

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

(CORAM: MUSSA, J. A., WAMBALI, J. A. And LEVIRA, J. A.)

CIVIL APPEAL NO. 46 OF 2018

ISSA N.S. MAROMBE APPELLANT

VERSUS

ABDEREHMAN S. MBWANA RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of
Tanzania (Land Division) at Mtwara)**

(Lila, J.)

dated the 10th day of September, 2011

in

Land Appeal No. 16 of 2010

.....

RULING OF THE COURT

5th & 22nd November, 2019

MUSSA, J.A.:

In the Lindi District Land and Housing Tribunal, the appellant unsuccessfully sued the respondent over ownership of a piece of land on Plot No. 52 Block T, Lindi Township. In a judgment and decree which were pronounced on the 28th July, 2010 the Tribunal dismissed the appellant's suit with costs.

Dissatisfied, he preferred an appeal to the High Court but, as fate would have it, he again, lost in a judgment and decree in

appeal that were pronounced on the 10th November, 2011 (Lila, J., as he then was).

Still discontented, on the 24th November, 2011 the appellant lodged a Notice of Appeal to this Court. It is quite apparent that the appellant also preferred an application, before the High Court, for leave to appeal to the Court of Appeal but, unfortunately, the documents such as the chamber summons and the supporting affidavit through which the High Court was moved are not contained in the record of appeal. All what are comprised upon record, in this regard, are the Ruling and drawn order of the High Court (Lila, J.) striking out the application for being time barred on the 18th August, 2012 (see pages 24-27 of the record).

A little later, on the 29th August, 2012 the appellant sought to replicate his quest for leave to appeal to this Court by way of a Notice of Motion which was taken out under the provisions of Rule 45(b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same was supported by an affidavit which was affirmed by the appellant. The outcome of the application is anybody's guess since

the record of appeal does not contain the decision or order of the Court if it was made. Nonetheless, from a subsequent decision of the High Court, which we will shortly refer, it is discernible that the application was struck out by the Court on account of being premature.

The applicant's next move was to prefer a miscellaneous Civil Application No. 16 of 2016 in the High Court at Mtwara. It is not clear as to when exactly the appellant lodged this application as, once again, the documents which instituted the application are not contained in the record of appeal. We however, gathered from the Ruling of the High Court which was pronounced on the 18th May, 2017 that the application was *"for extension of time within which to file a notice of appeal to the Court of Appeal of Tanzania ..."* At the height of the hearing, the application was granted and the appellant was given ten (10) days within which to lodge the Notice of Appeal. Pursuant to the order, the appellant lodged a fresh Notice of Appeal on the 26th May, 2017.

Next, in the chronology of events, on the 8th June, 2017 the appellant lodged an application in the High Court for leave to appeal to the Court of Appeal under section 47(1) of the Land Disputes Courts Act, Chapter 216 of the Laws. The application was by way of a chamber summons supported by an affidavit which was affirmed by the appellant. Having heard the application on the 27th February 2018, the High Court (Mlacha, J.) granted leave to appeal to the Court Appeal.

In the final event, the appellant lodged the record of appeal at hand on the 26th March, 2018. As it turns out, in the memorandum of appeal, the appellant seeks to impugn the decision of the High Court (Lila, J.) upon nine points of grievance.

The respondent is intent upon resisting the appeal and has, presently, enjoined a notice of preliminary points of objection which goes thus: -

"1. The appeal is incompetent and bad in law as it is supported by an incomplete record of appeal thus offending the provisions of rule 96(2) of the Court of

Appeal Rules. As it does not contain the memorandum of appeal from the Tribunal to the High Court.

2. The appeal is bad in law as leave under section 47(1) of the land disputes courts Act 2002 was obtaining (sic) out of time."

When the appeal was placed before us for hearing, the appellant was represented by Mr. Amin Mohamed Mshana, learned Advocate, whereas the respondent was fending for himself, unrepresented. When we invited the latter to address us on the preliminary points of objection the respondent fully adopted the foregoing extracted notice as well as the written submission which he had earlier lodged in support of the preliminary points of objection.

We note that in his written submissions in support of the first limb of the two preliminary points of objection, the respondent contends that the record of appeal is incompetent for not being accompanied by the memorandum of appeal through which the appellant challenged the decision of the Tribunal in the High Court.

The omission, he said, is fatal and, to buttress his stance, he referred us to two unreported decisions of the Court comprised in the Consolidated Appeals Nos. 55 and 65 of 2012 – **Aeshi Hilary and Three others V. Nobert Joseph Yamsebo** and; Civil Appeal No. 140 of 2016 – **Onaukiro Anandumi Ulomi V. Standard Oil Company Ltd and Three others**. In the referred cases, he further charged, the appeals were struck out on account of incompleteness and, thus, the respondent urged us to take a similar course of action with costs. As regards the second limb of the preliminary points of objection, the respondent contends that the appellant belatedly sought and obtained leave to appeal to this Court which was granted by the High Court on the 27th February, 2018.

In response, Mr. Mshana hesitated long before he eventually conceded that the memorandum of appeal which instituted the appeal from the Tribunal to the High Court is, indeed, not contained in the record of appeal. To redress the shortcoming, the learned counsel for the appellant urged us to grant leave to the appellant

to lodge a supplementary record of appeal in terms of Rule 96 (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

As regards, the second limb of the respondent's preliminary points of objection, Mr. Mshana contended that the appellant sought leave to appeal in the wake of obtaining extension of time which was granted by the High Court in the decision by Twaib, J. on the 18th May, 2017.

In a brief rejoinder, the respondent reiterated his prayer to have the appeal struck out, more particularly, on account of incompleteness.

On our part, we propose to first address the preliminary point of objection with respect to the incompleteness of the record of appeal. In this regard, it is, indeed, a conspicuous and notorious fact that the memorandum of appeal which instituted the appeal from the Tribunal to the High Court is not contained in the record of appeal. In addition, as we have hinted upon, some other documents such as the chamber summons and the affidavit which instituted the application before Twaib, J. are similarly not

contained in the record. We should also mention the order of this court which was seemingly made pursuant to the appellant's application for a second bite which is also no show in the record of appeal. All these documents are, of necessity, required to be contained in the record of appeal in terms of Rule 96(1) and (2) of the Rules. Nonetheless, with due respect to the stance taken by the respondent, of recent, the shortcoming does not necessarily render an appeal incompetent and, on occasion, the Court may, instead, grant leave to an appellant to lodge a supplementary record of appeal in terms of Rule 96 (7) of the Rules.

In fine, we are thus minded to grant leave to the appellant to lodge a supplementary record of appeal to accommodate the missing documents within thirty days from the date of this Ruling.

As regards the second preliminary point of objection, we refrain from making any definite decision on the matter due to the missing documents pertaining to the application before Twaib, J. as well as the order of this Court. When all documents are accommodated pursuant to our order it will still be open for the

Court to consider and deliberate on how, in particular, Mlacha, J. became seized of the application for leave to appeal to the Court of Appeal. In the meantime, the appeal will stand adjourned to a date to be fixed by the Registrar. Costs to abide by the outcome of the appeal.


DATED at DAR ES SALAAM this 20th day of November, 2019

K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 22nd day of November, 2019 in the presence of Theresia Issa Marombe and Zainabu Issa Marombe for the appellant and Mr. Abderehman Said Mbwana the respondent in person is hereby certified as a true copy of the original.


H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL