

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: MUSSA, J.A. MUGASHA, J.A. And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 205 OF 2016

**1. ANDREW MSEUL
2. JANE TIBIHIKA
3. MUHAMUD HOMAMED
4. FILEMON FELIX MUNGI
5. CHONGERA ALPHONCE
6. KASHAMBA KAMUKOTO**

..... **APPELLANTS**

VERSUS

**1. THE NATIONAL RANCHING COMPANY LTD
2. THE ATTORNEY GENERAL RESPONDENTS**

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Mwangesi, J.)

Dated the 17 day of December, 2015

In

Civil Case No. 2 of 2011

RULING OF THE COURT

27th November & 5th December, 2017

MUSSA, J.A.:

In the High Court of Tanzania, at Bukoba registry, the appellants unsuccessfully sued the respondents over ownership of a piece of land situate on Block No. 287/211, Missenyi Ranch, Kagera Region. In a judgment and decree that was handed down, on the 17th December, 2015 (Mwangesi, J., as he then was), the appellants were ordered to immediately vacate the suit premises.

Dissatisfied, on the 21st December, 2015 the appellants lodged a Notice of Appeal with a desire to challenge the judgment and decree of the High Court. For purposes of clarity, we propose to reproduce the relevant portion of the Notice thus:-

***"IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA***

IN THE MATTER OF AN INTENDED CIVIL APPEAL

NO..... OF 2015

BETWEEN

ANDREW MSEULI & 7 OTHERS APPELLANTS

VERSUS

THE NATIONAL RANCHING COMPANY

& ANOTHER 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

*(Appeal from the Judgment and Decree of the High Court of Tanzania at Bukoba (**HON. S.S. MWANGESI, JUDGE**) dated 17th December, 2015 in (H/C) Civil Case No. 2/2011)*

NOTICE OF APPEAL

(Made under Rule 83 of Tanzania Court of Appeal Rules, 2009)

TAKE NOTICE THAT, the Appellants above named, being dissatisfied with the decision of the Honourable Justice S.S. Mwangesi given at Bukoba on the 17th day December, 2015 intends to appeal to the Court of Appeal of Tanzania against the whole of the said decision."

Subsequently, on the 15th September, 2016 the appellants instituted the present appeal upon lodging the record and memorandum of appeal. In the latter document, the appellants seek to impugn the decision of the High Court on the strength of seven grounds of appeal. In addition, they have enjoined written submissions in support of the appeal.

In response, the first respondent has greeted the memorandum of appeal with a Notice of preliminary points of objection to the following effect:-

"(1) The appeal before the court is incompetent for Defective proper Notice of Appeal (sic) citing the Appellants in representation.

(2) The appeal before the court is time barred and not legally tenable for lack and proof of service of the Appellant's letter to the first and second Respondent inclusive applying for copy of judgment drawn decree and proceedings."

When the appeal was placed before us for hearing, the appellants were represented by Mr. Aaron Kabunga, learned Advocate, whereas the first and second respondents had the services of Messrs Mafuru Mafuru

and Athumani Matuma who are, respectively, learned Advocate and learned Senior State Attorney. As it turned out, in the course of arguing the preliminary points of objection Mr. Mafuru abandoned the second point and concentrated his efforts on the claim with respect to the alleged deficiency on the Notice of Appeal.

The gist of the learned Advocate's complaint is that, apart from the first appellant who is mentioned by name in the Notice of Appeal, the other appellants are generically referred to as "*and Others*" without specifying their names. Mr. Mafuru was of the opinion that the defect was fundamental and, as a result, the Notice of Appeal is vitiated just as the appeal is rendered incompetent. To buttress his contention, the learned Advocate referred us to the unreported Civil Appeal No. 78 of 2008 – **Lugano Kalomba & 22 others Vs The Permanent Secretary, Ministry of Education and Vocational Training and Another**. On his part, Mr. Matuma for the second respondent went along and fully supported the submissions of the learned counsel for the first respondent.

In reply, Mr. Kabunga conceded that the second to sixth appellants are not specifically mentioned by name in the Notice of Appeal; rather, as contended by Mr. Mafuru, they are only generically referred to as "others".

Nonetheless, he was quick to add that the defect was typographical and that the same is easily curable by an amendment under Rule 111 of the Tanzania Court of Appeal Rules, 2009 (the Rules). Thus, the learned counsel for the appellant prayed to be granted leave to amend and regularize the Notice of Appeal.

In a brief rejoinder, Mr. Mafuru objected to the prayer of amendment which, he said, once the same is acceded by the Court, it will pre-empt and defeat the purpose of the preliminary objection which was raised by the first respondent. On this stance, the learned counsel for the first respondent sought fortification from two decisions, viz, **Minister of Labour and Youth development and Another vs Gasper Swai and 67 Others** [2003] TLR 239; and **Kantibhai Patel Vs Dahyabhai Mistry** [2003] TLR 437.

Addressing the point of contention, it is, indeed, discernible from the extracted Notice of Appeal that the appellants are named as "**Andrew Mseuli & 7 Others**". Such generic naming of parties is wrong much as the procedure for a representative suit does not obtain in the Court of Appeal (See the unreported Civil Application No. 37 of 2007 – **Ludger Nyoni and 360 Others Vs The National Housign Corporation**; Civil Appeal No. 68

of 2008 – **Hamisi Kaka and 78 Others Vs The TRC**; Civil Appeal No. 3 of 2012 – **Zakaria Kamwela and 126 Others Vs The Attorney General**; Civil Appeal No. 87 of 2012 – **Jared Nyakila and Another Vs Shanti Shah and Two Others**; and Civil Appeal No. 78 of 2008 – **Lugano Kalomba and 22 Others** (supra). Thus the names of all appellants to this appeal should have been listed. Of particular misinformation resulting from the defect in this case is the fact that, whereas the Notice of Appeal refers to Andrew Mseuli and 7 Other appellants, the memorandum of appeal lists and names only 6 appellants which is incomprehensible. This lack of clarity with respect to as to who exactly are the appellants is, in our considered opinion, prejudicial to the respondents.

We are mindful that in the referred **Lugano Kalomba** case, the Court took the stance that the defect is curable and, as it were, the appellant was allowed to effect an amendment to the Notice of Appeal under Rule 111 of the Rules. Incidentally, as hinted upon, Mr. Kabunga picks the cue and prays to be accorded with the same treatment in the matter under our consideration. With respect, **Lugano Kalomba** was decided upon a different set of particulars in that the generic naming defect was, in that case, prompted by the Court as distinguished from a

preliminary point of objection raised by a party. Where, as here, the Notice of appeal has been challenged upon a preliminary objection raised by an adversary party, the prayer to invoke Rule 111 cannot be acceded to by the court because if such prayer was to be entertained, the preliminary objection would have been pre-empted (See **Kantibhai Patel vs Dahyabhai Mistry** (supra)).

Speaking of Rule 107 (1) of the Old Rules (now Rule 111) the Court in the unreported Civil Appeal No. 34 of 2010 - **Jaluma General Supplies Ltd Vs Stanbic Bank (T) LTD** observed as follows:-

"the expression "at any time" in Rule 107 (1) means any time before an objection is taken."

Thus, on account of the objection taken by the first respondents, time is up and the appellants cannot be allowed to effect amendments to the defective Notice of Appeal. To this end, we take the position that the preliminary objection by the first respondent is well taken and the same is, accordingly, sustained. To the extent that the impugned Notice of Appeal imports some confusion as to who exactly are the appellants in this matter, we have no doubt that the purported appeal before us has been vitiated and rendered incompetent.

Unfortunately, the defective Notice of Appeal was not the only ailment which undermined the beleaguered appeal. It is noteworthy that the certificate of delay issued by the Deputy Registrar under Rule 90(1) of the Rules, was couched thus:-

***"CERTIFICATE OF DELAY (Under rule 90(1) of the
Tanzania Court of Appeal Rules 2009)***

I hereby certify that the application for copies of proceedings, Ruling decree and other documents in respect of the above mentioned suit was lodged in this Court on 21/12/2015 by the Advocate for the Plaintiffs up to the date of issuance of this Certificate of Delay being signed the documents applied for were not supplied in time by the Court.

Therefore due to this delay in preparation of the proceedings these days be excluded from the days to institute the appeal under rule 90(10 of the Tanzania Court of Appeal Rules 2009

Dated at Bukoba this 11th day of August, 2016.

Signed
DEPUTY REGISTRAR
BUKOB

To say the least, the foregoing extract materially detracts from what is expected of a valid certificate of delay. A valid certificate of delay is one issued after the preparation and delivery of the requested copy of the

proceedings of the High Court. That necessarily presupposes that the Registrar would certify and exclude such days from the date when the proceedings were requested to the day when the same were delivered.

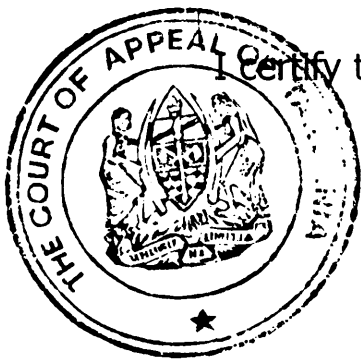
Looking at the certificate of delay at hand, the same is faulty for not indicating exactly when the copy of proceedings was delivered to the appellants. Since we have, however, already found the appeal to be incompetent on account of a defective Notice of Appeal, we see no reason to venture further on the effect of the apparent shortcoming. All said, the appeal stands struck out with costs.

DATED at BUKOBA this 30th day of November, 2017.


K. M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL



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


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL