

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: KIMARO, J.A., KAIJAGE, J.A. And LILA, J.A.)

CIVIL APPEAL NO. 62 OF 2016

MOHAMED NASSORO KHALFAN APPELLANT

VERSUS

1. TANZANIA BUILDING AGENCY

2. HON. ATTORNEY GENERAL RESPONDENTS

**(Appeal from the ruling of the High Court of Tanzania
at Mtwara)**

(Mzuna, J.)

dated the 23rd day of August, 2013

in

Land Case No. 1 of 2009

RULING OF THE COURT

26th & 28 July, 2016

LILA, J.A.:

Mohamed Nassoro Khalfan, the appellant, instituted a suit in the High Court of Tanzania at Mtwara against Tanzania Building Agency and Honorable Attorney General, herein to be referred to as the first and second respondents respectively, claiming for a plot No. 111 with a certificate of title No. 27184 dated 31st December, 1981. The suit was dismissed following

the High Court (Hon. M.G. Mzuna, J.) upholding a point of preliminary objection raised by the respondents that the suit was time barred. Dissatisfied, he lodged his notice of appeal in this Court on 30/8/2013. He, thereafter, pursuant to Rule 90(1) of the Court of Appeal Rules, 2009 herein to be referred to as simply the Rules, lodged a memorandum of appeal.

When the matter was called for hearing, Mr. Serapius Mdamu, learned advocate, appeared for the appellant while Mr. Paul Kimweri, learned Senior State Attorney resisted the appeal for and on behalf of the first and second respondents.

At the very outset, when Mr. Mdamu, learned advocate started submitting on the grounds of appeal, he was asked to address the Court on whether or not the appeal before it is competent particularly whether the record of appeal is complete. This Court put it open to him that the ruling delivered by Honorable J.S Mgeta J. on 4/7/2013, is not incorporated in the record of appeal. Mr. Mdamu, learned advocate, was quick to concede that the same is not incorporated in the record of appeal and that they discovered so since when they were served with the copies of proceedings and ruling but their attempt to get it from the Deputy Registrar failed. He admitted that non - inclusion of that ruling has the effect of making the

record incomplete and the appeal is also rendered incompetent. When asked as to which is the appropriate order to be given, he prayed that the Court should invoke the provisions of Rule 111 of the Rules and allow him to amend the record of appeal. When asked about the relevance of such rule in the present situation, he resorted to Rule 50 of the Rules which deals with leave to amend. When further inquired by the Court if inclusion into a record of appeal of a document which was not incorporated in the record of appeal amounts to amendment, he readily conceded that it does not.

On his part, Mr. Kimweri, learned Senior State Attorney, told this Court that amendment can only be done on a document which is incorporated in the record of appeal. He said as the ruling of 4/7/2013 is not included in the record then it cannot be amended. He further submitted that the procedure to exclude documents or parts thereof from the record of appeal is governed by Rule 96(3) of the Rules which empowers the justice or Registrar of the High Court or tribunal, on application of any party, to direct which documents or parts of documents to be excluded from the record. He concluded by saying that this is not the case herein. He then urged us to invoke the provision of Rule 4(2)(b) of the Rules and strike out the appeal

which will allow the appellant to take remedial steps to rectify the defects and file a proper appeal.

Mr. Mdamu, learned advocate, had nothing to say in rejoinder.

We are, on our part constrained to share views with Mr. Paul Kimweri, learned Senior State Attorney. It is apparent, under the Rules, the first step to initiate an appeal is to lodge a notice of appeal. Rule 83(2) of the Rules is very clear on this. It is the first gear to be engaged to move the Court. Then follows institution of appeal as provided under Rule 90(1) of the Rules. That rule enumerates documents which in their totality institutes an appeal. These are:

- (a) *A memorandum of appeal in quintuplicate*
- (b) ***The record of appeal in quintuplicate***
- (c) *Security for costs*
(emphasis ours)

The contents of the record of appeal are well outlined in Rule 96 of the Rules. The significance of Rule 96 of the Rules and how it should be construed is stated in **Said Salim Bakhresa & Co. Ltd v Agro Processing and Allied Products Ltd and Another, Civil Appeal No. 51 of 2011** where the Court stated that;

*"We are of the settled view that Rule 96 plays a central role in the administration of civil appeals to this Court. It governs the preparation and contents of a record of appeal. Sequel to a notice of appeal, the next important document that has to be lodged in order to institute an appeal is the record of appeal along with other documents; mentioned in Rule 90 of the Rules (see **Maneno Mengi Ltd and Others V Nyama Chumber and Another [2004] IEA. 116 (CAT)**). This explains why Rule 96(1) has received a strict interpretation by the Court."*

The import of the above decision is that the record of appeal is a crucial document in instituting an appeal and its contents must be fully incorporated. It must, to be brief, be complete and a party instituting an appeal must strictly comply with it as it was insisted in **Kiboro V. Posts and Telecommunication Corporation [1974] E.A. 156** that compliance with that rule constitutes a condition precedent to the propriety of the record of appeal at lodgment. The omission of a document renders the appeal incurably defective and therefore incompetent.

Rule 96(1) of the Rules provides a list of documents which must be contained in a record of appeal. Amongst them is, under sub rule (g), the judgment or ruling.

In the instant appeal, as hinted above, the copy of ruling delivered on 4/7/2013 by Honorable Mgeta, J. is missing in the record of appeal. Counsel of both sides are not in dispute on this fact. They are also in consensus that, for that reason the appeal is incompetent. They only differ on the order to be given by the Court. Mr. Mdamu, learned advocate, was of the view that he should be given opportunity to rectify the defects by way of amendment under Rule 111 of the Rules. On a further reflection he shifted to Rule 50 of the Rules which also deals with amendment. He however, later conceded that inclusion into a record of appeal of a document previously not included is not an amendment. He conceded at the end that those rules are not applicable. He just ended there without proposing the way forward. As amply demonstrated above, Mr. Kimweri, learned Senior State Attorney, urged us to invoke the provisions of Rule 4(2)(b) of the Rules and strike out the appeal.

In view of the authorities cited above and the legal position on the need for a record of appeal to be complete, we are of a settled view that the

appeal before us is incurably defective and therefore incompetent. Regarding allowing an amendment under Rule 111 or 50 of the Rules, the Court faced such a situation in **Said Salim Bakhresa's** case (above) and had this to say:

*"As to amendments, we agree that under Rule 111 of the Court of Appeal Rules, this Court has powers to allow amendment of any notice of appeal, or notice of cross appeal, memorandum of appeal or any other part of the record of appeal. But once again we agree with Dr. Lamwai, learned Counsel that, under that rule, **amendment does not extend to adding documents**. As held by this Court in **Robert Edward haw Kin's** case, amendment under Rule 104 of the old Rules (which is the similarly worded as Rule 111 of the Rules) presupposed the existence of a document or documents in the record of appeal sought to be amended and that, one cannot amend what does not exist. So the appellant's application to amend the record of appeal by adding*

the missing documents is totally misconceived and untenable.”

(emphasis ours).

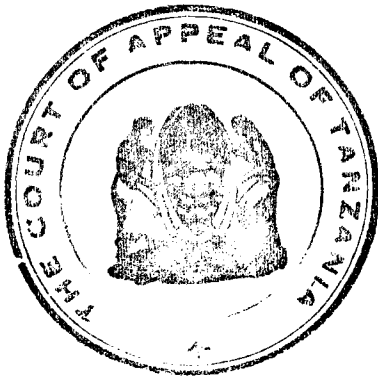
We fully subscribed ourself to the above legal position. We accordingly hold that it is improper to allow the applicant amend the record of appeal by incorporating the missing ruling delivered on 4/7/2014. If the appellant wished that ruling be excluded, he ought to have had applied to the Justice or Registrar of the High Court, under Rule 96(3) of the Rules, to have a direction that it can be excluded. No such application was sought and granted. It was not open for a party, the appellant, to exclude for whatever reason that ruling without the direction of the justice or Registrar of the High Court under Rule 96(3) of the Rules.

There is unbroken chain of authorities to mention but one **Port Authority V. D.D.L Invest International Ltd, Civil Appeal No. 8 of 2010**, to the effect, that a record of appeal which fails to incorporate any of the documents listed in Rule 96(1)(a) to (f) is fatally defective, and that the defective records of appeal led to the respective appeals being struck out.

With respect to Mr. Mdamu, learned advocate, we are in the circumstances obliged to invoke the provisions of Rule 4(2)(b) of the Rules

and strike out the purported appeal as we hereby do. The purported appeal is hereby struck out with costs.

DATED at **MTWARA** this 27th day of July, 2016.



N.P. KIMARO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL