IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MUSSA, J.A. And LILA, J.A.)

CIVIL APPEAL NO. 73 OF 2009

1. TINA & CO. LIMITED
2. WOLFGANG SPENGLER .....APPELLANTS
3. MRS. CHRISTINE SPENGLER

VERSUS

EURAFRICAN BANK (T) LTD
NOW KNOWN AS BOA BANK (T) LTD.....RESPONDENT

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

(Werema, J.)

dated the 24th day of April, 2009
in
Commercial Case No. 80 of 2006

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## RULING OF THE COURT

3rd & 18th August, 2016

**MUSSA, J.A.:**

In the High Court of Tanzania (Commercial Division), at Dar es Salaam, the respondent, a banking institution, successfully sued the appellants for the recovery of sums of Tshs. 45,799,888.39 and US$ 7,101.91 which were allegedly owing on account of overdraft facilities that were extended by the respondent to the first appellant. The liability

of the second and third appellants was dejured from their respective personal guarantees which they executed in favour of the respondent as security for the overdraft facilities. The appellants are aggrieved upon a memorandum of appeal comprised of four points of grievance which we need not recite.

When the appeal was called on for hearing before us, the appellants were represented by Mr. Audax Vedasto, learned Advocate, whereas the respondent had the services of Mr. Dilip Kesaria, also learned Advocate. As the learned counsel for the appellants geared towards arguing the appeal, we prompted him to comment upon two disquieting features which are apparent from the record of appeal. The **first,** relates to the letter through which the appellants applied to be supplied with certified copies of the proceedings, judgment and drawn order of the High Court for appeal purposes. The irony is that it is not apparent from the body of the letter, which is annexed at page 833 of the record of appeal, that the same was copied and served on the respondent. It is common ground that, on the strength of the impugned letter, the Deputy Registrar issued a certificate of delay under Rule 83(1) of the defunct Court of Appeal Rules, 1979 (the old Rules) excluding the

period from the 28th April, 2009 to the 14th July, 2009 in computing the time within which the appeal was to be instituted. Thus, in the light of the certificate, the appeal was formally lodged on the 27th August, 2009. **Second**, we invited Mr. Vedasto's comment on some documents which were mentioned in the record of proceedings and, yet, the same have been omitted from the record of appeal. These are, a Ruling delivered on the 13th March, 2007 which is referred at page 107 of the record; a letter appearing as item 9 (page 113) of the list of documents to be relied upon by the plaintiff (the respondent herein); and a letter appearing as item 6 (page 315) of the list of documents to be relied upon by the defendants (the appellants herein).

As regards the first issue of enquiry, Mr. Vedasto seemed to suggest that the Court should not be concerned to raise the issue of the non-service of the impugned letter in a situation, such as the present, where the respondent did not complain. The Court, he urged, **"...has, rather, to take that service was done unless a party who was to be served alleges and proves non service."** As to the mode of proof, the learned counsel for the appellants referred to the decision of

the Court in **Sebastian Kinyondo Vs Dr. Medard Mutungi** [1999] TLR 479 where it was observed:

> *"...where in the preliminary objection, the respondent alleges that he was not served with a copy of the notice of appeal within seven days of the Notice of Appeal, he has a greater burden to discharge than the appellant..."*

Coming to the second issue of our concern, Mr. Vedasto conceded that the Ruling which was delivered on the 13th March 2007 is not annexed to the record of appeal. Nonetheless, he was quick to rejoin that the Ruling was, after all, not contemplated in the list of documents which were required to be contained in a record of appeal as enumerated under Rule 89(1) (a) to (k) of the old Rules which were applicable at the time of compiling the record. In the premises, he concluded, it was needless for the appellants to have to annex the Ruling in the record of appeal.

Speaking of the two referred letters which were appended in the list of documents to be relied upon by, respectively, the plaintiff (respondent) and the defendants (appellants); Mr. Vedasto contended

that Rule 89(1) (f) of the old Rules only contemplated such documents which were put in evidence at the hearing as distinguished from those which were listed as being desired for production. He, therefore, contended that inasmuch as the two letters were not put in evidence, it was unnecessary for the appellant to attach them in the record of appeal.

In response, Mr. Kesaria vigorously contended that the letter through which the appellants applied to be supplied with the records of the High Court proceedings is materially inadequate for not being copied to the respondent. The learned counsel for the respondent submitted that the fact that the respondent did not raise a preliminary objection would not preclude the Court from intervening where appropriate. Mr. Kesaria urged that since there is no indication on the face of it to the effect that the letter was served on the respondent, the inescapable consequence is that the appellant should not be allowed to rely on the certificate of delay issued by the Deputy Registrar. That being the situation, the appeal was required to be lodged within sixty days from the 28th April, 2009 when the Notice of Appeal was filed and, having

been lodged on the 24th August 2009, he said, the appeal is hopelessly out of time and, accordingly, he prayed that the same be struck out.

As regards the second issue of enquiry, whilst conceding that it was needless to annex the two letters which were not put in evidence, Mr. Kesaria urged that the Ruling which was pronounced on the 13th March, 2007 ought to have been annexed in the record much as it constituted part of the interlocutory proceedings envisaged by Rule 89(1) (k) of the old Rules. Thus, he concluded, to the extent that the record of appeal was just as well incomplete, the appeal is, similarly, incompetent and, on that score, it should be befallen by the same fate of being struck out.

Having heard the learned rival contentions, we propose to first address the issue relating to the letter through which the appellants applied to be supplied with certified copies of the High Court documents for appeal purposes. As hinted upon, the issue was raised by the Court *suo motu* and, for that matter, we should clearly express from the very outset that the Court is not precluded from raising the issue even where, as here, the respondent did not formally complain that the letter was

not served upon her. On the contrary, it was incumbent upon us to raise the issue so as to satisfy ourselves that the appellants are entitled to the certificate of delay that was issued by the Deputy Registrar in the wake of the request for the documents which was made through the impugned letter. As it were, our enquiry was necessitated by Rule 83(1) and (2) of the old Rules which governed the appeal at hand and which made provision as follows:-

> *"83(1) Subject to the provisions of Rule 122, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-*
>
> *(a) a memorandum of appeal, in quintuplicate;*
>
> *(b) a record of appeal in quintuplicate;*
>
> *(c) Security for the costs of the appeal;*
>
> *save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date*

*of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy of the appellant.*

2. ***an appellant shall not be entitled to rely on the exception to sub rule (1) unless his application for the copy was in writing and a copy of it was sent to the respondent".*** [Emphasis supplied]

The bolded sub rule (2) tells it all: For an appellant to be entitled to the proviso to Rule 83(1), of the old Rules, it is imperative upon him to serve the respondent with a copy of the letter applying for the proceedings of the High Court. It is noteworthy that the requirement

was replicated in Rule 90(1) and (2) of the present Tanzania Court of Appeal Rules, 2009 (the Rules). Thus, the consequential question which necessarily presents itself in the situation at hand is whether or not the impugned letter was served upon the respondent. The question need not detain us, the more so as on, at least, two previous occasions the Court had to grapple with a corresponding issue as to whether or not a Notice of Appeal was served on a respondent. Such was an issue of concern in Civil Appeal No. 107 of 2008 – **Wilfred Muganyizi Rwakatare vs Hamisi Sued Kagasheki and Another** (unreported), where the Court observed:-

> *"There is no indication by signature, rubber stamp or whatever to prove that the 1st Respondent ever received the Notice of Appeal. We are of the firm view that if the 1st Respondent had been duly served with a Notice of Appeal in person, or through his advocate, whoever received the Notice of Appeal would have signed and such signature would be apparent to prove service...."*

The foregoing decision was subscribed and followed in another unreported Civil Appeal No. 53 of 2007 – **Rowland Faini Sawaya t/a Sawaya Bus versus Cornel K. Tarimo and Another** where the Court stated:-

> *".... service of the Notice of Appeal on a respondent must be apparent on the face of the Notice itself, such as by his signature or stamp or that of his advocate".*

By analogy, we so find, service on a respondent of a copy of the letter requesting for proceedings of the High Court must be apparent on the face of the letter itself such as by the respondent's signature or, as the case may be, by the stamp and signature of his advocate.

No such proof of service is apparent on the face of the impugned letter and, that being so, the appellants would not be entitled to rely on the certificate of delay issued by the Deputy Registrar. In the absence of the certificate, it is beyond question that the appeal was lodged outside the prescribed sixty days and the same is, so to speak, time barred and incompetent. Having so adjudged, we are constrained to

strike out the appeal and, since we need not determine this matter more than is necessary for its disposal, we refrain from making any finding with respect to the other issue of our enquiry. As the issue of incompetence was raised *suo motu* by the Court, we make no order as to costs.

DATED at DAR ES SALAAM this 11th day of August, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL