

**IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR**

(CORAM: OTHMAN, C.J., KIMARO, J.A. And MUSSA, J.A.)

CIVIL APPEAL NO. 121 OF 2015

BETWEEN

1. 2.	ANASTAZIA LUCIAN KIBELA MARTHA LUCIAN KIBELA	}APPELLANTS
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VERSUS

1. 2. 3. 4. 5. 6.	ABDALLA AMOUR MOHAMED VERONICA LUCIAN KIBELA MAKOYE CHARLES LUCIAN KIBELA MAKOYE (Being represented by the Administrator General) ROSEMARY LUCIA KIBELA MAKOYE (Being represented by the Administrator General) HAJI SETHI HAJI THE ADMINISTRATOR GENERAL	}RESPONDENTS
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**(Appeal from ruling of the High Court of Zanzibar
at Vuga)**

(Mahmoud, J.)

dated 6th day of November, 2014

in

Civil Case No. 27 of 2010

RULING OF THE COURT

04th & 9th December, 2015

OTHMAN, C.J.:

Before us is a preliminary objection raised by the 1st and 2nd respondents under Rule 107(1) of the Court of Appeal Rules, 2009

challenging the competency of the appeal for not having been accompanied with the necessary documents as required by Rule 96(1)(c), (d) and (g).

Mr. Suleiman Abdulla, learned Advocate for the 1st and 2nd respondents submitted that the Appellants' record of appeal was defective in that it did not contain the pleadings, that is, the original plaint filed by the appellants on 24/8/2010; their 1st amended plaint signed on 3/3/2012; the 6th respondent's written statement of defence to the 2nd amended plaint and its counter affidavit to the appellants' Chamber Summons and affidavit filed on 09/09/2010 that had applied for a temporary injunction. The record of appeal, he added, had also omitted the ruling of Mshibe, J. signed on 6/11/2010, which dismissed the suit as well as proceedings before the learned Judge. He invited the Court to uphold the preliminary objection and to dismiss the appeal with costs.

Mr. Mustafa Haji, learned counsel for the 3rd, 4th and 6th respondents and Mr. Haji Seth Haji, the 5th respondent who appeared unrepresented, supported the preliminary objection.

Opposed, Mr. Isaack Msengi, learned Advocate for the appellants submitted that the preliminary objection had no legs to stand on as Rule 96(1) had been complied with. He honorably conceded that the original plaint; the ruling of Mshibe, J signed on 6/11/2010; the appellants' Chamber Summons and Affidavit filed on 25/6/2013 which led to the 2nd amended plaint, as well as its Chamber Summons and Affidavit that sought a temporary injunction and filed on 9/9/2010 had been omitted in the record of appeal. The omission of the documents, he submitted, was either inadvertent or the Court had not supplied them.

Mr. Msengi contended that Chamber Applications were not pleadings. That what the appellants' had incorporated in the record of appeal was sufficient for the Court to determine the rights of the parties and to do justice. He strenuously argued that as the parties went to trial on the 2nd amended plaint filed on 26/06/2013, which was included in the record of appeal, there was no need for the earlier pleadings to have been part of the record as some parties were added and others who were on the original plaint were removed by the permission of the court.

In a succinct rejoinder, Mr. Abdulla submitted that it was the Court and not the appellants who had the discretion to decide which documents

were important and which were not important in the record of appeal. The appellants were required to comply with the law and they did not.

Central to the determination of the preliminary objection is Rule 96(1)(c) and (d). It 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 pleading;***
- (d) ***the record of proceedings;***
- (e)
- (f)
- (g) ***the judgment or ruling; (Emphasis added).***

We have closely examined the original record of Civil Case No. 27 of 2010. Neither the original plaintiff claimed to have been filed on 24/8/2010 (see para 19 of the 2nd amended plaintiff at p.5 of the Record) nor the chamber summons and affidavit dated 25/6/2013 that sought to amend the 1st amended plaintiff are in that record. The appellants and some of the

respondents on this appeal entered appearance for the first time at the High Court on 5/10/2010 in answer to the Appellants' chamber summons and affidavit filed on 9/9/2010 seeking a temporary injunction against the 2nd-6th respondents. As readily conceded by Mr. Msengi, omitted in the record of appeal were the original plaint and the 1st amended plaint that was filed on 6/03/2012. Also absent is the 6th Respondent's written statement of defence filed on 28/08/2013 in response to the appellant's 2nd amended plaint filed on 26/06/2013. In our respectful view, Rule 96(1)(c) was breached.

Moreover, the record of proceedings are grossly incomplete. While the proceedings in Civil Case No. 27 of 2010 commenced on or about 5/10/2010, a copy of proceedings incorporated in the record of appeal commence on 23/12/2011 following the decision of the Court (Msoffe; Mbarouk; Bwana; J.A.) in Civil Appeal No. 46 of 2011 dated 14/12/2011, which was against the ruling and order of the High Court (Mshibe, J.) dated 6/12/2010. The Court ordered the High Court to reconstitute itself and to deal with Civil Case No. 27 of 2010 beginning with the appellants' chamber summons recorded as filed on 9/9/2010. Glaringly absent in the record of appeal and also admitted by Mr. Msengi are those chamber summons as

well as its accompanying affidavit also filed on 9/9/2010. With these as omissions, it goes without much ado, that the impugned record of proceedings as submitted by the appellants and certified under Rule 96(5) as correct by Mr. Msengi, run counter to the requirement of Rule 96(1)(d).

Given the history of the suit and one involving a controversy over inheritance; the material facts pleaded in the 2nd amended plaint and the order of the High Court (Mahmoud, J.) delivered on 6/11/2014, which dismissed the suit, *inter alia*, on the ground that the 2nd amended plaint had not impleaded the proper parties, it was all the more essential and necessary to have a complete record of appeal available for the determination of the appeal. If the appellants were desirous of excluding certain documents or parts thereof, they could have had recourse to Rule 96(3) by applying to a Justice of appeal or the Registrar seeking directions to that effect. They did not. The fact that some of the documents are missing in the original record would also warrant such as a step, particularly if the parties and the court cannot trace them or reconstitute a proper record containing those documents.

All considered, in our respective view, the record of appeal is manifestly defective in terms of Rule 96(1)(c) and (d). Accordingly, we

uphold the preliminary objection, declare the purported appeal incompetent and proceed to strike it out with costs. It is so ordered.

DATED at **ZANZIBAR** this day of 7th December, 2015.

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', with a long horizontal stroke extending to the left.

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL