

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MMILLA, J.A.)

CIVIL APPEAL NO. 53 OF 2016

OYSTERBAY VILLAS LIMITED APPELLANT

VERSUS

KINONDONI MUNICIPAL COUNCIL RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of
Tanzania at Dar es Salaam.)**

(Nchimbi, J.)

**dated the 11th day of March, 2014
in
Commercial Case No. 88 of 2011**

.....

RULING OF THE COURT

14th September & 12th October, 2016

LUANDA, J.A.:

The above named appellant is dissatisfied with the judgment and decree of the High Court of Tanzania (Commercial Division) in Commercial Case No. 88 of 2011. She has come to this Court by way of an appeal.

However, some few days before the appeal came for hearing, the respondent raised a preliminary objection consisting of four points. According to a well established procedure such an objection should be

disposed of first before proceeding with the hearing of the appeal. We did that. We invited Mr. Hussein Yusufu Ngurumo, learned solicitor for the respondent to address us on those points.

Having carefully reconsidered the points raised, he prayed to abandon the three points he had raised and so he remained with one point which runs as follows:-

The appeal is bad in law for want of complete record of appeal thus contravening the provision of Rule 96(1) of the Court of Appeal Rules 2009 (the Rules).

But even this point which Mr. Ngurumo had relied upon has no legs to stand on. This is because the application for the release of the apartments made by Chamber Summons supported by affidavit made in the High Court is missing in the record of appeal. As correctly pointed out by Mr. January Raphael Kambamwene, learned counsel for the appellant the application for release of the apartments was withdrawn as shown on page 147 of the record. As such there is no decision based on those documents. So, those missing documents in the record of appeal are

not needed at all for the determination of the appeal. The point raised has no merit. The same is dismissed.

But that is not the end of the matter. The Court on its own motion pointed out to the learned counsel that the record of appeal does not contain the application to amend the notice of appeal as well as the application for extension of time, though it contains the ruling and the order respectively. In terms of Rule 96 (1) (k) of the Rules those missing documents are vital for the proper determination of the appeal.

Responding, Mr. Kambamwene told the Court that for the purpose of an appeal to this Court on matters originating from the High Court, Rule 96(1) of the Rules enumerates what documents should be contained in a record of appeal. In other words the documents enumerated therein refer to documents arising from the proceedings of the High Court and not from this Court. He submitted that it is not the legal requirement that the record of appeal should also contain applications entertained by the Court.

On the other hand Mr. Ngurumo left it to the Court to decide.

Rule 96 (1) of the Rules reads:-

96(1) For the purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3), contain copies of the following documents:-

- a) An index of all the documents in the record with the numbers of the pages at which they appear;*
- b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by Rule 86, his last known address and proof of service on him of the notice of appeal;*
- c) the pleadings;*
- d) the record of proceedings;*
- e) the transcript of any shorthand notes taken at the trial;*
- f) the affidavits read and all documents put in evidence at the hearing, or if such documents are not in the English language, their certified translations;*
- g) the judgment or ruling;*
- h) the decree or order;*
- i) the order, if any giving leave to appeal;*

j) the notice of appeal; and
k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant,
save that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any of their parts that are not relevant to the matters in controversy on the appeal.

In this case the record of appeal, apart from containing proceedings arising from the High Court, it also contains the ruling and order of the Court emanating from two applications namely an application to amend notice of appeal and that of extension of time to file memorandum of appeal out of time. These two documents give life to the appeal filed by the appellant otherwise the appeal would have been struck out for incompetency notwithstanding to have not originated from the proceedings of the High Court. Under the circumstances, we think the Court is entitled to see and satisfy itself whether there were such applications made and if made, whether the Court had been properly moved. And this can only be achieved by incorporating the applications in the record of appeal. We are of the settled view, therefore, that those applications should have also

been included in the record of appeal as in terms of Rule 96 (i) (k) of the Rules those documents are necessary for the proper determination of the appeal. Failure to do so renders the appeal incompetent. We are not prepared to go along with Mr. Kambamwene.

In sum, the appeal is incompetent. The same is struck out. We award no costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 29th day of September, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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




E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL