

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

CIVIL APPEAL NO. 117 OF 2016

(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

1. THE GUARDIAN LIMITED }
2. PRINTER AFRIQUE LIMITED }APPELLANTS

VERSUS

JUSTIN NYARI RESPONDENT

**(Appeal from the judgment and decree of the High
Court of Tanzania at Arusha)**

(Sambo, J.)

Dated the 23rd day of February, 2009

in

Civil Case No. 35 of 2001

RULING OF THE COURT

4th & 10th July, 2018

MBAROUK, J.A.:

This appeal is against an ex-parte judgment and decree of the High Court dated 23rd February, 2009 in Civil Case No. 35 of 2001. The case was heard ex-parte for non-appearance of the defendants/appellants. The plaintiff/respondent herein claimed for payment of exemplary damages of T.Shs. 200,000,000/= payment

of interest on the awarded damages from the date of judgment to the date of payment in full. The claim was the result of the defamation claimed to have been committed by the defendants/appellants against the plaintiff/respondent in their newspaper. The trial High Court awarded the plaintiff/respondent general damages to the tune of T.Shs. 350,000,000/= costs of the case and interest on the decretal amount at 12% per annum from the date of the judgment to payment in full. Aggrieved, the appellant has preferred this appeal.

This appeal was filed on 9th November, 2015. Earlier on before this appeal was set for hearing, the respondent filed a notice of preliminary objection on 1st December, 2015 to the following effect.

"That the appellants' record of appeal is fatally defective for not including therein, documentary exhibits, P1,P2,P3,P4,P5, and P6; which were put in evidence at the hearing, in non-Compliance with the mandatory provisions of Rule 96(1) of the Tanzania Court of Appeal Rules, 2009."

Thereafter, on 4th April, 2011, the respondent filed another notice of preliminary objection containing two points after the appellant filed a supplementary record of appeal. The two points contained in the notice of preliminary objection state as follows:-

- 1. That the appellants filed purported supplementary Record of Appeal has no basis in law as there is no provision to that effect in the Tanzania Court of Appeal Rules, 2009.*
- 2. That the Appellants purported inclusion of exhibits in the purported supplementary Record of Appeal is a conceited, vain and futile effort to improve the Appellants defective and incompetent Record of Appeal filed on 9/11/2015 after the expiry of the period of 14 days to do so under Rule 96(6) of the Tanzania Court of Appeal Rules, 2009."*

In this appeal, Mr. Colman Ngalo, learned advocate appeared for the appellants, whereas Mr. Loomu Ojare, learned advocate appeared for the respondent.

When the appeal was called on for hearing as per the practice of this Court, we allowed Mr. Ojare to argue his preliminary objection and he started by praying to withdraw his 2nd notice of preliminary objection filed 4th April 2017 and the same was marked withdrawn. He then proceeded to argue his notice of preliminary objection filed on 1st December, 2015.

Arguing in support of the objection filed on 1st December, 2015, Mr. Ojare submitted that pages 61-63 of the record of appeal, there are documents which were tendered as exhibits in the High Court, such as a newspaper called Uhuru was admitted as Exhibit P2. Also other newspapers called Arusha Times was admitted as Exhibit P3, Nipashe newspaper was admitted as Exhibit P4, and the Financial Times was admitted as Exhibit P5 were not included as part of the record of appeal.

Mr. Ojare further submitted that all those documents were supposed to be part and parcel of the record of appeal and as here is no order to exempt them not to be part of the record of appeal under Rule 96(3) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the record of appeal is defective in terms of Rule 96(1) (f) of the Rules. He added that, an incomplete record renders the appeal incompetent and hence prayed for it to be struck out with costs.

On his part, Mr. Ngalo initially gave a history which led him to file his supplementary record on 16th March, 2017, but we think that as far as the 2nd preliminary objection was withdrawn, it was no more necessary to submit on it.

In his opposition to the 1st preliminary objection concerning the non-inclusion of Exhibit P1-P6 Mr. Ngalo conceded that there are some missing documents but he said, justice requires that the Court should look at the Court Rules as a whole. Mr. Ngalo added that in his record of appeal there are annextures which are claimed not to have been included and he said he has annexed them as he received them. Hence added that, those annextures are enough

and relevant for the purpose of making the record of appeal complete.

For that reason, Mr. Ngalo prayed for the preliminary objection to be overruled. As for costs, he left it for the Court to decide.

In dealing with this matter, we have found it prudent to be guided by the relevant provisions of the law in the Rules which is Rule 96 of the Rules which provides as follows:-

"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 provision of sub-rule (3) contain copies of the following documents-

(a) N/A

(b) N/A

(c) N/A

(d) N/A

(e) N/A

(f) *the affidavits read and **all documents put in evidence** at the hearing, or if such documents are not put in English language, their certified translation;*

(g) *N/A*

(h) *N/A*

(i) *N/A*

(j) *N/A*

(k) *N/A*

(Emphasis added).

On the other hand, Rule 96(3) of the Rules provides that:-

*"96(3) **A justice or Registrar of the High Court or tribunal, may on the application of any party direct which documents or parts of documents should be excluded from the record, application for which direction may be made informally.**"*

(Emphasis added)

As pointed out above, it is not optional for a party filing a record of appeal to choose which documents tendered as exhibit in a decision sought to be appealed against as relevant for the

determination of the appeal. See **Jaluma General Supplies Versus Stanbic Bank (T) Limited**, Civil Appeal No. 77 of 2011, and **Fedha Fund and Two Others versus George T. Varghese and Another**, Civil Appeal No. 8 of 2008 (both unreported).

This Court in the case of **Jamal A. Tamim versus Felix Francis Mkosamali and Attorney General**, Civil Appeal No. 110 of 2012 (unreported) provided as follows:-

*"A similar stance was earlier taken and lucidly expressed by the Court of Appeal of Kenya when interpreting rule 85(1) and (3) of the Kenya Court of Appeal Rules, 1979 (which is in pari material with our rule 96(1) and (3) of the Rules) in the case of **Mohamed Aden Abdi v. Abdi Nuru Omar t/a Delta Haulage Service Ltd**, Civil Appeal No. 190 of 2006 (unreported). The Kenyan Court held:*

"Clearly the decision as to which documents are to be excluded from the record of appeal is a matter for the superior court under Rule 85(3) of the Court of Appeal

Rules and since the respondent did not seek any direction under Rules 85(3) aforesaid, therefore the proviso to rule 85(i) has to be read with the rule 85 (3),”

In the instant case, Mr. Ngalo failed to seek permission under Rule 96(3) of the Rules to exclude Exhibit P1 – P6 in his record of appeal. That renders the record of appeal incomplete and the appeal incompetent. Even if Mr. Ngalo claims to have put in the record of appeal those documents as annextures, but annextures are different from exhibits. Whereas annextures are documents annexed to the plaint, but on the other hand exhibits are documents tendered at the time of hearing when a witness testifies in court. Rule 96(1) of the Rules requires both of them to be part of the record of appeal – See Rule 96 (1) (c) and (f) of the Rules.

All in all, in compliance with Rule 96 (1) of the Rules, the appellant ought to have incorporated Exhibits P1-P6 tendered as exhibits at the hearing as shown at pages 61-63. Failure to do so renders the record of appeal incomplete and an appeal

incompetent. For being incompetent we are constrained to sustain the preliminary objection filed by Mr. Ojare on 1st December, 2015 and strike out the appeal with costs, as we hereby do. It is so ordered.


DATED at ARUSHA this 8th day of July, 2018

M. S. MBAROUK
JUSTICE OF APPEAL

G. A.M NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



E. F. RUSSI
DEPUTY REGISTRAR
COURT OF APPEAL