

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CIVIL APPEAL NO. 30 OF 2015

NYAKATO SADIKI MKAMA.....APPELLANT

VERSUS

FRANK DAUDI (MINOR)

(SUING THROUGH HIS NEXT FRIEND,

FATUMA MAGANGA).....RESPONDENT

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

(Rumanyika, J.)

Dated the 2nd day of December, 2013

In

Land Appeal No. 61 of 2012

RULING OF THE COURT

25th & 29th April, 2016

MWARIJA, J.A.:

The appellant, Nyakato Sadiki Mkama, instituted this appeal to challenge the decision of the High Court (Rumanyika, J.) in Land Appeal No. 61 of 2012. Before us, Mr. Kamaliza Kayaga, learned counsel appeared for the appellant. On the part of the respondent, who is a minor, Ms. Fatuma Maganga, the respondent's next friend, appeared in person.

When the appeal was called on for hearing Mr. Kayaga rose to inform the court, at the outset, that he did not intend to proceed to argue the appeal because, after having gone through the record, he discovered that the same does not contain the decree which arose from the impugned decision of the High Court. For this reason, the learned counsel submitted, the appeal is incompetent because the omission to include the decree contravenes the provisions of Rule 96 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Mr. Kayaga submitted therefore that the appeal may be struck out.

The learned counsel prayed however for an order directing each party to bear its own costs. He argued that the incompleteness of the record was occasioned by the High Court's failure to extract the decree in appeal. He said that, the High Court had the duty of extracting the decree in compliance with the provisions of O.XXXIX r. 35 (1) of the Civil Procedure Code, Cap.33 of the Revised Laws. When he was asked by the court as to whether **firstly**, the appellant was not supposed to have applied for the decree and **secondly**, to have checked the record to

ensure its completeness and act accordingly in case of any shortfall, the learned counsel conceded that the appellant had that duty.

The respondent did not have any objection as regards the striking out of the appeal on the ground of incompetence. She however pressed for costs arguing that the defect which rendered the appeal incompetent was not occasioned by her but the appellant's previous advocate. She said that the appellant had all along caused her to incur the costs of litigating over the rights of the respondent in this case, and that therefore, upon the striking out of the appeal, she should be awarded her costs.

It is a correct position as stated by Mr. Kayaga that the record of appeal is incomplete for want of the decree in appeal. As stated by the learned counsel, under Rule 96 (2) of the Rules, the decree of the High Court arising from an appeal is one of the necessary documents which must be contained in a record of appeal. The Rule states as follows:-

"96-(1)...

*(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 appeal;

(d) the judgment or ruling;

(e) the decree or order;

(f) the notice of appeal,

and in the case of a third appeal, shall contain also the corresponding documents in relation to the second appeal and the certificate of the High Court that a point of law is involved.” (Emphasis added)

The effect of an omission to include in the record, any of the above stated documents is to render the appeal incompetent. See for example **Mwatex (2001) Limited v. Registered Trustees of K.K.K.T**, Civil Appeal No. 51 of 2014 (unreported).

On the basis of the position stated above, we agree with Mr. Kayaga that the appeal is incompetent. The same is therefore accordingly hereby struck out.

On the issue of costs, we agree with the respondent that she is not to blame for the omission which rendered the appeal incompetent. Furthermore, even if it would have been true that the High Court did not extract the decree, still the appellant had the duty of applying for it so that he could include it in the record. The principle guiding award of costs is well settled. In **Mohamed Salmini v. Jumanne Omari Mapesa**, Civil Appeal No. 4 of 2014 (unreported), the court stated *inter alia* as follows on that principle:

"As a general rule, costs are awarded at the discretion of the court. But discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that, costs would usually follow the event, unless there are reasonable

grounds for depriving a successful party of his costs."

In this application, we do not find any reasonable ground upon which the respondent should be denied her costs. The appellant shall bear the costs.

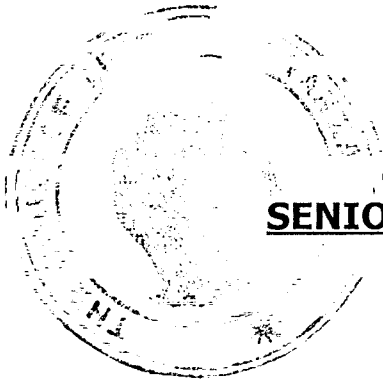
DATED at **TABORA** this 27th day of April, 2016.


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