

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

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And KILEO, J.A.)

CONSOLIDATED CIVIL APPEALS NOS. 55 OF 2012 And NO.65 OF 2012

1. AESHI HILARY 2. THE ATTORNEY GENERAL 3. JUSTUS KASALAMA 4. VITUS KAPUFI	} APPELLANTS
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VERSUS

NORBERT JOSEPH YAMSEBO..... **RESPONDENT**

**(Appeals from a decision of the High Court of
Tanzania at Sumbawanga)**

(Mmilla, J.)

dated 30th day of April, 2012

in

Misc. Civil Cause (Election Petition) No. 1 of 2010

RULING OF THE COURT

19th September, & 8th October, 2012

MSOFFE, J.A.:

In October 2010 parliamentary elections were held in this Country. AESHI HILARY and NORBERT JOSEPH YAMSEBO were among the persons who contested for the Sumbawanga Urban constituency. The former and the latter contested on the ticket(s) of CHAMA CHA MAPINDUZI (CCM) and CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA), respectively. On 1/11/2010 the Returning Officer declared the former as the winner in that constituency. The latter did not agree with the election result. Henceforth,

he petitioned the High Court at Sumbawanga vide Misc. Civil Cause (Election Petition) No. 1 of 2010. The petition was against AESHI HILARY; THE ATTORNEY GENERAL; JUSTUS ATHANAS KASALAMA, the Returning Officer for Katandala Ward; and VITUS KAPUFI, the Assistant Returning Officer for Matanga Ward. On 30/4/2012 the High Court (Mmilla, J.) allowed the petition and accordingly declared the election result null and void. Aggrieved, on 28/5/2012 AESHI HILARY instituted Civil Appeal No. 55 of 2012 against NORBERT JOSEPH YAMSEBO, THE ATTORNEY GENERAL, JUSTUS ATHANAS KASALAMA and VITUS KAPUFI. In similar vein, on 3/7/2012 THE ATTORNEY GENERAL and JUSTUS ATHANAS KASALAMA lodged Civil Appeal No. 65 of 2012 against NORBERT JOSEPH YAMSEBO.

When the appeals were called on for hearing Messrs. Richard Rweyongeza, Juma Nassoro and Abubakar Salim, learned advocates, appeared on behalf of AESHI HILARY. NORBERT JOSEPH YAMSEBO had the services of Mr. Victor Mkumbe, learned advocate. Ms. Mwema Punzi, learned Senior State Attorney represented the Attorney General and she was assisted by Mr. Karim Rashid, learned State Attorney. Ms. Mwema, Mr. Rweyongeza and Mr. Mkumbe prayed that the appeals be consolidated mainly because they arise from the same judgment. We acceded to the

request and accordingly made an order for consolidation of the appeals. The citation of the parties in the appeals, as consolidated, now appears as under:-

1. AESHI HILARY	} APPELLANTS
2. THE ATTORNEY GENERA		
3. JUSTUS KASALAMA		
4. VITUS KAPUFI		
VERSUS		
NORBERT JOSEPH YAMSEBO RESPONDENT		

Mr. Mkumbe raised a number of preliminary objections to the appeals, as consolidated, notices of which were given earlier in terms of Rule 107(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). However, before arguing the objections, the Court *suo motu* wanted to ascertain from the parties as to whether or not there was any application made before the High Court for determination of the amount payable as security for costs in terms of section 111(3) of the National Elections Act (CAP 343 R.E. 2002). Ms. Mwema, Mr. Rweyongeza and Mr. Mkumbe told us in no uncertain terms that indeed there was such an application filed and determined in consequence of which the election petition was fixed for

hearing in line with the provisions of sub-section (2) thereto. We have no reasons for doubting learned counsel in this respect. Having answered the above question in the affirmative the next question was whether or not the record of proceedings to that effect was incorporated as part of the record of appeal before us. On this, the response by learned counsel was in the negative. According to Mr. Rweyongeza, the said record of proceedings is not a core document for purposes of determining this appeal. In his view, the said record will not feature in the hearing of the appeal. In the alternative, he prayed for the Court's indulgence to invoke Rule 2 of the Rules and, in the spirit of substantive justice, direct the appellants to file a supplementary record of appeal containing the said proceedings. Ms. Mwema was of the same view save that she went further and attributed part of the blame to the High Court for not supplying the 2nd respondent with the said record in spite of their letter dated 11/5/2012 applying for, *inter alia*, a copy of proceedings.

Admittedly, Mr. Mkumbe did not canvass any objection in relation to the point under scrutiny here. Nevertheless, he maintained that the said record of proceedings is a vital document under the Rules. In the absence

of the said record, the appeals are incompetent and should be struck out, he asserted.

The crucial issue is whether or not the record of proceedings relating to the application for determination of the amount payable as security for costs is vital for purposes of the competence or otherwise of these appeals, as consolidated. In addressing this issue our starting point will be section 111(3) of the Elections Act (*supra*). The sub-section reads:-

*(3) The petitioner **shall within fourteen days after filing a petition**, make an application for determination of the amount payable as security for costs, **and the court shall determine such application within the next fourteen days following the date of filing an application for determination of the amount payable as security for costs.***

[Emphasis is ours].

The above sub-rule is couched in imperative terms. This means that the functions stated therein must be performed within the stipulated period. In this sense, the record of proceedings in question is important in this appeal for two reasons. **One**, to give opportunity to this Court to see

rule, which we may respectfully say that it is the principal provision in this issue, is only subject to the provisions of sub-rule (3) which reads:-

(3) A Justice or Registrar of the High Court or Tribunal, may, on the application of any party, direct which documents or parts of documents should be excluded from the record, application for which may be made informally.

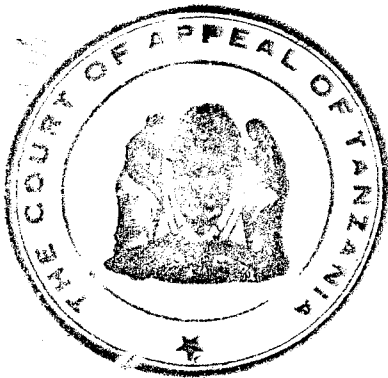
In this case, it is common ground that the appellants did not apply to the Registrar of the High Court seeking that the record of proceedings in issue be excluded from the record. In the absence of an application to that effect, it follows that under paragraph (k) above, the record of proceedings in question ought to have formed part of the vital documents in this appeal in terms of Rule 96 (1) of the Rules. In fact, having failed to comply with Rule 96 (1) (k) and (3), still the appellants had a remedy under sub-rule (6) of the Rule. Sub-rule 6 reads:-

*(6) Where a document referred to in rule 96 (1) and (2) is omitted from the record, the appellant may within 14 days of lodging the record of appeal **without leave** include the document in the record.*

[Emphasis is ours].

amount payable as security for costs is a vital document for purposes of this appeal. In the absence of the document, the appeals are incompetent for want of an essential document under Rule 96(1) (k) of the Rules. The appeals, as consolidated, being incompetent are hereby struck out. Since the point subject of this decision was raised by the Court *suo motu* there will be no order as to costs.

DATED at DAR ES SALAAM this 3rd day of October, 2012.



J.H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

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

A handwritten signature in black ink, consisting of several overlapping loops and curves, positioned above the name Z.A. Maruma.

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL