

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MFALILA, J.A., LUBUVA, J.A., And SAMATTA, J.A.)

CIVIL APPEAL NO. 63 OF 1998

BETWEEN

AZIM SULEMAN PREMJI APPELLANT

AND

1. THE ATTORNEY GENERAL)
2. DR. AMAN WALID KABOUROU) RESPONDENTS

(Appeal from the decision of the High
Court of Tanzania at Tabora)

(Masanche, J.)

dated the 11th June, 1998

in

Miscellaneous Civil Cause No. 3 of 1995

RULING OF THE COURT

MFALILA, J.A.:

Before the hearing of this appeal got underway, Mr. Mwengela learned counsel for the second respondent rose and applied for leave to raise a preliminary objection under Rule 106 (b) which might have been raised under Rule 82. We granted him such leave. Thereupon Mr. Mwengela submitted in support of his preliminary objection that since the appellant failed to serve the respondent with the memorandum and record of appeal within seven days as required by Rule 90, the present appeal is incompetent and should therefore be struck out. He submitted further that this appeal is incompetent for another reason, that is the incompleteness of the record. He said that the record of appeal is incomplete because it does not contain the original petition which was amended, and that its absence deprived the respondent the opportunity to find out whether the petition was filed in or out of time.

In further support of the preliminary objection, Mrs. Sumari learned Senior State Attorney who appeared for the first respondent, the Attorney General, argued that the appellant acted unreasonably in sending the memorandum of appeal and the record of appeal to Mr. Kwikima whom he knew was no longer representing the second respondent. Mr. Mwengela had gone further and suggested that the appellant had done so deliberately in order to frustrate the defence of the second respondent.

In reply Mr. Mbezi, learned counsel for the appellant, said that both the memorandum and record of appeal were timeously served on the counsel for the Second respondent one Mr. Kwikima and that he did this under Rule 77 (2) after having earlier served both the 2nd respondent and Mr. Kwikima with the notice of appeal. He added that as he received no response from either of them after service of notice of appeal, he reverted to Rule 77. As to the second ground of the record being incomplete, Mr. Mbezi said that the record was complete with all the necessary documents required under Rule 89 (1).

Before we proceed to determine the preliminary objection on merits, we wish to state that the second respondent was highly prejudiced in his defence by a decision made by the trial judge on his application to 'dismiss Mr. Kwikima and engage another advocate. We honestly failed to see why the judge rejected the second respondent's application to dismiss an advocate who had acted irresponsibly by abandoning him in midstream, and then refusing to let him engage another advocate. This surprising decision by the judge put the 2nd respondent in a very awkward situation whereby he had to fend for himself in a very difficult legal situation. It should always be borne in mind that the right to defend one's case and the choice

of an advocate to do this is unconditional. These two rights cannot depend on the willingness of an advocate to withdraw from the case. A client has an unfettered right to dismiss an irresponsible and/or incompetent advocate.

In determining this preliminary objection we intend to reproduce the relevant provisions of the Court Rules:

Rule 77 - (1)

(2) Where any person requires to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the High Court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him at that address, notwithstanding that it may be of an advocate who has not been retained for the purpose of an appeal.

Rule 79 - (1) Every person on whom a notice of appeal is served shall -

- (a) Within fourteen days after service on him of the notice of appeal lodge in the appropriate registry and serve on the intended appellant notice of full and sufficient address for service, and
- (b) Within fourteen days serve a copy of the notice of address for service on every other person named in the notice of appeal as a person intended to be served.

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situation is different from one where the defect involves the absence of any one of the documents listed in Rule 89 i.e. a decree or memorandum of appeal.

For these reasons, we dismiss the preliminary objection and order that the appeal should now proceed to hearing on merits.


DATED AT DAR ES SALAAM THIS 10TH DAY OF DECEMBER 1998.

L. M. MFALILA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

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


(A.G. MWARIJA)
DEPUTY REGISTRAR