

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

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 14 OF 2015

1. SUMRY HIGH CLASS LIMITED }
2. SUMRY BUS SERVICES LIMITED } APPELLANTS

VERSUS

MUSSA SHAIBU MSANGI..... RESPONDENT
(Appeal from the Judgment and Decree of the High Court of Tanzania,
(Commercial Division) at Dar es Salaam)

(Nyangarika, J.)

dated the 13th day of August, 2014
in

Commercial Case No. 20 of 2012

RULING OF THE COURT

02nd & 16th April, 2020

KEREFU, J.A.:

This appeal is from the judgment and decree of the High Court of Tanzania (Commercial Division), at Dar es Salaam in Commercial Case No. 20 of 2012. In that decision, the High Court (Nyangarika, J.) upheld the respondent's claim against the appellants in respect of the breach of agreement executed between the parties on 3rd February, 2011 and awarded him TZS 79,000,000.00 being the replacement costs of the motor vehicle with registration No. T436 AWJ, TZS 60,000,000.00 as general damages, interest and costs of the case. Aggrieved, the appellants lodged

this appeal containing six (6) grounds of complaint. However, for reasons to be apparent in due course, we will not reproduce the said grounds herein.

The brief background of the suit as obtained from the record of appeal shows that, on 3rd February, 2011 the appellants (the sellers) and the respondent (the buyer) entered into an agreement for purchasing of two motor vehicles with Registration No.T436 AWJ and T365 BDK for a consideration of TZS 158,000,000.00 to be paid in five installments. The first installment of TZS 110,000,000.00 was to be paid at the time of signing of the agreement and other installments of TZS 10,000,000.00 each for the remaining balance of TZS 48,000,000.00 were to be paid within a period of four months at the end of each month starting from the end of February. On the other hand, the appellants were required to furnish the respondent with copies of the Registration Cards for the two motor vehicles at the time of the signing of the agreement. Then, after a period of one month the appellants were to furnish the respondent with copies of the said Registration Cards in his name and upon completion of the last installment to handover the original Registration Cards. Upon signing of the agreement, the respondent paid TZS 110,000,000.00 as

agreed but the appellants did not avail copies of the Registration Cards in respondent's name. It is common ground that, on 23rd July, 2011 the motor vehicle with Registration No. T436 AWJ was involved in an accident and completely burnt down and the respondent could not recover from the insurer due to the fact that the insurance cover was still in the name of the first appellant. The respondent approached the appellants to remedy the situation but they were not cooperative. As such, the respondent successfully instituted the suit against the appellants as indicated above, hence the current appeal.

It is on record that the appellants' appeal was faced with a challenge of lodging complete record of appeal. It all started with the appellants. During the pendency of hearing of appeal, the appellants realized that there were some missing pages from the transcribed proceedings of the trial court. Their realization came after expiry of the fourteen (14) days within which an appellant is permitted to lodge the omitted documents without leave of the Court as prescribed by Rule 96 (6) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In the circumstances, the appellants lodged Civil Application No. 403/16 of 2018 seeking extension of time to include the missing pages. The said application was heard by a

single Justice (Mwambegele, J.A.) who, at the end of his deliberations, granted extension of time to the appellants to lodge the omitted pages within a fortnight.

Dissatisfied, the respondent lodged Civil Reference No. 12 of 2018 challenging the decision of the single Justice for granting the appellants extension of time without seeing the allegedly missing pages of the trial proceedings as were not displayed before the Court. After hearing both parties on the said application, the Court (Mussa, Mugasha and Lila, JJA.) reversed the decision of the single Justice, dismissed the Civil Application No. 403/16 of 2018 and expunged the lodged documents.

Subsequently, on 28th June, 2019, the respondent lodged a notice of preliminary objection that, *the record of appeal lodged by the appellants on 16th February, 2015 is incomplete as material evidence are missing on the record of appeal, thus contravenes the mandatory provisions of Rule 96 (1) (d) (e) (g) and (k) of the Rules* and prayed for the appeal to be struck out with costs. On 23rd July, 2019 at the hearing of the appeal, the appellants conceded to the said objection and prayed to be allowed to lodge a supplementary record under Rule 96 (7) of the Rules as amended by GN. 344 of 2019. Based on that concession, the Court (Mwarija, Wambali and

Korosso, JJA.) granted leave to the appellants to lodge a supplementary record within thirty (30) days to include the following documents:-

- (a) Trial court proceedings from pages 24 up to 32;*
- (b) Trial court proceedings dated 2/10/2012 in respect of PW1's examination in chief and re-examination;*
- (c) Ruling dated 13/02/2014 on the prayer for re-calling PW1; and*
- (d) Transcribed proceedings of the trial court in respect of examination in chief of DW2 conducted on 7/5/2014.*

Pursuant to the above Court's order, the appellants lodged a supplementary record of appeal on 21st August, 2019. However, the said record was again confronted with a notice of preliminary objection to the effect that:-

- (a) The supplementary record is incurably defective as it contravenes the mandatory provisions of Rule 99 (3) and 96 (5) of the Rules; and*
- (b) The contents in the supplementary record does not supplement but contradicts the main contents of record of appeal originally filed on 16th February, 2015, thus putting the Court at limbo or dilemma as to which of the two crucial documents should be used in determining the appeal.*

At the hearing of the appeal, Messrs. Walter Chipeta and Abubakar Salim, learned counsel appeared for the appellants, whereas the respondent had the services of Mr. Deogratius Ogunde Ogunde, also learned counsel.

As it is the practice, we had to determine the preliminary objection first before going into the merits or demerits of the appeal. However, upon consultation with the counsel for the parties and for the purposes of accelerating the hearing and disposal of this matter, we agreed to hear both, the preliminary objection and grounds of appeal. It was also agreed that, in the course of composing the judgment, should the Court find the preliminary objection meritorious, it will sustain it and that will be the end of the matter. If that will not be the case, then the Court will overrule the preliminary objection and proceed to compose the judgment on the merits or demerits of the appeal.

Submitting in support of the preliminary objection, Mr. Ogunde prayed for leave of the Court, which we granted, for him to abandon the second point of objection and argue only the first point. Mr. Ogunde argued that the supplementary record lodged by the appellants on 21st

August 2019 is incurably defective for non compliance with mandatory provisions of Rules 99 (3) and 96 (5) of the Rules. He contended that, pursuant to those provisions, a supplementary record is required to be prepared as nearly as possible as the record of appeal and the appellant is required to attach a certificate of the correctness for authenticity of the lodged documents.

He argued further that, in the instant appeal the appellants have not complied with the said mandatory requirement, as there is no certificate of correctness accompanying the supplementary record. He further argued that, in the supplementary record there is no letter by the appellants addressed to the Registrar requesting for those documents and there is also no letter of the Registrar evidencing that the said documents were supplied to the appellants. It was his argument that non inclusion of those letters and the fact that the supplementary record does not specify its source, its authenticity is questionable.

Amplifying further on this point, Mr. Ogunde argued that, the contents of the supplementary record to a large extent contradicts the main record of appeal lodged on 16th February, 2015 and the Court will be

in a dilemma as to which document (s) to rely upon in determining the appeal. To support his argument, he referred us to page 1 of the supplementary record and page 54 of the main record. He said, the coram of the trial court for 2nd October, 2012, in the two documents is different, because in the supplementary record it is indicated that the advocate who represented the respondent is Mrs. Kisulu, while in the main record it was Mr. Said. He strongly argued that, though the name of Kisulu is appearing in the supplementary record, that advocate has never represented the respondent and even the name of Mrs. Kisulu is not found in the roll of registered advocates. Mr. Ogunde also argued that, the supplementary record has not complied with the order of the Court as part of the testimonies of PW1 (examination in chief and re-examination) which is essential for determination of the appeal is not included. It was therefore the view of Mr. Ogunde that, since the supplementary record was lodged contrary to the mandatory requirement of Rules 99 (3) and 96 (5) of the Rules together with the order of the Court dated 23rd July, 2019 the same is defective and has rendered the entire appeal incompetent. To buttress his position, he referred us to our previous decisions in **Onaukiro Anandumi Ulomi v. Standard Oil Company Limited and 3 Others**,

Civil Appeal No. 140 of 2016 and **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (both unreported). He then urged us to disregard the supplementary record which was lodged contrary to the requirement of the law. He contended that, if the same will be disregarded then the record of appeal is incomplete thus the entire appeal incompetent. On the strength of his argument, he urged us to sustain the preliminary objection and strike out the appeal with costs for being incompetent.

In response, Mr. Chipeta resisted the preliminary objection that it was without merit. He strongly disputed what was submitted by Mr. Ogunde by arguing that the supplementary record was not a substitute of the main record but only to complement it by including the missing documents. According to him, a certificate of correctness submitted earlier with the main record of appeal lodged on 16th February, 2015 was adequate and there was no need for the appellants to submit another certificate. Mr. Chipeta argued further that Rule 99 (3) cited by Mr. Ogunde does not specify which documents to be included in the supplementary record and there is no express requirement of a certificate of correctness. He distinguished the cases of **Onaukiro Anandumi Ulomi** (supra) and

Njake Enterprises Limited (supra) cited by Mr. Ogunde that they are all related to defects found in the certificate of delay and not supplementary records.

As for the contradictions and the name of Mrs. Kisulu appearing in the supplementary record, Mr. Chipeta argued that the same are minor spelling mistakes which do not go to the root of the matter and parties were not prejudiced. Regarding the missing part of the PW1's testimony, Mr. Chipeta cited Rule 99 (1) of the Rules and argued that, under the said Rule, the respondent is also required to submit supplementary record of documents relevant on his part. However, the learned counsel argued that, if the Court will find that there are defects in the supplementary record should invoke section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 (the AJA), as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act No. 8 of 2018) which enjoins courts to do away with technicalities and concentrate on substantive justice. To fortify his argument, he cited **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported) and urged us to overrule the preliminary objection with costs and determine the appeal on merit.

In rejoinder, Mr. Ogunde challenged the contention of his learned friend that the defects identified in the supplementary record are curable under the overriding objective principle. He contended that the said principle is not designed to disregard the mandatory provisions of the procedural law. He thus reiterated his previous prayer by urging us to sustain the preliminary objection and strike out the appeal with costs.

Having considered arguments for and against the preliminary objection advanced by the learned counsel for the parties, the issue for our determination is whether the supplementary record is defective and if so, whether the defect is fatal to the appeal.

As intimated above, there is no dispute that the supplementary record lodged by the appellants on 21st August, 2019 was not accompanied with certificate of correctness. It is also not in dispute that there is no letter of the Registrar certifying that he supplied the copies of the documents contained in the supplementary record to the appellants. To justify the said omission, Mr. Chipeta argued that there was no need for a supplementary record to be accompanied with a certificate of correctness as according to him the one submitted earlier with the main record was adequate. With respect, we are unable to agree with Mr. Chipeta on this

point and we wish to remind him on the duty of diligence imposed on the parties and their learned counsel on the documents lodged in the Court under Rule 96 (5) of the Rules. The said Rule provides that:-

"Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under Rule 33 to appear on his behalf." [Emphasis added].

From the above cited Rule, it is clear that the appellants and their counsel were required to include a certificate of correctness to safeguard the authenticity of the documents lodged in Court. Having scrutinized the two records we are in agreement with Mr. Ogunde that the two records to a large extent contradict each other both in contents and substance. For instance, the trial court's proceedings dated 2nd October, 2012 contained in the supplementary record indicate that on that day after framing of the issues the matter proceeded with hearing and PW1 testified, while in the main record on the same date after framing of issues there was no witness who testified as the matter was adjourned to 16th October, 2012. For the sake of clarity we find it compelling to reproduce few parts extracted from the said two records herein below at the risk of making this ruling unduly long:-

"Page 1, of the supplementary Record

Date: 2nd October, 2012

Coram: Hon. K.M. Nyangaika, J:

For the Plaintiff: Mrs. Kisulu

For the Defendant: Mr. Abubakari

Court Clerk: Ms. Joyce

Court Reporter: Agala

Page 5 – 12 of the supplementary Record, **after framing of the issues** is as follows:-

Court – Call your witness? Jina lako kamili?

MUSSA SHAIBU MSANGI – WITNESS

Naitwa Mussa Shaibu Msangi, Miaka 49, Muislam, Mtanzania. Walahi Bilahi Taala nathibitisha mbele ya mahakama hii kwamba ushahidi nitakaotoa utakuwa wa kweli, kweli tupu.

COURT – Mwongoze shahidi wako?

MR. SAIDI – FOR THE PLAINTIFF - *My lord I pray to use Kiswahili language because my client is not conversant with English language.*

COURT – *proceed.*

MR. SAIDI – FOR THE PLAINTIFF - *Thank my lord. Shahidi jina lako nani?*

MUSSA SHAIBU MSANGI – WITNESS - Jina langu Mussa Shaibu Msangi

COURT – Sasa wakili unaongea hapa na Mahakama tumia kirekodi sauti hicho halafu shahidi wako aseme kwa sauti tumsikie.

MR. SAIDI – FOR THE PLAINTIFF - Kabila lako nani

MUSSA SHAIBU MSANGI – WITNESS - Mpare

MR. SAIDI – FOR THE PLAINTIFF - Unaishi wapi

MUSSA SHAIBU MSANGI – WITNESS - Msasani Bonde la Mpunga.

MR. SAIDI – FOR THE PLAINTIFF- Unafanya kazi gani sasa hivi

MUSSA SHAIBU MSANGI – WITNESS - Mimi ni mfanya biashara

MR. SAIDI – FOR THE PLAINTIFF - Unafanya biashara gani

MUSSA SHAIBU MSANGI – WITNESS - Nina biashara mbalimbali za usafirishaji pamoja na grilling mashine

MR. SAIDI – FOR THE PLAINTIFF - Shahidi je unaifahamu kampuni ya Summry High Class na Summry bus service?

COURT – Swali hilo haliwezi kukubalika. Swali hilo linamwongoza shahidi

MR. SAIDI – FOR THE PLAINTIFF - Shahidi hebu ielezee mahakama uhusiano wa makampuni ya Summry

COURT – Mwongoze shahidi mambo unayotaka wewe mahakama iyajue ndiyo umuongoze?

MR. SAIDI – FOR THE PLAINTIFF - Shahidi unakumbuka

COURT – Hilo swali uivyoanza linatengeneza majibu unakumbuka utasema ndiyo haturuhusu kuandika ndiyo

MR. SAIDI – FOR THE PLAINTIFF - Shahidi hebu ieleze mahakama kwa nini uko hapa?

COURT – Swali gani atajibu nini, kesi nyingine uko nje nilidhani umejiandaa, kama hukujiandaa tuahirishe?

MR. SAIDI – FOR THE PLAINTIFF - Mheshimiwa tumejiandaa

COURT – Muulize unamfahamuje mdaiwa?

MR. SAIDI – FOR THE PLAINTIFF - Shahidi unawafahamu vipi wadaiwa wawili wa hii kesi yako?

MUSSA SHAIBU MSANGI-WITNESS - Wadaiwa wawili kuhusu kesi yangu nawafahamu

COURT – Unawafahamuje ndiyo swali?

