

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: LILA, J.A., KOROSSO, J.A., And LEVIRA, J.A.)**

**CIVIL APPEAL NO. 21 OF 2016**

**NAKOMOLWA MATEPELI SHILA ..... APPELLANT**  
**VERSUS**

**MWANAHAMISI ALLY NONGWA**  
**(Legal Representative of KIDAWA SEIF (Deceased) ..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,  
Land Division at Dar es Salaam)**

**(Mutungi, J.)**

**Dated the 19<sup>th</sup> day of May, 2015**

**in**

**Land Case No. 155 of 2010**

.....

**JUDGMENT OF THE COURT**

17<sup>th</sup> August, & 24<sup>th</sup> December, 2020.

**KOROSSO, J.A.:**

The appellant was the 1<sup>st</sup> defendant in the trial court and the respondent was the plaintiff. The respondent instituted the suit against the appellant and another (who is not a party to this appeal) seeking the following orders:

1. A declaration that the plaintiff is the lawful owner of the disputed piece of land
2. A perpetual injunction restraining the defendants and their agents, servants, employees and workmen from dealing with the suit property in any manner whatsoever.
3. An order for vacant possession.

4. An order for payment of mesne profits per month from the 1<sup>st</sup> Jan 2007 till the defendants give vacant possession.
5. An order for payment of interest at a commercial rate of 20% per annum from 1<sup>st</sup> Jan 2007 till payment of mesne profit referred to above.
6. An order for payment of interest at court rate on the decretal sum from the date of judgment till payment of the decretal sum.
7. Costs of the suit.
8. Any other remedy the court will deem fit.

Most of the claims in the plaint were refuted by the respondent in his written statement of defence.

The background to the case subject of this appeal is that, the respondent's mother (now deceased) owned the disputed property which she had originally acquired from the Mbagala Mission. She was declared the lawful owner by the High Court in Civil Appeal No. 1 of 1974. Thereafter, the deceased disposed part of her land by selling portions of the said disputed property to various people including the appellant at the same time she remained with part of the land which she had not sold. It is alleged that the appellant claimed ownership of some of the land the deceased had left for her own usage stating that the deceased had sold the said land (disputed land) to him in 1974.

Sometime in 2008, the respondent who is the administratrix of her deceased mother's estate became aware that communication towers/pillars had been erected within the disputed property. The respondent's investigation into the issue led her to learn that the appellant was the one who had leased part of the disputed land to a mobile telecommunication service provider known as Zain who had then installed the communication signals there. The respondent successfully sued the appellant in the Ward Tribunal for Mbagala Ward (WT). The appellant being aggrieved appealed to the District Land and Housing Tribunal for Tembeke (DHLT), where it was held that the trial tribunal (WT) lacked pecuniary jurisdiction to entertain the case and the proceedings were consequently nullified and whoever was aggrieved by the decision was advised to file a suit in the High Court.

When the suit was filed and heard by the High Court, a finding that the disputed land was part of the deceased estate was exacted. It was also ordered that the appellant (1<sup>st</sup> defendant then) had no claim of right or title to the disputed land and therefore had no mandate to lease the disputed land to anyone. The respondent was declared the lawful owner and an order for vacant possession of the suit land was issued together with a permanent injunction to the appellant and the other defendant and their employees.

Undeterred, the appellant filed the current appeal to this Court and has raised eight grounds of appeal in the Memorandum of Appeal filed on the 9<sup>th</sup> February, 2016 which read as follows:

1. That the learned Madam Judge, erred in law and fact having declared the respondent (being a legal representative of the late Kidawa Seif) lawful owner of the suit premises.
2. That the learned Madam Judge erred in law and fact having declared the Respondent the rightful owner of the suit premises while the suit was hopelessly time barred.
3. That the learned Madam Judge erred in law and fact by not observing that the Appellant had earlier in 1971 purchased one piece of land where he has constructed his residential house and later on in 1977 purchased another piece of land which is in dispute from the late Kidawa Seif and he has been in possession and occupation of the same without any disturbance since then until 2007/2008 when the respondent started to claim ownership after construction of Communication Tower thereof.
4. That the learned Madam Judge erred in law and fact having not observed that the appointment of the respondent herein as administratrix of the estate of Kidawa Seif in lieu of the 1<sup>st</sup> administratrix in 2010 was improper

5. That the Learned Madam Judge erred in law and fact having not observed that the 1<sup>st</sup> administrator of the estate of the late Kidawa Seif one (Said Sefu Kitambula) who was appointed immediately after death of Kidawa Seif in 1994 up to 2010 when he withdraws from administration of estate he had never in time memorial for all that period of more than fifteen (15) years claimed the suit land as one of the properties forming part of the estate of the late Kidawa Seif.
6. That the learned Madam Judge erred in law having not observed that the administrator of the estate of Kidawa Seif then, one Said Kitambulilo who is a very material and potential witness was not summoned to appear in Court to adduce his evidence regarding the disputed land hence the Court ought to draw inference that if he was called he would have given evidence contrary to the Respondent's interests.
7. That the learned High Court Judge misdirected and erred in her analysis and application of law on the evidence as adduced in Court hence arrived at wrong decision
8. That the learned Madam Judge has erred in law in her interlocutory Ruling in her decision to permit continuation of the

suit hence the proceedings and Judgment of the trial Court are a nullity,

The appellant's prayer before the Court is for the appeal to be allowed, the decision and decree of the High Court to be quashed and set aside, and also that the appellant be declared the lawful owner of the suit premises and costs.

At the hearing of the appeal before us, the appellant was represented by Mr. Augustino Ndomba assisted by Ms. Heavenlight Mlinga both learned Advocates and Mr. Robert Rutaihwa, learned Advocate appeared for the respondent.

As it is a well settled practice that the preliminary objection has to be determined first before venturing into the merits or demerits of the appeal, the respondent having filed notice of preliminary objection, it was imperative to chart out how to thus proceed. Nevertheless, upon our dialogue with learned counsel for both parties on this issue, it was agreed that so as to expedite the process of the hearing and disposal of the appeal, the parties be heard first on the preliminary objection raised and then proceed to argue the appeal. The undertaking being that in the passage of composition of the Judgment, where the Court is to find the preliminary objection meritorious, and sustain it, that will be the end of the matter. Otherwise, if the Court finds the preliminary objection to be

devoid of merit and overrules it, the Court will proceed to compose the judgment considering the merits and demerits of the appeal.

The respondent's advocate commenced by seeking leave to abandon the second point of objection and remain with the first point of objection. It states that:

*"The appeal is incompetent as it contravenes the mandatory provisions of Rule 96(1)(g) of the Court of Appeal Rules 2009 on the ground that the Record of Appeal does not include the copy of the ruling of the trial court dated 23<sup>d</sup> April, 2014'.*

In amplifying this point of objection, Mr. Rutaihwa contended that this emanates from the fact that the appellant failed to comply with the order of this Court after it had sustained a preliminary objection filed by the respondents. That in the said Ruling, the appellant was ordered to file a supplementary record of appeal to include the alleged omitted documents. He thus contended that the appellants were in contravention of Rule 96(1)(k) of the Tanzania Court of Appeal Rules, 2009 (as amended) (the Rules).

The counsel contended further that although the appellant filed the supplementary record within the time specified, however, contrary to the Court's order dated 26<sup>th</sup> June 2019 in Civil Appeal No. 21 of 2016

(the current appeal), the appellant filed supplementary record excluding the exhibits tendered and admitted in the trial court that is, exhibits P1, P2, P3, P4, P5, P6, D1, D2, D3, D4 and D5 (found at pages 147, 150, 151, 152, 153, 164, 165 and 166 of the record of appeal). That the other missing document is the Ruling by the High Court which overruled and dismissed objections filed by the respondents alleging that the suit was time barred and that the speed track had expired.

The learned counsel argued that the documents which are still missing are essential for determination of the appeal and their absence means they cannot be referred to if needed. The learned Advocate stated further that non-inclusion of the missing documents in the supplementary record of appeal filed meant that the appellant did not comply with the aforementioned Order of this Court. With regard to the consequences for failure to comply with Rule 96 of the Rules, he cited the case of **Sumry High Class Limited and Another vs Mussa Shaibu Msangi**, Civil Appeal No. 14 of 2015 (unreported) where the appeal was found incompetent because of failure to file essential documents/exhibits relevant for determination of an appeal. He thus prayed that the preliminary objection be sustained and the appeal be found incompetent and consequently struck out.



On the part of the appellant, in response to the preliminary objection point as regards compliance with the order by this Court of the 26<sup>th</sup> June, 2010 for the appellant to file missing documents by way of a supplementary record, Mr. Ndomba argued that the respondent complied with the said order but was unable to get all the missing documents which were admitted during the trial despite the request made to the Deputy Registrar (DR) and oral reminders which did not bear fruits. He argued that it was upon failure to get the requisite documents from the DR that the respondent decided to file the supplementary record with copies of annexures they had in their possession before they were tendered, admitted and endorsed.

The counsel argued that they should not be penalized for filing unendorsed documents since they did so to comply with the order of this Court to the best of their abilities under the circumstances. He argued that in anyway, the copies filed in the supplementary record are similar in content to those tendered and admitted in court. He thus prayed for the preliminary objection to be overruled and dismissed for being devoid of merit.

On the part of the respondent, when given an opportunity to submit his rejoinder, he had nothing to add, praying that his submissions in

chief on this preliminary point of objection be considered and reiterated the prayers he previously submitted.

The preliminary objection expounded by the respondent which has been reproduced hereinabove, invariably emanates from the Ruling of this Court which we have already made reference to herein above, dated 26<sup>th</sup> June, 2019. This Ruling was in respect of a preliminary objection raised by the respondent related to missing documents in the record of appeal, in which the first point of objection in the Notice of Preliminary objection was sustained.

We have decided to paraphrase the two points of objection raised because after enjoining the two preliminary points, that is, the first point of objection and the one filed as an additional Notice of Preliminary objection, it invariably states:

*"The appeal is incompetent as it contravenes the mandatory provisions of Rule 96(1) (f) and (k) of the Tanzania Court of Appeal Rules, 2009 on the ground that the Record of Appeal does not include copies of exhibits tendered before the trial Court".*

After deliberation of this objection, the Court stated:

*"Regarding the grounds on the omission of the documents in the Record of Appeal, the law has*

*now been made flexible by the amendment which was brought about by Government Notice No. 344 of 2019 to the Court of Appeal Rules, 2009 whereby, by virtue of sub-rule (7) which added to Rule 96, in case of omission of some documents in the Record of Appeal, the Court can on its own motion or through an informal application by the appellant, grant leave to the appellant to include the omitted documents in the Record of Appeal. In that regard, we direct the appellant to amend the Record of Appeal by including the missing documents within a period of thirty (30) days from the date of delivery of this ruling."*

From the above excerpt, it is clear that the appellant was ordered to amend the record of appeal so that it includes the missing documents, and given thirty (30) days from the date of the said ruling to comply. In effect, the appellant was required to lodge a supplementary record of appeal within the time specified.

The issue before us is whether there was compliance with the said order of this Court, and if not, what are the consequences thereto.

The submissions by the counsel for the appellant who disputes the allegations of non-compliance with the respective Court Order, arguing that the supplementary record was filed within the time specified,

however, at the same time he concedes that the supplementary record did not include endorsed exhibits by reasoning that this happened because all efforts to get them through correspondence with DR ran futile which led them to file copies of the annexures to their pleadings in the trial court instead endorsed admitted exhibits. The learned counsel also argued that nothing was compromised since the contents therein are similar to the endorsed exhibits and they had to file the same, to save the day in the absence of the endorsed documents and to comply with the Court order.

What is clear, upon perusal of the record of appeal, is that the supplementary record was filed on the 19<sup>th</sup> July, 2019 within the confines of the time ordered by the Court in a ruling of 26<sup>th</sup> June, 2019. Indeed, it is indisputable that the annexures included in the supplementary record of appeal filed are not endorsed by the admitting court to show that they were admitted, a fact conceded by the counsel for the appellant. There is also the fact that the supplementary record of appeal filed did not include all the narrated missing documents. Our perusal of the said supplementary record shows that it is only a few unendorsed documents which are included that is, the sale agreement dated 13<sup>th</sup> October 77, the sale agreement dated 17<sup>th</sup> September, 78 and the sale agreement dated 14<sup>th</sup> October, 77 and nothing else. Apart

from the missing documents, the Ruling of the High Court of 28<sup>th</sup> May, 2014 (as per the original record) which related to raised objection that the suit was time barred was also missing. In this appeal, failure to include the said Ruling of the High Court on whether or not the suit was time barred escalates the issue further since this was one of the essential documents in determination of the current appeal. This is because the 2<sup>nd</sup> ground of appeal, challenges the findings in the said Ruling. Thus, in its absence it means this Court cannot determine the said ground of appeal.

Having regard to the above, and the concession by the learned counsel for the appellant, the filed supplementary record omits various essential records and at the same time includes documents which were not admitted as exhibits at the trial.

We have considered the reasons advanced by the appellant's counsel for failure to include the relevant documents in the supplementary record. However, our perusal of the record, has shown that apart from the letter to the DR of the High Court, Land Division (DR) (at pages 221-222) with Reference No. TLC/LIT/HC/LD/NS/1/2015 dated and filed on 23<sup>rd</sup> September, 2015 requesting to be supplied with certified copies of proceedings which was responded to by the DR, in a letter with Reference No. HLD/L/C/150/2010 dated 14<sup>th</sup> December, 2015 stating

that the requested documents were ready for collection upon payment of necessary fees, there is no other follow-up letter asking for the same.

There is no any information or averment from the appellant or his counsel alluding to the fact that he did not receive all essential documents nor any sworn affidavit alluding to this fact apart from the appellant's counsel oral submissions in Court stating the same. We have also noticed that there is no evidence of communication from the counsel for the appellant seeking from the DR the omitted documents after the ruling of this Court ordering for the same to be lodged as a supplementary record of appeal. There was also no communication from the DR that certifies that the appellant was supplied with copies of the missing documents contained in the supplementary record. Therefore, the appellant's assertion that he had done concerted efforts to get the documents is not supported by evidence.

In any case, under Rule 96(3) of the Rules, there was an available remedy for the appellant if he felt his efforts to get relevant documents ran futile or otherwise, the said provision allows a party to apply to a Justice or Registrar of the High Court or Tribunal for documents or parts of documents to be excluded from the record. Therefore, instead of filing unendorsed documents that was an action available to the appellant which he failed to undertake.

This being the case, and the fact remains that the supplementary record filed by the applicants did not include essential documents that were omitted in the record of appeal as ordered by this Court. Under the circumstances, the learned advocate for the appellant cannot escape the fact that in filing the supplementary record, with so much missing record and those filed being documents which were not admitted in evidence and thus erroneous, indisputably, there was non-compliance with the Order of this Court of filing all the omitted documents in the record of appeal.

On several occasions this Court has reminded counsel and parties of the need to ensure that documents lodged in Court are devoid of errors, in such cases as, **Attorney General vs Jackson Ole Nemeteni @Mjomba and 19 Others**, Consolidated Civil Appeal No. 35 and 41 of 2010 and **Anthony Ngoo and Another vs Kitinda Kimaro**, Civil Appeal No. 33 of 2013 (both unreported). Taking into account the foregoing concerns raised above related to the filed supplementary record, we agree with the respondent's counsel contention that the Order of this Court of 26<sup>th</sup> June, 2019 has not been complied with.

The next issue for determination now, is what are the consequences thereto. Where there is non-compliance with Rule 96(1) of the Rules, the usual way forward available is for the Court *suo motu* or after being

moved, to grant leave for the appellant to lodge a supplementary record.

Nonetheless, with the coming into play of the amendments to the Rules by GN No. 344 of 2019, that proscribes further applications for lodging supplementary record. Rule 96(8) of the Rules states:

*"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."*

This Court has already had an opportunity to deliberate on the pertinence of the above cited provision in **Puma Energy Tanzania Limited vs Ruby Roadways (T) Limited**, Civil Appeal No. 35 of 2018 when considering a party's prayer to file a second supplementary record to address discerned defects, the Court observed 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..."*

Therefore, in the current appeal, having found that the appellant failed to comply with the order of this Court to enable the Court to properly



determine the appeal before us on merit, and there being no room to allow the appellant another chance to file the same by virtue of Rule 96(8) of the Rules. As such, the record of appeal before us is incomplete and consequently incompetent.

We are aware that, the usual practice is to strike out the appeal where the record of appeal is found incomplete. Various decisions have ended by striking out the appeal, such as **Puma Energy Tanzania Limited vs Ruby Roadways (T) Limited** (supra). Upon further reflection on this issue, we wonder whether this should be the position herein. This is because when a party who was granted leave to file supplementary record and does not do so, it shows lack of seriousness on their part to pursue the appeal. An order striking out the appeal provides an opportunity for the party to refile. If left as it is, may lead to endless litigation.

We think it is time to further reflect on the resultant effect of striking out an appeal where a person has failed to file the omitted record after being granted leave to do so. In such a situation the best way forward should be to dismiss the appeal. We feel it might be time to for the relevant authority to look further into the resultant effect of such orders.

In any case, our hands are tied by various decisions of the Court and we are thus compelled upon our finding that the appeal is incomplete hence incompetent, to proceed to strike out the appeal. For the foregoing reasons, the preliminary objection is sustained and the appeal is struck out with costs.

**DATED** at **DAR ES SALAAM** this 21<sup>st</sup> day of December, 2020.

S. A. LILA  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The Judgment delivered on this 24<sup>th</sup> day of December, 2020, in the presence of Mr. Augustino Ndomba Counsel for the Appellant and Mr. Robert Rutaihwa Counsel for the respondent, is hereby certified as a true copy of the original.



B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**