affidavit in reply deponed to by Dilip Kesaria reveals that the deponent stated to have been authorized by the applicant (then respondent) to resist the application, subject of a notice of appeal sought to be amended in that application. It is surprising that the applicant disowns her own advocate for lack of authority as she does in this application. We shall now turn our attention to arguments on rule 84 (1) of the Rules.

Mr. Nyangarika's argument is that it is mandatory to serve the respondent in person with a copy of notice of appeal within 14 days in terms of rule 84 (1) of the Rules. According to him, resort to service at the address used in the High Court is optional. That view is not shared by Mr. Nyika and with respect, we agree with him since we are satisfied that, rule 84 (2) of the Rules is too clear to be given the interpretation that Mr. Nyangarika invites us to give. On the contrary, while one may agree with Mr. Nyangarika that an intended appellant may serve a copy of a notice of appeal directly, the same rule permits service of such copy at the address used by the respondent in the proceedings in the High Court including that of an advocate who represented him notwithstanding that such an advocate may not have been retained for

the purpose of an appeal. There is nothing in rule 84 (2) of the Rules imposing an absolute duty to an intended appellant to serve the respondent directly to the exclusion of the advocate who retained him in the High Court.

There is no dispute here that the respondent was successfully represented by the two law firms in the High Court. We note from para 5 of the founding affidavit that, after delivery of judgment of the High Court against the respondent, the two law firms informed the applicant about it on an unknown date. At that time, it was not known if the respondent would have opted to appeal. It is common cause that the respondent's notice of appeal was lodged on 29 November, 2016. A copy thereof was served on the erstwhile advocates on 6 December, 2016 in terms of rule 84 (2) of the Rules. There could be a possibility that, the erstwhile advocates did not inform the applicant but that is, in our view, a matter between her and such advocates rather than being a ground for saying, as the respondent does, that the said advocates had no instructions to accept service of the notice of appeal. The deponent to the founding affidavit is so economic with information on what transpired between the date on which he last communicated with the

previous advocates to the date he instructed the current advocate. The applicant has made no attempt to obtain an affidavit from any of the previous advocates neither has he stated in the affidavit what steps has he taken against the said advocates for failure to inform him of the pendency of the appeal and the notice of hearing.

The totality of the foregoing militates against the claim that the applicant was unaware of the pendency of the appeal and hearing thereof and hence condemned unheard. Much as we have no quarrel with the authorities placed before us on the consequences of a decision made without affording an adverse party an opportunity to be heard, we are, with respect, afraid that the applicant has not satisfied us that he was indeed not aware of the pendency of the appeal or the date of its hearing as contended. On the contrary it is plain that the notice of hearing was indeed served on her erstwhile advocate, who defaulted appearance resulting in the Court proceeding with hearing ex parte in terms of rule 112 (2) of the Rules. As rightly submitted by Mr. Nyika, no sufficient cause has been shown to move the Court to exercise it discretion under rule 112 (2) of the Rules for a rehearing of the appeal. Before we conclude, we wish to state that the argument that the

applicant was not notified of the delivery of judgment may be valid but, as submitted by Mr. Nyika quite irrelevant for the purpose of this application and we reject it.

In the upshot, we find no merit in this application and dismiss it with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 5th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 5th day of March, 2024 in the presence of Mr. Kassim Nyangarika, learned Counsel for the Applicant and Ms. Antonia Agapiti, learned Counsel for the Respondent is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL