IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CIVIL APPEAL NO. 40 OF 2012

JAMES MOSHA.....APPELLANT

VERSUS

SHOSE JARED MKONYI ..... RESPONDENT

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

(Sheikh, J.)

dated the 20th day of October, 2006
in
Civil Appeal No. 14 of 2003

RULING OF THE COURT

7th & 12th September, 2012

MASSATI, J.A.:

The appellant was aggrieved by the decision of Sheikh J, dated 20/10/2006 in Civil Appeal No. 14/2003. On 26/10/2006 he filed a notice of appeal and also wrote a letter to the District Registrar of the High Court, Arusha, requesting for copies of judgement, proceedings, and order and "other all necessary documents" to enable him prepare the record of appeal. On 30th September, 2011, the District Registrar issued a Certificate of Delay signifying that all the necessary

documents requested by the appellant were ready and supplied to him on 26th September, 2011. Armed with those documents, the appellant prepared his record and filed the appeal on 25th November, 2011.

Upon being served with the record of appeal, the respondent instructed Mr. Mpaya Kamara, learned counsel, to represent her. The learned counsel filed a notice of preliminary objection to bar the hearing of the appeal on the ground that:-

> *"The Appellant's appeal is incompetent and time barred on account of non service of the Notice of Appeal and letter requesting for copies of proceedings to the Respondent".*

At the hearing of the appeal, Mr. Kamara adopted his written submission on the preliminary objection which he had earlier on filed. Briefly, his objection was that since the respondent was not served with a Notice of Appeal and a copy of the letter requesting for copies of documents, the appellant could not rely on the proviso to Rule 83

(1) of the Court of Appeal Rules, 1979 (now Rule 90 (1) of the Court of Appeal Rules, 2009) to explain away the delay; and so the Certificate of Delay was ineffectual. He urged us to find that the appeal was filed out of time, hence incompetent, and so strike it out with costs. He referred us to a number of decisions of this Court, which, as will be clear shortly, it will not be necessary for us to consider them.

The appellant who appeared in person, at first registered his complaint that, contrary to Rule 107 (1) of the Court of Appeal Rules, 2009 that requires that a notice of preliminary objection be served on the other party within three clear days, he was served only yesterday afternoon. Nevertheless, he said, he was ready to tackle the preliminary objection. His short answer to the objection was that the respondent was served with both documents by registered post which was delivered on 21/11/2006. He showed to the Court copies of the postage receipt. So, he prayed that the preliminary objection be dismissed.

In rejoinder, and on reflection, Mr. Kamara readily conceded that as the preliminary objection depended on the ascertainment of the fact, whether or not the respondent was served, it did not meet the test of a preliminary objection par excellence as laid down in **MUKISA BISCUITS MANUFACTURIES LTD vs WEST END DISTRIBUTORS LTD** (1969) EA 696. In view of these developments, the learned counsel promptly withdrew his preliminary objection. We commend the learned counsel for his candidness on this matter. As held in the **MUKISA** case, and religiously followed by this Court in its several decisions, a preliminary objection can only be valid if the facts on which it rests are not disputed by the parties, which would not appear to be the case in the present case.

In the course of hearing however, we also asked Mr. Kamara, and the appellant to comment on whether the record of appeal contained a decree of the High Court on appeal, and if not, what was the effect?

Mr. Kamara submitted that there was no decree in the record and since a decree is a prerequisite/essential document in a record of appeal under Rule 89 (2) (v), of the Court of Appeal Rules 1979, (now Rule 96 (2) (e) of the Court of Appeal Rules, 2009), its absence renders the record of appeal defective and so the appeal incompetent with the usual consequence that it ought to be struck out. On his part, the appellant, while conceding that there was no decree on appeal in the record of appeal, submitted that the decree was in fact in his possession and that it was just omitted from the record by oversight. He left it to the Court to determine the fate of the appeal.

There is no dispute that under both Rule 89 (2) (v) of the Court of Appeal Rules 1979, and the current Rule 96 (2) (e) of the Court of Appeal Rules 2009, a decree is one of the core documents in a record of appeal. Its omission renders the record of appeal defective and the appeal itself incompetent. (See **SALEHE IBRAHIM vs DADIRAHIM MOHAMED** (2000) TLR. 7; **YOKE GWEKU AND OTHERS vs NAFCO AND OTHERS** (1991) TLR 87; **JUMA IBRAHIM MTALE vs K. G. KERMALI** (1983) TLR 50.

present case, in **JUMA IBRAHIM MTALE's** case *(supra)*, the record of appeal did not contain a decree as required under Rule 89 (2) of the Court of Appeal Rules 1979. This Court held that in the absence of the decree, the appeal was incompetent.

In exercise of our residual powers under Rule 4 (2) (a) of the Court of Appeal Rules, 2009 we hold that since the record of appeal is defective for lack of a decree, the appeal before us is incompetent. We accordingly strike it out. However, we make no order as to costs.

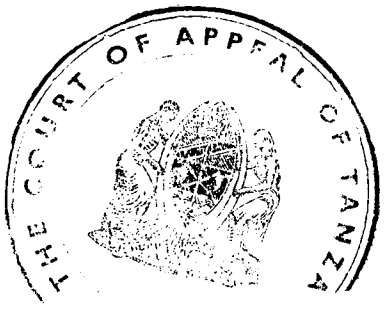
DATED at ARUSHA this 8th day of September, 2012.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL