

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

**(CORAM: MWARIJA, J.A. MZIRAY, J.A. And KWARIKO, J.A)**

**CIVIL APPEAL NO. 18 OF 2015**

**1. AMRAN MOHAMED TALIB .....1<sup>ST</sup> APPELLANT**  
**2. AKRAM AMRAN MOHAMED TALIB.....2<sup>ND</sup> APPELLANT**  
**3. LAKE INJECTION SERVICES LIMITED.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**JAMAL ABDALLAH SULEIMAN .....RESPONDENT**

**(Appeal from the Judgment and decree of the High Court of Tanzania  
(Commercial Division) at Dar es Salaam)**

**(Nyangarika, J.)**

**dated the 9<sup>th</sup> day of October, 2014  
in  
Commercial Case No. 40 of 2012**

**RULING OF THE COURT**

**20<sup>th</sup> August & 3<sup>rd</sup> September, 2018**

**MZIRAY, J.A.:**

In Civil Case No. 40 of 2012, in the High Court of Tanzania (Commercial Division) at Dar es Salaam, the respondent sued the appellants jointly and severally claiming for:

- (a) Repayment of USD 88,000.00 or its equivalent in Tanzania Shillings at the Forex Exchange Rate at the time of payment or;*
- (b) Transfer of the Title No 54020 to the respondent;*

- (c) Interest rate of 30% per annum on USD 88,000.00 from the date 24<sup>th</sup> day of March, 2011 until when the judgment was delivered;*
- (d) Interest at the court's rate on decretal amount from the judgment day until when it is paid in full*
- (e) Costs of the suit.*

The appellants in their joint Written Statement of Defence denied the claim and in addition filed a notice of preliminary objection to the effect that the respondent had no cause of action against the 1<sup>st</sup> and 3<sup>rd</sup> appellants. Before the matter was scheduled for hearing, and for the reason that the respondent was a foreigner, the appellants filed an application for security of costs and its ruling thereof was delivered on 10/07/2012. The matter however proceeded on merits and at the end of the trial, the learned trial judge (Nyangarika, J) entered judgment for the respondent in the following terms:

- 1. The appellants shall, jointly and severally pay the respondent a total of USD 88,000.00 or its equivalent in Tanzania Shillings at the Exchange Rate in force at the time of payment.*

*2. The appellants shall, jointly and severally pay the respondent interest at the court rate of 7% from the date of filing the suit till final and full payment.*

*3. The appellants shall, jointly and severally pay the respondent costs of the suit.*

Dissatisfied by the decision of the High Court, the appellants lodged the present appeal. Before us, the appellants had the services of Mr. Frank Mwalongo, learned advocate, while Mr. Josefu Mwakajinga, learned advocate, represented the respondent. When the appeal was called on for hearing, the Court *suo motu* asked the parties through their respective learned Advocates to address it on the competence or otherwise of the appeal as it came to our attention that the record of appeal is incomplete.

Addressing us, both learned counsel conceded that the record of appeal as lodged is incomplete because there is no application for security of costs in the record and its ruling thereof. Also, there was no ruling on the preliminary objection raised.

Despite conceding that copies of the said documents are not incorporated in the record of appeal, Mr. Mwalongo argued that the missing documents are irrelevant to the matter in controversy and are unnecessary for the proper determination of the present appeal. He went on to submit that, since the missing documents were neither necessary nor relevant, then, the omission was of no consequence. The basis of his argument was anchored on Rule 96 (1) (k) of the Court of Appeal Rules, 2009, as amended, (the Rules). He stated that the language in that particular provision is not couched in mandatory terms but purely optional. In addition, he argued and was apparently fully supported by Mr. Mwakajinga that should the Court hold that the missing documents are relevant to the matter in controversy, it should therefore proceed to make an order for amendment under Rule 111 of the Rules to rectify the noted irregularity.

On our part, we are of the settled view that Rule 96 plays a central role in the administration of civil appeals to this Court. It governs the preparation and contents of a record of appeal. Sequel to a notice of appeal, the next important document that has to be lodged in order to institute an appeal is the record of appeal, along with other

documents mentioned in Rule 90 of the Rules. (See **MANENO MENGI LTD. AND OTHERS V. NYAMACHUMBER AND ANOTHER** (2004) EA. 116).

In the instant appeal, there is no doubt that the record of appeal before us is incomplete. An application for security of costs and its ruling together with the ruling on the preliminary objection raised were missing in the record of appeal. This Court had an occasion to deal with similar situation in the case of **Aeshi Hilary & 3 Others V. Norbet Joseph Yamsebo**, Consolidated Civil Appeal Nos. 55 of 2012 and No. 65 of 2012 (unreported) wherein the Court stated:

*"We wish to repeat and reiterate that the record of proceedings in relation to the application for determination of the amount payable as security for costs is a vital document for purposes of this appeal. In the absence of the document, the appeals are incompetent for want of an essential document under Rule 96(1) (k) of the Rules. The appeals, as consolidated, being incompetent are hereby struck out."*

We are aware and it should be noted that there are two categories of documents for purposes of appeal. The first category is that of primary

or core documents, which are all those listed in Rule 96(1) of the Rules in the case of a first appeals, and, in addition those documents listed in Rule 96(2), in the case of a second and third appeal. (See **ROBERT EDWARD HAWKINS AND ANOTHER V. PARTICE P. MWAIGOMOLE**, Civil Application No. 109 of 2007; **HARUNA MPANGAOS AND 902 OTHERS V. TANZANIA PORTLAND CEMENT CO LTD.**, Civil Appeal No. 10 of 2007 (both unreported) and **KIBORO V. POSTS AND TELECOMMUNICATIONS CORPORATION** (1974) EA. 156. The second category is those other documents which a party may consider necessary for the purpose of determining an appeal.

In **KIBORO's** case it was held and religiously followed by the then Court of Appeal for East Africa, that, compliance with that rule constitutes a condition precedent to the propriety of the record of appeal at lodgment. This has been taken to mean that the omission of any part of a document in the primary category renders the appeal incurably defective and therefore incompetent. (See also: **FEDHA FUND LIMITED AND OTHERS V. GEORGE T. VARGHESE AND ANOTHER**, Civil Appeal No. 8 of 2008 and **JALUMA GENERAL**

**SUPPLIES LTD. V. STANBIC BANK (T) LTD**, Civil Appeal No. 34 of 2010 (both unreported). It has also been held and in our view correctly so, ~~that~~ all the trial court's notes, documents, interlocutory proceedings and documentary exhibits made and received before the decision appealed against are primary documents. (See **COMMERCIAL BANK OF AFRICA LTD V. NDIRANGU** (2000) 1 EA.29).

Given the above exposition, and considering the fact that the missing documents fall under the description in paragraph (k) of Rule 96 (1) of "**such other documents, if any, as may be necessary for the proper determination of the appeal**" the same ought to have been included in the record of appeal. It is for the above reasons that we decline Mr. Mwalongo's invitation and proceed to hold that, all the documents listed in Rule 96(1)(a) to (k) are primary or core documents, and, unless expressly excluded under sub-rule 3, they must be in the record of appeal, if there is to be a competent appeal.

In this case, as it can be seen, the missing ruling on the preliminary objection is a necessary document for purposes of

determining the appeal because the same resolved the issue of cause of action in the civil suit before the trial court.

Mr. Mwalongo, learned counsel has also urged us to find that, if the record of appeal is defective/incomplete it is rectifiable, and has asked us to grant the appellants leave to amend the record of appeal under Rule 111 of the Rules.

As to the sought amendment, we agree that under Rule 111 of the Rules, this Court has powers to allow amendment of any notice of appeal, or notice of cross appeal, memorandum of appeal, or **any other part of the record of appeal**. But it should be made clear that, amendment does not extend to adding documents. One cannot amend what does not exist. So, Mr. Mwalongo's application to amend the record of appeal by adding the missing documents is totally misconceived and untenable.

In conclusion we are of the settled view that the record of appeal as lodged is certainly defective and violative of Rule 96(1) (k) of the Rules. Since a defective record of appeal cannot validly institute an appeal, we find that the present appeal is incompetent. The appeal is



consequently hereby struck out. As the issue was raised by the Court on its own motion, we make no order as to costs.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 29<sup>th</sup> day of August, 2018.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

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

  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**