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

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

**CIVIL APPEAL NO. 316 OF 2017**

**YAHAYA SELEMANI MRALYA**
**(Administrator of the estate of the**
**late SELEMANI MRALYA ..... APPELLANT**

**VERSUS**

**1. STEPHANO SIJIA**
**2. YUSUPH KIJUU** } **..... RESPONDENTS**
**3. HASSANI IDD MATAKA**

**(Appeal from the Judgment and decree of the High Court of Tanzania (Land Division) at Dodoma)**

**(Mohamed , J.)**

**dated the 13th day of May, 2016**
**in**
**Land Appeal No. 18 of 2013**

---

## RULING OF THE COURT

**10th & 16th July, 2018**

**MZIRAY, J.A.:**

In this appeal, the appellant Yahaya Selemani Mralya is appealing against the decision of the High Court of Tanzania at Dodoma (Mohamed, J.) in Land Appeal No. 18 of 2013 dated 13th of May, 2016 which upheld the trial tribunal's decision and dismissed his appeal with costs.

Briefly, the background to this appeal traces its origin in the District Land and Housing Tribunal for Kondoa at Kondoa wherein the appellant filed Application No. 6 of 2013 and sought for the following reliefs:-

i. *A declaration order that the appellant is the legal owner of the land in dispute measuring approximately 40 acres out of 480 acres of land located at Chandama village in Chemba District.*

ii. *An order that the respondents be forcefully evicted from the appellant's land located at Chandama village.*

iii. *An order for permanent injunction against the respondents, their agents or any person acting under their instructions from interference with the appellant's use of land,*

iv. *An order that the respondents jointly and severally to pay the appellant a sum of Tshs. 8,000,000/= being general damages and,*

v. *Costs for the suit.*

As it appears from the record of appeal, on 17/06/2013 the suit was dismissed by the trial tribunal and the respondents were declared the lawful owners of the disputed land. Dissatisfied, the appellant lodged simultaneously this instant appeal and an application for stay of execution. As it is usually the procedure, the application for stay of execution was heard first on 27/4/2016 by way of written submissions and a date for the ruling was set to be on 13/5/2016. On that date however, without hearing the merits of the appeal, the learned judge who was presiding over the

matter proceeded to deliver judgement instead of the Ruling on the application for stay. At page 95 of the record of appeal, part of his judgement reads as follows:-

> *"When the appeal came for hearing on 27/4/2016, the unrepresented appellant simply endorsed and relied on the grounds of his memorandum of appeal in support of his appeal.*
>
> *In rebuttal, the unrepresented respondents also endorsed their following joint reply to the memorandum of appeal..."*

The learned judge proceeded to consider the merits of the appeal and in the end dismissed the appeal with costs.

Definitely with that procedural irregularity the appellant would not have been contented. He quickly filed this appeal advancing three grounds of appeal, to wit:-

1. *"That, honourable learned trial judge erred in law and in fact in determining the matter without availing parties to address on the grounds of appeal as what was before the High Court at that juncture time was to compose ruling on the application for stay of execution and not otherwise, thus the Appellant has*

*been condemned unheard against the principle of natural justice.*

2. *That, honourable learned trial judge erred in law and in fact in holding that the Appellant herein was time barred to claim on the disputed piece of land while the cause of action arose in the year 2012 when the respondents herein invaded in the disputed land.*
3. *That, honourable learned trial judge erred in law and in fact for having properly found that the Appellant herein, the original owner of the disputed land cleared that virgin land in the year 1967 but granted the same to the respondents who encroached the disputed land in 2012.*

At the hearing before us, both parties entered appearance in person, unrepresented. The appellant in his brief address, while focusing much on the first ground of appeal, informed the Court and complained that the High Court Judge was wrong in delivering the judgment without giving a chance to the parties to argue the grounds of appeal. He informed the Court that subsequent to the appeal filed in the High Court, the appellant also lodged an application for stay of execution. He submitted that the application for stay of execution was heard and the High Court Judge proceeded to set a date for ruling. He said that on the scheduled date,

instead of delivering the ruling as expected, the High Court Judge delivered a judgment. He expressed his dissatisfaction with the procedure adopted by the High Court and invited this Court to rectify the irregularity.

When asked to address the Court on the competence of the appeal after we had intimated that the documents relating to the application for stay of execution were not incorporated in the record of appeal, the appellant readily conceded that the documents were missing. As to the consequences, he simply left the matter in the hands of the Court.

On their part, the respondents not having the benefit of counsel did not have much to say on this. They also conceded to the fact that proceedings and documents relating to the application for stay of execution were missing in the record of appeal and they had nothing more to comment on.

There is no doubt that the record of appeal before us is incomplete. Proceedings and documents relating to the application for stay of execution were not incorporated in the record. This was a contravention of Rule 96 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Rule 96 of the Rules provides:

*"96(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).....(c);*

*(d) The record of proceedings;*

*(e).....(k);*

*Save that the copies referred to in paragraph (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).....*

*(3) A Justice or Registrar of the High Court or tribunal, may, on the application of any party, direct which documents or parts of the document should be excluded from the record, application for which direction may be made informally;*

*(4).....(5);*

*(6) 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 supplied).*

This Court has held, on a number of occasions, that a decision to choose documents that are not relevant for the determination of the

appeal is not optional on the party filing the record of appeal. There is a chain of authority to this point. (See for example, **Mariam Idd [as Administratrix of the estate of the late Mbaraka Omari] versus Abdulrazack Omary Laizer [as Administrator of the estate of the late Abubakar Omari** - Civil Appeal no. 20 of 2013, **Rodrick Humphrey Jonas Fedha Fund and two others v George T. Vargheese and Another** - Civil appeal No. 8 of 2008 and **Jamal A. Tamim v. Felix Francis Mkosamali And the Attorney General**- Civil Appeal no. 110 of 2012 (all unreported).

The parties to this case have conceded that proceedings and documents relating to the application for stay of execution were missing in the record of appeal. On our part, we hasten to agree with them that the proceedings and documents relating to the application for stay of execution were indeed not incorporated in the record of appeal. On that basis, the record of appeal as lodged is certainly defective for violation of Rule 96(1) (d) of the Rules. Since a defective record of appeal cannot validly institute an appeal, we find that the present appeal is incompetent.

Having found that the appeal before us is incompetent for having incomplete record, we would have, ordinarily, proceeded to strike out the appeal forthwith. However, being seized with the record on the face of it, we have noted a serious irregularity in the High Court proceedings. We will explain. Principally, once an appeal is lodged in court, it is the duty of the court to issue summons to the parties in the case and accord them a right of hearing. We have no doubt in our minds that this is a correct view in line with the *audi alteram partem* rule of natural justice which requires the court to adjudicate over a matter by according the parties a full hearing before deciding the matter in dispute. See the decisions of this Court in **Shomary Abdallah Versus Hussein and Another** [1991] TLR 135; **National Housing Corporation versus Tanzania Shoes and Others** [1995] TLR 251 and **Ndesamburo v Attorney General** [1997] TLR 137 on the right to be heard before an adverse decision is taken against a party.

In **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at p. 1055, Lord Diplock had this to say:-

> *"Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has*

*the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what his answer to it."*

This being the position, and the fact that parties did not argue the grounds of appeal, the High Court Judge was, with respect, wrong in delivering the judgment without giving a chance to the parties to argue the grounds of appeal. It is for this serious irregularity that we refrained from striking out the appeal so as to rectify the same by way of revision. This is the approach taken by this Court in the cases of **Emmanuel Charles @ Leonard V. R,** Criminal Appeal No. 369 of 2015, **DPP V. Elizabeth Michael Kimemeta @ Lulu**, Criminal Application No. 6 of 2012; **Tanzania Heart Institute V. The Board of Trustees NSSF,** Civil Application No. 151 of 2008 and **Chama cha Walimu Tanzania V. The Attorney General**, Civil Application No. 109 of 2008 (all unreported).

Affording parties an opportunity to be heard is an enshrined right under Article 13(6) (a) of the Constitution, the breach of which undermines the entire decision. On the premises, we are constrained to intervene and,

in the interest of justice, we invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws. In the result, we set aside the judgment of the High Court dated the 13th May, 2013. We further order that the record be remitted to the High Court for it to deliver the Ruling on the application for stay of execution and accordingly hear and determine the fate of the appeal. We make no order as to costs.

**DATED** at **DODOMA** this 13th day of July, 2018

K. M. MUSSA
**JUSTICE OF APPEAL**

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

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

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

E. Y. MKWIZU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**