

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

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

CIVIL APPEAL NO. 88 OF 2014

**PHILLIP TILLYA APPELLANT
VERSUS
VEDASTINA BWOGI RESPONDENT**

**(Appeal from the judgment and decision of the High
Court of Tanzania Land Division
at Dar es Salaam)**

(Sambo, J.)

Dated the 8th day of December, 2012

In

Land Appeal No. 82 of 2008

RULING OF THE COURT

13th September, 13th October, 2016

MASSATI, J.A.:

This appeal originates from Kinondoni District Land and Housing Tribunal Land Application No. 51 of 2007 on a dispute over ownership of a piece of land known as Plot No. 82 Wazo Hill Industrial Area, where, where the respondent was declared the lawful owner. This was followed by an order to the appellant to demolish whatever structures he had erected on the disputed premises. Aggrieved, the appellant took his grievance to the High Court (Land Division) where it was featured as Land Appeal No. 82 of 2008. On 8th December, 2012, Sambo J, dismissed the appeal.

Still aggrieved, the appellant has come to this Court on a second appeal, which was filed on 9th October, 2014.

When the appeal came up for hearing, we first took up with Mr. Anthony Mark, learned counsel for the appellant, on certain deficiencies in the record of appeal which effectively crippled our ability to properly, effectually and completely determine the appeal. The major deficiency was that some documents which were put in evidence at the hearing, such as Exhibits P3, D1 and D2 were not contained in the record of appeal. This, we pointed out to him, went contrary to Rule 96(1) (f) and (k) of the Court of Appeal Rules 2009 (the Rules).

Caught unaware, Mr. Mark first admitted the deficiency, and its crippling effects, and after throwing in several suggestions to remedy the situation, settled with a prayer for leave to file a supplementary record of appeal under Rule 96(6) of the Rules or extension of time to apply and obtain the said leave.

Mr. Cleophas Manyangu, learned counsel for the respondent reacted by submitting that since the appellant had admitted that

the record of appeal was incomplete, he would not object to the prayer for extension of time in which to apply for such leave, but would insist on getting his pound of flesh, by way of costs for the adjournment.

It cannot be gainsaid that the purpose of Rule 96(1) and (2) of the Rules, is to assist the Court in accessing to as complete a record of what transpired in the lower courts or tribunal as possible, for it to properly, effectually and completely determine the appeal before it. Unless expressly excluded by the Registrar of the High Court or a Justice, under Rule 96(3), the presumption is that every document listed under Rule 96(1) and (2) of the Rules is necessary and must be contained in the record of appeal where appropriate. It is against this background that, in a number of its decisions, this Court and its predecessor, East African Court of Appeal, have repeatedly held that a record of appeal which misses such essential documents is defective, and renders the appeal incompetent and liable to be struck out. (**See KIBORO Vs POSTS AND TELECOMMUNICATION CORPORATION (1974 E.A 156; SAID**

SALIM BAKHESSA AND CO. LTD Vs AGRO PROCESSING AND ALLIED PRODUCTS LTD AND ANOTHER, Civil Appeal No. 51 of 2011, EQBAL EBRAHIM Vs JOHN MASENGA Civil Appeal No. 5 of 2012 (both unreported).

Ordinarily, we would have struck out the present appeal on account of incompetency. But the present case is unique in several ways. Firstly, no preliminary objection has been raised on this point by the respondent. Secondly upon the Court raising it, the appellant immediately (informally) applied for leave to file a supplementary record of appeal outside the 14 days he is allowed to do without leave under Rule 96(6) of the Rules. Thirdly under the Court of Appeal Rules 1979 (the old Rules) there was no provision in Rule 89 (now Rule 96), similar to Rule 96(6). Supplementary records could only be filed under Rule 92. Under rule 92(3) of the old Rules:-

" an appellant may at any time lodge in the appropriate registry four copies of a supplementary record of appeal"

However, the phrase "*supplementary record*" was restricted to copies of such "*further or additional documents or parts thereof which are required for the proper determination of the appeal*". A supplementary record could not therefore have contained a "core document" so to speak, listed in Rule 89(1) of the Rules. (**See ROBERT EDWARD HAWKINS AND ANOTHER Vs PATRICE P. MWAIGOMOLE** Civil Application No. 109 of 2007 (unreported) But Rule 96(6) of the current Rules, provides:-

"where a document referred to in rule 96(1) and (2) is omitted from the record of appeal the appellant may within 14 days of lodging the record of appeal without leave, include the document in the record".

So, under the present Rules, which was not the case under the old Rules, an appellant may file a supplementary record of appeal containing any document referred to in Rule 96 (1) and (2) (that is to say, any core document) within 14 days after lodging the record of appeal. In our view, the intention of this new rule is to enable a genuine and prudent appellant to make good an otherwise defective record of appeal.

In a recent decision in **THE GENERAL MANAGER KAHAMA MINING CORPORATION LIMITED Vs KHERI KADU** Civil Application No 13 of 2015 (unreported), this Court held that under Rule 96(6) of the Rules, it was implicit that an appellant could apply for extension of time in which to file a supplementary record of appeal. But earlier on in **JACKSON MABULA NJILE Vs CRDB BANK PLC AND BADUGU GINNING CO. LTD**, Civil Appeal No. 21 of 2014 (unreported), the Court also appreciated that the appellant had such opportunity under Rule 96(6) of the Rules, and that if one felt that he could not do so within the time stipulated by the Rule, he ought to file a formal application for extension of time in which to do so, instead of waiting until the date when the appeal is slated for hearing. We entirely subscribe to this view, but would add that if an appellant is minded to do so, he should do it before any preliminary objection is taken on the point.

Unlike the **JACKSON MABULA NJILE** case (supra) which was strongly resisted by the respondents, the present application for extension of time is not opposed. In the circumstances, we allow the application. Although Rule 96(6) of the Rules does not anticipate a formal application, we encourage and adopt this

wholesome practice recommended in the **NJILE** case (supra) and order that the appellant lodge a formal application for extension of time within 14 days from the date of this order in which to apply for leave to file a supplementary record. Costs should be in the cause,

DATED at **DAR ES SALAAM** this 19th day of September 2016.



M.S. MBAROUK

JUSTICE OF APPEAL



S.A. MASSATI

JUSTICE OF APPEAL



S.E. MUGASHA

JUSTICE OF APPEAL