

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MSOFFE, J.A., MANDIA, J.A., And ORIYO, J.A.)

CIVIL APPEAL NO. 61 OF 2006

**THE SENATE OF THE UNIVERSITY OF
DAR ES SALAAM APPELLANT**

VERSUS

1. EDMUND A. MWASAGA 2. BAKARI RASHIDI 3. MOSES MPUNGU 4. ZAINAB KHALID 5. LUGANO ISSACK CHITAMA	} RESPONDENTS
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**(Appeal from the decision of the High Court of
Tanzania at Dar es Salaam)**

(Mihayo, J.)

**dated the 27th day of March, 2006
in
Misc. Civil Cause No. 90 of 2001**

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RULING OF THE COURT**

9 & 17 February 2011

MSOFFE, J.A.:

On 27/3/2006 the High Court (Mihayo, J.) gave its decision in Misc. Civil Cause No. 90 of 2001 whereby it granted Orders of Certiorari against the appellant herein. Aggrieved, on 18/7/2006 the appellant Senate, through its learned advocate Mr. Wilfred Mnzava, lodged in this Court a memorandum and record of appeal against the

above decision. Realizing that the record was accompanied by a defective drawn order, on 16/4/2008 the appellant instituted Civil Application No. 49 of 2008 seeking the following orders from this Court:-

- (a) *The Applicant/Appellant be granted **Extension of time** to file a decree signed and dated by a judge and **Leave to amend** filed decree by replacement to form part of the record of appeal in the above cited appeal; in compliance with the law.*
- (b) *The said decree BE filed in Court by way of a supplementary record or in such other way as the Court shall direct.*
- (c) *That the said decree be filed in Court within seven (7) days of being supplied to the Applicant/Appellant by the High Court.*

(d) *That the costs of and incidental to this application abide the results of the appeal.*

On 15/11/2008 this Court (Kimaro, J.A.) gave its decision in which it held, *inter alia*, as follows:-

..... In the event, I allow the applicant to file an amended copy of the drawn order. The same should be filed seven days after obtaining the same from the High Court....

The applicant also asked the Court to give directions on how the amendment should be effected. In my considered opinion it is not the duty of the Court to direct the advocate on how he should file the amended order. That is a task which lies with him.

It is important to mention here that the appellant did not thereafter seek reference from the above decision in terms of Rule 57 (1) (b) of the then Tanzania Court of Appeal Rules, 1979 (hereinafter the Rules). Instead, on 20/3/2009, again through its learned

advocate Mr. Mnzava, the appellant lodged an amended record of appeal incorporating a valid drawn order.

When the appeal was called on for hearing the Court had to deal with a preliminary objection notice of which was given earlier under Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 by Mr. Israel Magesa, learned advocate for the respondents. In brief, the gist of the objection is that the amended record of appeal was filed without leave of the Court contrary to Rule 104 of the Rules, and also contrary to the aforementioned decision of Kimaro, J.A.

In his oral submission before us, Mr. Magesa was of the affirmative view that in terms of Rule 104 of the Rules the appellant ought to have obtained leave of the Court prior to filing the amended record of appeal. In his further view, there is nothing in the decision of Kimaro, J.A. granting the appellant leave to file the amended record of appeal. He accordingly invited us to strike out the amended record of appeal.

On the other hand, Mr. Mnzava maintained the view that the amended record of appeal was properly filed in accordance with the provisions of Rule 104 of the said Rules. According to him, the order given by Kimaro, J.A. constituted "sufficient leave" to the appellant to file the amended record of appeal. At any rate, he went on to say, with the coming into effect of GN No. 223 published on 18/6/2010 in which a new sub-rule (2) has been inserted under Order XX Rule 7 (1) of the Civil Procedure Code, to the effect that a decree shall bear the date on which the decree was extracted from the decision, the preliminary objection is misconceived in law because the GN applies retrospectively.

With respect, the preliminary objection need not detain us. We are of the considered view that Rule 104 is very clear. It reads:-

104. The Court may at any time allow 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 appeal, on such terms as it thinks fit.

There is no serious dispute that under Rule 104 an amendment has to be sanctioned by the Court hence the words "The Court may at any time allow" in the Rule. In our reading and understanding of the Rule we do not get the impression that any of the documents mentioned therein can be amended without leave of the Court. The question is whether, in the circumstances of this case, it was open to the appellant to file an amended record of appeal in the absence of a specific order by Kimaro, J.A. to that effect. Our answer to this question is in the negative. We say so for reasons which we will endeavour to demonstrate hereunder.

In the notice of motion, under paragraph (b) thereto, there was a specific prayer in which the Court was being asked to give directions as to how the amendment was to be effected. Since the Court declined to give directions we do not think that it was open to the appellant to "clothe" itself with power to file an amended record of appeal. Before filing the amended record of appeal there ought to have been a specific order by the Court allowing the appellant to do

50. In the absence of such order, it follows that the amended record of appeal was improperly filed.

We appreciate that the appellant might have been in a predicament as to what it could do in the matter, given the fact that Kimaro, J.A. had declined to give directions on how the amended drawn order was to be filed. In such a situation, the option was not, as stated above, for the appellant to file the amended record of appeal. Rather, we think, perhaps the appellant could have explored the possibility of filing a reference to this Court in terms of Rule 57 (1) (b) of the Rules from that portion of Kimaro, J.A.'s ruling in which she refused to give directions on how to file the amended drawn order.

This brings us to the other pertinent issue on the import of Order XX Rule 7 (2) of the Civil Procedure Code which was inserted following the amendment brought about by GN No. 223 of 18/6/2010. To start with, we agree with Mr. Mnzava that the amendments in the GN are designed or intended to apply

retrospectively. However, as this Court observed in **Simon Nchagwa v Majaliwa Bande**, Civil Appeal No. 126 of 2008 (unreported):-

What is immediately noted from the amendments is that the content of the provisions of Order XX Rule 7 in existence before the amendment did not change. It remained intact. It has now been re-designated as Order XX Rule 7 (1) instead of the previous Order XX Rule 7. So, in terms of content nothing has changed. Instead, the amendment has brought in confusion, because a provision which contradicts what was in existence has been brought in ...

So, by virtue of this Court's decision in **Nchagwa** the insertion of Order XX Rule 7 (2) has not only brought in confusion but it is also inconsequential in law. That being the case, Order XX Rule 7 is still intact and is also good law. Thus, an intending appellant has to ensure that a decree sought to be appealed against is consistent with the requirements stipulated under Order XX Rule 7. This reasoning

also applies to an Order, as in this case, because the provisions of Order XX Rule 7 in relation to a decree apply to Orders as well – See **Mkama Pastory v Tanzania Revenue Authority**, C.A.T. Civil Appeal no. 95 of 2006 (unreported).

Before we conclude this Ruling we wish to make two observations in passing. **One**, it occurs to us that GN 223 of 18/6/2010 has other unpleasant features. It is purportedly made under Rule 81 of the Civil Procedure Code Act 2010 (CAP 33). With respect, there is nothing like the Civil Procedure Code Act 2010 (CAP 33) in our laws. Instead, we have the Civil Procedure Code (CAP 33 R.E. 2002). In similar vein, there is no Rule 81 in the said Code. What we have is section 81. And under the said section 81 an amendment of the First Schedule, as was attempted to be done here, has to be done with the consent of the Minister responsible for legal affairs. The above GN lacks the requisite consent of the Minister. It will therefore be fair to say that the GN is not good law. We trust and hope that the relevant authorities will take up the matter with a view to effecting corrective or remedial measures.

Two, as correctly submitted by Mr. Magesa, once the appellant realized that the memorandum and record of appeal filed on 18/7/2006 was defective for want of an essential document under Rule 89 (1) (h) of the Rules, we think that the remedy was not to institute Civil Application No. 49 of 2008 that was eventually determined by Kimaro, J.A. In such a situation, we are of the view that the appellant could have sought leave of the Court to withdraw the record with a view to starting the appeal process afresh. If the appellant was, and presumably still is, not inclined to do so, there is a strong possibility that the above record will one day be struck out in line with the reasoning of this Court in its numerous decisions notably **Haruna Mpangaos and 902 Others v Tanzania Portland Cement Co. Ltd**, Civil Appeal No. 10 of 2007 and **Kapinga & Company Advocates v National Bank of Commerce Limited**, Civil Appeal No. 42 of 2007 (both unreported).

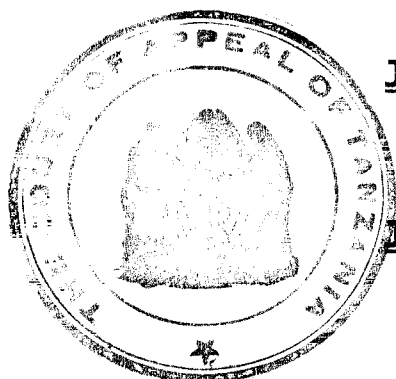
All in all, the preliminary objection has merit. We accordingly sustain it and strike out the amended record of appeal. The respondents shall have the costs of this order.

DATED at DAR ES SALAAM this 14th day of February, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL



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


M. A. Malewo
DEPUTY REGISTRAR