

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR
(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And BWANA, J.A.)

CIVIL APPEAL NO. 50 OF 2012

1. BI. ASHA SEIF
2. BI. ZUWENA SEIF } **APPELLANTS**
VERSUS
RANJEET GOKAL DAMJI..... **RESPONDENT**

**(Appeal from the decision of the High Court of Zanzibar
at Vuga)**

(Mwampashi, J.)

Dated the 20th day of October, 2009
in
Probate and Administration Cause No. 26 of 1996

RULING OF THE COURT

10th & 13th December, 2012

MBAROUK, J.A.:

When the appeal was called on for hearing, Mr. Abdalla Juma Mohamed, learned advocate for the respondent raised a preliminary objection, notice of which was filed earlier on in terms of Rule 107(1) of the Tanzania Court of Appeal Rules, 2009. Initially, the learned advocate for the respondent preferred two grounds of objection, but at the hearing, he

prayed to withdraw the first ground of objection and remained with the following point of objection:-

1. That the appellants' appeal is bad in law as the appellants failed to serve the respondent the memorandum of appeal and the record of appeal.

Submitting on a brief account which led them to raise the preliminary objection, Mr. Abdalla pointed out that, the appellants filed their notice of appeal on 23rd October, 2009, and on 26th October, 2009 served Mr. Uhuru Hemed Khalfan (the then learned advocate for the respondent). Mr. Abdalla further submitted that the requirements of Rule 83(1) of the Court of Appeal Rules, 1979 were not complied with by the appellants. He contended that on 2nd November, 2009, Mr. Uhuru wrote a notice of address for service and served the advocate for the appellants on 4th November, 2009. In the said notice of address for service, Mr. Uhuru indicated that the respondent to be served personally at the address of:-

*Swahili/Faru Street,
House No. 14,
Kariakoo,
Dar es Salaam*

Mr. Abdalla added that, to date the respondent is yet to be served with the memorandum of appeal and record of appeal. He said, Rule 97(1) of the Court of Appeal Rules, 2009 (the Rules) requires that the respondent to be served with the copies of the memorandum of appeal and record of appeal within seven days after lodging the same in the appropriate registry. For non-compliance with the requirements of Rule 97(1) of the Rules, Mr. Abdalla urged us to find that the respondent was prejudiced and ambushed, as he was not aware of the contents of the memorandum of appeal. In support of his submission, he cited to us the decision of this Court in the case of **Shirika la Meli la Zanzibar and The Hon. Attorney General v. Mohamed Hassan Juma and Others**, Civil Appeal No. 56 of 2006 (Unreported). He then prayed for the appeal to be struck out with costs.

On his part, Mr. Salim Mnkonje, learned advocate for the appellants, respectfully conceded that they have failed to serve the respondent with the memorandum of appeal and record of appeal as per the requirements of Rule 97(1) of the Rules. He admitted to have wrongly served the then advocate for the respondent instead of serving the respondent personally. However, Mr. Mnkonje urged us to invoke Rule 2 of the Rules so as to meet substantive justice. After all, he said, the defect earlier stated has not occasioned any failure of justice. In support of his argument, he cited to us the decision of this Court in the case of **Tesco Consultants and Associates v. New Northern Creameries Limited**, Civil Application No. 102 "A" of 2010 (Unreported). After all, Mr. Mnkonje submitted that Rule 97(1) of the Rules does not specifically state the outcome of non-compliance with the said Rule.

He then prayed for the appeal not to be struck out, instead the same should be adjourned to allow the appellants

to serve the respondent with the copies of memorandum and record of appeal in compliance with Rule 97(1) of the Rules.

Rule 97(1) of the Rules states as follows:-

"The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of Rule 86."

As earlier pointed out, the then advocate for the respondent complied with the requirements of Rule 86 by serving the advocate for the appellants with the notice of address for service. Mr. Mnkonje acknowledged receipt of the said notice. All in all, Mr. Mnkonje with respect conceded not to

have served the respondent with the memorandum and record of appeal.

Article 107 B of the United Republic of Tanzania Constitution states as follows in Kiswahili:-

"Katika kutekeleza mamlaka ya utoaji haki mahakama zote zitakuwa huru na zitalazimika kuzingatia tu masharti ya Katiba na yale ya Sheria za Nchi."

It's translation in English, the same will read as follows:-

*"In discharging their judicial functions, all the courts **shall be independent and shall be bound only by the provisions of the constitution and the laws of the land.**"(Emphasis added).*

In addition to that, this Court in the case of **Ami (T) Ltd. V. OTTU on Behalf of P. J. Asenga and 106 Others**, Civil Application No. 140 of 2010 (unreported) held that:-

"the clear and unambiguous provisions of the Rules have to be given effect."

Also see, **Meis Industries Ltd. v. Mohamed Enterprises (T) Ltd**, Civil Reference No. 2 of 2011 (unreported)

Rule 97 (1) of the Rules is the applicable law which applies in this matter. The same is couched with mandatory terms. Taking into account Article 107 B, our hands are tied to consider the provisions of Rule 97(1) of the Rules as the applicable provision of the law.

Even if the law does not specifically state the outcome of non-compliance with Rule 97 (1) of the Rules, but it is trite law and practice of the Court that where an appellant fails to take

an essential step or steps as provided by the Rules, the notice of appeal or the appeal should be struck out. In the instant appeal the appellants failed to comply with the mandatory provisions of Rule 97 (1) of the Rules for not having served the respondent with the memorandum and record of appeal at all. Such a failure renders the appeal incompetent. For being incompetent, we are constrained to strike out the appeal. In the event, the appeal is hereby struck out with costs.

DATED at ZANZIBAR this 12th day of December, 2012

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

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

