

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

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

CIVIL APPEAL NO. 79 OF 2014

**MINING AGRICULTURE &
CONSTRUCTION SERVICE LTD..... APPELLANT
VERSUS
PALEMON CONSTRUCTION LTD..... RESPONDENT**

**(Appeal from the judgment and decree of the High Court of
Tanzania (Commercial Division)
at Mwanza)**

(Nyangarika, J.)

Dated the 28th day of February, 2014

in

Commercial Case No. 03 of 2011

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REASONS FOR THE RULING OF THE COURT

25th & 26th March, 2015.

MBAROUK, J.A.:

On 25th March, 2015, after we heard the preliminary objection filed by Mr. Stephen Magoiga, learned advocate for the respondent, we struck out the appeal with costs and reserved our reasons, which we now give.

Earlier on 27th February, 2015, Mr. Magoiga lodged a notice of preliminary objection on points of law to the following effect:-

"That the instant appeal is bad and incompetent for contravening the mandatory provisions of Rule 96 (1) (d) (f) and (g) of the Court of Appeal Rules, 2009 and as such will move the court to strike out the same with costs."

Submitting on his preliminary objection, Mr. Magoiga started by pointing out that, according to Rule 96 (1) (d) and (g) of the Court of Appeal Rules, 2009 (the Rules) it is mandatory for the record of appeal to contain the record of proceedings, judgment and ruling. However, he said, there are two important rulings of the trial court which are missing in the record of appeal. He gave the example of the ruling which was delivered on 06-07-2012 at 10:50 hrs. and another one delivered on 06-12-2012 which were

supposed to be part of the record but are missing in the record of appeal. For that reason, Mr. Magoiga urged us to find that, the mandatory requirements under Rule 96 (1) (d) and (g) of the Rules have been contravened.

Apart from that, Mr. Magoiga submitted that from page 180 – 200 of the record of appeal there are documents which have been annexed as exhibits, but they were not the actual exhibits tendered at the trial court. He further submitted that, Exhibit D1 (a) – (g) and Exhibit D1 (g) – (m) were not included in the record of appeal, which is contrary to Rule 96 (1) (f) of the Rules.

Mr. Magoiga further submitted that, all the missing documents referred earlier are very relevant for the determination of this appeal. Hence, he said, in the absence of those missing documents renders the appeal incompetent. In support of his argument, he cited to us the decisions of this Court in the cases of **Tanzania Breweries Ltd Vs. Jonathan Kalaze**, Civil Appeal

No. 52 of 2014 and **Wilson Tarimo Vs. NIC Bank (T) Ltd**, Civil Appeal No. 53 of 2014 (Both unreported). The learned advocate for the respondent, then submitted that neither Rule 96 (3) of the Rules nor Rule 96 (6) of the Rules were complied with by the appellant. The same read as follows:-

"96 (1)

96 (2)

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 should be excluded from the record, application for which direction may be made informally.*

96 (4)

96 (5)

96 (6) Where a document referred to in rule 96 (1) and (2) is omitted from the record, the appellant may within 14 days of lodging the record of appeal without leave include the document in the record.”

Non-compliance of these provisions also add up for the appeal to be incompetent, said Mr. Magoiga. For the reason of being incompetent, Mr. Magoiga urged us to strike out the appeal with costs.

On his part, Mr. Silwani Galati Mwantembe, learned advocate for the appellant, readily conceded to the prayer made by the advocate for the respondent with the exception of the issue of costs, where he prayed for each party to bear his own costs.

We fully agree with the learned advocate for the respondent that, this appeal is bad and incompetent for contravening the mandatory provisions of Rule 96 (d), (f) and (g) of the Rules. There is no doubt that the record of appeal has omitted such essential documents for the determination of the appeal as indicated earlier. Also, there has been no order from a Justice or Registrar High Court for the exclusion of those documents in terms of Rule 96 (3) of the Rules. In addition to that, the prescribed time to apply for leave to include those documents in terms of Rule 96 (6) of the Rules has already expired.

It is now settled that non-compliance with the above named provisions of the Rules render the appeal incompetent. See **Tanzania Breweries Ltd** (*supra*) and **Wilson Tarimo** (*supra*). We are increasingly of the view that the discrepancies stated above render the appeal incompetent. It was for those reasons we

upheld the preliminary objection raised by the advocate for the respondent and struck out the appeal with costs.

DATED at **MWANZA** this 26th day of March, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL