

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT MWANZA**  
**(CORAM: MBAROUK, J.A., MUSSA, J.A, And JUMA, J.A.)**

**CIVIL APPEAL NO. 51 OF 2014**

**MWATEX (2001) LIMITED..... APPELLANT**

**VERSUS**

**REGISTERED TRUSTEES OF K.K.K.T ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Mwanza)**

**(Rwakibarila, J.)**

**dated the 15<sup>th</sup> day of September, 2014**

**in**

**Land Appeal No. 30 of 2010**

.....

**RULING OF THE COURT**

16<sup>th</sup> & 18<sup>th</sup> September, 2014

**MBAROUK, J.A.:**

From the very outset, when the appeal was called on for hearing on 16<sup>th</sup> September, 2014, we wanted to satisfy ourselves on the competency of the appeal having found that there are exhibits which are missing *from* the record of appeal. For that reason, the Court raised the issue "*suo motu*". The said missing exhibits are as follows:-

- *Exhibits P1 (Certificate of Title No. 18016).*
- *Exhibit P2 (Building Permit).*

- *Exhibit P3 (four pictures).*
- *Exhibit D1 (Sale Agreement and its covering letter).*
- *Exhibit D2 (Survey Plan for sub division of Mwatex Plot).*

All those exhibits have not been included in the record of appeal contrary to the mandatory requirement of Rule 96 (2) of the Tanzania Court of appeal Rules, 2009 (the Rules) which reads as follows:-

*"(2) For the purpose of any appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and shall contain also the following documents relating to the appeal to the first appellate court-*

- (a) the order if any giving leave to appeal;*
- (b) the memorandum of appeal;*
- (c) the record of proceedings;*
- (d) the judgment or ruling;*
- (e) the decree or order;*
- (f) the notice of appeal."*

This appeal arises from the High Court in its appellate jurisdiction, hence Rule 96 (2) of the Rules applies. In actual fact, under sub-rule (1) (f) referred to under Rule 96 (2) of the Rules, all documents put in evidence at the hearing are also supposed to be part of the record of appeal. Hence, the exclusion of such documents in the record of appeal render the appeal incompetent.

In the instant case, the contentious matter is a land dispute which arose from the District Land and Housing Tribunal at Mwanza in Land Case No. 191 of 2008. The first plot, is a smaller strip of land measuring 4.38 hectares, i.e in simple arithmetic is approximately 10.82 acres. It has beacons Nos. DH 876, DH. 878, DH. 877 **EV. 762** and **EV. 763** in Plot No. 2/1 within the registered title with Non 18016 in Mwanza City's Nyakato Industrial Area. The second plot, is that registered title No. 18016 which is a larger strip of land measuring 13.63 hectares, i.e. in simple arithmetic approximately 33.68 acres. It has beacons Nos. DH. 879, DH. 873, DH. 874, DH. 875, **EV. 763** and **EV.762** in Plot No.2/2 within that registered with title No. 18016 in Mwanza City's Nyakato Industrial Area. The last two beacons Nos. **EV.**

**762** and **EV. 763** (which have been added emphasis) in plots Nos. 2/1 and 2/2 are found in the common boundaries of the first and second plots.

We are of the considered opinion that the determination of this appeal cannot proceed without taking reference to those missing exhibits. We are further of the opinion that each and every exhibit named herein has its importance and were used in the course of the trial and later in reaching to the decision in both judgments of the two courts below. Hence, such missing documents are vital in the determination of this appeal.

In response to what has been raised by the Court, Mr. Salum Amani Magongo, who was assisted by Mr. Pauline R.K. Rugaimukamu, learned advocate for the appellant readily conceded to the defect that, the above mentioned exhibits were missing in the record of appeal. However, he submitted that each case and in particular, each item under Rule 96 (1) and (2) of the Rules has to be considered individually and on its own merit. In support of his argument, he cited to us the decision of this Court in the case of **Charles Muguta v.**

**Mutamwega Bhatt Muganywa**, Civil Appeal No. 39 of 2008  
(unreported).

All in all, Mr. Magongo later urged us to strike out the appeal for being incompetent and for contravening the mandatory requirements of Rule 96 (2) of the Rules.

Initially, the Court also asked the advocate for the appellant why he has failed to file the written submission in compliance with Rule 106 (1) of the Rules. In response, Mr. Magongo informed the Court that their application for extension of time was rejected by the Court Registry without any reply thereof in writing. This, we think, that allegation was not fair, because no reasons were given in writing by the Court Registry.

On his part, Mr. Jerome Muna, learned advocate for the respondent, submitted that as far as the learned advocate for the appellant has conceded that the appeal is incompetent for the failure to include the referred missing exhibits in the record of appeal in compliance with the mandatory requirements of Rule 96 (2) of the Rule, hence he just emphasized that, the appeal should be struck out.

Mr. Muna added that, the appellant had a chance under Rule 96 (6) of the Rules to include the omitted documents within 14 days after lodging the record of appeal without leave of the Court, but they have failed to comply with that requirement. He further added that, the missing exhibits in the record of appeal are vital documents in this appeal. Hence, urged us to strike out the appeal for being incompetent.

In his reaction to the issue of the failure of the appellant to file the written submission in compliance with the requirement under Rule 106 (1) of the Rules, the learned advocate for the respondent urged the Court that it can safely leave to examine the issue having established that the appeal is incompetent.

On our part, we are of the opinion that, it is now a settled law that, it is imperative to include in the record of appeal all documents referred under Rule 96 (1) and (2) of the Rules, save for any such documents excluded in compliance with the requirement under Rule 96 (3) of the Rules.

In the case of **Fedha Fund Limited and Two Others v. George T. Varghese**, Civil Appeal No. 8 of 2008 (unreported) this court had this to say:

*"The decision to choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal. Under Rule 89 (3) of the court Rules, it is either a Judge or a Registrar of the High Court who, on an application by a party, has to direct which documents to be excluded from the record of appeal. Since the learned advocate for the appellant did not obtain such leave, it was mandatory for him to file the documents."*

Rule 89 (3) of the Court of Appeal Rules, 1979 (old Rules) which is *in pari materia* with Rule 96 (3) of the Rules has conferred powers to a Judge or a Registrar High Court to direct which documents are to be excluded from the record of appeal.

However, in the instant appeal, the record does not show that the requirement under Rule 96 (3) of the Rules was complied with. According to various decisions of this Court, the effect of such non compliance with mandatory requirements under Rule 96 (1) and (2) of

the Rules is to find the appeal incompetent. For instance, see **Fedha Fund Limited and Two Others** (supra), **Dodsal Hydrocarbons and Power Tanzania Limited and Two Others Vs. Hamsuk Bhagwanki Masrani**, Civil Appeal No. 93 of 2012, **Wilson Tarimo Vs. NIC Bank (T) Limited (Formerly known as Savings and Finance Commercial Bank Limited)**, Civil Appeal No. 53 of 2014 (All unreported) to name a few.

The appellant had a chance to include such missing/omitted documents in the record of appeal within 14 days of lodging the appeal under Rule 96 (6) of the Rules. However, that prescribed time has passed without any action taken. The overall effect of such non – compliance with the Rule 96 (1) and (2) of the Rules is to strike out the appeal for being incompetent.

We are of the opinion that, as far as we have established that the appeal is incompetent, hence there is no need to examine the effect of the failure to file written submissions under Rule 106 (1) of the Rules.



In the event, we strike out the appeal and order each party to bear his costs.

DATED at MWANZA this 17<sup>th</sup> day of September, 2014.

M.S. MBAROUK  
**JUSTICE OF APPEAL**

K.M. MUSSA  
**JUSTICE OF APPEAL**

I.H. JUMA  
**JUSTICE OF APPEAL**

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



M.A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**