IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., LUANDA, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 67 OF 2015

A.A.R INSURANCE (T) LTD.....APPELLANT
VERSUS
BEATUS KISUSI..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Commercial Division) at Mwanza)

(Nchimbi, J.)

dated the 17th day of February, 2015
in
Commercial Case No. 4 of 2013

JUDGMENT OF THE COURT

30th & 31st May, 2016

LUANDA, J.A.:

The appellant, AAR INSURANCE (T) LTD was sued in the High Court of Tanzania (Commercial Division) by the respondent for a breach of contract. Judgment was entered against the appellant, hence this appeal.

Before the appeal came for hearing, Mr. Julius Mushobozi learned counsel for the respondent, raised a number of preliminary points of objection. However, after a short dialogue with the Court,

save one, he withdrew the rest. The one which remained runs as follows:-

> *"That the appellant has failed to number some of the documents in the record of appeal as required by Rule 12(4) of the Court of Appeal Rules, 2009".*

Indeed the record shows that some pages to have not complied with Rule 12(4) of the Court of Appeal Rules, 2009 (the Rules) namely in every tenth line of each page to have not indicated in the margin on the right side of the sheet.

Mr. Gabriel Mnyele learned advocate, who appeared for the appellant conceded that much. But he was quick to point out that the omission is not fatal. We entirely agree with Mr. Mnyele. It is not in every situation that a non-compliance with a rule as contended by Mr. Mushombozi, renders the appeal incompetent simply because the word "shall" is used in the rule. Non-compliance which do not go to the root or substance of the matter can be overlooked provided there is substantial compliance with the rule read as whole and no prejudice is occasioned. (See **Maneno**

Mengi and 3rd Others V Farida Said Nyamachumbe & Another, Civil Appeal No. 45 of 2003 (unreported).

In this case the respondent and the Court were able to read the record without any difficulty, notwithstanding non- compliance with Rule 12(4) of the Rules. And since the omission did not prejudice the respondent, we hereby overlook that matter and overrule the objection.

After we had disposed of the preliminary objection, we now turn to the appeal. Mr. Mnyele had raised fifteen grounds of appeal. But having carefully read the record, we were of the firm view that the appeal could be dispose of on the manner in which the exhibits were tendered, received and acted upon which is the subject matter of ground numbers 1, 2, 3, 4, 5 and 7.

Mr. Mnyele submitted that the Commercial Court Rules, 2012 (Vide G.N. 250/2012) do not provide the manner in which the documents are to be admitted. Rule 48(1)(d) of the Commercial Court Rules, do not provide on how the documents are to be admitted. It only requires the maker of witness statement to

sufficiently identify any document. He went on that there is nothing in the Commercial Rules that are to the effect that once the witness statement is filed, the documents identified therein are automatically admitted as exhibits. Since there is no provision in the Commercial Court Rules, in terms of Rule 2(2) of the said Rules, there is a *lacuna*. As such the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC) should be called in aid. He made reference to O.XIII, Rule 4 of the CPC where it provides the manner on how such document should be admitted. And the consequences of that failure is provided under O.XIII, Rule 7(2) of the CPC in that documents not admitted in evidence shall not form part of the records. It is the submission of Mr. Mnyele that since the documents were not tendered at all, though acted upon, the best option is to quash some portion of the High Court proceedings, set aside the decree and order retrial to commence after mediation.

On the other hand, Mr. Mushobozi submitted that, once the witness statement is filed along with documents, then those documents are deemed to have been admitted, if no objection was taken out. To put it differently, the accompanying documents are

taken to have been automatically tendered. He went on to say the decision arrived at is sound in law. He prayed that the appeal be dismissed with costs.

First and foremost, we wish to point out that on 13/7/2012 vide GN 250, the High Court of Tanzania (Commercial Division) Procedure Rules came into force. It provided the procedure as to how to conduct disputes of commercial nature. But realizing that the Rules might not be exhaustive, it specifically provided the manner in which to fill in the gaps. This is what Rule 2(2) of the said Rules is all about. The Rule reads: -

> *"2(2).In the case of any lacuna in these Rules the provisions of the Code shall apply."*

And the word 'Code" is defined as Civil Procedure Code.

With the coming into force with these Rules, the procedure of taking evidence of a witness both in the plaintiff and defendant cases in the High Court (Commercial Division) has drastically changed. A witness is required to file his witness statement along with the "intended" exhibits. The statements are exchanged. Then

a witness appear in Court for cross-examination. In our case the appellant had three witnesses whereas the respondent had one, the respondent alone. The three witnesses in the appellant's case filed six "intended" exhibits; whereas the respondent filed ten "intended" exhibits. But these "intended" exhibits were not formally tendered in court, though they were referred to in the proceedings and judgment as exhibits.

We wish to state at this juncture that the function of admission of documentary exhibit is the domain of the trial court and not the parties to the proceedings. It is the trial Judge or magistrate who will have to apply the governing law of admissibility of exhibits like whether the document is a primary or secondary evidence (See S.60-67 of The Law of Evidence, Cap. 6. R.E. 2002). Two, once the exhibit is admitted, if it is in civil proceedings, it must be endorsed as provided under O.XIII, R.4 of the CPC which reads:

> *"4-(1) Subject to the provisions of the subrule (2), there shall be endorsed on every document which has been*

admitted in evidence in the suit the following particulars, namely –

(a) The number and title of the suit;

(b) The name of the person producing the document;

(c) The date on which it was produced; and

(d) A statement of its having been so admitted; and the endorsement shall be signed or initialed by the judge or magistrate."

And we think the need to endorse is to do away with tempering with admitted documentary exhibits.

In our case the learned Judge considered the aforesaid documents without complying with the rules of admissibility and endorsement. That was not proper. Those documents, in term of O.XIII, Rule 7(1) as correctly submitted by Mr. Mnyele should not form part of the record. The Rule reads:

"7(1).Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the

original under rule 5, shall form part of the record of the suit."

The same are expunged.

In exercising our revisional powers as provided under S.4(2) of the Appellate Jurisdiction Act, Cap. 141 we quash the High Court proceedings commencing after mediation and set aside the decree. We order for a retrial before another judge. We award no costs.

It is so ordered.

DATED at **MWANZA** this 30th day of May, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL