

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

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

CIVIL APPLICATION NO. 170 OF 2013

MASUMBUKO KOWOLESYA MTABAZI.....APPLICANT

VERSUS

DOTTO SALUM CHANDE.....RESPONDENT

**(Application for leave to amend record of Appeal in Civil Appeal
No. 44 of 2013 from the decision of the High Court
of Tanzania at Dar es Salaam)**

(Nchimbi, J)

dated 12th day of November, 2010

in

Civil Appeal No. 79 of 2007

RULING OF THE COURT

16th & 28th June, 2017

LILA, J.A.:

In this notice of motion, Masumbuko Kowolesya, the applicant, seeks to move the Court under Rules 48(1) and (2), 49(1), 50(1), 30(1) and 111 of the Court of Appeal Rules, 2009 (the Rules), to grant leave to amend the record of appeal in Civil Appeal No. 44 of 2013. The notice of motion is supported by an affidavit sworn by Mr. Sylvester Eusebi Shayo, advocate for the applicant.

At the hearing of the application the respondent did not enter appearance though he was duly served by publication in two issues of Mwananchi daily copies of which are in the Court record. Mr. Shayo urged the Court to proceed with the hearing of the application in the absence of the respondent under Rule 63(2) of the Rules. After satisfying ourselves that the respondent was duly served, we acceded to the prayer.

Amplifying on the application before us, Mr. Shayo stated that the exhibits tendered at the District Land and Housing Tribunal (the Tribunal) by both the seven (7) applicants (now respondents) and four (4) Respondents (now applicants) listed in annexure M – 4 of the affidavit in support of the application are not included in the record of appeal in Civil Appeal No. 44 of 2013. He said the application is intended to urge the Court to allow the applicant amend the record of appeal by including such documents. He further contended that despite writing five reminder letters requesting for supply of such documents, the applicant managed to get copies of proceedings, judgment and certificate of delay only but has not been able to obtain

copies of exhibits tendered during the trial. He further said, he did not also include in the record of appeal the parties' written submissions on the basis of which Mr. Nchimbi, J gave the judgment in appeal as the copies were not availed to him by the Registrar of the High Court, Land Division. He concluded that the record of Civil Appeal No. 44 of 2013 is incomplete in that it lacks the copies of exhibits and the written submissions. He accordingly urged the Court to grant him leave to include such documents and the various letters requesting for copies of judgment, decree and proceedings.

However, before he rested his case, we wished to know from Mr. Shayo if the present application was brought under the proper provisions of the law bearing in mind that **the amendment sought is to include the missing documents in the record of appeal.** We, in particular, raised to his attention the prevalence of Rule 96(6) of the Rules and asked him to address the Court on the competence of his application before us.

Mr. Shayo, upon reading the provisions of Rule 96(6) of the Rules, was quick to, at first, concede that the applicant ought to have had brought an application for extension of time to include in the record of appeal the missing documents after he was late in including them without leave of the Court within fourteen (14) from the date the record of appeal was lodged instead of lodging the present application. On further consideration he said as amendment means improving the already existing thing then the applicant could apply for amendment as he has done or else seek extension of time to include the missing documents under Rule 96(6) of the Rules after failing to do so within the prescribed period of fourteen (14) days. To him the applicant had two options. He then opted to leave the matter for the Court to decide on the competence or otherwise of the application.

A thorough reading of the notice of motion, the affidavit in its support and conceptualization of the arguments by Mr. Shayo, it is crystal clear that in this application the applicant is seeking leave to amend the record of appeal in Civil Appeal No. 44 of 2013 of this Court by including in it the omitted documents which are necessary in the

determination of the appeal. Rule 96(1) (a) to (k) of the Rules lists down documents which a record of appeal must contain to make it complete. In the present application the applicant is applying for leave to include in the record of appeal exhibits tendered before the Tribunal, written submission by the parties at the High Court and letters applying for copies of proceedings, judgment and decree. Inclusion of exhibits in the record of appeal is a requirement under Rule 96 (1) (f) while written submissions and letters requesting for copies of judgment, proceedings and decree is a requirement under Rule 96(1) (k) of the Rules. These documents, according to Mr. Shayo, were omitted when the record of appeal was lodged. He is now seeking leave of the Court to include them.

The issues confronted by the Court is whether inclusion in the record of appeal of an omitted document amounts to amendment of the record under the Rules?

This issue need not detain us much. The Court faced an almost similar situation in the case of **General Manager Kahama Mining**

Corporation Limited Vs Kheri Kadu, Civil Application No. 13 of 2015 (unreported) in which the General Manager Kahama Mining Corporation Limited sought for an order that:-

- 1.) *The Court may be pleased to allow amendment of part of the record of appeal so that the appellant can supplement the written submissions on the preliminary objection by parties to the case before the trial court as part of the record of appeal.*
- 2.) *And for an order that the costs if and incidental to this application abide by the result of the said appeal.*

Upon service of the application, Kheri Kadu raised an objection stating that:-

" The application to amend is wrongly filed under Rule 111 of the Tanzania Court of Appeal Rules, 2009 as there is no record that could be amended".

In that case, Mr. Kayaga, learned advocate who appeared for Kheri Kadu contended before the Court that Rule 111 which must be read with Rule 20, applies to amendment of documents which are already filed in Court and that since the gist of the application is to file a missing part of the record, that is the written submissions filed in support of the preliminary objection in the trial court, the applicable provision is Rule 96(6). On the other side, Mr. Sheikh who advocated for the General Manager Kahama Mining Corporation Limited, contended that his interpretation of Rule 111 was that it allows amendment of a record of appeal by filing a missing document or part of the record.

In determining the objection, the Court consulted **COLLINS COBUILD Advanced Learner's Dictionary** 2006 for the meaning of the word amend wherein it defined it to mean:-

*" if you amend something that has been written such as a law, or something that is said **you change it in order to improve***

it or make it more accurate".(emphasis is ours).

On the basis of the above and after quoting in full the provisions of Rule 111 of the Rules the Court emphatically stated that:-

"Properly interpreted, the provision empowers the Court to allow any party to amend the document named in that provision or any other part of the record. This means that there must be in existence a record of appeal filed in Court for a prayer to amend to be granted".

The Court went further to state:-

" Where therefore, like in this application, a party seeks to be allowed to file a missing document in the record of appeal which has already been filed in Court, the process amounts to

inclusion of that document, not amendment of the existing record. For this reason therefore, as submitted by Mr. Kayaga, the applicable provision is Rule 96(6) which provides as follows:-

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

(emphasis is ours)

Referring to the above quoted Rule, the Court concluded by stating that:-

" The Rule allows an appellant to include in the record of appeal, any document stated under Rule 96(1) and (2) which was omitted at the time of filing the record of appeal."

As it can be appreciated, the situation faced by the Court in the case of **General Manager Kahama Mining Corporation** (supra) is at all fours with the situation facing us in the present application. We, for that reason, fully subscribe ourselves to the Court's findings in that case and we insist that to be the correct interpretations of Rules 96(6) and 111 of the Rules. We accordingly find that the applicant ought to have had included those omitted documents in the record of appeal within fourteen (14) days from when the record of appeal was lodged without leave under Rule 96(6) of the Rules. In the event he is late as it seems to be the case, then he was to seek for extension of time to do so as was stated in **Ms Henry Leonard Maeda and Another Vs Ms John Anael Mongi and Another**, Civil Application No. 31 of 2013 (unreported) cited in the case of **General Manager Kahama Mining Corporation Limited** (supra).

All said, as the applicant cited Rule 111 instead of Rule 96(6) of the rules, we are inclined to hold the view that the present application is incompetent for having been brought under a wrong provision of

the law. We have no option but to strike it out. Consequently, we see no reason to consider Mr. Shayo's submissions on the application.

For the foregoing reasons, the application is incompetent. It is hereby struck out. No order for costs as the legal issue was raised by the Court.

DATED at **DAR ES SALAAM** this 22nd day of June, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL