**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MKUYE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)**

**CIVIL APPLICATION NO. 369B/ 16 OF 2018**

**1. SYLVESTER LWEGIRA BANDIO**
**2. HILDA KARABARANGU BANDIO** ..... **APPLICANTS**

**VERSUS**

**NATIONAL BANK OF COMMERCE LIMITED ..... RESPONDENT**

**[Application for exclusion of documents from the record of appeal arising from the decision of the High Court of Tanzania at Dar es Salaam]**

**(Sehel,J.)**

**dated the 16th day of February, 2018**
**in**
**Commercial Case No. 171 of 2002**

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## RULING OF THE COURT

23rd March & 9 April, 2021

**MKUYE, J.A.:**

The applicant has filed this application for an order that part of the record of appeal in Civil Appeal No. 125 of 2018 containing pages 265, 266, 267, 268, 269, 270 and 271 be excluded from the record of appeal. The application has been predicated under the provisions of Rules 4 (2) (b) and 111 of the Tanzania Court of

Appeal Rules, 2009 as amended by GN No. 362 of 2017 (the Rules). The application is predicated on the ground that:-

> *"Pages Nos. 265, 266, 267, 268, 269, 270 and 271 of the record were not part of the pleadings in Commercial Case No. 171 of 2002."*

Annexed to the notice of motion is an affidavit duly sworn by Mr. Richard Karumuna Rweyongeza, learned advocate for the applicants. The respondent neither filed an affidavit in reply nor written submission in reply despite being served.

When the application was called on for hearing, the applicants were represented by Mr. Richard Karumuna Rweyongeza, learned advocate in the absence of the respondent who was duly served through IMMMA Advocates on 22nd February, 2021. In this regard, Mr. Rweyongeza prayed and we granted him leave to proceed in the absence of the respondent in terms of Rule 63 (1) of the Rules.

Before submitting on the merit of the application, Mr. Rweyongeza prayed to adopt the notice of motion and the written submission to form part of his submission. According to the averments in the affidavit as well as the written and oral

submissions, the documents which are sought to be excluded were not part of the proceedings in Commercial Case No. 171 of 2002. In particular, pages 265, 266, 267, 268, 269, 270 and 271 which form part of Annexure "H" of the Joint Amended Written Statement of Defence and Counter Claim filed in the High Court on 20th July 2016 are irrelevant to this appeal; and that, they were erroneously included during the photocopying process. Mr. Rweyongeza added that this affected Volume I of the record of appeal. Lastly, it was his submission that this anomaly can be rectified under Rules 111 and 4 (2) (b) of the Rules and prayed for the application to be granted.

Having considered the submission from the learned advocate for the applicants, the issue for our determination is whether or not the application is tenable.

Rule 111 of the Rules which has been relied upon by the applicant provides as follows:-

> *"The Court may at any time allow amendment of any notice of appeal or notice of cross appeal or memorandum of appeal, as the case may be, or any part of the record of appeal, on such terms as it thinks fit."*

To our understanding, the above cited provision of the law allows amendment of the notice of appeal, notice of cross appeal, memorandum of appeal or any part of the record of appeal on such conditions as the Court may think fit.

In an endeavour to interpret the provisions of Rule 111 of the Rules in the case of **Masumbuko Kowolesya Mtabazi v. Dotto Salum Chande**, Civil Application No. 170 of 2013 (unreported), this Court cited with approval the case of **General Manager Kahama Mining Corporation Limited v. Kheri Kadu**, Civil Application No. 13 of 2015 (unreported) in which the Court referred to the **Collins Cobuild Advanced Learner's Dictionary, 2002** and stated as follows:-

> *"If you amend something that has been written such as a law, or something that is said you change it in order to improve it or make it more accurate."*

Thereafter, the Court in the same case construed the provisions of Rule 111 of the Rules and stressed that:-

> *"Properly interpreted the provision empowers the Court to allow a party to amend the document named*

*in that provision or any part of the record.* ***This means that there must be existence in the record of appeal filed in Court for a prayer to amend to be granted."***

[Emphasis added]

Going by the interpretation of Rule 111 of the Rules above, it means that there must be in existence in the record of appeal filed in Court documents which need to be rectified for purposes of improving the record of appeal.

In this case, the applicant is seeking to exclude documents which were inadvertently included in the record of appeal. Having scanned the documents sought to be excluded, we are satisfied that they are, indeed, irrelevant to the appeal as they were not part of the proceedings in Commercial Case No. 171 of 2002 appealed against. Thus, we are settled in our mind that the application is tenable.

In the event, in terms of Rule 111 read together with Rule 4 (2) (b) of the Rules, we hereby, grant the application and order that pages 266, 267, 268, 269, 220 and 271 be excluded from the record

of appeal; and further that the applicant must lodge the rectified Volume 1 of the record of appeal within 30 days from the date of this order.

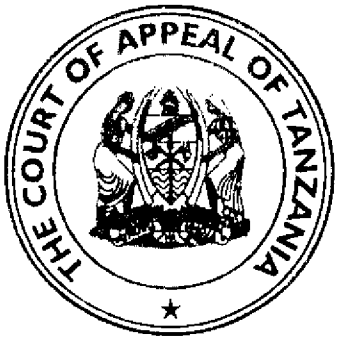
**DATED** at **DAR ES SALAAM** this 30th day of March, 2021.

R. K. MKUYE
**JUSTICE OF APPEAL**

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

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

The Ruling delivered this 9th day of April, 2021 in the presence of Mr. Theodori Primus, counsel for the applicants and Mr. John Laswai, counsel for the respondent is hereby certified as a true copy of the original.




D. R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**