MUSSA SHAIBU MSANGI – WITNESS - *Ni wafanya biashara wa usafirishaji, mnamo Januari 2011 tulitembelea kwenye ofisi zao Mikocheni ikiwa namilikiwa na magari yao, nikamkuta ndugu Summry nikaongea naye na nikamweleza kwamba nilikuwa na shida uniuzie gari yako moja basi baada ya maongezi yule bwana akanikubalia akasema yuko tayari kuniuzia na mimi nilikuwa na shida ya gari moja tukapatana naye bei tukafika milioni themanini, nikamwambia mimi niko tayari kukupa cash ya gari moja iaki mwenzangu akanipa ushauri kwamba kwa nini nisikuuzie gari mbili nikasema kweli uwezo wa kukulipa gari mbili kwa pamoja mimi sina.*

COURT – *Sasa hayo mazungumzo sio muhimu mwisho mkafikia uamuzi gani au makubaliano gani?*

MUSSA SHAIBU MSANGI – WITNESS - *Tukakubaliana kuuziana magari mawili ambayo alinipa unafuu wa akaniambia nitakuuzia gari mbili kwa million mia moja hamsini na nane, lakini naomba unilipe nusu ya pesa, tukakubaliana kwamba nina uwezo wa kulipa cash million mia moja na kumi, halafu zilizobakia tukakubaliana tutalipana kwa awamu mpaka nitakapomaliza.*

MR. SAIDI – FOR THE PLAINTIFF - *Shahidi ungependa huu mkataba wa mauziano kama ...*

COURT – *Wala hajasaini mkataba*

MR. SAIDI – FOR THE PLAINTIFF - *Shahidi mlikubaliana kwamba utalipa milioni mia moja na kumi na ulilipa?*

MUSSA SHAIBU MSANGI – WITNESS - *Ndiyo*

COURT – *Sasa hivyo haviwezi kuandikwa hivyo ni kama mnazungumza tu mmekubaliana milioni kumi ndiyo, kwamba utamlipa, ndiyo sasa tutaandika nini kwenye record zetu. Sio hivyo sasa kama kuna kitu unataka kumrejea shahidi wako uiombe mahakama unataka urejee kitu gani?*

MR. SAIDI – FOR THE PLAINTIFF - *Baada ya makubaliano hayo mkafanyaje shahidi?*

COURT – *Siyo hivyo kama kuna kitu unataka kumrejea shahidi wako ueleze mahakama unataka urejee nini?*

MR. SAIDI – FOR THE PLAINTIFF - *My lord nilikuwa naomba shahidi wangu aelezee baada ya makubaliano hayo walifanya utaratibu gani?*

COURT – *Unataka umrejee nini kwenye hati zilizoko mahakamani?*

MR. SAIDI – FOR THE PLAINTIFF - *Mkataba wa mauzo*

COURT – *Ambayo ni annexure gani?*

MR. SAIDI – FOR THE PLAINTIFF - *Annexure three*

COURT – *Annexure MSMA?*

MR. SAIDI – FOR THE PLAINTIFF - Ndiyo

COURT – Haya Mrejee shahidi wako kwenye hiyo unayotaka?

MR. SAIDI – FOR THE PLAINTIFF - Shahidi baada ya makubaliano

COURT – Wewe unataka kumrejea shahidi wako kwenye hiyo annexure mbona haujamrejea sasa?

MR. SAIDI – FOR THE PLAINTIFF - Shahidi ungependa kutoa...

COURT – Mwonyeshe sasa kwanza haujaizungumzia, haya rejea?

MR. SAIDI – FOR THE PLAINTIFF - Shahidi ungependa kutoa mkataba huo kama kielelezo kwenye kesi hii yako?

COURT – Anatoa nini, naona tuahirishe ukajiandae, haujajandaa. Tuwape mda umwandae vizuri shahidi wako ukija hapa tunaendelea na kesi

MR. SAIDI – FOR THE PLAINTIFF - Mheshimiwa Jaji kwa mazingira yalivyo tufanye adjournment

COURT – Hii case yako wewe mahakama haina kesi hapa ujiandae vizuri namna ya kumwelekeza shahidi wako kutoa ushahidi mahakamani. Ujiandae vizuri shahidi wako sitaahirisha tena. Kesi imeahirishwa mpaka tarehe 26/10/

COUNSELS – Thank my lord.

Hiyo cheque yangu na ninafikiri alichukua cash yake haikuwa na usumbufu.

MRS. PHILIP- FOR THE PLAINTIFF - Shahidi umeulizwa sana kuhusiana na gari kuungua na Bima

MUSSA SHAIBU MSANGI – WITNESS - Ndiyo

MRS. PHILIP- FOR THE PLAINTIFF - Hebu iambie Mahakama wakati ajali inapatikana kwa nini unadai kwamba gari ilikuwa na Bima wakati umesema ulienda kukata Bima tarehe 28 kwa vipi baada ya kuungua ndiyo ulikata Bima na unasema lilikuwa na Bima?

MUSSA SHAIBU MSANGI – WITNESS - Labda urudi kidogo nyuma hapo ni kwamba gari iliisha Bima tarehe 07/06 baada ya kufanya majadiliano na mwenzangu mdaiwa akanishauri kwamba hajakamilisha ratiba ya kunibadilishia kadi ya gari iingie kwenye jina langu akaniomba niendeleo kulipa kwa jina lake na nikalipa tarehe 24/06/2011 Bima ya miezi 6 tu ili akinikamilishia niendeleo ikiisha niendeleo kwa jina langu.

MRS. PHILIP- FOR THE PLAINTIFF: Hiyo bima ya miezi 6 ilikuwa ina –expire lini?

MUSSA SHAIBU MSANGI – WITNESS: Ilikuwa inaisha tarehe 23/12/2011.

Then, the trial court's proceedings indicates at pages 54 to 55 of the main record for the same date are as follows:-

Date: 2nd October, 2012

Coram: Hon. K.M. Nyangaika, J

For the Plaintiff: Mr. Said, Advocate

For the Defendants: Mr. Abubakari

CC: J. Grison, Mrs.

After framing of the issues

Mr. Abdallah Said, Advocate: I have one witness, Musa Shaibu Msangi, today and we are ready.

Mr. Abubakar, Advocate: I am ready.

Court: Let the case proceed for hearing today as scheduled.

PW1: Mussa Shaibu Msangi, 49 years, moslem, Tanzania, Affirm and states as record by the transcriber.

Mr. Abdallah Said: I pray to refer PW1 to annexure MSM 3 attached in the Plaint.

Court: Prayer granted.

*K.M. Nyangarika
Judge
2/10/2012*

Court: Let the plaintiff's counsel prepare before hearing as he appears not to be fully prepared for the case.

Abubakar, Advocate: I concur.

Abdullah Said: I have no objection and I undertake to prepare myself for the case.

Order: The case is hereby adjourned to 16/10/2012 at 12.00 noon.

*K.M. Nyangarika
Judge
2/10/2012*

Again, the trial court's proceedings for 7th May, 2014 at pages 13 to 48 of the supplementary record are completely different in substance with the trial court's proceedings of the same date found at pages 93 – 94 of the main record. Furthermore, though page 13 of the supplementary record the coram indicates that the respondent was represented by Mrs. Kisulu assisted by her learned brother Kaiti, the said names do not feature anywhere in the coram and trial court's proceedings of the same date found at pages 93 to 94 of the main record. Though Mr. Chipeta argued that the same were only minor errors appearing on the coram, his submission is not supported by the record because the name of Mrs. Kisulu is not only appearing on the coram but throughout the proceedings contained in the supplementary record. See for instance pages 22 to 48 of the supplementary record. This gives us an impression that Mr. Chipeta did

not bother to peruse the supplementary record to verify its authenticity. In our view, the case of **Yakobo Magoiga Gichere** (supra) he cited is not applicable to this appeal because the defects identified herein go to the root of the matter. We are increasingly of the view that, non inclusion of the certificate of correctness cannot be cured by the principle of overriding objective as the same cannot be blindly applied on such a non-compliance which goes to the root of the appeal. See **Njake Enterprises Limited** (supra) and **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017 (unreported).

It is our considered view that had the learned advocates for the appellants paid attention to Rule 96 (5) of the Rules they would have easily discovered that the contents of the supplementary record they lodged in Court contradicts the main record. The Court in several occasions has reminded parties and advocates to ensure that documents lodged in Court do not contain errors. See for instance cases of; **Umoja Garage v. National Bank of Commerce** [1997] TLR 109, **the Attorney General v. Jackson Ole Nemeteni @ Ole Saibui @ Mjomba and 19 Others**, Consolidated Civil Appeal No. 35 and 41 of 2010 and **Anthony Ngoo and**

Another v. Kitinda Kimaro, Civil Appeal No. 33 of 2013 (both unreported). Specifically, in **Anthony Ngoo and Another** (supra) the Court held that:-

"Had the learned counsel taken time to verify on the correctness of the certificate of delay or any other documents for that matter before incorporating them in the record of appeal, the conspicuous defects ...would have been attended to... in terms of Rule 96 (5) of the Rules."

We are aware that the above case is on the defects found on the certificate of delay but we find the same to be relevant to the circumstances of this appeal as in that case, the Court among others, considered the duty imposed on the appellant and his advocate under Rule 96 (5) which is the subject matter herein.

In the circumstances, and taking into account that there is no certificate of correctness to certify the documents contained in the supplementary record and a letter by the Registrar to verify that those documents were truly availed to the appellants, we are in agreement with Mr. Ogunde that the authenticity of the supplementary record is

questionable. Therefore, the same cannot be relied upon by this Court to determine the appeal hence the record of appeal before us is incomplete.

Ordinarily, after making that observation, we would have granted leave to the appellants to lodge another supplementary record, however, Rule 96(8) of the Rules as amended by GN. No. 344 of 2019 bars further applications for lodging supplementary records. Rule 96 (8) of the Rules provides that:-

"Where leave to file a supplementary record under sub-rule (7) has been granted, the Court shall not entertain any similar application on the same matter."

In our recent decision in **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2018 we discussed the applicability of the above Rule when considering a prayer by the appellant to lodge a second supplementary record to cure another defect in the record of appeal discovered after the appellant had been granted leave to lodge a supplementary record containing missing documents in the main record, we stated that:-

*"...The bottom line in our view is that **defects in the record of appeal attributed to the omission of essential documents***

required under rule 96(1) or (2) of the Rules can only be cured once in terms of rule 96(8) of the Rules....” [Emphasis added].

Similarly, in this appeal, since this Court had already granted the appellants leave to lodge a supplementary record to cure the defects in the record of appeal, we cannot grant leave to the appellants to lodge a second supplementary record of appeal.

We are also mindful of the fact that in his submissions, Mr. Chipeta shifted the blame to the respondent that since some of the missing documents were also relevant on his part, he ought to have lodged a supplementary record in terms of Rule 99 (1) of the Rules. Though we appreciate the duty of the respondent imposed by that Rule, we find the argument of Mr. Chipeta under the circumstances to have no basis. It is our considered view that since the appellants are the ones who lodged the appeal, they had an obligation to lodge complete and competent record in Court, to properly move the Court to determine the appeal on merit. The appellants could not lodge an incompetent record and expect the respondent to salvage it. See **Tanzania Breweries Limited v. Jonathan Kalaze**, Civil Appeal No. 52 of 2014 (unreported).

In the event and on the account of the identified contradictions and uncertainty surrounding the supplementary record lodged by the appellants on 21st August, 2019, we find the same unreliable and cannot by any standard supplement the record of appeal. As such, the record of appeal before us is incomplete, hence incompetent liable to be struck out. Having so concluded, we shall not proceed to determine the merit of the appeal which we have held to be incompetent.

For the foregoing reasons, we are constrained to strike out the appeal as we hereby do with costs.

DATED at DAR ES SALAAM this 14th day of April, 2020.



R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 16th day of April, 2020 in the presence of Mr. Denis Lyimo, learned Counsel for the Appellant and Mr. Deogratius Ogunde Ogunde, learned counsel for the Respondent, is hereby certified as a true copy of the original.

A handwritten signature in black ink, appearing to read "E. G. MRANGU".

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL