

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

(CORAM: LUANDA, J. A., MMILLA, J. A. And MZIRAY, J.A.)

CIVIL APPEAL NO. 74 OF 2010

SIMPLISIUS FELIX KIJUU ISSAKA..... APPELLANT

VERSUS

THE NATIONAL BANK OF COMMERCE ..... RESPONDENT

(Appeal from the Judgment of the Commercial Division of the High Court of  
Tanzania At Dar es Salaam.)

(Bwana, J.)

dated the 12<sup>th</sup> day of March, 2003

in

Commercial case No. 175 of 2002

.....

RULING OF THE COURT

25<sup>th</sup> July, & 12<sup>th</sup> August, 2016

LUANDA, J.A.:

The above named appellant is dissatisfied with the decision of the High Court of Tanzania (Commercial Division). He has preferred to appeal to this Court.

However, a few days before the appeal came for hearing, IMMA ADVOCATES through Ms. Samah Salah learned counsel for the respondent,

filed an objection to the appeal basing on one point of law but divided into two parts namely the record of appeal does not contain:-

- (i) Copies of the application for extension of time to file the Notice of Appeal and Ruling thereof.
- (ii) Copy of a drawn order which granted the appellant leave to defend the summary suit.

Elaborating, Ms. Samah Salah said in relation to the application for extension of time to file Notice of Appeal, that there is only a drawn order but the Chamber Summons supported by an application and ruling are missing. She submitted that it was necessary to include these documents in the record of appeal so that the Court could satisfy itself whether the application for extension of time was properly made. Failure to do, she contended, breached Rule 96 (1) (k) of the Court of Appeal Rules 2009 (the Rules) which is couched in mandatory terms.

Turning to the drawn order for leave to defend the suit, she said that document is necessary because usually an application is followed by a ruling and thereafter drawn order is extracted. Again failure to attach a

drawn order is in breach of Rule 96(1)(k) of the Rules. In view of the foregoing, therefore, she submitted that the record of appeal is incomplete. The appeal should be struck out with costs, she charged.

Responding, Mr. Jethro Tuliemwesiga learned advocate for the appellant basically did not dispute about the missing documents mentioned by Ms. Salah. He, however, said those are not necessary documents for the determination of the appeal. In the absence of those documents, the appeal could be determined, he submitted. He prayed that the objection be dismissed with costs.

In rejoinder Ms. Salah said the word "shall" is used in Rule 96(1) of the Rules. So, it is mandatory.

From above there is no dispute that the record of appeal does not contain the application for extension of time and the drawn order for leave to defend the summary suit. We start with the drawn order for leave to defend summary suit.

The respondent (the NBC) instituted a summary suit against the appellant.

In terms of O.XXV, rr. 2 (1) and 3 of the Civil Procedure Code, Cap. 33 RE 2002 (the CPC) if a defendant intends to defend such suit, then he is required to obtain leave. The appellant applied for leave and as it was not contested the same was granted. Kalegeya, J. (as he then was) made the following order on 12/8/2002. We reproduce:-

- “ (i) *Leave to defend granted*
- (iii) *Written Statement of Defence by 28/8/2002*
- (iv) *Reply, if any by 4/9/2002.*
- (v) *1<sup>st</sup> pretrial and scheduling on 17/9/2002.”*

We are aware that normally an extract order emanates from a ruling. In this case there is no ruling capable of a drawn order being extracted. In these circumstances we do not think it would be possible to extract a drawn order from such an order reproduced above. We are of the settled view that taking the nature of the proceeding of granting that order for leave to defend without the same be extracted, suffices the requirement of a drawn order. The objection raised has no merit. We now turn to the first limb.

Rule 96 (1) of the Rules is couched in mandatory terms that the record of appeal must contain all copies enumerated therein unless they

are excluded by direction of the Justice or Registrar of the High Court or Tribunal upon an application made by a party to an appeal as provided by sub rule 3 of the said Rule. Mr. Tuliymwesiga appears to suggest that if the documents are not necessary for the determination of the appeal, then the Court can proceed to hearing the appeal.

With due respect to Mr. Tuliymwesiga we were unable to see any rule in the Rules which allows a party to an appeal to choose and pick as to what document should be included in the record of appeal. As shown above, it is clear that a party to an appeal has no such powers. The powers to do so is vested upon the Justice or Registrar of the High Court or Tribunal upon an application by a party to an appeal. This point is meritorious.

In the course of hearing the objection raised, the Court also drew the attention of Mr. Tuliymwesiga that there is yet another shortcoming which he readily conceded that the record of appeal does not also contain the exhibits tendered during the hearing of the suit. We would have on our own found the appeal incompetent.

In sum, we uphold the preliminary objection raised. The appeal is incompetent. The same is struck out with costs to the respondent.

It is so ordered.

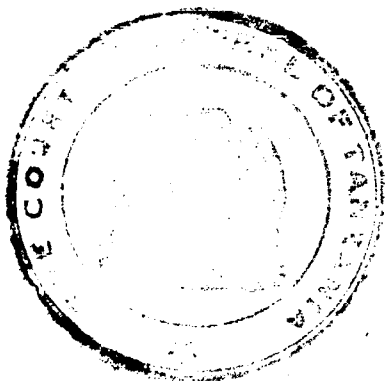
**DATED at DAR ES SALAAM** this 10<sup>th</sup> day of August, 2016

B.M. LUANDA  
**JUSTICE OF APPEAL**

B.M. MMILLA  
**JUSTICE OF APPEAL**

R.E. MZIRAY  
**JUSTICE OF APPEAL**

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



  
P. W. BAMPIKYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**