

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CIVIL APPEAL NO. 8 OF 2010

TANZANIA PORT AUTHORITY APPELLANT

VERSUS

D. D. L. INVEST INTERNATIONAL LIMITED RESPONDENT

**(Appeal from the judgment and decree of the High Court of Tanzania,
at Dar es Salaam)**

(Mapigano, J.) (delivered by successor J. (Kaijage, J.)

dated the 24th day of December, 2009

in

Civil Case No. 213 of 1994

.....

RULING OF THE COURT

3rd & 9th June, 2016

MASSATI, J.A.:

This appeal was heard on merit on 1st June, 2016, and we reserved our judgment. In the course of composing the judgment, we discovered that one of the exhibits, namely the Joint Venture Agreement, which was admitted in evidence as Exhibit P14 was not, in fact, in the record, as indicated in the index of the record of appeal. As this omission was not noticed by the Court or the parties during the hearing, we decided to resummon them so that they can be heard on it.

On 3rd June, 2016, the parties appeared before us again. The appellant was represented by Mr. William Mnzava and Mr. Sylvanus Mayenga, learned counsel, and Mr. Mwezi Mhango, learned counsel, represented the respondent.

Mr. Mnzava acknowledged the omission, and when his attention was drawn to the provisions of Rule 96 (1) of the Court of Appeal Rules, 2009 (the Rules) he submitted that there were exceptional circumstances in the present case which warrants the Court to resort to its inherent powers under Rule 4 (1) and (2) (b) and (c) of the Rules and extend time to the appellant to file a supplementary record of the missing document. His sentiments were supported by Mr. Mayenga. Together they admitted ignorance of the existence of any decision of this Court on the effect of such omission.

Mr. Mhango was equally dumb founded. Although he realized the seriousness of the omission, he was not aware of any case law, as to its effect on the appeal. He tried to draw the Court's sympathy by pointing out that this appeal has been struck out before, and refiled. However, he said that he was ready to go along with whatever decision the Court might take.

In his rejoinder submission, Mr. Mnzava pleaded with the Court to treat it as an exceptional case since the appeal has already been heard on merit.

We appreciate that this point has taken the learned counsel by surprise, but this is a Court of Law, and as such we are bound to take judicial notice of matters of law. As the saying goes, justice may well be blind to personalities but it is certainly not blind to law (See **ELIAS KAMAGI vs R.**, Criminal Appeal No. 118 of 1992 (unreported)).

The preparation and contents of a record of appeal in civil appeals is governed by Rule 96 (1) to (6) of the Rules. Rule 96 (1) (f) requires that all documents put in evidence at the hearing form part of the record, and Rule 96 (4) requires all such documents to be bound together chronologically if possible, and Rule 96 (5) demands that each copy of the record be certified to be correct by the appellant or his advocate.

In the present case, the index to the record of appeal shows that the Joint Venture Agreement was to be found on page 422 of the record. But on that page there is only Exhibit P13. The next page 423 begins with Exhibit D1. Mr. Mnzava admitted that the exhibit is missing in the record although it was admitted in evidence.

Since there is no dispute that this Exhibit is missing from the record, the only issue is, what is the effect of the omission?

There are numerous decisions of this Court to the effect that a record of appeal which fails to incorporate any of the documents listed in Rule 96 (1) (f) is fatally defective. (See **KALYANGO CONSTRUCTIN & BUILDING CONTRUCTORS LTD vs CHINA CHONCQUINC INTERNATIONAL CONSTURCTION CORPORATION (CICO)**, Civil Appeal No. 85 of 2009; **ROYAL INSURANCE TANZANIA LTD vs KINENGWA STRAND LTD**, Civil Application No. 111 of 2009; **JALUMA GENERAC SUPPLIERS vs STANBIC BANK (T) LTD**, Civil Appeal No. 77 of 2011; **JAMAL A. TAMIM vs FELIX FRANCIS MKOSAMALI AND ATTORNEY GENERAL**, Civil Appeal No. 110 of 2012; **MARTINE ISSACK vs SIMEO ISSACK**, Civil Appeal No. 57 of 2010; and **ROBERT EDWARD HAWKINS AND PRICE WATER COOPERS CONSULTANT LTD vs PATRICE P. MWAIGOMOLE**, Civil Appeal No. 48 of 2006 (all unreported). In all those cases, the defective records of appeal led to the respective appeals being struck out.

With respect, we find no special circumstances in the present case to justify a departure from the provisions of Rule 96 (1) of the Rules as

interpreted by case law, and resort to the use of inherent powers under Rule 4 (1) and (2) of the Rules.

In the light of the above postulated position of the law, we regret to pronounce that we find the record of appeal in the present appeal incurably defective, and appeal incompetent so we have no alternative but to strike the appeal out. We shall, however, make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 6th day of May, 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.

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL