IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A, LEVIRA, J.A. And MASOUD, J.A.)

CIVIL APPEAL NO. 30 OF 2020

ABSA BANK TANZANIA LIMITED..... 1ST APPELLANT

JOSEPH JOHN NANYARO.....2ND APPELLANT

VERSUS

HJORDIS FAMMESTAD ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, (Commercial Division) at Arusha)

(Fikirini, J)

Dated the 8th day of October, 2019
in
Commercial Case No. 6 of 2018

.....

RULING OF THE COURT

10th & 13th December, 2024

LEVIRA, J.A.:

This appeal is against the judgment and decree of the High Court of Tanzania (Commercial Division) in Commercial Case No.6 of 2018. In that suit, the respondent had sued the appellants jointly and severally for payment of USD.335,121.59 on account of unlawful withdrawal of money from the Bank Account No. 7000070 of the respondent maintained by the first appellant. The appellant denied the claim. Nonetheless, at the end of the trial, the trial court entered judgment partly in favor of the respondent. Being aggrieved by that decision, they preferred an appeal to the Court.

The respondent was, as well, not satisfied with that decision and thus preferred cross appeal a subject of this ruling.

The brief background facts of the suit as obtained from the record shows that, on 14th July, 2015 the respondent opened US Dollar Account No. 7000070 with the first appellant Bank. Later, on different dates, she instructed the first appellant to add two co-signatories to the said account, one of them was the second appellant who was added on 16th August, 2016. The respondent instructed the first appellant to allow the 2nd appellant to withdraw up to USD 10,000 per withdrawal without having a second signature. However, between 1st May, 2017 and 31st December, 2017, the second appellant in collaboration with the first appellant made nine unauthorized withdrawals which exceeded the limit permitted by the account holder, which in total amounted to the sum of US Dollars 391,050.00.

It was the respondent`s contention that contrary to the authority given, the first appellant authorized the second appellant to withdraw the amount beyond the limit without asking for second signature from the respondent as instructed. The respondent contended further that at the time of withdrawals the first appellant debited withdrawal charges from the said Account to the tune of USD 4,071.59. As a result, a great loss

was occasioned to the respondent. This set of facts moved the respondent to institute the case against the appellants in the High Court as aforesaid.

The appellants disputed the respondent`s claim. The first appellant only admitted that the respondent opened USD account with her but it was a joint account owned by the respondent, one Jamie E.E Benito and the second appellant with equal right to act on the said account. It was his further testimony that the respondent authorized the second appellant to withdraw any amount from that account without requiring a second signature. He added that the respondent was aware of the withdrawals by the second appellant as the same were availed to her through SMS alerts and thus consented to the transactions. The first appellant prayed for the respondent`s suit to be dismissed with costs.

On his part, the second appellant, just like the first appellant, disputed the respondent`s allegations save for admission that, the respondent opened a USD account with the first appellant`s Bank. However, he claimed that, on 16th August, 2017, he was added as a joint holder of the said account and thus a co-holder of it with equal rights. He contended further that he, as well, used to receive SMS and bank statement of all transactions on the said account.

On misappropriation of the money from the account, the second respondent stated that all the money withdrawn from the account was

used for paying the building materials, construction supplies, architect, Engineers, decorators, workers, laborers in construction of a Lodge. He disputed the allegation that, the respondent was the sole depositor of fund in the account. Finally, he prayed for the dismissal of the respondent`s suit.

Having heard from both sides, the trial court delivered its judgment partly in the respondent's favor as it found that, she also contributed to the occasion of the loss. Thus, it awarded her 60% of the amount claimed equivalent to USD 201,072.93 and the remaining 40% (134,048.636) to be borne by herself. This decision aggrieved both parties to the suit and hence the main and cross appeals, as stated earlier.

However, when the main appeal was called for hearing on 24th May, 2022, the Court found that the appellants' appeal was time barred. Consequently, it struck it out for being incompetent and ordered the respondent's cross appeal, the notice of which was lodged on 10th March, 2020, to proceed for hearing. Therefore, for the purpose of this ruling, the respondent shall be referred to as cross appellant and the appellants as cross respondents.

The respondent's cross appeal is predicated on a sole ground as follows:

That, the Honorable trial court erred in law and in fact by awarding the respondent payment of USD 201,072.934 only being 60% of the total amount, instead of awarding USD 335,121.59 being the actual loss suffered based on its own impulse that, the respondent failed to take a duty of care from the fraudulent conduct of the 2nd Appellant while the evidence was in fact to the contrary.

On 4th December, 2024, the cross respondents in this cross appeal filed a notice of preliminary objection against the appeal and prayed that the supplementary record of appeal lodged by the cross appellant on 27th September, 2024 be struck out with costs on the basis that:

i) *The purported proceedings forming part of the supplementary record of appeal lodged in this Court on 27th September, 2024 were not issued in accordance with the procedure applicable for insurance of a copy of transcript of the official record of proceedings where Rule 60 of the High Court (Commercial Division) Procedure Rules as amended in 2019 provides for procedure for issuance of a copy of transcript of the official record of proceedings which involves all parties to the suit, the cross appellant obtained the transcript of the official record of proceedings through the back door and lodged them without knowledge of the cross respondent.*

ii) *That while the order of this Court was very clear that the cross appellant was to lodge certified record of proceedings obtained in accordance with Rule 60 of the High Court (Commercial Division) Procedure Rules as amended in 2019, the cross appellant failed to comply with the Court order.*

iii) Without prejudice to the above the document was certified in accordance with Rule 60 (6) of the High Court (Commercial Division) Procedure Rules as amended in 2019, whereas the provision requires the Registrar to certify the authenticity of the transcript and the official record of hearing, what was certified by the Registrar on 6th September, 2014 was true and correct copy of the original certificate/document.

At the hearing of the cross appeal, the cross appellant was represented by Mr. Salimu Mushi, learned advocate, whereas the cross respondents had respectively the services of Mr. Mpaya Kamara and Dr. Onesmo Kyauke, both learned advocates.

Before we could embark on disposing of the appeal, we had first to determine the grounds of preliminary objection raised by the cross respondents. Therefore, we invited the counsel for the parties to address us on those grounds.

Addressing us in support of the preliminary objection, Dr. Kyauke combined the first and second grounds and argued them together, and the third ground was argued separately. In respect of the first and second grounds of objection, Dr. Kyauke referred us to the Judgment of the Court of 28th August, 2024 in which the Court discovered that the record of appeal presented before it, particularly, the official transcript of the hearing which was lodged in Court as supplementary record of appeal on

16th November, 2022, lacked certification by the Registrar contrary to Rule 60 (6) of the High Court (Commercial Division) Procedure Rules as amended in 2019 (the Commercial Court Rules), hence, invalid - see: page 25 of the impugned record of appeal. He went on to state that at page 23 of the impugned record of appeal, the Court took trouble to outline the procedure applicable for issuance of a copy of an official transcript of the hearing as per Rule 60 of the Commercial Court Rules. In the whole procedure, he insisted, issuance of certificate by the Registrar is a last act after complying with the requirements of Rule 60 (1) – (5) of the Commercial Court Rules and the same is issued under subrule (6) of the said Rule. He expounded on the procedure of issuing a copy of transcript whereby he said, it involves all the parties to the suit. Therefore, the Registrar is required to give them an opportunity to verify the correctness and in case of any dispute regarding the correctness of the transcript, he shall make reference to the official record.

It was Dr. Kyauke's submission that on 28th August, 2024 the Court gave the cross appellant 60 days to obtain a certified record of transcript of the official record of hearing in accordance with Rule 60 of the Commercial Court Rules contemplating that, the procedure under that Rule would be observed, otherwise it could have given her less than those days. Surprisingly, he added, in the cross-appellant's letter of 28th August,

2024 found at page 27 of the impugned record which was copied to the cross respondents but never served on them, the cross appellant only requested the Registrar to certify the electronically recorded proceedings without mentioning Rule 60 of the Commercial Court Rules and the directions of the Court. The said letter was received by the High Court on 3rd September, 2024 and within four days the Registrar wrote a letter to notify the counsel for the cross appellant that the copy of certified electronic recorded proceedings applied for was ready for collection, as it can be seen at page 53 of the impugned record. Dr. Kyauke argued that, the said letter of the Registrar was not served on the cross respondents and the said certified transcript was collected by the cross appellant. He argued further that, the cross appellant had 49 days out of 60 days granted by the Court to file supplementary record, but it took the Registrar only four days to supply the cross appellant with the requested copy. He insisted that, the Registrar did not comply with Rule 60 of the Commercial Court Rules, instead, he took the previously issued proceedings which were declared invalid, certify them, stamp and gave them to the cross appellant without involving the cross respondents.

According to Dr. Kyauke, the cross appellant was negligent in the following manner: **One**, she did not inform the Registrar in her letter of 3rd September, 2024 that he had to comply with Rule 60 of the Commercial

Court Rules; **two,** the said letter, though copied to the respondents was never served on them. Had it been that it was served on them, their counsel would have informed the Registrar that there was need to comply with Rule 60 of the Commercial Court Rules; and **three**, the deadline of filing supplementary record was 60 days, therefore, the cross appellant had 49 days remaining after receiving the impugned record which she could go back to the Registrar to remind him that he did not comply with the order of the Court, but she never did so. Based on this submission, Dr. Kyauke was firm that the impugned record was not certified in accordance with Rule 60 (6) of the Commercial Court Rules and the Order of the Court. He thus urged us to make such a finding.

Regarding the third ground of preliminary objection, Dr. Kyauke submitted that Rule 60 (6) of the Commercial Court Rules requires the Registrar to certify the authenticity of the transcript after compliance with Rule 60 (1) to (5) of the said Rules. As such, he said, the Registrar was bound to make reference to the audio official recording before certification. According to him, the intention of Rule 60 of the Commercial Court Rules is to avoid situations where the official audio can be tempered with or being cooked. That is why, he insisted, the law provides for a room for involvement of the parties so as to ensure that the record is authentic.

He referred us to page 193 of the impugned record where the Registrar certified the said record as *a "true correct copy of the original Certificate/Document;"* instead of certifying the transcript of the official audio recording. Dr. Kyauke argued that, the Registrar did not make reference to Rule 60 of the Commercial Court Rules. As a result, the purported supplementary record of appeal is invalid and it should be struck out."

Regarding the question as to whether the cross appellant can be given an opportunity to file another supplementary record of appeal, Dr. Kyauke submitted that the Court is empowered to give such an order once in terms of Rule 96 (8) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He made reference to the decisions of the Court in **Puma Energy Tanzania Limited and Ruby Roadways (T) Limited,** Civil Appeal No. 3 of 2018 [2020] TZCA 186 (15 April 2020, TANZLII) and **Blue Peal Hotel & Appartment v. Ubungo Plaza Limited**, Civil Appeal No. 78 of 2017 [2021] TZCA 127 (19 April 2021, TANZLII).

On his part, Mr. Kamara added that when the Court gave the cross appellant 60 days to file a certified record it had in mind Rule 60 of the Commercial Court Rules which in essence provides for timelines. The first is in subrule (3) which provides for twenty-one days from receipt of the Registrar's transcript, for the parties to submit to him the corrected

transcripts and serve each other; and subrule (4) which gives the aggrieved party regarding the correctness of the transcript, seven days from receipt of the corrected transcript to notify the Registrar. Nonetheless, he insisted, that the respondents were not involved in the process contrary to the requirement of that provision.

As regards certification, Mr. Kamara argued that what is required to be certified is the authenticity of the transcript of official record of hearing in terms of Rule 60 (6) the Commercial Court Rules and not a document as it was done by the Registrar.

In reply, Mr. Mushi referred us to page 25 of the impugned record with a view of showing that, the Court gave a clear order that the proceedings be certified in accordance with Rule 60 (6) of the Commercial Court Rules. According to him, there was no issue on how the record was obtained. The only issue was certification, he insisted. It was his further argument that, Rule 60 (6) of the Commercial Court Rules gives right to either party to apply for proceedings and it appears that, when the application is made, the obligation turns to the Registrar to supply to both parties the proceedings. In that respect, he referred us to page 53 of the impugned record where, the Registrar's letter indicated that the cross respondents were informed as they were copied the letter. They were informed that the copy of certified electronic recorded proceedings was

ready for collection. Therefore, they cannot complain that they were not involved in the process.

Regarding timelines of events, Mr. Mushi argued that, the Registrar's letter referred to above was of 9th September, 2024 but until the hearing day of the cross appeal, the cross appellant has never received any complaint from the cross respondents regarding the correctness of the recorded proceedings, the same as they did in certification. Otherwise, he said, it is not proper for them to rise a complaint now as a preliminary point of objection.

Mr. Mushi contended that, in terms of Rule 60 (6) of the Commercial Court Rules, even if the party fails to act as per the requirements under other subrules of Rule 60 of the said Rules, the Registrar is empowered to issue a certified copy of official transcript. Therefore, he said, the Registrar was justified to issue the certified copy.

As regards the argument that the appellant was negligent, Mr. Mushi, on the contrary condemned the cross respondents for being negligent for failure to file correction of errors taking into consideration that, they were the appellants in the main appeal.

Arguing on the issue of certification, Mr. Mushi contended that, in terms of the Evidence Act, Cap 6, a document includes transcript.

Therefore, the Registrar was right to certify as the original *certificate/document* as seen at page 193 of the impugned record. According to him, the cases cited by the counsel for the cross respondents are distinguishable from the circumstances of the present matter as Rule 96 (8) of the Rules was amended by GN. 188 of 2024. As of now, he added, the appeal cannot collapse because the supplementary record is not in order.

He concluded by insisting that the whole process under Rule 60 of the Commercial Court Rules is vested to the Registrar. Therefore, since we do not have any information from the Registrar, it cannot be ruled that there was no compliance with that Rule, hence the preliminary objections raised lack qualities to be termed so.

Dr. Kyauke made a brief rejoinder to the effect that, the initial supplementary record of appeal filed by the cross appellant was declared invalid and thus the process under Rule 60 of the Commercial Court Rules had to start afresh in order for the cross appellant to obtain a valid record. He went on to submit that, in terms of Rule 60 (1) of the Commercial Court Rules, the court shall produce an official transcript of the hearing to the parties simultaneously in soft copy. As such, he argued, the Registrar is required to inform the cross appellant to collect them.

For the sake of argument, he said, assuming that the cross respondents were served the said copy, then the Registrar would have to wait for twenty one days before certification in terms of subrule (3) of Rule 60 of the Commercial Rules and he, as well, ought to have waited for seven days in case of any dispute regarding the correctness of the transcripts verified by the parties; and after that, should have certified the authenticity of the transcript of the official record of hearing. Nevertheless, he said, the present matter did not pass through those stages because on 3rd September, 2024, the Registrar received the letter from the counsel for the cross appellant and on 9th September, 2024, he informed the said counsel that the certified electronic recorded proceedings applied for were ready for collection. From page 193 of the impugned record, it is clear that the said record was certified on 6th September, 2024, meaning that the cross respondents were not given the 21 days to submit to the Registrar their corrected transcripts and serve the same to each other. In the circumstances, he concluded, there was non compliance with Rule 60 of the Commercial Court Rules.

Mr. Kamara clarified that the certification done under Rule 60 (6) of the said Rules is the end process after compliance with subrules (1) to (5) of Rule 60 of the Commercial Court Rules. In addition, he said that the letter of the Registrar which was copied to the cross respondents was not

served on them. Besides, it only notified that the copy of certified electronic recorded proceedings was ready for collection; meaning that, the certification had already been done though it was not certain as to what was certified. As such, he insisted, there was no further proof required to prove noncompliance with the law. Finally, he urged us to sustain the grounds of preliminary objection raised.

Having carefully heard the parties and perused the record of appeal, particularly the impugned supplementary record of appeal, the only issue for our determination is whether the impugned record was issued in compliance with the law and Court Order of 28th August, 2024. It is without any difficulty for one to note that, the whole discussion above was based on Rule 60 of the Commercial Court Rules. For ease of reference, the said provision reads:

> ***"60. Certification of transcript***
>
> *(1) The Court shall, after the conclusion of the case and upon request of a party, produce an official transcript of the hearing to be provided to the parties simultaneously in soft copy at the parties' costs.*
>
> *(2) The parties shall proof read the transcript and make necessary corrections which shall be tracked or highlighted without altering the content of the proceedings.*

(3) The parties shall submit their corrected transcripts to the Registrar and serve each other within a period of twenty one days from receipt of the Registrar's transcript.

(4) Where any dispute arises as to the correctness of the transcripts verified by the parties, the aggrieved party shall notify the Registrar within a period of seven (7) days from receipt of the corrected transcript.

(5) The Registrar shall upon receipt of notification under sub rule (4) or suo motu invite the parties to resolve any dispute by making reference to the official audio recording and his decision on such dispute shall be final.

(6) On receipt of the corrected transcripts from the parties; or upon resolving any dispute in terms of sub rule (4), or upon failure to comply with sub rules (3) and (4), the Registrar shall certify the authenticity of a transcript of the official record of hearing."

It is crystal clear from the above provision that, for a copy of transcript of official record of proceedings to be valid, it has to undergo the above outlined procedure. The stipulated procedure serves to ensure that the record presented before the court is authentic and thus it can be relied upon by the court in decision making.

The impugned record has its genesis from the Court Order of 28th September, 2024 which was given upon Court's finding that, the electronic recorded proceedings filed as supplementary record by the cross appellant were not certified in terms of Rule 60 (6) of the Commercial Court Rules. The said order was given following a point of preliminary objection raised by cross respondents at the hearing of cross appeal to the effect that, the testimonies of PW1, the cross appellant in this cross appeal and WD3 one Iman Gratian were received without oath or affirmation contrary to the provisions of the law. Ultimately, in resolving the raised point of preliminary objection, the Court found that the initial supplementary record of appeal which was filed by the cross appellant was invalid for lack of proper certification and declared it so. However, the Court went ahead and granted the cross appellant leave to lodge a supplementary record of appeal. The following was the order of the Court at page 26 of the impugned record:

> *"Consequently, we take heed and grant leave to the cross appellant to lodge a supplementary record of appeal to accommodate the certified record of proceedings within sixty (60) days from the date of this decision."*

According to the above reproduced order of the Court, the cross appellant was given 60 days to file a certified record of proceedings after

the invalidation of the supplementary record which had contravened Rule 60 (6) of the Commercial Court Rules. In other words, for the Registrar to be able to certify the authenticity of a transcript of the official record of hearing in accordance with the Rule 60 (6) of the said Rules, as ordered, there was need of another record to be certified since the first one was declared invalid.

The procedure to get a new supplementary record is well stipulated under Rule 60 of the Commercial Court Rules reproduced above. The first procedure was for the Registrar to receive a request from a party for the said copy in terms of Rule 60 (1) of the above Rules and provide the parties simultaneously in soft copy. In the present case, this requirement was partially met as it can be seen at page 53 of the impugned record. On 9th September, 2024, the cross appellant wrote a letter to the Registrar requesting for the copy of certified electronic recorded proceedings. Having received that letter, the Registrar served the cross appellant with the requested copy, instead of simultaneously provide to both parties as required by the law.

Therefore, since the cross respondents were not supplied with the soft copy of the official transcript of the hearing, the second procedure of proof reading and making necessary corrections as per subrule (2) of Rule 60 of the Commercial Court Rules was not followed. As a result,

there was no corrected transcripts submitted to the Registrar by the cross respondents within 21 days as per subrule (3) of the above Rule and the record is also silent whether the cross appellant submitted the same. In the circumstances, it cannot be said with certainty that the cross respondents had no dispute on the correctness of the official transcript of the hearing which they could have notified the Registrar within 7 days as provided under subrule (4) of Rule 60 of the Commercial Court Rules because they were not served with the copy. In our view, this is tantamount to being denied the right to be heard by the Registrar in terms of subrule (5) of the Rule under consideration in respect of the record which, if they had any reservation, at the end of the day would determine their rights.

We find that, it was not proper for the Registrar to certify the impugned record without observing the stipulated procedures and the timelines. This is because, there was no record of an official transcript of the hearing envisaged under Rule 60 of the Commercial Court Rules to be certified by the Registrar. We wish to observe that, the authenticity of the transcript of the official record of hearing, starts with sharing of that record with parties whose rights are ultimately determined basing on the said record. If a party is left out in the due process, like in the instant case where the cross respondents were not involved, the authenticity of

the produced record remains questionable despite the certification by the Registrar.

There is yet another thing raised by the cross respondents regarding the certification done by the Registrar in the present matter. Rule 60 (6) of the Commercial Court Rules under which the Registrar was required to certify the impugned record is very clear that, the Registrar shall certify the authenticity of a transcript of the official record of hearing. At the page 193 of the impugned record, the certification reads:

> *"I certify that this is a true and correct copy of the original certification/document."*

It is apparent from the excerpt above that, what the Registrar certified was *'a true and correct copy of the original certificate/document.'* With respect, we are unable to go along with Mr. Mushi's submission that, the term *'document'* used by the Registrar entails what is provided under subrule (6) of Rule 60 of the Commercial Court Rules. Our understanding of that provision, and indeed the position of the law, is that the Registrar shall certify the authenticity of a transcript of the official record of hearing, which as stated earlier, is built upon the due process stipulated above. We are of the considered view that, had the law intended to relax the requirements of supplying the copy of official transcript to the parties and proof reading it, as per subrule (1) and (2) of Rule 60 of the Commercial Court Rules, it would have been

done so under subrule (6) of Rule 60 of the said Rules as it did in respect of subrules (3) and (4) of the same provision. Therefore, we find and hold that in the absence of proof of involvement of the cross respondents in the process of preparing the impugned record rendered the purported certification and the said record invalid, just as the previous one which was invalidated by the Order of the Court of 28th August, 2024. Consequently, we sustain the grounds of preliminary objection raised by the cross respondents.

Since the authenticity of the impugned record is questionable and having declared it invalid, the same cannot be relied upon by the Court to determine the cross appeal. As a result, the record of appeal remains incomplete. Ordinarily, had it been that it is for the first time we give such an order in respect of the instant matter, we would have upon request, granted the cross appellant leave to lodge a supplementary record of appeal. It is unfortunate that our hands are tied as Rule 96 (8) of the Rules, bars further applications for lodging supplementary records. We are quite aware of the amendment of the above Rule by GN No. 188 of 2024 that the appeal cannot collapse because the supplementary record is not in order. However, having considered the circumstances of this matter, we find that hearing of the cross appeal is impossible. We say so because the supplementary record intended to rescue, among

others, the evidence of the cross appellant, who was the sole witness in the suit between the parties is allegedly received without oath or affirmation. Therefore, since the cross appeal before us is incompetent, we proceed to strike it out.

Having considered circumstances of this case, we make no order as to costs.

DATED at **ARUSHA** this 12nd day of December, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Ruling delivered this 13th day of December, 2024 in the presence of Ms. Alfredima Manga, holding brief for Mr. Salimu Mushi, learned counsel for the cross Appellant and Mr. Henry Simon Katunzi, holding brief for Mr. Mpaya Kamara, learned counsel for the 1st cross Respondent and also holding brief of Dr. Onesmo Kyauke, the learned counsel for the 2nd cross Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL