

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)**

**CIVIL APPEAL NO. 313 OF 2017**

**DAUDI HAGHA.....APPELLANT**

**VERSUS**

**1. SALUM NGEZI**

**2. DAMIAN TOYI..... RESPONDENTS**

**(Appeal from the Decision of the High Court of Tanzania at Tabora)**

**(Mruma, J.)**

**dated the 12<sup>th</sup> day of March, 2015**

**in**

**Land Appeal No. 16 of 2011**

\*\*\*\*\*

**RULING OF THE COURT**

*28<sup>th</sup> April & 5<sup>th</sup> May, 2021*

**GALEBA, J.A.:**

Daudi Hagha, the appellant instituted Land Application No. 22 of 2008 at the District Land and Housing Tribunal for Kigoma (the DLHT), claiming TZS 3,100,000.00 and TZS 17,783,325.00 for misrepresentation and arrears of rent respectively. He was also praying for a declaration that the appellant and the respondents have equal undivided shares in two of the rooms in the house erected on Plot No 12 Block 'G' Omari Street Kasulu township (the dispute property) and costs. The respondents disputed the claims and filed a counter claim for rescinding the contract they had with

him for joint ownership of the dispute property. The DLHT dismissed the application and ordered the respondents to refund TZS. 1,725,000.00 to the appellant. Being aggrieved, the appellant filed Land Appeal No. 16 of 2011 in the High Court at Tabora. However, like the application in the DLHT, his appeal was dismissed although he was awarded a refund of TZS. 3,100,000.00 which he had advanced to the respondents before the dispute arose. Still undaunted, the appellant has preferred this appeal challenging the decision of the High Court, in which he lodged a memorandum of appeal containing three grounds. However, for reasons that will soon be clear, we will not deal with the grounds in this ruling.

Nonetheless, when the record of appeal was served on the respondents, they lodged a notice of preliminary objection predicated on two (2) points of law that: -

*"1. The record of appeal contains;*

*(i) A defective judgment by the High Court which does not disclose the name of the 2<sup>nd</sup> respondent.*

*(ii) A defective decree which is materially different from the judgement of the High Court.*

*2. A certificate of delay by the Deputy Registrar refers to High Court Land Appeal No. 16 of 2018 and Application No. 20 of 2015 which are not the subject matter of the appeal by the appellant."*

When this appeal was called on for hearing, the appellant was represented by Messrs. Kamaliza Kamoga Kayaga and Musa Kassim both learned advocates and the respondents had the services of Mr. Mugaya Mtaki also learned counsel.

As per the established practice by the Court, the above objection had to be disposed of first before we could get to the substantive appeal. At the outset Mr. Kayaga conceded that points of objection raised are valid and that the appeal is incompetent. Initially he prayed that the same be struck out, but on a reflection, particularly after noting that the errors pointed out in the notice of preliminary objection could legally be rectifiable, he moved the Court under Rule 111 of the Tanzania Court of Appeal Rules 2009 (the Rules) to grant him leave to go and seek rectification so that he could lodge a supplementary record containing valid documents. He added that the errors in the documents were occasioned by the office of the Deputy Registrar of the High Court.

In respect of item 1(i) complaining that the judgment does not indicate who the second respondent was, he argued that the point was materially trivial because, all the documents show that the 2<sup>nd</sup> respondent is Damian Toyi.

On his part, Mr. Mutaki submitted that if Mr. Kayaga's prayers will be granted, it will be tantamount to pre-empting the preliminary objections raised. He insisted that as counsel for the appellant admitted that the appeal was incompetent, then it ought to be struck out with costs as legally, there is no appeal before the Court.

On a critical review of the documents complained of and we agree that, **one**, the caption to the judgment at page 196 of the record of appeal shows thus: -

*"DAUDI HAGHA.....APPELLANT  
versus  
SALUM NGENZI **AND ANOTHER**.....RESPONDENT"*

That means there is obscurity and inconspicuousness as to the identity of the second respondent's name, Damian Toyi.

**Two**, whereas the judgment of the High Court dismissed the appeal with costs but awarded the appellant TZS. 3,100,000.00 at page 208 of the

record, that amount which is a material component of the High Court's judgment, is not reflected in the decree.

**Three**, the certificate of delay at page 265 of record reads:-

*"This is to certify that Mr. MUSA KASSIM, Advocate for the applicant herein applied in writing for certified copies of Ruling, Drawn order and Proceedings for appeal to the Court of Appeal of Tanzania in respect of Miscellaneous Land Application No. 20 of 2015 vide a letter dated 16 of March 2015."*

However, we have reviewed the letter by Mr. Kassim at page 214 of the record of appeal and it is clear that the advocate did not apply for documents relating to the said Miscellaneous Land Application, the letter was requesting for documents in respect of Land Appeal No. 16 of 2011. That means the certificate was defective.

In totality those are the three defects that are clear and undisputed by counsel.

On our part, we will start with the issue of non-disclosure of the second respondent in the caption to the judgment. Mr. Mtaki moved us to strike out the appeal by relying on the case of **Juma Marumbo and 42**

**Others v. Regional Commissioner, Dar es salaam Region and Two Others**, Civil Application No. 242 of 2016. Mr. Kayaga submitted that the case is distinguishable because in that case the respondents were many and disclosure of their names was necessary but in this matter the respondents are just two and in all other documents, the second respondent is indicated.

On this point, we agree with Mr. Kayaga. In this matter two respondents were involved; the first and the second respondents herein. The case of **Juma Marumbo and 42 Others** (supra) is clearly distinguishable because in that case the parties in the High Court were 65 but the application for stay of execution in the Court of Appeal where the issue arose, the caption of the case indicated Juma Marumbo and 42 Others. When the matter was raised by the Court as to the non-disclosure of the 42 applicants, their counsel submitted that a list containing the names was attached to the affidavit, but upon discovery that the list had 65 names, the advocate argued that although the list had 65 names, the application involved those who signed on the list. When the names of those who signed were counted, they were found to be 44 and not 43. Counsel explained that one signature overlapped and appeared in two rows in the

list. We are of the view that in the case of **Juma Marumbo and 42 Others** (supra) the applicants' number was uncertain and confusing, that is why the Court relying on **Othiniel Ahia and 52 Others v. L. M. Investments Limited**, Civil Application No. 2 of 2015, held that the application was incompetent. In this case, however in the first paragraph of the judgment the names of the respondents are both mentioned. In our view, as the applicants are only two, the issue of non-disclosure of one of the names is a minor slip and it is curable under section 96 of the Civil Procedure Code [Cap 33 R.E. 2019] which provides that clerical or arithmetical mistakes in judgments, decrees or orders may be corrected by the court.

As for the decree, the crucial issue for resolution is whether the defect is legally curable or rectifiable under Rule 96(7) of the Rules. We will find a position of law in **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2018, where the Court stated that:-

*"The mischief behind rule 96(7) of the Rules was to put to life incompetent appeals suffering from defects in the records of appeal, including, but not limited to non-inclusion of essential documents*

*envisaged under rule 96(1) and (96(2) of the Rules.”*

Rule 96(7) of the Rules which was enacted recently in 2019 *vide* the Tanzania Court of Appeal (Amendment) Rules 2019, G.N. No. 344 of 2019 provides that: -

*"Where the case is called on for hearing, the Court is of opinion that document referred to in rule 96(1) and (2) is omitted from the record of appeal, it may on its own motion or upon an informal application grant leave to the appellant to lodge a supplementary record of appeal.*

A decree therefore, being one of the documents essential for inclusion in the record of appeal under Rule 96(1)(h) of the Rules, in our view, is curable under Rule 96(7) of the Rules, a position this Court maintained in **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited** (supra). Briefly, the defect in the decree is rectifiable as per the current law.

Another defective document was a certificate of delay. In respect of a defective certificate, in **Katibhai Patel v. Duhyabhai F. Mistry**, [2003] T.L.R. 437, this Court held that: -



*"The very nature of anything called a certificate requires that it be free from error **and should an error crop into it, the certificate is vitiated.** It cannot be used for any other purpose because it is not better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over; it goes to the very root of the document. You cannot sever the erroneous part from it and expect the remaining part to be a perfect certificate; **you can only amend it or replace it altogether as by law provides.**"*

(emphasis supplied)

Two important points notable in the above quotation are, **one**, a defective certificate of delay is invalid and it cannot be relied upon in any legal proceeding and **two**, although invalid, a defective certificate of delay can be rectified. Other decisions on this aspect are **Mediterranean Shipping Co. (T) Ltd v. Afritex Limited**, Civil Appeal No. 165 of 2017 and **Salhina Mfaume and 7 Others v. Tanzania Breweries Co. Limited**, Civil Appeal No. 111 of 2017 (both unreported).

Based on the above discussion, we are of a firm position that all the three documents, the judgment, the decree and the certificate of delay are rectifiable under Rules 2 and 96(7) of the Rules and in further giving effect

to the provisions of section 3B (1) (a) and (c) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019].

Accordingly, although in the past the defects would have led to the striking out of appeal, the current position as shown above, is to allow for their rectification. We therefore grant the appellant forty-five (45) days within which he can procure rectification of the defective documents and file them in a form of a supplementary record of appeal. Costs shall abide the result of the appeal.

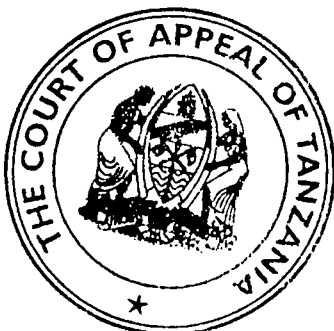
**DATED at TABORA, this 4<sup>th</sup> day of May, 2021**


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

M. A. KWARIKO  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

The Ruling delivered this 5<sup>th</sup> day of May, 2021 in the presence of Mr. Kamaliza Kamoga Kayaga and Mr. Musa Kassim, learned Counsel for the Appellant and Mr. Emmanuel B. Musyani, learned Counsel for the Respondents, is hereby certified as a true copy of the original.



  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**