

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

(CORAM: MBAROUK, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPEAL NO. 142 OF 2017

MOHAMED SULEIMAN MOHAMED.....APPELLANT

VERSUS

- 1. AMNE SALUM MOHAMED**
- 2. MOZA SALUM MOHAMED**
- 3. ZEYANA SALUM MOHAMED**
- 4. GHANIA SELEMAN KHALEF**
- 5. HALIMA SALUM MOHAMED**
- 6. MOHAMED SALUM MOHAMEDRESPONDENTS**
- 7. SAID SALUM MOHAMED**
- 8. RAYA SALUM MOHAMED**
- 9. JOKHA SALUM MOHAMED**
- 10. SHEKHA SALUM MOHAMED**
- 11. FATMA SALUM MOHAMED**

**(Appeal from the judgment and decree of the High Court
of Zanzibar, at Vuga)**

(Issa, J.)

dated the 25th day of April, 2017

in

Civil Appeal No 65 of 2016

RULING OF THE COURT

12th & 14th December, 2018

MBAROUK, J.A.:

The above named appellant is dissatisfied with the decision of the High Court of Zanzibar given on 25th day of April, 2017 in Civil Appeal No. 65 of 2016. The dispute between the parties arose from the land where the respondents

herein claimed that the appellant herein had trespassed into their plot of land situated at Bububu Kikaangoni in the Urban-West Region of Zanzibar. The judgment was in favour of the respondents.

The appellant felt aggrieved by the decision of the High Court, he has preferred his appeal to this Court premised on three grounds of appeal, namely:-

- 1. That, the High Court erred in law by not finding that the respondent has no locus standi to file the suit as at the time of the institution of the suit they have not inherited the property in dispute.*
- 2. That, the High Court erred in law and fact by not finding that the amendment of plaint at the trial court was null and void as the preliminary objection raised to that effect was not heard, the act of which allowed the respondents to include new title deed which*

was prepared while the suit was in court and failed to give wait of appellant titled deed.

3. *That, the high court erred in law for wrongly interpret (sic) section 75 of civil procedure decree in respect of the interference of decree on error or defect that affect the merits of the case thereby occasioning a miscarriage of justice to the appellant."*

The appeal by the appellant was confronted with a preliminary objection, which was lodged by the respondents' advocate in terms of the provisions of Rule 107(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) on 10th day of December, 2018, premised on one point of law with nine paragraphs which read as follows:-

- "1. *That, the appellant's appeal is incompetent as the record of appeal offends the provision of Rule 96(2) and (3) of the Court of Appeal Rules, 2009 as amended.*

The Particulars of Preliminary Objection:

- a) *The decree in appeal found at page 149 of the record of appeal is defective for its being vague in that the prayers found in the decree concern application for stay of execution issued by the Land Tribunal on 11th February, 2016 while the orders of that decree at page 150 concern the dismissal of appeal with cost and vacating of the order of stay of execution.*
- b) *At page 130 of the record there is an application for stay of execution the hearing of which is found at page 153 but the ruling and drawn order is omitted in the record.*
- c) *At page 79 of the record there is ruling of the temporary injunctive application but the drawn order is missing. What is*

found at page 20 is a letter from the chairman of the Land Tribunal to Sheha of Shehia of Bububu.

d) At page 36 there is ruling of revision delivered by the Chief Justice but drawn order is missing.

e) At page 84 of the record there is ruling of the Chairman of the Land Tribunal refusing application to withdraw from the case but drawn order is missing.

f) At page 80 there is ruling setting aside injunctive order issued on 21 November, 2011 but drawn order is missing.

g) At page 75 and 76 two decree are found with different titles but the same content.

h) At page 98 we find ruling of preliminary objection but drawn order is missing.

i) The sequence of names appearing in decree issued by the High Court found at page 149 of the record of appeal differs from that of the judgment of the High Court found at page 137.”

At the hearing of the appeal, Mr. Haji Suleiman Tetere and Mr. Salim Bushiri, learned counsels, entered appearance for the appellant, whereas all respondents’ were represented by Mr. Rajab Abdalla Rajab, learned advocate.

In compliance with the common practice of the Court, we had to dispose of the preliminary point of objection which had been raised, before we could embark on the main appeal. In that regard, we invited the learned counsel for the respondents to address us on the preliminary points of objection, which he raised.

Mr. Rajab submitted that, the appeal is incompetent on two limbs. In the first limb, it is incompetent for being accompanied by the defective decree and the second limb is for

lack of complete records of appeal, thus in contravention with Rule 96 (2) (c) of the Rules.

He submitted that, the decree in appeal found at page 149 of the records of appeal is defective for being vague in the prayers found in the decree concerning the application for stay of execution issued by the Land Tribunal on 11th day of February, 2016. Relying on the provisions of Rule 96 (1) (h) of the Rules, in which he argued that, a copy of a decree is listed as one of the essential documents that a record of appeal must contain, the learned counsel argued that the inclusion of a defective decree in the record of appeal renders the appeal incompetent.

On the second limb of missing of document, Mr. Rajab named the missing documents to include the ruling and order of the stay of execution, ruling of the temporary injunction, ruling and drawn order of revision, ruling of the chairman of the Land Tribunal, ruling of setting aside injunctive order and

ruling on preliminary objections. In view of those two limbs Mr. Rajab urged us to strike out the appeal.

On his part, Mr. Tetere, learned advocate for the appellant conceded that the appeal before the Court is incompetent for being supported with defective decree and there is an omission of some documents. He submitted that, a defective decree renders the appeal incompetent and it is true in the record of appeal that there was omission to include documents necessary for the determination of the appeal and hence prayed for the Court to invoke Rule 4(2) (b) of the Rules and section 3A (1) (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 as amended by The Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 in the need to achieve substantial justice.

As pointed out earlier, the centre of controversy is to the effect that the appeal is accompanied by defective decree and the record of appeal which misses some parts of the record of proceedings. For that reason, this has prompted us to examine

closely the requirements relating to the filing of the record of appeal in the Court of Appeal Rules, 2009.

Under Rule 96 (1) (h) of the Rules, it is mandatory that a record of appeal must contain, among other documents, a copy of a decree. Therefore, when a decree is defective, the effect is that the record becomes defective. See the case of **Victor Frank Ishebabi v. Leisure Tours and Holdings and Others**, Civil Appeal No. 152 of 2004, **Dhow Mercantile (E.A.) Ltd v. Abdirizzak S. Tuke**, Civil Appeal No. 93 of 2004, (both unreported). For an appeal to be competent it has to be accompanied by a valid decree in terms of Rule 96(1) (h) of the Rules.

The second limb of the point of objection was concerning missing of the documents. The High Court in this matter was the first appellate court. Appeals coming to the Court from the appellate jurisdiction of the High Court are governed by Rule 96 (2) of the Court of Appeal Rules 2009. The Rule says:

"For 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 first appellate court-

- (a) The order if any giving leave to appeal;*
- (b) The memorandum of appeal;*
- (c) The record of proceedings;*
- (d) The judgment or ruling;*
- (e) The decree or order;*
- (f) The notice of appeal,*

and in case of a third appeal, shall contain also the corresponding documents in relation to the second

appeal and the certificate of the High Court that a point of law is involved.”

We have thoroughly gone through the record of appeal filed by the appellant. It is true that the inclusion of the documents mentioned by the learned advocate for the respondents was omitted when the record of appeal was filed. As conceded to by the learned advocate, that omission renders the appeal incompetent - see the case of **Elias Ramin Bachu v. Joseph Paul Zenda**, Civil Appeal No 10 of 2016 and **Tanzania Breweries Limited v. Jonathan Kalaze**, Civil Appeal No 52 of 2014 (both unreported). The documents are important for purposes of enabling the Court to determine the limitation period of filing the appeal and the merits of the appeal.

Given the non-compliance of Rule 96(2) of the Rules, the appeal is incompetent, but for the purposes of meeting substantive justice as per rule 4 (2) (b) of the Rules and the overriding objective as per section 3A (1) (2) of the Appellate

Jurisdiction Act, Cap 141 R.E. 2002 as amended by The Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 we strike out the appeal with leave to refile the proper record within sixty (60) days from the date of delivered of this ruling with costs.

It is so ordered.

DATED at **ZANZIBAR** this 13th day of December, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL