

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPEAL NO. 43 OF 2015

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

**FARIDA HAMZA (*Administratrix of the Estate of the late Hamza Adam*) . . . APPELLANT
VERSUS**

**GEOFREY KABAKA. RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Mwanza)**

(Sumari, J.)

dated the 22nd day of January, 2015

in

Land Appeal Case No. 29 of 2013

RULING OF THE COURT

30th November & 3rd December , 2015

RUTAKANGWA, J.A.:

This purported appeal has its origin in Land Application No. 130 of 2008 (*"the application"*) in the Mwanza District Land and Housing Tribunal (*"the trial tribunal"*). In that application, the parties were Geoffrey Kabaka as the applicant and Hamza Adam as the respondent. The application was granted with costs to the applicant.

The respondent, Hamza Adam, was not satisfied with the trial Tribunal's decision. He accordingly lodged Land Appeal No. 29 of 2013 in the High Court, Land Division at Mwanza.

The competence of the appeal was challenged by the respondent in the appeal, Geoffrey Kabaka, by way of a preliminary objection. The ruling on the preliminary objection was delivered on 9th October, 2014. However, before the latter date, the appellant passed away on 3rd August, 2014.

Despite the death of the appellant the appeal was heard on 4th December, 2014 and finally determined on merit. In its judgment dated 22nd January, 2015, the High Court partly allowed the appeal.

Surprisingly, going by the notice of appeal found on page 190 of the record of appeal, lodged on 23rd January, 2015, the deceased appellant was dissatisfied with the decision of the High Court, hence this appeal (*"the appeal"*). The appeal was instituted by Farida Hamza in her capacity as Administratrix of the Estate of the deceased Hamza Adam.

When this purported appeal came before us for hearing, Mr. Kassim Gilla, learned advocate for the respondent, rose to argue a point of preliminary objection, whose notice he had earlier on duly lodged, challenging the competence of the appeal.

It was Mr. Gilla's contention that the appeal is incompetent on account of being supported by an incurably defective record of appeal. In

elaboration, Mr. Gilla explained, firstly, that the record of appeal does not contain a copy of the ruling on the preliminary objection which was challenging the competence of the appeal in the High Court on the ground that it had been lodged out of time.

Secondly, Mr. Gilla submitted that the record of appeal does not contain a copy of exhibit D3, which is a vital document in the determination of the appeal.

Lastly, it was his contention that the record of appeal does not contain a copy of the chamber summons, the supporting affidavit and counter-affidavit and the entire proceedings, relating to the application for leave to appeal.

On the totality of these omissions, it was Mr. Gilla's strong contention that the mandatory provisions of Rule 96 (2) (c) of the Tanzania Court of Appeal Rules, 2009 (*"the Rules"*) were flouted and this infraction of the Rules rendered the purported appeal incompetent. On the authority of the decision of this Court in **WILSON TARIMO v. NIC BANK ((T) LTD**, Civil Appeal No. 53 of 2014 dated 9th September, 2014 (unreported), he urged us to strike out this appeal with costs on the ground of incompetence.

Mr. Henry Sato Masaba, learned advocate for the appellant, conceded the cited infractions of Rule 96 (2) of the Rules. All the same, he adamantly maintained that the appeal was competent and should be heard on merit. Pressed by the Court to establish the competence of the appeal in view of the authority cited to us by Mr. Gilla, Mr. Masaba belatedly appeared to concede the obvious and pressed that if we were inclined to strike it out, then we should do so with leave to the appellant to institute a fresh appeal.

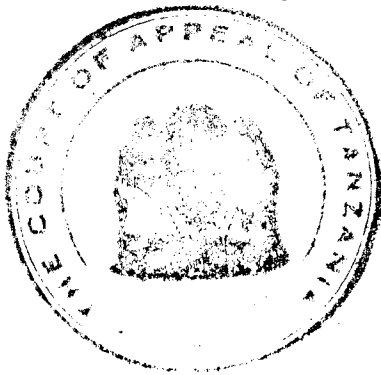
With the concession of Mr. Masaba we think the issue of the incompetence of this appeal should not unnecessarily detain us. In the absence of the documents pointed out by Mr. Gilla, it is our conviction that we cannot hold with any degree of certitude that the appeal in the High Court was not time barred. Furthermore, we cannot safely hold that the High Court was properly moved by the appellant to grant her leave to appeal. We are saying so deliberately because even the incorporated ruling of the High Court granting leave to appeal is silent on the provisions of the law on which it predicated the grant of leave to appeal. We are now increasingly of the view that the missing documents are not only vital in the determination of the appeal but more so in the determination of the

competence or otherwise of the appeal. Mr. Gilla's submission is a correct exposition of the Court's settled law on the issue. If the High Court was wrongly moved to grant leave to appeal, then the entire proceedings were a nullity. In the absence of copies of leave to appeal pleadings and proceedings we cannot hold without any demur that the High Court, had been properly moved.

All said, we uphold the point of preliminary objection correctly raised by Mr. Gilla, and hold this purported appeal to be incompetent. We accordingly strike it out with costs. The appellant is at liberty to institute a fresh appeal subject to the relevant laws on limitation.

We so order.

DATED at MWANZA this 1st day of December, 2015.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL