IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

CIVIL APPEAL NO. 110 OF 2012

JAMAL A. TAMIM ..... APPELLANT

VERSUS

1. **FELIX FRANCIS MKOSAMALI**
2. **ATTORNEY GENERAL** ..... **RESPONDENTS**

(Appeal from the Decree and Judgment of the High Court of Tanzania, At Kibondo Tabora Registry)

(A.N.M Sumari, J.)

Dated the 20th day of April, 2012
in
Miscellaneous Civil Cause No. 2 of 2010

RULING OF THE COURT

25th April, & 3rd May, 2013

KAIJAGE, J.A.:

In the October, 2010 parliamentary elections, the appellant, JAMAL A. TAMIM, contested and lost on a Chama Cha Mapinduzi (CCM) ticket in the Muhambwe Constituency. The first respondent, FELIX FRANCIS MKOSAMALI of NCCR – Mageuzi was the successful candidate. Dissatisfied with the results of the election, the appellant petitioned in the High Court to avoid the same. The second respondent herein, the ATTORNEY GENERAL, was cited as the second respondent in the petition in compliance with the National electoral law. On 20/4/2012, the High Court (Sumari, J.) dismissed appellant's petition and certified the first respondent a lawfully

elected member of parliament for Muhambwe Constituency. Aggrieved by the decision of the High Court, the appellant preferred the present appeal.

In this appeal, the appellant has the services of Mr. George Hezron, learned advocate, while Mr. Gabriel Kabuguzi, learned advocate and Mr. Obadia Kameya, learned Principal State Attorney, appeared for the first and second respondents respectively.

When the appeal was called on for hearing, learned counsel for the first respondent rose to seek for directions, on a position affecting the competence of the appeal which he had just discovered. He informed the Court that by the time he made that discovery of the defects in the record of appeal, it was too late to raise the objection on a point of law in accordance with the dictates of rule 107(1) of the Court of Appeal Rules, 2009 (the Rules). He thus prayed to be allowed to address the Court on the defects in the record affecting the competence of the appeal.

Learned counsel for the appellant objected to that prayer on the ground that the prayer goes against rule 107(1) of the Rules on when and

how to raise a preliminary objection on a point of law. He invited us to proceed with the hearing of the appeal.

We have closely examined rule 107 of the Rules. It provides:-

> "Rule 107(1) A respondent intending to rely upon preliminary objection to the hearing of the appeal, shall give the appellant three clear days notice thereof before hearing, setting out the grounds of objection such as the specific law, principle or decision relied upon, and shall file five such copies of the notice with the Registrar within the same time and copies or Photostat of the law or decision, as the case may be shall be attached to the notice.
>
> (2) If the respondent fails to comply with the rule, **the Court may refuse to entertain the objection or may**

adjourn the hearing thereof upon such terms and orders as to costs and as it thinks fit." (Emphasis supplied).

Our understanding of the rule quoted herein above is that; a party intending to raise a preliminary objection is mandated to follow the procedure set down in rule 107(1) of the Rules, but in case the procedure is not followed, rule 107(2) gives this Court discretion to refuse to hear the objector or to set down the appeal to hearing in a future date. We interpret the use of the word 'may' in rule 107(2) to give discretion to this Court to hear or to refuse to hear the objector.

Considering the fact that this Court had intended, *suo motu*, to ascertain from the parties on whether the record of appeal, as filed, is in conformity with rule 96(1) of the Rules, and in view of the nature and seriousness of the defects in the record, we took a decision to allow learned counsel for the first respondent to address us as prayed.

Briefly, learned counsel for the first respondent submitted that the record of appeal is incomplete. In elaboration, he stated that the record as

filed on 18/10/2010 is violative of rule 96(1) (c) and (k) of the Rules. He said that both the petition and the reply thereto are not incorporated in the record of appeal. He insisted that the petition and the reply thereto are vital pleadings. Apparently, it is only the amended petition and the replies thereto which are incorporated in the record. He further disclosed that three (3) rulings given by the trial Court in the course of interlocutory proceedings are not also incorporated in the record.

Learned Principal State Attorney for the second respondent admitted the defects unearthed by learned counsel for the first respondent. He further pointed out various documents which were put in evidence at the hearing of the petition, but which are not incorporated in the record of appeal. Such documents which were put in evidence include; Exh. R3 which is the NCCR-Mageuzi Manifesto, a document showing Muhambwe Constituency election results (Exh. 14), a document exhibiting the time table for Muhambwe Constituency campaigns (Exh. R2) and documents submitted by parties in the petition pursuant to the order made by the High Court on 19/3/2012, appearing at page 43 of the record. Learned Principal

State Attorney contended that the said documentary evidence was excluded from the record in contravention of rule 96(1)(f) of the rules.

In rebuttal, learned counsel for the appellant conceded to the non-inclusion, in the record of appeal, of all documents referred to on behalf of the respondents. However, he strongly maintained that the pleadings, the interlocutory rulings and other documents put in evidence but not incorporated in the record of appeal, are irrelevant to the matters in controversy on the appeal and are unnecessary for its proper determination.

We begin by examining the relevant provisions under rule 96 of the Rules. That rule provides:-

> "96(1) For the purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3), contain copies of the following documents-
>
> (a) .....

(b) .....

(c) the **pleadings;**

(d) .....

(e) .....

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

(g) .....(j)

(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."

(Emphasis supplied).

An amended petition and the replies thereto which are incorporated in the record are subsequent pleadings filed after the petition is filed. Rule 4 of the National Elections (Election Petitions) Rules, 2010 (GN 447/2010) provides that; 'avoidance of election of a member of Parliament, **shall be by way of an election petition'.** So, a petition and a reply thereto are vital **pleadings** which, in the light of rule 96 (1) (c) of the Rules, are mandatorily required to be incorporated in the record of appeal. By parity of reasoning, the assertion made by the learned counsel for the appellant that a petition and a reply thereto are irrelevant is, with respect, legally misplaced.

Rule 96 (1) of the Rules is only subject to the provisions of sub-rule (3). Similarly, the proviso to Rule 96 (1) of the Rules, must be read with sub-rule (3). (see; **JALUMA GENERAL SUPPLIES v STANBIC BANK (T) LIMITED,** Civil Appeal No. 77 of 2011 (unreported). Sub-rule (3) of rule 96 of the Rules provides:

> *"R.96 (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*

85 (3) aforesaid, therefore the proviso to rule 85 (1) has to be read with rule 85 (3)."

From the foregoing discussion, we are settled in our minds that learned counsel for the appellant was not entitled on his own account to exclude, as he did, the petition and the replies thereto from the record of appeal. If he thought that a petition and the replies thereto were irrelevant, he should have applied for directions under rule 96 (3) of the Rules.

The next issue for consideration and determination is whether the documentary exhibits were properly excluded by the appellant from the record of appeal. Exh. R2, Exh. R3 and Exh. 14 are among the documents which were put in evidence in the course of hearing of the petition. On the strength of rule 96 (1) (f) of the Rules, copies of such documents are required to be incorporated in the record of appeal. On the authority of **Jaluma's** case (supra), they could have been properly excluded from the record upon compliance with the provisions of rule 96 (3) of the Rules.

Undoubtedly, this is a first appeal. It is trite law that it is in the form of a re-hearing. The appellant is entitled in law, to have our own consideration and views of the **entire evidence** and our own decision thereon: see, **D.R. PANDYA v. R.** [1957] E.A 336. This court, on appeal, will certainly be unable to discharge this obligation if its decision will be based only on partial evidence incorporated in the record of appeal and in the absence of documents (Exh.R2, Exh. R3 and Exh. R14) which were put in evidence, but excluded by the appellant. In any case, the said documents could have been properly excluded if directions were to be made under rule 96(3) of the Rules.

Indeed, in his memorandum of appeal the appellant appear to be complaining about the following, among other things:

1. *That, the learned trial judge erred in law and in facts in adopting wrong approach* ***in evaluating evidence on record.***
2. *That the trial judge erred in law in not analyzing, at all, the respondent's evidence, therefore,*

causing the purported judgment to not be a judgment in law.

Reading from the appellant's memorandum of appeal, this court is being invited to re-evaluate and consider the entire evidence on record. However, in the absence of the evidence excluded from the record by the appellant, this Court on appeal will not be able to arrive at a decision based on its consideration of the entire evidence.

Learned counsel for the appellant having, upon reflection, conceded some of the defects in the record of appeal, we need not be detained by a further discussion on other unsatisfactory features besetting the record. Learned counsel for the appellant has however prayed, in the alternative, that he be allowed to file a supplementary record.

Supplementary records in Civil Appeals, have a specific rule governing them. Rule 99 (1) of the Rules permits only the respondents to lodge supplementary records upon satisfying necessary conditions specified thereunder. We thus decline to grant to the appellant that which the law does not permit.

Rule 90 (1) of the Rules provides, *inter alia,* that an appeal is instituted by lodging, in the appropriate registry, the record of appeal, among other things. As already observed, the appellant in the present matter filed the purported record of appeal in violation of rule 96 (1) (c) (f) and (k) of the Rules. The defects as found in the record of appeal are fatal and have rendered the present appeal incompetent. The appeal is consequently hereby struck out.

In view of the fact that the respondents did not give the requisite notice under rule 107 (1) of the Rules, there will be no order as to costs.

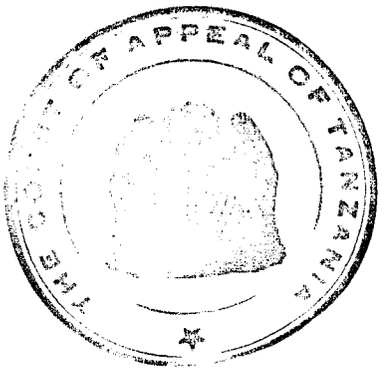
DATED at **TABORA** this 1st day of April, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL