

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM : KIMARO, J.A., MANDIA, J.A., And JUMA, J.A.)**

CIVIL APPEAL NO. 40 OF 2013

NBC LTD APPELLANT

VERSUS

SAHIB BUS SERVICES LTD 1ST RESPONDENT

FARAH OMARY MOHAMED 2ND RESPONDENT

ZAINAB FARAH MOHAMED 3RD RESPONDENT

**(Appeal from the Judgment and Decree of the
High Court of Tanzania at Arusha)**

(Nyerere, J.)

Dated the 31st day of October, 2012

In

Civil Case No. 18 of 2001

RULING OF THE COURT

17th June, & 3rd July, 2014

MANDIA, J.A.:

On **19th April, 2001** the respondent lodged in the High Court of Tanzania at Arusha a plaint for Civil Case which was at first numbered 35 of 2001 and later, we do not know when, changed to 18 of 2001. The number which has been tempered with is indicated at page 5 of the record.

On 7th May, 2001 the defendant filed a Written Statement of Defence in reaction to the plaint filed on 19th April, 2001. The citation on top the written statement of defence is "*Miscellaneous Civil Application No 35 of 2001,*" as indicated at page 33 of the record. On 20th August, 2001 the

respondent filed an **amended plaint** in which he gave the citation of his case as Civil Case No. 18 of 2001. This is indicated at page 39 of the record. On **4th September, 2001**, the appellant filed an **amended written statement of defence** to the amended plaint filed on 20th August, 2001. The citation of the amended written statement of defence is "Miscellaneous Civil Application No. 35 of 2001, as indicated at page 67 of the record.

On 1st day of March, 2005, the respondent filed a **second amended plaint** as indicated at page 73 of the record; the citation thereof being Civil Case No. 18 of 2001. The appellant reciprocated by filing a second amended written statement of defence which he titled Misc. Civil Application No. 35 of 2001 as shown at p. 101 of the record. On 27th April, 2005 the respondent filed a reply to the second amended written statement of defence and defence to counterclaim, the citation of which is Civil Case No. 18 of 2001. This comedy of errors went on to the end of the case. At p. 335, when the respondents filed their written submissions they cited civil case No. 18 of 2001, while at p. 353 of the record when the appellants filed their closing submissions as defendants they gave the citation of the case as Civil Case No. 35 of 2001. At the end, the trial judge, at page 377 of the record indicated that she was pronouncing

judgment in respect of Civil Case No. 18 of 2001 on 30/10/2012, and gave a decree with the same citation. On 14th November, 2012 the appellant lodged a Notice of Appeal in respect of the judgment dated 30th October, 2012, but indicated that the judgment was in respect of Civil Case NO. 35 of 2001.

On 17th June, 2014, Mr. Thomas Sipemba, learned advocate, appeared before us acting for the appellant NBC, and Mr. Alute Mughwai, learned advocate appeared for the respondents. The Court, ***suo motu***, pointed out the peculiar lapses in citation of the case from the trial in the High Court to the filing of the appeal in this Court. Mr. Thomas Sipemba admitted that there were errors as pointed out by the Court but prayed that he be allowed to correct the errors by amending the Notice of Appeal and the record of appeal, "*since the errors did not go to the root of the matter.*" He even pointed out an error in the certificate of delay at page 415 of the record when it cited Civil Case No. 35 of 2001. Mr. Sipemba moved this Court for the order of amendment, purportedly under Rule 111 of the Court of Appeal Rules, 2009.

On his part Mr. Alute Mughwai argued that since the Court is sitting to consider an appeal whose record is defective, and since it is the Court ***suo motu*** which pointed out the defects, and since Mr. Thomas Sipemba

went as far as securing a defective certificate of delay made at his instance but did not return it to the Court for correction, it was late in the day for Mr. Sipemba to seek an order for amendment of the record with a view to correcting the evident errors on record. He therefore urged the court to strike out the appeal and, taking the particular circumstances of the case, did not press for costs.

In reply, Mr. Thomas Sipemba maintained that Rule 111 allows the court to allow an amendment any time, and struck to his earlier prayer.

What we have narrated above shows that the appellant and the respondents were talking at cross-purposes from the trial court right up to this Court, and the trial court joined in the game by not stopping the pantomime being played by the parties. This court therefore went further to inspect the court registers to get an insight as to what happened. We discovered that in the register for Civil Cases for 1998-2004 on 19/4/2001 the then plaintiff who is the present respondent, filed Civil Case No. 18 of 2001 against the present appellant. It is this case number upon which the judgment of the trial High Court dated 30/10/2012 is based. We also examined the register for miscellaneous Civil Applications. We discovered that on 19/4/2001 the then applicant, who is the present respondent, filed miscellaneous Civil Application No. 35 of 2001 against the present appellant

under Section 68 of the Civil Procedure Code as well as Order 37 Rule 1&2 of the same Code. In the application the applicant prayed for injunctive orders. On 13/8/2001, four months after the application was filed, the court entered the following order:-

"The application is hereby marked withdrawn with no orders as to costs."

This means from 13/8/2001 Miscellaneous Civil Application No. 35 of 2001 ceased to exist yet, on 4th September, 2001 the appellant filed an Amended Written Statement of Defence citing the number of the application which had been withdrawn on 13/8/2001, and the mistake kept recurring up to the time the present appeal was filed. As it is now, both Miscellaneous Civil Application No. 35 of 2001 and Civil Case No.35 of 2001 **do not** exist. Unfortunately both the certificate of delay at page 415 of the record, which was issued on 17/4/2013 at the instance of the appellant as indicated at Page 415 of the record, as well as the Notice of Appeal, cite Civil Case No. 35 of 2001 as the case which went on trial in the High Court. Mr. Thomas Sipemba learned advocate, has argued that this "mistake" is minor and does not go to the root of the matter before us, and the "mistake" can be cured under Rule 111 of the Court of Appeal Rules, 2009. On the opposite side of the spectrum, Mr. Alute Mughwai is of the view that the "mistake" has resulted into a defective record which makes the

appeal before us incompetent. We are inclined to agree with the argument put forth by Mr. Alute Mughwai. We are of the opinion that preferring an appeal on the basis of a non-existent case, to wit, Civil Appeal No. 35 of 2001, is not a "mistake" which does not go to the root of the matter and can be cured under Rule 111 of the Court of Appeal Rules, 2009. We have painstakingly pointed out all the fundamental defects in the record and we do not hesitate to conclude that the defects point out a very serious lack of attention to detail by the appellant and/ or their advocate. We therefore find the appeal before us incompetent and accordingly strike it out. Mr. Alute Mughwai did not press for costs, not surprisingly, because the defects were unearthed by the Court. In these circumstances we will not make an order for costs.

DATED at ARUSHA this 1st day of July, 2014.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL



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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL