

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 15 OF 2011

SHAMTE KHATIB APPELLANT

VERSUS

CHARLES MOSES RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
At Dar es Salaam)**

(Shangwa, J.)

Dated the 30th day of October, 2009

In

PC. Civil Appeal No. 1 of 2002

.....

RULING OF THE COURT

1ST & 10th March, 2016

MUGASHA, J.A.:

This is a third appeal originating from the Primary Court of Buguruni where the appellant (**SHAMTE KHATIB**) was declared rightful owner of a plot at Zizini area in Buguruni. The respondent (**CHARLES MOSES**) unsuccessfully appealed to the District Court where the appeal was dismissed for being time barred. Still aggrieved, the respondent successfully appealed to the High Court which ordered a trial *de novo*

because the respondent was not accorded a right of hearing in the first appeal.

The appellant is aggrieved and has lodged his appeal in this Court. In the memorandum of appeal he has raised the first ground of appeal which is to the following effect:-

"That, His Lordship the judge erred in law and upon the facts when he entertained and decided on the appeal from the Ilala District Court, when that very appeal was previously dismissed by Ihema, J. on 21st March, 2003 for want of prosecution and there were no efforts to restore or appeal from it".

Pursuant to rule 106 (1) of the Rules, parties filed written submissions. When the appeal was called on for hearing, Mr. January Rafael Kambamwene, learned counsel represented the appellant. The respondent appeared in person and informed the Court that his advocate, Mr. Mashaka is dead. However, both Mr. Kambamwene and the respondent agreed that the written submissions already filed by the

parties be relied upon by the Court to determine the appeal so as not to further delay the matter.

It is the contention of the appellant that, the appeal before the High Court was dismissed on 21st March, 2003 by Judge Ihema and that there were no efforts to restore the appeal. On the other hand, the respondent submitted that, the record of appeal is incomplete because it lacks the ruling by Shangwa, J. dated 29/9/2008 which did set aside the dismissal order of the appeal before Judge Ihema. The respondent annexed the ruling to his written submissions. However, at the hearing of the appeal Mr. Kambamwene neither made any rejoinder nor availed any clarification.

At page 13-14 the record of appeal shows that, on 21/3/2003 the appeal was dismissed for want of prosecution by Ihema, J. Thereafter, efforts to restore the appeal were commenced on 30/4/2007. The hearing of the application to restore the appeal was scheduled on 9/8/2007. However, on 7/8/2007 parties were permitted to argue the application by written submissions. According to the record before the High Court, the filing of submissions was finalised on 5/5/2008 and on

2/9/2009 Shangwa, J promised to deliver the ruling on 29th September, 2008. On 18/11/2008, Shangwa, J made another order that the appeal be disposed of by written submissions following which the Judge delivered judgment on 30/10/2009. However, the written submissions on the application for restoration of the appeal and the respective ruling are not incorporated in the record of appeal as required by rule 96 (2) (c) and (d) of the Rules.

In addition, when it was brought to the attention of Mr. Kambamwene that the record of appeal also lacks a High Court certificate on points of law to be determined by the court, he replied that, the certificate is contained in the leave dated 06/08/2010 which was granted by Wambura, J, and as reflected in the respective Drawn Order.

The point for our determination is whether the appeal is competent.

The Primary documents which must be included in the appeal like the one at hand are stated under rule 96 (2) which states:

"For the purposes of any appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings of the trial court corresponding as nearly as may be to those set out in sub-rule (1) and shall also contain 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 proceedings;*
- (d) The judgment or ruling;*
- (e) The decree or order;*
- (f) The notice of appeal; and*

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

Sub-rule 3 provides as follows:

"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 directions may be made informally"

The cited rule prescribes the primary documents which must accompany an appeal and to be precise, this being a third appeal, a ruling if any, the record of proceedings are among the vital documents which must be incorporated in the record of appeal. The exception to the rule is only where a party applies for exclusion of a certain document from the record of appeal.

In view of the said lacking documents and considering that the appellant was not permitted to exclude the ruling and written submissions on the application for restoration in terms of rule 96(3), the record of appeal is incomplete. **FEDHA FUND LIMITED AND TWO OTHERS VS GEORGE VARGHESE AND ANOTHER, CIVIL APPEAL NO 8 OF 2008** (unreported).

Regarding the certificate on points of law, Mr. Kambamwene tried to impress on us that, the certificate on points of law is contained in the order giving leave granted by Wambura, J. This assertion made us to check the Chamber Summons to see if the appellant had applied for the certificate. Unfortunately, at page 44 of the record we were

confronted with a Chamber Summons sought under rule 43 (a) and section 5 (2) (d) of Appellate Jurisdiction Act **[CAP 141 RE, 2002]**. One of the grounds upon which the application was sought reads as follows:-

"That this Honourable Court be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the decision (Ruling and Order) of this Honourable Court delivered on 30th October, 2009 by Mr. Justice Shangwa, on grounds that there are certifiable points of law for consideration by the Court of Appeal".

In the first place, the applicant was obliged to obtain a certificate on points of law worth determination by the Court. However, the purported application for the certificate was not properly before the High Court as it was sought under section 5 (2) (d) of the Appellate Jurisdiction Act **[CAP 141 RE.2002]** states as follows:

"Notwithstanding the provisions of subsection (1)- no appeal shall lie against any preliminary or interlocutory decision or order of the Commercial Division of the High

Court unless such decision or order has the effect of finally determining the suit”.

In this regard, the purported application for the certificate on points of law before the High Court suffered from wrong citation and it was not properly before the High Court. As such, the application was ought to have been struck out. In numerous cases, this Court has held that wrong citation of the law or rule, renders the application incompetent. **(CHINA HENAN INTERNATIONAL CO-OPERATION GROUP V SALVAND RWE GASIRA, CIVIL REFERENCE NO. 22 OF 2005; EDWARD BACHWA & 3 OTHERS V THE ATTORNEY GENERAL & ANOTHER, CIVIL APPLICATION NO. 128 OF 2006 and in ALOYCE MSELLE V THE CONSOLIDATED HOLDING CORPORATION, CIVIL APPLICATION NO. 11 OF 2002,** where one of the grounds of appeal was that the High Court was not properly moved when leave to appeal was granted as in the chamber application section 5(2) (c) was cited instead of section 5(1) (c). The Court inter alia stated:

“.....there is an unbroken chain of authorities of this Court to the effect that wrong citation of a provision of law under which an application is made

*renders that application incompetent. Such decisions include **NBC V SADRUDIN MEGHJI, CIVIL APPLICATION NO 20 OF 1997, RUKWA AUTOPARTS LTD V JESTINA G MWAKYOMA, and CIVIL APPLICATION NO. 45 OF 2000; and CITIBANK (T) LTD V TTC & OTHERS, CIVIL APPLICATION NO. 65 OF 2003.** So Mchome, J should not have granted leave to appeal”.*

Considering that the appeal originates from the Primary Court, the appeal is not accompanied by a certificate by the High Court that a point of law is involved. (**SEE AUGUSTER SALANJE V MUSSA MOHAMED PEMBA (1992) TLR 62 and ZAINABU MWINJUMA VS HUSSEIN ABDALLA CIVIL APPEAL NO 104 OF 2009.** (Unreported).

In view of the aforesaid, the appeal is not competent for lacking complete record of appeal. As such, the incompetent appeal is struck out with costs.

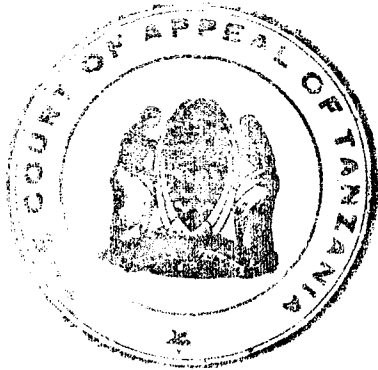
DATED at DAR ES SALAAM this 9th day of March, 2016


S. A.MASSATI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL