IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: MWARIJA, J.A., KENTE, J.A., And RUMANYIKA J.A.:

CIVIL APPEAL NO. 65 OF 2020

SAHARA MEDIA GROUP..... APPELLANT

VERSUS

SIMBANET TANZANIA LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, at Dar es Salaam)

(Sehel, J.)

dated 4th June, 2018,

in

Commercial Case No. 02 of 2016

.....

RULING OF THE COURT

2nd June & 9th August, 2023

RUMANYIKA, J.A:

Before the High Court of Tanzania, Commercial Division at Dar es Salaam, Simbanet Tanzania Limited (the respondent) successfully sued Sahara Media Group Limited (the appellant). The latter got a decree of USD 305,653.13 being an outstanding balance for the unpaid invoices on the service rendered by the respondent to the appellant, 2% interest per month on the outstanding monthly bills, loss of profit and interest at the court's rate

of 7% per annum on the decretal sum from the date of judgment to the date of full payment.

Briefly, on 21st February, 2002, the respondent executed an agreement with the appellant (Exhibits P1 and D1) to provide the appellant with data and internet network services at its Arusha, Dar es Salaam, Dodoma and Mwanza service stations. On the other hand, the appellant was required to install a microwave providing a Last Mile Connectivity and pay for the configuration and set up charges at the said stations. It was the respondent's defence that it performed according to the agreed terms and conditions but the appellant defaulted payment for the services ignoring some invoices issued. The appellant claimed the outages, instability and low quality of the internet available in some stations to be the reason for its refusal to pay. It counterclaimed thus USD 47,949.30 being the price of the band with connection it allegedly purchased from TTCL trouble shooting the said poor quality internet services and unstable connectivity.

Attempting to settle the matter out of court, the parties agreed that the appellant pay USD 115,400 for a full settlement instead of USD 276,442 in three installments, the first installment in June, 2014 and the 3rd one in August, 2014 latest. However, it paid the 1st installment of USD 38,400 on 9th

June, 2014 and the 2nd installment of USD 23,000 on 25th August, 2014. It promised to pay the balance late in August, 2014 but defaulted. The said default apart, the appellant continued to enjoy the respondent's services as initially contracted until in October, 2014 when the outstanding bill stood at USD 305,653.13. Finally, the respondent lost hopes of being paid. It thus served a demand notice on the appellant to which it turned a blind eye. This prompted the respondent to file the suit before the High Court, whose decision is the subject of this appeal as highlighted above.

Upon hearing both parties, the trial court decided the case in favour of the respondent who was awarded USD 305,653.13 being payment for the outstanding bills plus interest thereon. The appellant's counterclaim was dismissed.

Dissatisfied with the above decision, the appellant is before the Court and is armed with four grounds of appeal to challenge it. Nonetheless, for the reasons that will come to light shortly, we will not reproduce those grounds of appeal.

At the hearing of the appeal on 2nd June, 2023, the appellant was represented by Mr. John Seka learned counsel whereas Mr. Geofrey Nyaisa

who had the assistance of Ms. Kavola Semu also both learned counsel appeared representing the respondents.

As the practice would require us to do, before commencement of the hearing of the appeal we heard the learned counsel on a preliminary objection (the point of objection) formally filed on 26th May, 2023 by the respondents' counsel. It is on the competence of the appeal allegedly, contrary to rule 97(1) of Tanzania Court of Appeal Rules, 2009 (the Rules), the appellant's having failed to serve the memorandum of appeal and the record of appeal on the respondent. On that account, Mr. Nyaisa prayed for an order to strike out the appeal with costs.

Mr. Seka readily conceded to the point of objection save for the proposed consequential orders sought by Mr. Nyaisa to strike out the appeal with costs. He contended that, the appellant's failure to serve the respondent with the said copies to the respondent thus contravening rule 97 (1) of the Rules was unfortunate and accidental. Nonetheless, he asserted, this is not such an incurable omission to render the appeal liable to be struck out as proposed by Mr. Nyaisa. Instead, he argued, the Court may salvage it by invoking the Principle of Overriding Objective stipulated under section 3A of the Appellate Jurisdiction Act Cap 141 (the AJA). Instead, he asked the Court

to adjourn the hearing of the appeal to allow a belated service for the interest of substantive justice. The appeal, he added, is otherwise competently before the Court save for the said omission which is curable. He cited to us our decisions in the cases of **Jacline H. Ghikas v. Hamson Mllatie Richie Assey,** Civil Application No. 656/01 of 2021 [2020] TCA 438 TANZLII to facilitate his point.

Further, basing on our decision in the case of **The Judge-In-Charge, High Court at Arusha And The Attorney General v. N.I.N Munuo Nguni** [2004] T.L.R. 44 he contended that, the rules of procedure, in this case rule 97 (1) of the Rules are handmaiden which should not be allowed to defeat the ends of justice.

There was also, the issue of variance of the dates of the impugned judgment and decree appearing at pages 278 and 282 of the record of appeal reading 30th May, and 4th June, 2019 respectively. Mr. Seka conceded to the said variance. However, he beseeched us to find that, the variance of the dates does not render the appeal incurably defective. He thus prayed for an adjournment of the hearing giving him a room to file a supplementary record containing the properly dated judgment and decree.

Rejoining, Mr. Nyaisa contended that, the effect of noncompliance with rule 97 (1) of the Rules is fatal and the Court should hold as such. Distinguishing the **Gikasi case** (supra) from the instant case, he argued that, in the former case, the record omitted a Notice of Motion and not failure to serve the record of appeal and memorandum of appeal on the respondent as is here. He also argued that, had the two documents been served on the respondent, possibly the latter would have a negative observation on its competence rendering it to be incurably defective but has been deprived that opportunity.

Further, he asserted that, there is only one remedy in the circumstances which is to strike out the appeal with costs for being incompetent. He said that the said omission is tantamount to the appellant's failure to take such essential steps. To support his argument, he cited our unreported decision in the case of **Bi Asha Seif & Another v. Ranjeet Gokal Damji**, Civil Appeal No. 50 of 2012, where also, he argued, the Court referred to Article 107A, 107B of the Constitution of the United Republic of Tanzania, the Principle of Overriding Objective and some other laws to strike out that appeal.

Stressing his point to show that, in the instant case the Court has no choice but to strictly observe the mandatory requirement of rule 97 (1) of the

Rules, he cited our decision in the case of **Makori Damas Ngoja v. National Housing Corporation & Another**, Civil Application No. 273 of 2018 (unreported). He distinguished the above referred case from the instant case reasoning that, in the present case the issue is non-service of the said documents on the respondent allegedly, rendering the appeal to be incompetent, while in the **Judge Incharge Arusha case** (supra), complained of was a cross appeal. Further, Mr. Nyaisa contended that, the appellant's failure to serve the said documents on the adverse party as here goes to the root of the matter rendering the appeal to be incompetent. He stressed that the appeal is liable to be struck out with costs which is the only remedy in the circumstance.

Winding up, Mr. Nyaisa asserted that, Mr. Seka's prayer is for an extension of time to serve the respondent with the said memorandum and record of appeal in disguise and before the wrong forum. He asserted thus without appropriately presenting material upon which the Court to exercise its discretion to grant it, Mr. Seka's prayer is not tenable.

Upon hearing the submissions of both learned counsel on the point of objection, the issue for our consideration is whether, appellant's total noncompliance with rule 97 (1) of the Rules to serve the memorandum of

appeal and the record of appeal on the respondent renders the appeal incurably incompetent. For ease of reference thus, we find it necessary to quote rule 97 (1) of the Rules. It reads as follows:

> ***"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*** *who has complied with the requirements of rule 86".*
> (Emphasis added).

As is discerned from the above cited rule, serving of the memorandum of appeal and the record of appeal by the appellant on the respondent within seven days of the filing is mandatory. However, in the present appeal it is not disputed that there was noncompliance with that requirement. We are aware that the Rules are silent on the legal consequences of the said omission and the way forward. Nonetheless, we wish to observe that, non-observance of the limitation period prescribed by the law, in this case rule 97(1) of the Rules, is incurable in the circumstance. It is more serious in the instant case that, the appellant totally failed to serve the record and memorandum of appeal to the respondent which has to be struck out as

proposed by Mr. Nyaisa. Confronted by a similar situation in **Bi Asha Seif and Another** (supra), the Court pronounced itself as follows:

> *...In the instant appeal the appellants failed to comply with the mandatory provisions of rule 97(1) of the Rules* ***for not having served the respondent with the memorandum and record of appeal at all. Such a failure renders the appeai incompetent..., we are constrained to strike out the appeal".***
> (Emphasis added).

Applying the above legal principle to the instant case therefore, with respect, to start with, we decline to buy Mr. Seka's request to invoke the Principle of Overriding Objective to adjourn the hearing of the appeal. Since giving the appellant a second chance as sought, to serve the said documents on the respondent is tantamount to circumventing the mandatory rule 97(1) of the Rules which provide for a limitation period to discourage endless litigation, notwithstanding the Principle of Overriding Objective.

We observe so for four main reasons: **One**, the Principle of Overriding Objective does apply where a matter is time barred nor is that principle a free-size fish net which catches sardines and sharks at the same time; **two**, an order to adjourn hearing of the appeal to allow service of the record of

appeal, and the more so allowing belated service of the memorandum of appeal, in our view has a similar effect as inviting uncontrolled flexibility in civil litigation which is already a cumbersome procedure. Since doing so is tantamount to entertaining an application for extension of time in disguise which for now and here, we don't have jurisdiction to do; **three**, rule 97 (1) of the Rules is intended to prevent respondents from being ambushed by appeals in the Court which in any event we cannot accept; **four**, non-observance of a limitation period which is, in mandatory terms prescribed by law to do an act in any judicial proceedings as is here, is not a mere legal technicality. We wish to stress thus, that, the said omission concerns limitation of time which goes to the root of the matter. In other words, the Court is seized with jurisdiction when the memorandum of appeal and record of appeal were served on the respondent within seven days of their lodgment. Therefore, the Principle of Overriding Objective cannot apply to rescue the appeal. It is even worse where, as is this case service was not done at all. With respect, we are reluctant to buy Mr. Seka's idea persuading us to hold otherwise.

We reiterated that legal principle in the cases of **Filon Felician Kwesiga v. Board of Trustees of NSSF**, Civil Appeal No. 136 of 2020

where the Court made references to its decisions in **Njake Enterprises Limited v. Blue Rock Limited And Another**, Civil Appeal No. 69 of 2017 and **Mondorosi Village Council And 2 Others v. Tanzania Brewaries Limited And 4 Others**, Civil Appeal No. 66 of 2017 (both unreported). It is very unfortunate, as admitted by Mr. Seka, that the respondent was not aware of this appeal until recently, which is about three years after the appellant lodged the memorandum of appeal on 30th March, 2020.

When the above principle is applied to the instant case, with respect to Mr. Seka, the cases of **Gikasi** (supra) and **The Judge In-Charge Arusha** (supra) are distinguishable. We agree with Mr. Nyaisa's contention that, the two cases are distinguishable from the instant case. In the former case, the issue was of non-service of a notice of motion on the respondent which the applicant disputed whereas, in the latter case the appellant objected the respondent's cross appeal. In the instant appeal the issue is quite different. It is about a non-disputable failure of the appellant to comply with mandatory provisions of rule 97 (1) of the Rules to serve the memorandum of appeal and the record of appeal to the respondent. This omission in our view is a serious one. It goes to the root of the matter as discussed above and cannot be spared in the circumstance.

Now that, for the foregoing reasons the issue of non-compliance by the appellant with rule 97 (1) of the Rules is sufficient to dispose of the appeal, we find that, any discussion on the variance of the dates of the impugned judgment and decree which Mr. Seka has admitted, will serve academic purpose only.

In the event, we find the appeal to be incompetent and consequently strike it out with costs.

DATED at **DAR ES SALAAM** this 7th August, 2023.

A.G. MWARIJA
JUSTICE OF APPEAL

P.M. KENTE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 9th day of August, 2023 in the presence of Mr. John Seka, learned counsel for the Appellant also holding brief for Mr. Godwin Nyaisa, learned counsel for the Respondent, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL