IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A., KOROSSO, J.A., KENTE, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 37 OF 2018

GIDEON WASONGA..... 1ST APPELLANT
HARRY MSAMILE KITILYA..... 2ND APPELLANT
SHOSE MORI SINARE..... 3RD APPELLANT
SIOI GRAHAM SOLOMON..... 4TH APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT
THE PREVENTION AND COMBATING
OF CORRUPTION BUREAU.....2ND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

[Appeal from the judgment and decree of the High Court of Tanzania, Main Registry at Dar es Salaam]

(Kihio, Makuru, Mwangesi JJ,.)

dated the 25th day of April, 2017
in
Miscellaneous Civil Cause No. 14 of 2016

.....

RULING OF THE COURT

28th October, & 23rd December, 2021

MKUYE, J.A.:

The appellants herein, Gideon Wasonga, Harry Msamile Kitilya, Shose Mori Sinare and Sioi Graham Solomon were charged before the Resident Magistrate's Court of Dar es Salaam Region at Kisutu with a number of criminal offences, to wit, conspiracy to commit an offence contrary to section 384; forgery contrary to sections 333, 335 (a) and 337; uttering false documents contrary to section 342; and obtaining

money by false pretences contrary to section 302, all of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019] together with money laundering contrary to sections 12 (4) and 13 (a) of the Anti-Money Laundering Act, No. 12 of 2006. The appellants pleaded not guilty to the charge and they were subsequently remanded in custody.

The appellants' grievance leading to the institution of Misc. Civil Cause No. 14 of 2016 in the High Court was based on the prosecution having preferred and charged them with, among others, the offence of money laundering which is a non bailable offence by virtue of section 148 (5) of the Criminal Procedure Act [Cap 20 R.E 2002, now R.E 2019] as amended by Act No. 15 of 2007 (the CPA) and section 36 (2) of the Economic and Organized Crime Control Act [Cap 200 R.E 2002, now R.E 2019] (the EOCCA). The appellants after having been denied bail opted to petition the Attorney General, the Prevention and Combating of Corruption Bureau and the Director of Public Prosecutions challenging the provisions of section 148 (5) of the CPA and section 36 (2) of the EOCCA contending that the said provisions are unconstitutional and sought, *inter alia* to have them declared so for offending Articles 13 (4) and (6) (a) (b) (c) and (d) and Article 17 (1) of the Constitution of the United Republic of Tanzania, 1977 [Cap 2 R.E. 2002].

At the inception of the hearing of the matter before the High Court, the respondents raised preliminary objections which were dismissed and the hearing proceeded before a panel of three judges (Kihiyo, Makuru and Mwangesi, JJ). Upon hearing both parties, the trial court found that the provisions of section 148 (5) of the CPA and section 36 (2) of the EOCCA are constitutional. Consequently, the matter was dismissed with costs.

Aggrieved, the appellants have now appealed to this Court fronting a memorandum of appeal containing six grounds of appeal which for a reason to become apparent in the due course, we shall not reproduce them.

Before the appeal was called on for hearing the respondents raised a preliminary objection on three points of law the notice of which was lodged earlier on to the effect that:

1) *The certificate of delay contained in the record of appeal is fatally defective for excluding the period from 27th April, 2017 and 23rd May, 2017 when the appellants applied for copies of proceedings, judgment and decree and lodged a notice of appeal respectively up to 19th February, 2018 when the appellants were supplied with requested documents, cannot be reckoned for the purpose of*

excluding time under Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009.

2) *(i) The appellants have failed to serve the Notice of Appeal to the Respondents within 14 days from the date of lodging thus contravening the mandatory provision of Rule 84 (1) of the Tanzania Court of Appeal Rules of 2009.*

(ii) The appellants have failed to serve the memorandum of appeal to the respondents within 7 days from the date of lodging thus contravening Rule 97 (1) of the Tanzania Court of Appeal Rules, 2009.

3) *The appeal is Res judicata as the same subject matter was previously determined in the case of the* ***Attorney General versus Dickson Paulo Sanga,*** *Civil Appeal No. 175 of 2020, Court of Appeal at Dar es Salaam (unreported).*

When the appeal was called on for hearing on 18th October, 2021, the 1st appellant was represented by Dr. Rugemeleza Nshala and Mr. Jeremiah Mtobesya learned advocates; the 4th appellant was represented by Messrs. Alex Mgongolwa and Godwin Nyaisa also learned advocates while the 2nd and 3rd appellants were not in attendance. On the other hand, all respondents were represented by Messrs Abubakar Mrisha, Tumaini Kweka, Mussa Mbura, Hangi Chang'a and Deodatus

Nyoni, all learned Principal State Attorneys assisted by Mr. Salimu Msemo and Ms. Vivian Method, both learned Senior State Attorneys together with Ms. Jacquiline Kinyasi, learned State Attorney.

On set, Mr. Mgongolwa intimated to the Court that the 4th appellant was no longer interested in pursuing the appeal and thus he prayed to withdraw the appeal and their involvement in the appeal which prayer was granted and we marked the same withdrawn under Rule 102 (1) of the Tanzania Court of Appeal Rules 2009 (the Rules) and discharged the advocates who represented him. However, due to lack of proof of service on the 2nd and 3rd appellants and their advocates, we adjourned the hearing until on 28th October, 2021 in order to pave way for their attendance.

When the matter was called on for hearing on scheduled date, the appearance was the same as on 18th October, 2021 except for the exclusion of Messrs. Alex Mgongolwa and Godwin Nyaisa who were discharged from representing the 4th appellant and the addition of Mr. Zaharan Sinare, learned advocate who appeared for the 2nd and 3rd appellants.

As is the practice of this Court, we found it appropriate to dispose of the preliminary objection first. All counsel submitted at length on all points of preliminary objection but for purpose of completeness we wish

to begin with the issue that was raised by Mr. Sinare to the effect that the 2nd point of preliminary objection with two limbs raised by the respondents did not qualify to be points of law.

In elaboration to the issue he raised, Mr. Sinare contended that the 2nd point of preliminary objection that the notice of appeal was not served on the respondents within time; and that the memorandum of appeal was not served at all are not capable of being raised as preliminary objections. While relying on the cases of **Karata Ernest and Others v. Attorney General,** Civil Revision No. 10 of 2010 (unreported) at page 1-2 (full bench) and **Mukisa Biscuits Manufacturers Company Ltd v. Westend Distributors Ltd** [1969] EA 696, he argued that a preliminary objection must be on a pure point of law and that the courts are not required to look at the evidence - See **Shose Sinare v. Stanbic Bank Tanzania Ltd,** Civil Appeal No. 89 of 2020 (unreported) at page 12. He went on submitting that in subordinate courts, the preliminary objection is found in the pleadings while in this Court it can be looked at in the memorandum of appeal. It was his argument that since in this matter, the record of appeal was shown to the Court by the appellants to show that the memorandum of appeal was served on the respondents, this cannot qualify to be a preliminary objection. He referred us to the case of **Gasper Peter v.**

Mtwara Urban Water Supply Authority (MTUWASA), Civil Appeal No. 35 of 2017 (unreported) at pages 7 and 10 to show that anything requiring proof by evidence ceases to be a preliminary objection.

In response to the issue raised by Mr. Sinare, Mr Nyoni in the first place dismissed Mr. Sinare's contention arguing that the preliminary objection cannot be answered by another preliminary objection. He further distinguished the cases of **Karata Ernest and Others** (supra) and **Shose Sinare** (supra) that the preliminary objection does not need evidence and he referred to us the case of **Ali Shaban and 48 Others v. Tanzania Road Agency (TANROADS) and Another,** Civil Appeal No. 261 of 2020 (unreported) page 8 to show that a preliminary objection can be found on facts or rather it can be looked at the record of appeal itself. He also cited to us the case of **Moto Matiko Mabanga v. Ophir Energy PLC and 6 Others,** Civil Appeal No. 119 of 2021 (unreported) at page 16. He, therefore, stressed that the two points in the 2nd preliminary objection are pure points of law.

We have considered the counsel's submissions on the issue which needs our determination, that is whether the preliminary objection no. 2 is on pure points of law or not.

As to what entails preliminary objection, that was well expounded in the landmark case of **Mukisa Biscuits Manufacturing Company** (supra) which was rightly cited by Mr. Sinare as follows:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

Also, in the case of **Karata Ernest and Others** (supra), the Court while citing the case of **Mukisa Biscuits Manufacturing Company Ltd** (supra) observed that:

> *"At the outset, we have showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the cause of deciding it. It only consists a point of law which has been pleaded or which arises by clear implication out of the pleadings."* [Emphasis added]

The Court went further to state that:

> *"Obvious examples include, objection to the jurisdiction of the court;* ***a plea of limitation,*** *when the court has been wrongly moved either by non-citation of the enabling provisions of the*

law, ***where an appeal is instituted without*** *a* ***valid notice of appeal or without leave or a certificate where one is statutorily required;*** *where the appeal is supported by patently incurably defective copy of the decree appealed from etc."*[Emphases added]

We are also aware that in the case of **Shose Sinare** (supra) this Court reiterated that in order for a preliminary objection to be successful, it should not need support from evidence.

In this matter, Mr. Sinare forcefully argued that the preliminary objection based on failure to serve a notice of appeal on the respondents within time; and failure to serve the copy of memorandum of appeal on the respondents are not pure points of law pointing out the fact that the appellants went as far as showing the record of appeal to the Court to prove that the memorandum of appeal was served on the respondents. On the rival side they are of the view that there is nowhere the preliminary objection can be found except in the record of appeal - See **Moto Matiko Mabanga** (supra).

On our part, we must state at the outset that, we agree with the learned Principal State Attorney in principle that a preliminary objection cannot be answered by another preliminary objection See – **The Attorney General and Another v. Mahedi Mohamed Gulamali**

Kanji, Civil Application No. 42 of 1999 (unreported). In the said case the Court discouraged the practice of preempting preliminary objection by filing another notice of directions. However, we do not think that Mr. Sinare had tried to pre-empt the preliminary objection raised since he did not file any notice for direction in relation to the preliminary objection. It is, our considered view that, that was his line of argument to controvert the preliminary objection which was raised by the other parties.

As to where the point of preliminary objection can be found, we do not have qualms that the court needs to ascertain it into the plaints and its annexures without any further evidence in determining the issue of time limitation - **Moto Matiko Mabanga** (supra). However, we equally agree with Mr. Nyoni that in the circumstances of this case, the preliminary objection would always be in the record of appeal. On this, we are guided by the same case of **Moto Matiko Mabanga** (supra) in which the Court considered the case of **Ali Shabani and 48 Others** (supra) and stated as follows:

> *"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure points of law whose determination does not require an ascertainment of facts of evidence. At*

> *any rate,* ***we hold the views that no objection will be from abstracts without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence*** *..."* [Emphasis added]

Also, in the case of **Wilfred Rwakatare v. Hamis Kagasheki and Another,** Civil Appeal No. 118 of 2011 (unreported) when the Court was faced with an akin situation it was found that the evidence of service was to be looked from the record itself. In particular, the Court stated that:

> *"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 view that if the 1st respondent had been duly served with the 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 ...."*

In this case, based on the above authorities, we think, the notice of appeal alleged to have not been served within time; and the memorandum of appeal alleged to have not been served on the respondents cannot be found at a place other than in the record of appeal which both parties have to look at. We, therefore, fail to

comprehend what Mr. Sinare was trying to drive home as the defect cannot be found in abstract.

On the other hand, we acknowledge that the counsel for the 1st appellant tried to display to the Court the copy of the record of appeal which he had to show that the memorandum of appeal was served on the respondents. However, we think, that was not proper. This is so, because the truth is that the copies of the record of appeal for the use of the Court and the respondents had copies of memorandum of appeal which do not depict what the counsel for the 1st appellant wanted to convince the Court.

In this regard, we are satisfied and we agree with the learned Principal State Attorney that the two-points objection set out in ground no. 2 are on points of law because they are discernible from the record of appeal without requiring support from evidence.

Having ruled on the issue that the two points in the 2nd preliminary objection were pure points of law we propose to deal with the 1st limb of the 2nd point of objection on the issue whether the notice of appeal was served on the respondents within time as we think it is capable of disposing off the whole matter without necessarily embarking on all points of objection.

Expounding on this point of preliminary objection, Mr. Nyoni after having sought to adopt the notice of preliminary objection, skeleton submission and the list of authorities, contended that in terms of Rule 84 (1) of the Rules the intended appellant is required to serve on the respondents within fourteen (14) days after lodging the notice of appeal the copies thereof. However, he said, in this case though the appellants lodged the notice of appeal on 23rd May, 2017 they served it on the respondents on 23rd June, 2017 which was thirty (30) days after its lodgment.

In this regard, it was Mr. Nyoni's submission that failure to serve the notice of appeal on the respondents within time renders the appeal incompetent with the effect of being struck out. He referred us to the cases of **National Bank of Commerce and Another v. Ballast Construction Company Limited**, Civil Appeal No. 72 of 2017 at page 7; **John Nyakimwi v. Registered Trustees of Catholic Diocese of Musoma**, Civil Appeal No. 85/ 08 of 2017 at pages 6 – 10; and **Mokiri Damas Ngoja v. National Housing Corporation and Another,** Civil Appeal No. 273 of 2018 at page 8, (all unreported) in which the Court struck out the appeal for that reason.

Mr. Nyoni went a step further arguing that in the instant case, the principle of overriding objective cannot apply in view of mandatory

provisions under Rule 84 (1) of the Rules. In that regard, he stressed that the appeal be struck out.

In response to the 1st limb in ground no. 2 of the preliminary objection, it was Mr. Mtobesya who argued it on behalf of the 1st appellant. In the first place, he agreed in principle that under Rule 84 (1) of the Rules the notice of appeal is to be served on the respondent within fourteen (14) days from its lodgment. However, he came up with a new dimension and argued that Rules 84 and 86 should be read together in order to appreciate the purpose of the two provisions which is **one,** to notify the person to be affected by the intended appeal and **two,** to enable the other party notify his address of service. In this regard, it was his argument that the case of **National Bank of Commerce and Another** (supra) and other cases cited by the learned Principal State Attorney were distinguishable arguing that they did not consider both Rule 84 (1) and 86 of the Rules together. On that basis, he beseeched the Court to overrule this limb of objection.

For the 2nd and 3rd appellants, Mr. Sinare reiterated the stance he took earlier on that the same were not points of law to be raised as preliminary objection. However, he contended that should the Court decide that they amount to points of law which can be raised as points of preliminary objection, then the same can be remedied by invoking the

overriding objective principle. He referred us to the case of **James Burchard Rugemalila v. Republic**, Criminal Appeal No. 391 of 2017 (unreported) at page 22 where the Court had to look at the objects and reasons of the Bill that introduced the said principle and found that it was intended to reduce the decisions of the Court on technicalities and concentrate in dispensing substantive justice.

He added that, under Rule 4 (1) of the Rules, the Court is also enjoined at any time to direct a departure from the Rules in any case in which it is required in the interest of justice. In the end, therefore, he implored the Court to apply the overriding objection principle in order to salvage the appeal.

In rejoinder, Mr. Nyoni basically reiterated his submission in chief and stressed that the appeal is incompetent and that it should be struck out. In response to Mr. Mtobesya's argument, he submitted that Rule 84 (1) and 86 of the Rules are two different rules serving different purposes. He contended, while Rule 84 (1) of the Rules in mandatory terms requires notice of appeal to be served on other parties, Rule 86 of the Rules requires the respondent to file address for service after being served with a notice of appeal. In any case, he argued that they are irrelevant to the issue at hand.

We have considered the submissions from either side regarding the first limb of the 2nd point of preliminary objection on the issue that the appellants served the notice of appeal on the respondents out of time. Our starting point would be to re-state that the issue of service of the notice of appeal on the respondent is governed by Rule 84 (1) of the Rules which states as follows:

> *"An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal, but the Court may, on ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court."*

To our understanding of this provision, the appellant is mandatorily required to serve the notice of appeal to the respondent within fourteen days after the same is lodged.

In the case of **National Bank of Commerce and Another** (supra), the Court considered the above provision and stated as follows:

> *"From the above excerpt, it is clear that the rule [Rule 84 (1)] gives a right to one party and imposes an obligation to the other party. While it is the respondent's right to be served with the copy of the notice of appeal the intended*

appellant is, on the other side, obliged to ensure that he serves the notice of appeal on the respondent. The purpose of serving the respondent with the notice of appeal is not far to seek. The notice is intended to make the respondent aware that an appeal is being preferred hence be able to marshal his arsenals properly".

We have perused the record of appeal in particular at page 375 and 376 and we have found that, as was correctly argued by Mr. Nyoni, indeed, the notice of appeal was lodged on 23rd May, 2017. However, it was served on the 1st, 2nd and 3rd respondents on 23rd June, 2017 as shown on the rubber stamps of the respective respondents acknowledging receipt of the copies of the said notice of appeal. This means that the same was served on the respondents 30 days after its lodgment.

Mr. Mtobesya argued forcefully that Rule 84 (1) and 86 (1) of the Rules should be read together. We note that in the case of **National Bank of Commerce and Another** (supra) which was cited by Mr. Mtobesya, the Court did not consider Rules 84 (1) and 86 (1) of the Rules together as he tried to suggest. It merely considered the issue of failure to serve the notice of appeal on the respondent as required by Rule 84 (1) of the Rules. In any case, we find that as was rightly

submitted by Mr. Nyoni the two provisions serve different purposes. Whereas Rule 84 (1) of the Rules is intended to notify whoever may be affected by the intended appeal; Rule 86 of the Rules imposes a duty to the person who is served with the notice of appeal to lodge his/her address of service for notification to the Court and the other party. We are unable to easily comprehend why Mr. Mtobesya came with such proposition since the requirement to serve the notice of appeal on the respondent is a mandatory requirement under Rule 84 (1) of the Rules and the requirement under Rule 86 (1) of the Rules is discretional. As such, even if the said provisions were to be considered together, we do not see that they are related as each provision serves its distinct purpose. It therefore, remains as a fact that the appellants failed to serve the copies of the notice of appeal on the respondents within 14 after it was lodged as required by Ruie 84(1) of the Rules.

The issue of the consequences on non-compliance with Rule 84 (1) of the Rules has been deliberated on numerous cases. Just to mention a few, they include: **National Bank of Commerce and Another** (supra); **John Nyakimwi** (supra) and **National Microfinance Bank v. Muyodeso**, Civil Appeal No. 289 of 2019 (unreported) and **Mokiri Damas Ngoja** (supra). For instance, in the latter case, we struck out the appeal because the appellant failed on

among others, to serve the notice of appeal on the respondent within 14 days as provided under Rule 84 (1). The same position was taken in **National Bank of Commerce and Another** (supra) and **John Nyakimwi** (supra).

In this case, since the notice of appeal was served on the respondents out of time, therefore, the appeal is incompetent for failure to comply with Rule 84 (1) of the Rules. In this regard, we find the 1st limb of the 2nd preliminary objection has merit and we sustain it.

As to the way forward, we have considered Mr. Sinare's argument that we should consider taking the position in the case of **James Burchard Rugemalira** (supra) or invoke the provisions of Rule 4(1) of the Rules which allows departure from the Rules in the interest of justice.

We do not have qualms with the objects and reasons for the Bill that introduced the overriding objective principle which was mostly intended to enhance dispensation of substantive justice as opposed to basing our decisions on technicalities as were considered in **James Burchard Rugemalira's case** (supra).

However, we find that the point of objection is not a mere technicality. It was premised on mandatory provisions of Rules 84(1) of the Rules which is required to be complied with. In the case of

Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others, Civil Appeal No. 66 of 2017 (unreported), the Court emphasized that, the said principle was not intended to allow parties to circumvent the mandatory rules of the Court or turn blind to the mandatory procedural provisions of the law which have the effect of going to the root of the case. (See also **Martin D. Kumalija and 117 Others v. Iron and Steel Limited,** Civil Application No. 70/18 of 2018; and **Puma Energy Tanzania Limited v Diamond Trust Bank Tanzania Ltd,** Civil Appeal No. 54 of 2016 (both unreported).

In this case Rule 84 (1) of the Rules is a mandatory procedural provision for any party who wishes to institute a civil appeal to this Court. It is among the factors which determines the competence of the appeal and hence goes to the root of the matter. We, thus, do not agree with Mr. Sinare's invitation.

Equally, we have taken into account the provisions of Rule 4(1) of the Rules which states:

> *"The practice and procedure of the Court in connection with appeals, intended appeals and revisions from the High Court, and the practice and procedure of the Court in relation to review and reference, and the practice and procedure of the High Court and Tribunal in connection with*

appeals to the Court shall be as prescribed in these Rules or any other written law, but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interest of justice."

In the first place, our reading of the above cited provision is that its emphasis is that the procedure and practice of the Court shall be as prescribed by the Rules and any other written laws. It also provides as an exception to depart from the Rules where it is so required in the interest of justice.

On our perusal of the matter at hand, we have not been able to see the circumstances calling for the invocation of such exception. Incidentally, even Sinare was not able to assist the Court as to what circumstances require such departure in the interest of justice to convince the Court to invoke that provision. In addition, much as the learned counsel did not avail us with authority on its applicability, we are of the considered view that such departure from the provision of the law is not intended to gloss over the mandatory provisions of the law requiring something to be done. As such we decline his invitation to invoke such provision.

In the event, we sustain the 1st limb of the 2nd preliminary objection and, consequently strike out the appeal for being incompetent before the Court with costs.

DATED at **DAR ES SALAAM** this 20th day of December, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

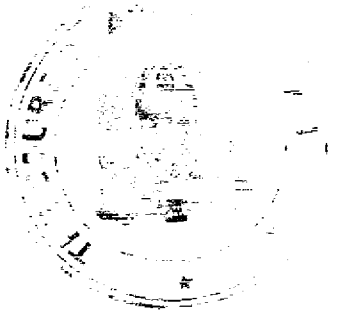
M. A. KWARIKO
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered on 23rd day of December, 2021 in the presence of Mr. Nashon Nkungu holding brief for Jeremiah Mtobesya learned counsel for the 1st appellant, Mr. Abdilah Husssein holding brief for Sinare Zaharan learned counsel for the 2nd and 3rd respondents and in the absence the 4th appellant, and Mr. Hangi Chang'a, Renatus Mkude and Monica Mbogo all learned Principal state attorney for the respondents, is hereby certified as a true copy of original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL