IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 182 OF 2018

(CORAM: MKUYE, J.A., LEVIRA, J.A. And RUMANYIKA, J.A.)

BRIDGEWAYS LOGISTIC.....APPELLANT

VERSUS

TRIPPLE "A" HAULIERS .....RESPONDENT

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

(Sehel, J.)

dated 13th day of August, 2018

in

Misc. Commercial Application No. 35 of 2018

.....

RULING OF THE COURT

15th March & 25th April, 2022

RUMANYIKA, J.A.:

Bridgeways Logistic, the appellant, impugns the decision of the High Court (Commercial Division) dated 13/08/2018 which declined to set aside its dismissal order of 09/02/2018 on an application related to the Commercial Case No. 89 of 2016 (the original case). Also, for reasons not subject of this ruling the High Court struck out the original case.

A brief account on the background of the matter is that there was, in the High court Commercial Case No.89 of 2016. Just on conclusion of a Final Pretrial Conference, subsequently the scheduling order was

accordingly set. However, when the case came up for hearing on 21/09/2017, besides, the applicant had a formal application for summons and an order to compel a witness' appearance additional to the list previously filed. The High Court (Sehel, J.) was not impressed. She found that the application was at war with Rule 29(2) of the Commercial Court Rules and it lacked merits. She dismissed it. Moreover, the learned judge struck out the main case on 09/02/2018. The applicant's efforts to restore the case became fruitless on 11/07/2018. It is unhappy, hence the present appeal.

When the appeal came on 15/03/2022 for hearing, we had to first hear the parties on the competency-based four preliminary objections formally raised on 04/12/2018 and 18/12/2018 now taken by Mr. Thomas Eustace Rwebagira, learned counsel for Triple "A" Hauliers Limited, the respondent. The appellant had services of Mr. Jimmy Mrosso, also learned counsel. The points of objection read as follows:-

1. That upon filing the record of appeal (the record) on 11/10/2018, the appellant didn't serve it on the respondent until on 12/11/2018 which was 25 days far beyond the seven days prescribed under Rule 97(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

2. That the record of appeal contravened Rule 96(1) (4) of the Rules since it was in shambles, irregular and not in a prescribed order of sequence. Some pages mixed up and rendered it incomplete.

3. That the appeal is incompetent as it falls short of the core documents namely, copies of the original plaint, amended written statement of defence to the amended plaint and the written statement of defence to the 2nd defendant's counter claim.

4. That the notice and memorandum of appeal were filed against a wrong party Bridgeways Logistic instead of Bridgeways Logistics Limited.

In a nutshell, Mr. Rwebangira submitted; **one**, that whatever the problems that the appellant encountered leading to late serving the respondent with the record of appeal should have been a ground for extension of time but it did not take that route, **two**; that on account of being in shambles and incomplete, the copy of the record of appeal served on the respondent is as good as no record of appeal because it is too difficult for him to understand and follows; **three**, that with such essential documents missing from the record of appeal, the respondent's counsel could not have sufficiently prepared for a hearing, and **four**, that the omission of the word "Limited" from the appellant's name contravened Section 15 of the Companies Act, Act No.12 of 2002 because proper

naming of the company is crucial for identification and determination of its liability.

The learned counsel rounded up the point submitting that the above stated omissions rendered the appeal incomplete, incompetent, and liable to be struck out with costs. He cited unreported decision of this Court in the case of **Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd,** Civil Appeal No. 112 of 2008 (unreported).

Replying, Mr. Mrosso readily conceded to the preliminary objection raised but he urged us to consider that the applicant and the court registry share the blame on the late service of the record upon the respondent's counsel. Moreover, the learned counsel pleaded the principle of overriding objective and prayed to file and serve the respondent's Counsel with a supplementary record of appeal for the interest of substantive justice and at the expense of such legal technicalities much as no party would be prejudiced. Additionally, Mr. Mrosso submitted that as long as the respondent's counsel had detected the defects too, pursuant to Rule 99 (1) of the Rules, the latter was duty bound to file a supplementary record of appeal. Just staying back relaxed and later in the day file the preliminary objection was not right. He cited to us our decision in the case of **Jovet**

Tanzania Limited v. Bavaria N. V., Civil Application No. 207 of 2018 (unreported).

As regards the appellant wrongly naming the respondent and its legal effects, Mr. Mrosso urged the Court to read the record holistically. Because, on that one, the High Court's records were clear.

Rejoining, Mr. Rwebangira submitted that with Mr. Mrosso's concession to the prayer, there is nothing that the latter could now do. Nor could one circumvent the preliminary objection with a prayer to file a supplementary record of appeal. Mr. Rwebangira further argued that once service of the record of appeal was done, as happened, the same was not amendable. Rather, he submitted that the appellant is liable only to file a new record. Should the appellant's prayer be granted it would prejudice no party, but litigation should always get to end, Mr. Rwebangira further contended.

Having heard the learned counsels' rival submissions and read the record sufficiently, the issue for determination is whether, in terms of the service, the timing and competence of the record, the appeal is properly before the Court. However, we think that the 1st limb of the preliminary objection will sufficiently dispose of the appeal.

On the requirement of the appellant to serve the record of appeal on the respondent, Rule 97 (1) of the Rules reads as follows:-

> *97(1) –* ***The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal*** *in the appropriate registry,* ***serve copies of them on each respondent****...* (Emphasis added).

At least both learned counsel have agreed that although the memorandum and the record of appeal were filed in the Court registry on 11/10/2018, the appellant served it on the respondent as late as 12/11/2018, say thirty days later. Without over emphasis therefore, the appellant contravened the above cited mandatory provisions of Rule 97 (1) of the Rules.

Several times and repeatedly this Court had occasions to discuss application of, and the effects of non-compliance with Rule 97(1) of the Rules. For instance, in **Mohamed Enterprises (T) Ltd v. Mussa Shabani Chekechea,** Civil Appeal No. 64 of 2015 (unreported), we held:-

> *...It is no doubt that by the use of the word "shall", in terms of the provisions of Section 53(2) of the Interpretation Act, Cap 1 of the Revised Edition*

> *2002, the sub-rule has been couched in mandatory terms compliance of which is imperative.* ***It follows that failure to comply with Rule 97 (1) of the Rules makes the present appeal incomplete*** (Emphasis added).

See: Also the case of **Petrina Aloyce** (Administrator of the Estate of the Late **Anastazia Emmanuel Masonganya v. Christina Leonard Nyamayinzu,** Civil Appeal No. 138 of 2015 (unreported).

From the above quotation therefore, the lately served record of appeal is, without more words, unjustified. The appellant had no choice other than to comply with Rule 97(1) of the Rules. It is very unfortunate that the appellant served the respondent with the record of appeal say 25 days far beyond the seven days' limit without extension of time being sought and granted.

We are mindful of the principle of overriding objective more so Section 3A of the Appellate Jurisdiction Act Cap 141 R.E. 2019 and Section 4 of Act No. 8 of 2018 on overriding objective. Indeed, it is not legal technicalities that count but the substantive justice. However, with great respect, Mr. Mrosso may wish to know that failure to serve the other party, or, as happened in this case, late service of the record of appeal to the

respondent, puts the latter's right to be heard just on cross roads. The omission complained about is such a serious one in our considered opinion. It is not a mere legal technicality. The lately served record of appeal cannot be said that it fairly avails one a room to sufficiently argue the case. For the reasons herein stated above, there is no doubt that the omission is fatal, it having gone to the roots of the principles of natural justice.

The end result is that the appeal is struck out. The respondent shall have its costs. Order accordingly.

DATED at **DAR ES SALAAM** this 21st day of April, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Ruling delivered on 25th day of April, 2022 in the presence of Mr. George Ngemela learned counsel for the respondent who is also holding brief for Mr. Jimmy Mrosso, learned counsel for the appellant, is hereby certified as a true copy of original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL