

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

**(CORAM: MBAROUK, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)**

**CIVIL APPEAL NO. 64 OF 2015**

**MOHAMED ENTERPRISES (T) LTD ..... APPELLANT**

**VERSUS**

**MUSSA SHABANI CHEKECHEA ..... RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania at Tabora.)**

**(Mkasimongwa, J.)**

**Dated the 27<sup>th</sup> day of October, 2014**

**in**

**Civil Case No. 6 of 2009**

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**RULING OF THE COURT**

27<sup>th</sup> & 29<sup>th</sup> September, 2017

**MUGASHA, J.A.:**

In the High Court Registry of Tabora, the respondent instituted against the appellant Civil Case No. 6 of 2009 claiming general damages at a tune of Tshs. 500,000,000/= The basis of the claim was the alleged negligence of the appellant to employ security guards to escort the late Shaban Hamis Chekechea who was on 5/1/2007 shot to death by the armed robbers when transporting tshs. 70,000,000/= belonging to the

appellant's which was as well stolen. It was alleged that the appellant did not provide the required security. After a full trial, judgment was entered in favour of the respondent who was awarded a sum of Tshs 100,000,000/= being compensation for the death of his father.

Aggrieved, the appellant lodged the present appeal. The appeal was greeted by preliminary points of objection on the following:

1. *"The Appellant did not serve a copy of the record of appeal to the Respondent.*
2. *The appellant did not serve a copy of the supplementary record of appeal to the Respondent within prescribed period of time".*

At the hearing, Dr. Masumbuko Lamwai represented the appellant whereas the Respondent had the services of Mr. Mugaya Mtaki, learned counsel.

Arguing the first point of objection, Mr. Mtaki pointed out that, the respondent was served through Mtaki and Advocates with the notice of appeal and the appellant's letter seeking to be supplied with the trial proceedings. However, the respondent has not been served with the record of appeal. Instead, the record of appeal was served to RMK advocates who channeled the same to Mtaki Advocates but time had already elapsed. He

argued this to be a contravention against Rule 97 (1) of the Court of Appeal, Rules, 2009.

In addressing, the second point of objection, Mr. Mtaki submitted that, on 25/10/2016 pursuant the Order by Mziray, J.A. the appellant filed supplementary record of appeal. However, the respondent has not been served with it and instead service was directed to RMK Advocates. He added that, in two applications involving parties to this appeal, Mr. Mtaki represented the respondent and Dr. Lamwai fended for the appellant. As such, it is vivid that Dr. Lamwai is aware that the respondent ought to have been served with the record of appeal through MK Mtaki Advocates and not RMK Advocates. He argued that, failure to serve the respondent with the record of appeal, is contrary with Rule 97 (1) of the Rules rendering the appeal not competent and it should be struck out with costs.

On the other hand, Dr. Lamwai submitted that, the respondent was served with the record of appeal through RMK Advocates who represented the respondent during the trial in the High Court. He added that in the respective trial different advocates including Mr. Mtaki represented the plaintiff/respondent. Thus, in the absence of any withdrawal order of RMK Advocates from representing the respondent at the trial, the address of the

respondent remains to be that stated in the plaint before the High Court. As such, since the appeal was filed on 11/6/2015; the record of appeal was timely served and properly so to the respondent through RMK advocates on 15/6/2015. He added, since Mr. Mtaki already has the record of appeal, the Court should invoke Rule 2 of the Rules and proceed to hear the appeal instead of striking out the appeal.

On the second point of objection, Mr. Lamwai submitted that, notwithstanding that the supplementary record was addressed to RMK Advocates, later attempts were made through the process server to serve the respondent through Mr. Mtaki. However, according to the process server's affidavit, Mr. Mtaki refused service of both supplementary record and appellant's written submissions. Apart from Dr. Lamwai's concession that he appeared together with Mr. Mtaki in two applications involving parties, he was of the view that those applications were not an appeal. He as well urged us to dismiss the preliminary objection and invoke Rule 2 of the Rules and proceed with hearing the appeal.

Mr. Mtaki rejoined by reiterating his earlier submissions adding that since the notice of appeal was served to the respondent through Mr. Mtaki, Dr. Lamwai ought to have relied on the same address to serve the

supplementary record of appeal to the respondent. Mr. Mtaki denied to have refused service but he declined because the supplementary record of appeal was addressed to RMK Advocates. However, he advised the process server to rectify the address but the process server never came back. He argued that, following refusal or otherwise to accept service, the appellant should have applied for extension of time to serve the respondent with requisite records. As such, Mr. Mtaki argued, this is not an appropriate case to invoke Rule 2 of the Rules because the appellant's counsel was not diligent in effecting service to the respondent as required by law.

It is not in dispute that the respondent was served with the notice of appeal on 12/11/2014 as reflected at page 76 of the record as follows:

*" MUSSA SHABAN CHECHEKEA  
C/O M.K Mtaki Advocate,  
School Street,  
P.O.BOX 2049,  
TABORA"*

It is also not in dispute that the record of appeal was served to :

*RMK ADVOCATES CHAMBERS  
P.O.BOX 558  
TABORA*

In resolving the first preliminary point of objection the issue for our determination is whether or not the respondent was served with the record of appeal as required by law. Service of the record of appeal to the respondent is governed by Rule 97(1) of the Rules which provides:

*" The appellant shall before or within seven days after lodging the memorandum of appeal in the appropriate registry, serve copies on each respondent who has complied with Rule 86."*

Under Rule 86(1) of the Rules, every person on whom a notice of appeal is served is required within fourteen days after service of the notice of appeal to lodge in the appropriate registry and serve the appellant of full and sufficient address. Therefore, in the case at hand the respondent was required to lodge details of sufficient address in the Court Registry of Tabora and serve the appellant. Apparently, none of the counsel did submit on this aspect. Assuming that the respondent did not lodge details of address and considering that, he was already served with the notice of appeal through Mtaki Advocate was it prudent to serve the respondent through the Address stated in the plaint? Our answer is in the negative because: **One**, the address in the plaint is for the purposes of service in

matters relating to the trial before the High Court and not the appeal before the Court. **Two**, since it is the notice of appeal which puts the appeal process in motion after it is served to the respondent, Rule 86 directs the respondent to lodge to the Court registry the address through which to effect the service of documents relating to the Appeal before the Court. **Three**, in the absence of any other address apart from Mtaki Advocates through which the respondent was served with the notice of appeal, that was the available respondent's address known to appellant ever since she served the notice of appeal to the respondent. Therefore, the appellant ought to have served the record of appeal to the respondent through Mtaki Advocate and not RMK Advocate who represented the respondent at the trial.

Moreover, since Dr. Lamwai has not contested that Mr. Mtaki represented the respondent in the two applications ancillary to the present appeal, including Civil Application No. 161 of 2015, in our considered view, Dr. Lamwai was pretty aware that, in the present appeal, the respondent's address is through Mtaki Advocate and not RMK Advocates. As such, we are in agreement with Mr. Mtaki that the record of appeal was not served to the respondent.

In view of the aforesaid, since the record of appeal was filed on 11/6/2015 and it was not served to the respondent within seven days as required by, Rule 97 (1) of the Rules this renders the appeal incompetent. Having failed to serve the respondent in time, then appellant ought to have applied for extension of time under Rule 10 of the Rules. We agree with Mr. Mtaki that the circumstances of the present matter do not necessitate invoking Rule 2 of the Rules. As such, we uphold the first preliminary point of objection and strike out the appeal with costs. Since the determination on the first point of objection disposes the matter we shall not dwell to determine the second point of objection.

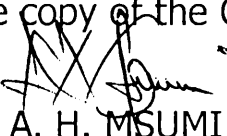
**DATED** at TABORA this 29<sup>th</sup> day of September, 2017.

M. S. MBAROUK  
**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.

  
A. H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**