IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 109 OF 2007

ROBERT EDWARD HAWKINS AND ANOTHER....APPLICANTS
VERSUS
PARTICE P. MWAIGOMOLE.....RESPONDENT

(Application to amend the Record of Appeal in Civil Appeal No. 46 of 2006 from the decision of the High Court of Tanzania at Dar es saiaam)

(Ihema, J.)

Dated 25th day of February, 2005
In
Civil Case No. 56 of 2000

RULING

11TH February, 2008 & 26th February, 2008

RUTAKANGWA, J.A:.

The applicants were aggrieved by the decision of the High Court sitting at Dar es salaam in Civil Case No. 56 of 2000. They filed an appeal in this Court (i.e. Civil appeal No. 46 of 2006) challenging the said decision. The appeal is yet to be heard and determined. In the meantime, they have, by Notice of motion, filed this application. The Notice of Motion is brought under rules 18 (1),

47 (1) and 104 of the Court of Appeal Rules, 1979, henceforth the Rules.

In this application, the applicants are seeking an order granting them leave:-

> *"To amend the record of appeal on the ground that the decree as a vital document in the record of appeal bears a different date from the date the judgment was pronounced."*

The Notice of Motion is supported by an affidavit sworn by Mr. Lugano Mwandambo. In paragraph 5 of the affidavit, Mr. Mwandambo has deponed as follows:-

> *"[T]hat in my understanding of the law upon leave of the Honourable Court been (sic) sought and obtained, the applicants are entitled to amend any part of the record of appeal such as the decree intended to be amended by notice of motion and file a supplementary record of appeal thereafter."*

Essentially, therefore, the applicants are seeking leave to amend the copy of decree contained in the record of appeal and thereafter lodge a supplementary record of appeal containing an *"amended decree."*

When this application came up for hearing, Mr. T Hyera, learned advocate for the respondent, argued, first, a point of preliminary objection, notice of which he had given earlier. The objection was to the effect that the application *"is misconceived and improperly"* before the court.

Submitting in elaboration, Mr. Hyera argued that the application is misconceived in the sense that for the order being sought (i.e. to amend the record) no leave is required. He confidently asserted that *"the applicants can file an application in the High Court for amendment of the decree"* and thereafter they would be at liberty to file a supplementary record of appeal under rule 92 (3) of the Rules. He was of the settled view, therefore, that this application was unnecessary. He accordingly urged me to strike it out with costs.

On his part, Dr. Nguluma, learned advocate for the applicants, pressed me to dismiss the preliminary objection. It was his contention that rather than their application, it was the preliminary objection which was totally misconceived. He stressed that their intention was to move the High Court to amend the decree it issued

to them which is contained in the record of appeal. Accordingly, he was of the view that rule 92 of the Rules is not even remotely relevant to this application. Rule 92, he maintained, *"is meant to capture missing pages or documents which were presented for consideration or prepared by the lower Court but which are missing in the record of appeal".* He accordingly urged me to dismiss the preliminary objection. He never pressed for costs.

The only legal issue before me is the determination of the competence or otherwise of this application. Is this application, as presented, legally maintainable or not? The correct answer to this question depends only on the interpretation one puts on rules 89, 92 and 104 of the Rules. One has, therefore, to examine these rules more closely.

Rules 92 and 104 read as follows:-

> *"92 – (1) If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a* ***supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal.***

(2)..... Not relevant .....

(3) An appellant may at any time lodge in the appropriate registry four copies of ***a supplementary record of appeal*** *and shall as soon as practicable after doing so serve copies of it on every respondent who has complied with the requirement of Rule 79.*

(4) A supplementary record of appeal ***shall be prepared as nearly as may be in the same manner as a record of appeal.***

104. The Court may at any time allow the amendment of any notice of appeal or notice of cross –appeal or memorandum of appeal, as the case may be or any other part of the record of appeal on such terms as thinks fit."

[Emphasis is mine].

From my reading of rule 92, it is obvious that in civil appeals the Rules recognize two categories of records of appeal. These are what I may conveniently call the primary record of appeal which institutes an appeal and a supplementary record of appeal. The primary record of appeal is lodged under rule 83 (1) of the Rules. The contents of this record of appeal are unambiguously spelt out in rule 89 (1) and (2) of the rules. For our present purpose sub-rule (1) is the most relevant. It will be apposite to reproduce it in full here.

Rule 89 (1) of the Rules provides as follows:-

"For purposes of an appeal from the High Court in its original jurisdiction, the record of appeal shall, subject to the provisions of sub rule (3), contain copies of the following documents-

(a) an index of all the documents in the record with the numbers of the pages at which they appear;

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by Rule 79, his last known address and proof of service on him of the notice of appeal;

(c) the pleadings;

(d) the trial judge's notes of the hearing;

(e) the transcript of any shorthand notes taken at the trial;

(f) the affidavits read and all documents put in evidence at the hearing or, if such documents are not in English, their certified translations;

(g) the judgment or order;

(h) the decree or order;

(i) the order, if any giving leave to appeal;

(j) the notice of appeal;

(k) such other documents, if any, as may be necessary for the proper determination of the appeal including any interlocutory proceedings which may be directly relevant,

save that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any

of their parts that are not relevant to the matters in controversy on the appeal."

It is important to point out here with great emphasis that this record of appeal, must under rule 83(1), be lodged in the appropriate registry within sixty (60) days of the date of the lodging of the notice of appeal, subject, of course to the exception contained therein. If the record of appeal, containing all these essential or core documents mentioned in rule 89 (1), which in other jurisdictions, such as in Kenya, are referred to as ***basic documents*** (a term inherited from the defunct Court of Appeal for East Africa), is not so lodged, the appeal will be held to be incompetent.

As is evident from rule 89 (1), one of the core or basic documents to be contained in a record of appeal is a copy of the order or decree appealed from. It is now settled law that non-incorporation of a copy of decree and /or incorporation of such a copy but which is incurably defective, renders the appeal incompetent. See, for instance:-

(i) NATIONAL BANK OF COMMERCE VS METHUSELA MAGONGO[1996] TLR 394,

(ii) REPUBLIC V. KENYA POST AND TELECOMMUNICATIONS [1999] E.A 250 (CAK),

(iii) HAJI AND OTHERS V. ABDALLA AND OTHERS [2004] 2 E.A 69 (CAT),

(iv) HASMA MSHENGA ALI V KAMIS HAMAD OTHMAN V REGISTRAR OF DOCUMENTS, CIVIL APPEAL No. 79 OF 2007 (CAT)

(v) FORTUNATUS MASHA v WILLIAM SHIJA AND ANOTHER [1997] TLR 41.

In MASHA V. SHIJA (supra) this Court succinctly stated as follows:-

> "However, we are of the view that where by reason of non-extraction of the decree or order, as in this case, the appeal is rendered incompetent, the issue of insufficiency or incompleteness does not really arise. The position that arises is simply one of non-existence of the appeal. Because insufficiency or incompleteness connotes something which is in existence and which can be

improved upon, say by adding to it. An incompetent appeal is one which in law did not come into existence although efforts were made to try to bring it into existence. In such circumstances, therefore, one cannot properly talk of there being an insufficient or incomplete appeal which one can improve upon by filing a supplementary record, because in law no appeal came into existence in the first instance; there was only a purported appeal, if you wish."

As rightly conceded by Mr. Mwandambo in his affidavit and Dr. Nguluma, it is equally settled law that a decree which bears a date different from the date of the impugned decision is fatally defective and invalid. It is also conceded that a copy of the decree contained in the record of appeal of Civil Appeal No. 46 of 2006, is invalid for this reason. That decree, like an incurably defective affidavit, is accordingly incapable of amendment. I am asserting so advisedly for this simple reason.

The amendments contemplated under rules 17(1), 47 and 104 of the Rules presuppose the existence of a document or documents sought to be amended. An amendment can be effected under any one of the following circumstances:-

(i) **amendment by adding:** this is an amendment which places new wording ~~at the end of a motion or of a~~ paragraph at the end of a motion or of a paragraph or other readily divisible part within a motion;

(ii) **amendment by inserting:** this involves placing new wording within or around a motion or document's current wording;

(iii) **amendment by striking out:** this involves removing some words or figures from a document's current wording;

(iv) **amendment by striking out and inserting:**- this kind of amendment removes wording and/or figures in a document and replaces them with alternative wording in its place, and

(v) **amendment by substituting:** this is an amendment which strikes out and replaces an entire main motion or a paragraph thereof or other readily divisible part of a motion or document: [See specifically BLACK'S LAW DICTIONARY, 8th edition at page 89).

From these categories of amendments, it is crystal clear that one cannot amend what does not exist. It goes without saying, therefore, that since the applicant is seeking leave to amend a decree which is not part of the record of appeal, that is which does not exist, the application is totally misconceived and legally unmaintainable and ought to be struck out.

Under normal circumstances I would have concluded the ruling at this juncture. However, I feel constrained not to do so. I have a duty to express my opinion on the submission by Mr. Hyera on the applicability of rule 92 of the Rules and on whether it would be successfully invoked by the applicants.

We all cherish the legal maxim that where there is a right, there is always a remedy. The applicants herein, definitely, have a right. This is the right of appeal. That right, however, is circumscribed. It must be exercised within the confines of existing laws.

It was suggested by Mr. Hyera and in Mr. Mwandambo's affidavit that the applicants' remedy lies in rule 92 (3) of the Rules. The applicants, after obtaining a valid or proper decree have to file a supplementary record of appeal under the rule, they have asserted and /or deponed.

To appreciate the true import of rule 92 one has first to read it as a whole and then consider the meaning of the word *"supplementary".* This is the catch- word. Read within the context of rule 92, it becomes clear that the word *"supplementary"* is not a word of art. It must be given its ordinary meaning. It is common knowledge that when a word is not defined in the statute itself, recourse may be had to dictionaries to find out the general sense in which that word is understood in common parlance: See, for

instance, PRINCIPLES OF STATUTORY INTERPRETATION, by Justice P.G. Singh, 8TH edition, at pages 279-80.

The word *"supplementary"* is an adjective derived from the noun *"supplement".* It is defined as follows in OXFORD ADVANCED LEARNER'S DICTIONARY OF CURRENT ENGLISH, 6th edition:-

> *"Provided in addition to something else in order to improve or complete it" at* page 1359.

As already alluded to, a supplementary record of appeal, presupposes the existence of complete primary record of appeal lodged by an appellant. Complete in the legal sense that it is containing all the necessary or core documents as itemized in rule 89(1). As rule 92 (1) unequivocally directs, the supplementary record of appeal may be lodged only for the purpose of making good some minor deficiencies in the record of appeal not affecting the competence of the appeal. Hence the deliberate use of the words *"containing copies of any further documents or additional part of documents which are, in his opinion required for the proper determination of the appeal".* A supplementary record of appeal, therefore, lodged by either the respondent or appellant or even both, in my settled view, should not supplant the contents of the record of

appeal. It should add something to the otherwise complete record of appeal further to those mentioned in rule 89 (1) in order to make it easy, in the view of the party lodging it, for the appeal to be properly and conclusively determined. I am fortified in this approach by the decision of the Court of Appeal for East Africa which was the forerunner of this Court, in the case of ***KIBORO V. POSTS & TELECOMMUNICATIONS CORPORATION [1974] E.A.*** 155.

Of course the Court of Appeal for East Africa no longer exists. But the good that it did lives after it. The said Court, like this Court, had its own Rules to regulate its practice and procedure in connection with appeals and intended appeals to it. These were the Court of Appeal for East Africa Rules, 1972. It is, indeed, no derogation to say that our own Rules are a replica of those Rules.

The problem facing me in this application was a bone of contention in the ***KIBORO*** case (supra). The conceded facts obtained from the head note in the report were simple. The appellant had filed a record of appeal which did not contain a certified copy of the decree appealed against. Just before the appeal was to be heard, he filed another record of appeal containing a

proper decree. He argued that he was entitled to file it as a supplementary record of appeal (under rule 89 (3) of that Court's Rules). In the alternative, he prayed to be allowed to file it out of time.

The Court of Appeal for East Africa unanimously rejected the appellant's two applications. It unequivocally held that a supplementary record of appeal cannot contain one of the basic documents required by the rules. The reasoning of both Law, Ag. V.P. and Mustafa, J.A are not only fascinating but also paralyzingly convincing. Law, Ag. V.P. said:-

> *"The meaning of a supplementary record of appeal is made clear in R. 89 (1). It means a record containing copies of further documents or any additional parts of documents which are .....required for the proper determination of the appeal. The word further must, in my opinion, mean further to the documents required by rule 85 (1) to be contained in the record of appeal. Any other construction would mean that any appellant, who has filed a record omitting one or more of the basic documents required by r. 85 (1) could , at any time before the hearing, file a fresh record containing those documents, without having to apply to the court for an extension of time under r. 4.*

If Mr. Muite (counsel for appellant) is right, a record of appeal could be filed in complete disregard of r. 85(I) and the matter put right by filing a new record complying with that rule any time before the hearing. I cannot accept that submission. I have no doubt that the record filed just before the hearing of this appeal was not a supplementary record, but a re-filing out of time of the original record containing one of the basic documents omitted from the original record, and that the appeal is incompetent unless this court extends time either for filing the copy of the decree as part of the original record, or for filing the fresh record of appeal in place of the original defective record .....Before the Court can do this, it must be satisfied that there is 'sufficient reason' for granting indulgence" at p. 156.

In concurring with Law, Ag. V.P., Mustafa, J.A. had this to say:-

"I am satisfied that a supplementary record in terms of r. 89 of the Rules, can only include additional or further documents, which are, in the opinion of an appellant or respondent, required for a proper determination of an appeal. It supplements the original record of appeal, which has to be filed within the prescribed time, and which has to contain the basic documents as provided in r. 85 of the Rules. ***If a basic document, like a copy of the decree, is omitted from the original record of appeal, that cannot be introduced into the record by filing a***

> ***supplementary record of appeal, when the prescribed time has expired. In this case the appellant could only file the omitted decree out of time with leave.*** *He has applied for such leave under r. 4 of the Rules. To succeed he must show 'sufficient reason' ....." a t P. 160. [Emphasis is mine].*

The learned President of the Court, Sir William Duffus, agreed while stressing that the omission to file a decree was an irregularity which could not be cured by filing the decree in a supplementary record but with leave of the Court under r. 4.

As pointed out earlier on in this ruling, our Rules are admittedly a replica of the Court of Appeal for East Africa Rules, 1972. Rules 8, 89 and 92 of the Rules, for example, are wholly identical with rules 4, 85 and 89 of the 1972 Rules. So the interpretation given by the defunct Court of Appeal on any of the rules which are identical with ours cannot be jettisoned by this Court without good reasons. I have personally found no such reason, let alone being given one by the learned advocates in this application.

The Rules do not give any definition of the phrase "*supplementary record*". But this should not be a handicap. It is well settled now, that "*if two statutes are in* ***pari materia,*** *any judicial decision as to the construction of one 'is a sound rule of construction for the other*": See, *ODGERS' CONSTRUCTION OF DEEDS AND STATUTES*, 6th edition, at page 340. Also in *BEAMAN V. A.R. T.S. LTD* [1949] 1 KB 550 at p. 567, Somervell, L.J. held thus:-

> *"Where a word has been construed judicially in a certain legal sense, it is .....right to give it the same meaning if it occurs in a statute dealing with the same general subject- matter, unless the context makes it clear that the word must have a different construction".*

I cannot read anything into rule 92 of the Rules which can lead me to believe that the drafters of the Rules nearly six years after the decision in **Kiboro's** case, had any intention to ascribe a different meaning to the phrase 'supplementary record' and/ or a different construction to rules 89 (1) and 92. The context of these rules does not, even implicitly, show this. Rule 92, therefore, in my settled opinion should be assigned by this Court , the same construction as the one given by the Court of Appeal for East Africa to rule 89 of its

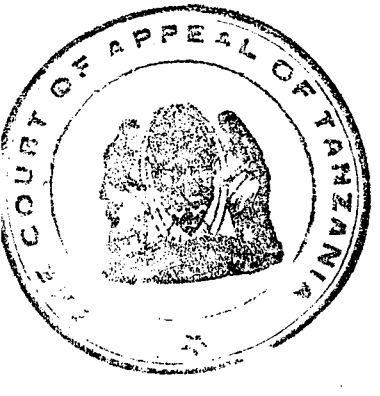
1972 Rules, as I believe that the interpretation was not erroneous in any way. It is, therefore, incorrect, in my opinion, to assert or propose that the defect in the applicants' record of appeal would be cured by filing a supplementary record of appeal under rule 92 (3) of the Rules containing a valid decree. The copy of the decree ought to have been filed together with primary record of appeal within the time prescribed in rule 83 (1) of the Rules. If such time has expired, then the applicants have to resort to rule 8 of the rules.

All said and done, I uphold the preliminary objection, although for different reasons. The application is held to be incompetent and it is accordingly struck out. Each side to bear its own costs in this application. It is so ordered.

DATED at DARE SALAAM this 26th day of February, 2008.

E.M.K. RUTAKANGWA,
JUSTICE OF APPEAL

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



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