

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

(CORAM: MASSATI, J. A., MUSSA, J. A. And MWARIJA, J. A.)

CIVIL APPEAL NO. 26 OF 2015

**KASANZU LUSASULA (Administrator of
the Estate of the late Lusasula Hubigi) APPELLANT**

VERSUS

LUGITO BULAYI RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Tabora)

(Rumanyika, J.)

dated the 1st day of November, 2012

in

Misc. Land Appeal No. 63 of 2010

.....

RULING OF THE COURT

15th & 18th April, 2016

MASSATI, J.A.:

This matter originates from a decision made by Sagata Ward Tribunal in a land dispute between Lugito Bulayi (the Respondent) and Lusasula Hubigi, who is described in the record of appeal as late The piece of land is about 30 acres. The Respondent lost in the Ward Tribunal, but appealed to the Shinyanga District land and Housing Tribunal, where he lost partly on the ground that he had no *locus standi* to represent the real owner, one Bulayi Mvere without letters of administration of his estate. But the District Land and Housing Tribunal also ordered the now Appellant/Lusasula Hubigi

to desist from using the dispute land, and should instead be evicted therefrom. The Appellant was aggrieved by that part of the judgment and appealed to the High Court in Miscellaneous Land Case Appeal No. 63 of 2010, where Rumanyika, J. dismissed the appeal on 1/11/2012. Further aggrieved, the Appellant lodged a Notice of Appeal to impugn the said decision on 9/11/2012.

It is that notice which gave birth to the present appeal.

At the hearing of the appeal, the Appellant was represented by Mr. Kamaliza Kayaga, assisted by Mr. Joseph Mugabe, learned counsel, whereas, the Respondent was represented by Mr. Mussa Kassim, learned counsel, who, however, was not present in Court, as he had written to inform the Court that he was travelling to Dodoma. However, the Respondent was present in person.

Before his departure, Mr. Kassim had filed a Notice of Preliminary Objection under Rule 107 (1) of the Court of Appeal Rules, 2009 (the Rules).

These objections were as follows:-

"TAKE NOTICE THAT the Respondent shall raise Preliminary Objection on point of law against the Appellant's Appeal as follows:-

- (i) *That, the Appeal before this court is incompetent for being accompanied with defective Notice of Appeal which does not disclose which case Number of the High Court the Appellant intended to appeal against contrary to Rule 83 (6) read together with Form D in the 1st Schedule both of the Tanzania Court of Appeal Rules, 2009 GN No. 368/2009.*
- (ii) *That, the Appeal before this court is incompetent for the written submission in support to appeal being written in contravention of Rule 106 (2) (a) – (d) of the Tanzania Court of Appeal Rules, 2009 GN No. 368/2009.*
- (iii) *That, the Appeal is incompetent for being preferred by the Party was not a party to the case in the lower court and tribunals and there is no leave of the court to the Appellant to file this appeal there is no leave from any court to the Appellant to file this appeal.*
- (iv) *That, the Appeal is incompetent for the records of appeal being incomplete by non-inclusion of proceedings and ruling which led to the filing on 21/3/2012 of the Amended Petition of Appeal pursuant to the order of the*

High Court, Hon. Wambali, J. which is violation of Rule 96 (1) (d); (g) & (k) of the Tanzania Court of Appeal Rules, 2009 GN No. 368/2009.

When it came to hearing, Mr. Kayaga readily conceded to the first and fourth preliminary objections. On that account, he agreed that the appeal was incompetent and should be struck out. As to costs, the learned counsel submitted that he was leaving it to the discretion of the Court.

On our part, we agree that the Notice of Appeal filed by the Appellant on 9th November, 2012 does not identify the case number against which it is intended to appeal.

Rule 83 (6) of the Rules prescribes how a Notice of Appeal should look like. For ease of reference, Form D to the First Schedule is reproduced below:-

FORM D
(Rule 83)

In the Court of Appeal of Tanzania at Criminal/Civil or application No. of 20.....

In the matter of an intended appeal/Criminal/Civil or Appeal No. of 20.....

*Between Appellant and
Respondent
(Appeal from the of the High Court of at
(Mr. Justice) Dated 20.....
in Criminal/Civil Application/Appeal
No. of 20.....).*

NOTICE OF APPEAL

*TAKE NOTICE that being dissatisfied with the decision of the
Honourable Mr. Justice given at
..... On the day of 20....., intends to appeal to the Court of
Appeal of Tanzania against the whole of the said decision/such part of the
said decision as decided.*

*The address for service of the appellant is
.....
.....*

It is intended to serve copies of this notice on

Dated this day of, 20.....

Signed Appellant/Advocate for the Appellant

To: The Registrar of the High Court of Tanzania at

Lodged in the High Court of Tanzania at

The last part of the preamble to this form, requires the appellant to specify the particular matter against which it is intended to appeal.

In our view, this requirement is important because it is the first document lodged in the Court by which the Court would then be able to identify and trace the particular matter that the Appellant intends to bring to the Court's attention. It identifies the particular case. Otherwise the Notice as it reads now could apply to any matter decided by Rumanyika, J. on the 1st November, 2012. So, in the form as it is now the Notice of Appeal is not capable of being connected with the present appeal. It is defective, and the defect is a fundamental alone (See **MANSOOR DAYA vs JENUS LIMITED**, Civil Appeal No. 13 of 2001 (unreported)).

With regard to the fourth objection, we again agree that, for non-inclusion of the proceedings and ruling leading to the filing of the Amended Petition of Appeal, issued by Wambali, J. the Appellant waged war with Rule 96 (1) (d) (g) & (k) of the Rules and thereby rendered the record of appeal defective. The law is now settled that a record of appeal which violates Rule 96 (1) of the Rules generally, is defective, and an appeal lodged by a

defective record is itself incompetent. (See **JAMAL A. TAMIM vs FELIX FRANCIS MKOSAMALI AND ATTORNEY – GENERAL**, Civil Appeal No. 110 of 2012, **JALUMA GENERAL SUPPLIES vs STANBIC BANK (T) LIMITED**, Civil Appeal No. 77 of 2011, (both unreported). Therefore the record of appeal in the present case is incurably defective.

For the above reasons, we agree with Mr. Kassim and Mr. Kayaga that these two preliminary objections have substance. We uphold them and they are enough to dispose of the matter. We order that the incompetent appeal be struck out with costs.

DATED at **TABORA** this 15th day of April, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL