

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J., MUGASHA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 220 OF 2017

DAUDI KULWA APPELLANT

VERSUS

**1. MARCO PETRO
2. PETER NDILA
3. LEAH MASHILI**

..... RESPONDENTS

**(Appeal from the Judgment of the High Court of Tanzania
at Mwanza)**

(Ebrahim, J.)

**dated the 17th day of March, 2016
in**

HC Land Appeal No. 73 of 2015

.....

RULING OF THE COURT

3rd & 5th October, 2018

NDIKA, J.A.:

The appellant, acting as the administrator of the estate of the late Mzuri Lulyeho, successfully sued the respondents along with Joyce Ndilanha, who is not a party herein, in the District Land and Housing Tribunal of Mwanza at Mwanza in Land Application No. 270 of 2015. His claim was for ownership and vacant possession of a seven-acre piece of land located at Mwandula Village, Kisesa Ward, Magu District. In its judgment, the trial tribunal declared the sale of the disputed land by the

said Joyce Ndilanha to the respondents unlawful and the appellant, as the administrator of the deceased's estate, was adjudged the lawful owner of that land. Along with the said declaratory reliefs, the tribunal issued against the respondents an order of eviction from the disputed land. On appeal by the respondents, the High Court at Mwanza reversed the aforesaid decision of the tribunal and restored ownership and possession of the disputed land to the respondents. In this Court, the appellant challenges the decision of the High Court on a single ground of complaint.

When the appeal came up for hearing on 3rd October, 2018, we noted that the respondents had lodged, through their learned counsel, Mr. Sifael Muguri, a notice of preliminary objection on 4th September, 2018 containing four points that we paraphrase as follows:

1. That the record of appeal does not include the proceedings of the High Court in Miscellaneous Land Application No. 138 of 2014 rendering the record defective.
2. That the record of appeal omitted the exhibits that were tendered and admitted at the trial and so the record was defective.
3. That the Memorandum of Appeal does not include proper particulars of the order intended to be sought from the Court and

that the said omission is contravention of the requirement under Rule 93 of the Tanzania Court of Appeal Rules (the Rules) and Form F in the First Schedule to the Rules.

4. That the record of appeal included a copy of the proceedings of the High Court in Land Appeal No. 73 of 2015 that is not certified by the Deputy Registrar rendering the record defective.

As is ordinarily the practice of the Court, once a preliminary objection is raised, the Court would shelve the hearing of the substantive matter to allow the disposal of the preliminary objection first. In this matter, however, for expediting the disposal of the matter we directed Mr. Mashaka Fadhili Tuguta and Mr. Sifael Muguri, learned counsel for the appellant and the respondents respectively, to argue the preliminary objection first and then address us on the merits of the appeal. It was agreed that if the Court is to uphold the preliminary objection, it would then proceed to strike out the appeal and that would be the end of the matter. However, should the said preliminary objection fail, then the Court will go ahead to consider and determine the appeal on the merits.

As directed, both learned counsel took turns to address us on the preliminary objection and thereafter on the merits of the appeal. As a result of that approach, we start to determine the preliminary objection.

In support of the preliminary objection, Mr. Muguri submitted, on the first point, that the appeal was incompetent on account of the record of appeal having not included the proceedings of the High Court in Miscellaneous Civil Application No. 138 of 2014. He elaborated that the said proceedings concerned an application by which the respondents sought and obtained an extension of time to appeal to that court from the trial tribunal's decision. The said exclusion of the proceedings, he contended, was a contravention of the mandatory provisions of Rule 96 (1) (k) of the Rules.

On the second point, the learned counsel contended that the record of appeal was also deficient in that it excluded all the three exhibits that were tendered at the trial. He named the exhibits as follows: first Exhibit P.1, which was a letter of the appellant's appointment as the administrator of the deceased's estate admitted at page 130 of the record. The other documents were Exhibits D.1 and D.2., that constituted two sale agreements, tendered and admitted as shown, respectively, at pages 161

and 162 of the record. It was his submission that the said exclusion was in contravention of the mandatory requirement under Rule 96 (1) (f) of the Rules, rendering the record defective.

Mr. Muguri, then, addressed the third point. He contended that the Memorandum of Appeal was substantially non-compliant with Form F in the First Schedule to the Rules read together with Rule 93 of the Rules in that it does not state the order or rather the relief that the appellant intended to seek from the Court in the appeal. In support of this issue, the learned counsel referred to the decision of the Court in **Dr. Abraham Israel Shumo Muro v. National Institute for Medical Research and the Attorney General**, Civil Appeal No. 52 of 2017 (unreported) where the Court struck out an appeal on account of being predicated upon a notice of appeal that was not substantially compliant with Form D in the First Schedule to the Rules.

On the final point, Mr. Muguri contended that the record of appeal was further defective in that it included, at pages 43 and 44, a copy of the proceedings of the High Court in Land Appeal No. 73 of 2015 that is not certified by the Deputy Registrar. We understood him to mean that the said copy was unauthentic and that it could not be a part of the record. He

said that this infraction was a violation of Rule 90 of the Rules. In conclusion, Mr. Muguri prayed that for all the ailments he had pointed out, the appeal be struck out with costs on account of being incompetent.

For the appellants, Mr. Tuguta, at first, made a general contention that all the points of preliminary objection do not meet the threshold requirement under Rule 107 (1) of the Rules, as amended, that the grounds of objection ought to have included the specific law, principle or decision to be relied upon. Specifically, on the first point, he claimed that the proceedings alleged to have been omitted were unknown. On the second point, he countered that Rule 96 (1) of the Rules was inapplicable to the present appeal and that it was not obligatory, but optional, that the exhibits admitted at the trial be included.

Mr. Tuguta, then, went on to reply on the third point. He fervently argued that the assailed Memorandum of Appeal was substantially compliant with Form F of the First Schedule to the Rules as the law does not enjoin strict compliance with that prescribed form. The learned counsel sought to distinguish the decision in **Dr. Abraham Israel Shumo Muro** (supra) relied upon by his learned friend in that it did not concern compliance with Form F but Form D. In addition, Mr. Tuguta argued that

the omission of the order intended to be prayed for in the appeal is curable as the appellant could address the Court orally at the hearing in that respect.

On the final point that the copy of the proceedings of the High Court in Land Appeal No. 73 of 2015 contained in the record of appeal is not certified by the Deputy Registrar, Mr. Tuguta countered that the notice of preliminary objection indicates no provision of the law that was violated by that omission. Noting that Mr. Muguri had cited the omission as a contravention of Rule 90 of the Rules in his oral submission, he submitted that the requirement of certification of a copy of proceedings was not the thrust of the said rule. The said provision, he added, concerned with the manner and limitation period for institution of appeals subject to exemption of time necessary for preparation and delivery of a copy of proceedings to the appellants as shall be certified by the Registrar. In conclusion, Mr. Tuguta urged us to dismiss the preliminary objection in its entirety.

In his brief rejoinder, Mr. Muguri submitted that the notice of the preliminary objection that he lodged complied with Rule 107 (1) of the Rules. That apart from stating the points of objection it was annexed with

the list of authorities to be relied upon. He, then, reiterated his prayer that the appeal be struck out with costs due to the ailments he had pointed out.

Before dealing with the substance of the preliminary objection, we wish to address Mr. Tuguta's general concern that all the points of preliminary objection do not meet the threshold requirement under Rule 107 (1) of the Rules, as amended, as the grounds of objection have not set out the specific law, principle or decision to be relied upon.

We have carefully examined Rule 107 (1) of the Rules, as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017, Government Notice No. 362 of 2017. It provides that:

*"A respondent intending to rely upon a preliminary objection to the hearing of the appeal or application shall give the appellant or applicant three clear days' notice thereof before hearing, **setting out the grounds of objection such as the specific law, principle or decision relied upon**, and shall file five such copies of the notice with the Registrar within the same time and copies of the law or decision, as the case may be, shall be attached to the notice."*[Emphasis added]

Our understanding of the sub-rule quoted above is that a party intending to raise a preliminary objection is mandated to follow the procedure in the said sub-rule, which includes furnishing a three clear days' notice setting out the grounds of objection as well as the specific law, principle or decision to be relied upon. The notice must, therefore, give the opposite party sufficient details setting forth the legal basis of the points of objection raised.

In the instant case, we note that for the third point of the objection the notice cites Rule 93 and Form F as the legal basis. Although in respect of the first, second and fourth points of objection, the notice makes no specific reference to any corresponding provision of law, principle or decision as the basis we are of the view that the manner in which the said points are couched coupled with the list of authorities that was filed along with the notice gave the appellant sufficient notice of the thrust of the intended objection. We, therefore, do not agree with Mr. Tuguta, with respect, that the points of objection do not meet the requirement under Rule 107 (1) of the Rules.

We now deal with the substance of the preliminary objection, beginning with the points assailing the completeness of the record of

appeal. This being a second appeal, we begin by examining the relevant provisions of Rule 96 (1) and (2) of the Rules. The said Rule provides that:

"(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) to (e) [omitted]

*(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) to (j) [omitted]; 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.

(2) For the purposes of any appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and shall contain also the following documents relating to the appeal to the first appellate court-

(a) to (b) [omitted]

*(c) **the record of proceedings;***

(d) to (f) [omitted]”[Emphasis added]

It is our understanding of the above sub-rules that since the instant matter is a second appeal, the record of appeal ought to include all the documents related to the proceedings before the trial tribunal as listed in Rule 96 (1) of the Rules and that, in addition, it also ought to contain the documents listed in Rule 96 (2) of the Rules. The enumerated documents in the cited provisions are primary or core documents.

There is an unbroken chain of authorities that the omission of any document in the primary category renders the appeal incurably defective and therefore incompetent: see, for example, the decision of the now defunct East African Court of Appeal in **Kiboro v. Posts and**

Telecommunications Corporation [1974] EA 156. See also the decisions of this Court in **Fedha Fund Limited and Others v. George T. Varghese and Another**, Civil Appeal No. 8 of 2008; **Jaluma General Supplies Ltd. v Stanbic Bank (T) Ltd.**, Civil Appeal No. 34 of 2010; **Said Salim Bakhresa & Co. Ltd. v. Agro Processing and Allied Products Ltd. and Another**, Civil Appeal No. 51 of 2011; and **Jamal A. Tamim v. Felix Francis Mkosamali and Another**, Civil Appeal No. 110 of 2012 (all unreported).

We would add that in the above decisions it was settled that it is not upon a party to decide which of the primary or core documents are relevant, and that, if a party is in doubt as to what to exclude from a record, he may apply to a Justice or Registrar of the Court or tribunal pursuant to Rule 96 (3) of the Rules for a direction on whether or not a document or a part of it could be excluded.

Given the above exposition of the law, the issue in the instant matter so far as the first and second points of preliminary objection are concerned is whether the record of appeal has excluded the primary documents as alleged by the respondents.

2015 cropped up which application was incurably defective for wrong citation of the law.”

It is significant that the appellant appears to have never sought any direction under Rule 96 (3) of the Rules on exclusion of the said proceedings. He simply left out the proceedings one-sidedly. Accordingly, we find merit in the first point objection and uphold it.

As regards the second point of objection, it is also true, as claimed by Mr. Muguri, that the record of appeal excluded the three exhibits admitted at the trial. But we would also add that one more exhibit admitted at the trial (that is, Exhibit D.4 – a tendered by DW6 Leah Mashili) was also left out, meaning that a total of four exhibits admitted at the trial were not incorporated in the record. With respect, we do not agree with Mr. Tuguta that the inclusion of the exhibits was optional. We find this exclusion a contravention of Rule 96 (1) (f) of the Rules. Taking into account that the appellant has been litigating as the administrator of the deceased's estate, the absence of Exhibit P.1, in particular, would preclude the Court from satisfying itself as to his *locus standi*. We are, therefore, settled in our minds that this omission is fatal. As a consequence, we find merit in the second point of preliminary objection, which we sustain.

As at this point we think that our conclusion in respect of the first and second points of the preliminary objection is sufficient to dispose of the appeal, we need not belabour the rest of the points of objection.

In the upshot, we hold that the purported record of appeal lodged by the appellant was in violation of Rules 96 (1) (f) and (2) (c) of the Rules. The defects as found in the said record are fatal and have rendered the present appeal incompetent. In consequence, the appeal is hereby struck out with costs.

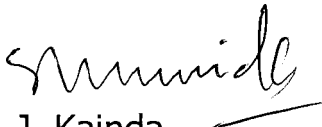
DATED at **MWANZA** this 5th day of October, 2018.

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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


S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL