IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: JUMA, C.J., MKUYE, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 20 OF 2020

CRDB BANK PLC. ..... APPELLANT

VERSUS

1. HERI MICROFINANCE LIMITED
2. CASSIANO LUCAS KAEGELE ..... **RESPONDENTS**

(Appeal from the judgment and decree of the High Court of Tanzania at Sumbawanga)

(Mgetta, J.)

dated the 8th day of September, 2017
in
Land Case No. 10 of 2015

.....

RULING OF THE COURT

22nd February & 29th March, 2022

MKUYE, J.A.:

This appeal originates from the judgment and decree of the High Court of Tanzania at Sumbawanga in Land Case No. 10 of 2015 dated 8th September, 2017 (Mgetta, J.). The facts leading to this appeal are as under.

On 23rd September, 2013 the appellant, CRDB Bank PLC entered into agreement with Heri Microfinance Ltd and Cassino Lucas Kaegele (the 1st and 2nd respondent respectively), whereby the appellant granted

a loan to the 1st respondent to the tune of Tshs. 650,000,000/= which was to be repaid within a period of twelve months. In consideration thereof, the 2nd respondent offered as security for the loan his landed properties located in Sumbawanga Municipality. It appears that the 1st respondent defaulted payment of the said loan. In efforts to rescue the situation, both parties voluntarily agreed to restructure the loan repayment upon which a new agreement was concluded whereby the 1st respondent was to effect payment within a period of twenty four months. At the time when the loan repayment was restructured, the 1st respondent had outstanding balance of Tshs. 483,574,673.59/=.

However, despite the re-structuring of the loan repayment, the 1st respondent still defaulted. This prompted the appellant to exercise her powers of sale of the mortgaged properties through Kimbembe Auction Mart Ltd (former 2nd defendant). This annoyed the respondents who decided to institute civil proceedings in the High Court against the appellant together with the 2nd defendant and the former 3rd and 4th defendants who purchased the properties. In the said suit the respondents sought for: a declaration that the sale by public auction of the mortgaged properties was illegal and, hence, null and void ab initio; an order that the loan account statement be reconciled; general

damages for loss of good will, business disruption and disturbances to be assessed by the court; costs of the suit; and any other relief the court may deem fit to grant.

At the end of the trial, the trial High Court entered judgment and decree in favour of the plaintiffs (respondents) and decreed as follows:

> *1) The sale of the two landed properties (houses) is declared null and void;*
> *2) The 1st and 2nd defendants to pay the plaintiffs (respondents) a total sum of Tanzania shillings two billion (TZS 2,000,000,000/=) as general damages with interest of 8% per annum from the date of judgment to the date of full satisfaction of the same;*
> *3) The 3rd and 4th defendants be refunded their respective purchase prices;*
> *4) The position of the parties remained as it was before sale that is to say that the plaintiffs have to repay the outstanding loan balance after the same has been reconciled between the plaintiffs and the Bank (1st defendant).*
> *5) Costs of this suit to be paid by the 1st and 2nd defendants."*

Aggrieved by the decision of the High Court, the appellant has appealed to this Court on four (4) grounds of appeal which for a reason to become apparent shortly, we shall not reproduce them.

On the other hand, the respondents filed a notice of preliminary objection (PO) on four (4) points which can conveniently be paraphrased into mainly three points as follows:

1) *The notice of appeal is defective for making reference to the judgment and decree of the High Court of Tanzania at Sumbawanga (Mgetta, J.) dated 8th September, 2017 in Civil Appeal No. 10 of 2015 instead of Land Case No. 10 of 2015 and thus contravening Rule 83 (6) of the Tanzania Court of Appeal Rules 2009 (the Rules) requiring a notice of appeal to be substantially in Form D in the Schedule to the Rules.*
2) *The appeal is incompetent for failure by the appellant to serve the notice of appeal to the former 2nd defendant who might be affected by the intended appeal as per Rule 84 (1) of the Rules; nor did he make any ex parte application to the Court for the directions as to who should be served.*
3) *The provisions of Rule 96 (1) (k) of the Rules are contravened for failure by the appellant to include in the record of appeal the written submissions for and against in Civil Application No. 194 /09 of 2019 for extension of time.*

When the appeal was called on for hearing, the appellant was represented by Mr. Zacharia Daudi, learned advocate; whereas the respondents had the services of Messrs. George Mushumba, Mathias Budodi and Roman Lamwai, all learned advocates.

When given the opportunity to elaborate their points of PO, it was Mr. Lamwai who made the submission. He prefaced his submission by adopting the notice of PO and written submission they had filed earlier on to form part of their submission.

After having done so, he contended that the appellant has failed to comply with Rule 83 (6) of the Tanzania Court of Appeal Rules, 2009 (the Rules) since essential information was not included in the notice of appeal as per Form D in the First Schedule to the Rules. In elaboration, he contended that in the notice of appeal, the appellant indicated that he is complaining against Civil Case No. 10 of 2015 while in this appeal she is challenging the decision in Land Case No. 10 of 2015. To fortify his arguments, he referred us to the case of **Atlantic Electric Ltd v. Morogoro Region Cooperative Union** (1984) Ltd [1993] TLR 12 at page 18 where the Court listed the information to be stated in the notice of appeal to include the number of the case complained against.

It was his further argument that, since there is no proper case number of the case sought to be appealed against, it means there is no notice of appeal against Land Case No. 10 of 2015. He concluded that this renders the notice of appeal defective. While relying on the case of **Frenk Benson Msongole v. Republic**, Criminal Appeal No. 36 of 2013

at page 3 para 2, 3 & 4 (unreported), he contended that the defective notice of appeal renders the appeal incompetent and hence liable to be struck out. He therefore prayed for the appeal to be struck out.

Mr. Lamwai went on submitting that the appeal is incompetent for the appellant's failure to comply with Rule 84 (1) of the Rules requiring the notice of appeal to be served to parties who are likely to be affected by the outcome of the appeal. He pointed out that, the appellant did not serve the former 2nd defendant (Kimbembe Auction Mart Ltd) who is also a judgment debtor as in the decree both appellant and 2nd defendant were jointly ordered to pay the respondents an amount to the tune of Tshs. 2,000,000,000/= with costs, in which case, the former 2nd defendant is a person likely to be affected by the appeal and, hence, it was necessary for her to defend herself in this appeal. Mr. Lamwai elaborated further that, even in the memorandum of appeal one of the appellant's complaint is that the order requiring both of them to pay the said amount was obtained illegally.

In this regard, Mr. Lamwai forcefully argued that failure to comply with Rule 84 (1) of the Rules renders the appeal incompetent. It was, therefore, his prayer that the appeal be struck out with costs.

With regard to the 3rd point of the PO, Mr. Lamwai argued that the appeal is incompetent before this Court because the appellant failed to include in the record of appeal some documents which were used by the Court earlier on. He mentioned those documents as being the written submissions which were used in the application for extension of time to lodge the instant appeal. He said, it was important for the appellant to include them to enable the Court satisfy itself if the appeal was brought within time. To bolster his argument, he referred us to the case of **Said Salim Bakhresa and Co. Ltd v. Agro Processing and Allied Products Ltd and Another**, Civil Appeal No. 51 of 2011 (unreported) in which essentially, the Court ruled that all documents listed in Rule 96 (1) (a) to (k) are documents which unless excluded under Rule 96 (3) of the Rules have to be included in the record of appeal. It was his firm argument that, as there was no express exclusion of the said documents, it offended Rule 96 (1) (k) of the Rules rendering the appeal incompetent. He urged the Court to strike out the appeal for the reason that the record of appeal is incomplete.

In response, Mr. Daud was the one who submitted for the appellant. With regard to the 1st point of PO relating to incorrect number of the case sought to be appealed against, he took us to page 366 of

the record of appeal arguing that the issue was dealt with by Mwambegele, JA. in Civil Application No. 194/09 of 2019 whereby it was dismissed for being a typographical error. He said, the said decision, having not being appealed against, this point of preliminary objection be dismissed as being misconceived.

In relation to the 2nd point of PO on failure to comply with Rule 84 (1) of the Rules, Mr. Daudi dismissed it for having no merit. He predicated his arguments on; **One** Kimbembe Auction Mart decided not to lodge an appeal as she did not file a notice of appeal. **Two**, the appellant served a notice of appeal to the respondents because she is appealing against the decree which is in favour of the respondents (decree holders). Mr. Daudi was adamant that it was proper for the appellant to serve the respondents with the notice of appeal but not necessarily Kimbembe Auction Mart.

Regarding the 3rd point of the PO, it was Mr. Daudi's argument that failure to include the written submissions relating to Civil Application No. 194/09 of 2019 does not render the record of appeal incomplete since this appeal is against the decision by Mgetta, J. dated 8th September, 2017 in Land Case No. 10 of 2015 and not Civil Application No. 194/09 of 2019. To support his argument, he made reliance on the case of

Mondorosi Village Council and 2 Others v. Tanzania Breweries Ltd and 4 others, Civil Appeal No. 66 of 2017 (unreported) where the Court relied on the case of **Leila Jalaludin Haji Jamal v. Shaffin Jalaludin Haji Jamal,** Civil Appeal No. 55 of 2003 (unreported) in which the Court found that non inclusion of the plaint and written statement of defence was not necessary for the determination of the appeal against the ruling in the application for security for costs but were necessary for the determination of the appeal in the main case. He rounded it up urging the Court to find that the points of PO are baseless and dismiss them with costs.

In rejoinder, Mr. Lamwai contended that, Mwambegele J.A. did not decide on the issue of notice of appeal since **one**, the issue discussed there was whether there was a valid letter applying for copy of proceedings since it made reference to Civil Case No. 10 of 2015 and reminder letter was in respect of Land Case No. 10 of 2015 as indicated at page 262 to 265 of the record of appeal. At any rate, he argued that, the Single Justice was not mandated to decide on the notice of appeal. **Two**, it was necessary to serve the notice of appeal to the 2nd defendant since she may be affected with the decision on appeal. **Three**, the overriding objective principle (Oxygen Principle) cannot apply where

Rule 96 (1) (k) is not complied with. He stressed that even in **Mondorosi Village Council and 3 Others** case (supra), it was said that the principle of overriding objective cannot be applied blindly. He then reiterated his previous prayer that the appeal be struck out with costs.

We have considered the notice of preliminary objection, written submission by the respondents in its support and the oral arguments for and against the points of preliminary objection raised. Our starting point would be to digress a little bit on the guiding principles relating to preliminary objections. In the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] EA 696, the defunct East African Court of Appeal discussed the essence of preliminary objection and stated that:

> *"A point of law which has been pleaded, or which arises in the course of the pleadings and which if argued as a preliminary point, may dispose of the suit."*

The said Court went on to elaborate on the issue and stated as follows:

> *"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded*

by the other side are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase of costs and, on occasion confuse the issues. The Court considers that this is improper practice should stop."

In this case, the first point of preliminary objection is that the appellant's notice of appeal is not in compliance with Rule 83 (6) of the Rules which requires the notice of appeal to be substantially in Form D set out in the First Schedule to the Rules. Rule 83 (6) of the Rules provides as follows:

"A notice of appeal shall be substantially in Form D in the First Schedule to these Rules and shall be signed by or on behalf of the appellant."

In the case of **Meis Industries Company Ltd v. Exim Bank Ltd**, Civil Application No. 70 of 2014 (unreported), the Court interpreted the provisions of Rule 83 (6) of the Rules and in considering the term "substantially", it consulted the New Oxford Advanced Learners Dictionary at page 1531 where the said term was defined to mean among others "**mainly, in most details, even if not completely ...**"

It means that it is not necessary that all the requirements must be included in the respective notice of appeal.

On top of that, we think, Rule 83 (6) of the Rules should not be read in isolation with other subrules in that Rule. We say so because of the existence of Rule 83 (3) of the same Rule which provides for the minimum requirements of the contents of the notice of appeal as hereunder:

> *"Every notice of appeal shall state whether it is* ***intended to appeal against the whole or part only of the decision*** *and where it is intended to appeal against part only of the decision, shall specify the part complained of, and shall state the address for service of the appellant and shall state the names and addresses by all persons intended to be served with copies of the notice."* [Emphasis added].

As hinted above, this provision sets out the minimum requirements of the content of the notice which include indicating whether the intended appeal is against the whole decision or part thereof. And, if it is only part of it the appellant has to specify the area of complaint. It also requires the address for service of the appellant and the names of all

persons intended to be served to be shown. As it is, the number of the case is not stated.

In the case of **Meis Industries Company Ltd** (supra) the Court also considered the issue of compliance with Rule 83 (3) of the Rules and found that if the notice of appeal is in the prescribed form and contains the requisite information as per the said Rule and it is lodged within time and signed, then it will be deemed to have substantially complied with Form D.

In this case the notice of appeal found at page 242 of the record of appeal reads as follows:

> *In the Court of Appeal of Tanzania at Sumbawanga Civil Appeal No. ..... of the year 2017.*
>
> *In the matter of an Intended Appeal No. ..... of 2017*
>
> *Between CRDB BANK PLC Appellant and HERI MICROFINANCE LTD and CASSIANO LUCAS KAEGELE Respondents.*
>
> *Appeal from the Judgment and Decree of the High Court of Tanzania at Sumbawanga (Mr. Justice J. S. Mgetta, J.) dated 08th September, 2017*
>
> *In Civil Case No. 10 of 2015*
>
> ***NOTICE OF APPEAL***
>
> ***TAKE NOTICE that CRDB BANK PLC** being dissatisfied with the decision of the Honourable Mr. Justice Mgetta given at Sumbawanga on the 08th September, 2017 **intends to appeal to the Court of Appeal of Tanzania against the whole of the said decision as decided.***

The Address for service of the appellant is c/o CHAMBI AND CO. ADVOCATES P.O. Box 686 SUMBAWANGA.

It is intended to serve copies of the notice on both respondents and the other 2 judgment debtors. Dated this 11th day September, 2017

Signed ..... advocate for the Appellant

To the Registrar of the High Court of Tanzania at Dar es Salaam

Lodged in the High Court of Tanzania at Sumbawanga this 12th day of September, 2017.

.....
REGISTRAR

DRAWN AND FILED BY

B. S. CHAMBI – ADVOCATES
P. O. BOX 686 SUMBAWANGA

COPY TO BE SERVED UPON:

1. *1st respondent* } *through Budodi Advocate*
2. *2nd respondent* } *Sumbawanga*
3. *Mselem ..... Sumbawanga*
4. *Safari General Business Co. .....Sumbawanga*
5. *Kimbembe Auction Mart Ltd .....of P. O. Box Dar es Salaam."*

[Emphasis added].

Looking at the excerpt above, it is notable that except for the title of the case where a wrong type of the case was entered, other necessary information is contained in the notice of appeal. This is so because the appellant has indicated to appeal against the whole decision and the same is signed and dated. The anomaly is that instead of

indicating Land Case No. 10 of 2015 as the case intended to be appealed against it indicates Civil Case No. 10 of 2015. We, therefore, agree with Mr. Lamwai that a wrong type/ number of the case was entered in the title of the case.

However, much as we agree with Mr. Lamwai that the type of the case cited in the title of the case is wrong, having critically looked at the content of the said notice of appeal against the provision of Rule 83 (3) of the Rules, we are satisfied that the notice of appeal is clear. Of course, we are alive that in the case of **Atlantic Electric Ltd** (supra) the number of the case complained against was listed among the information to be included in the notice of appeal. However, we think the said case is distinguishable to the one at hand because the number of the case is correct except for the type of the case which is civil instead of land matter. At this juncture we wish to emphasize that each case must be considered according to its own circumstances.

In this case, the notice of appeal under consideration indicates that the appellants intended to appeal against the whole decision, it states the address for service of the appellant and the names and address of persons intended to be served. Moreover, even, the other information such as the name of the judge, the date of the decision and

the High Court whose decision is sought to be impugned provide sufficient information as to the decision being referred to.

In this regard, we are of the view that, even if the type of case was wrongly cited it does not fall within all fours with **Mukisa Biscuits Manufacturing Co. Ltd** (supra) as it did not vitiate the substance of the notice of appeal. In our view, the notice of appeal substantially complied with the requirements set out in Rule 83 (3) of the Rules as well as Form D in the Schedule to the Rules.

Apart from that, we note that the issue of improper citation of the case sought to be appealed against featured in Civil Application No. 194/09 of 2019 as was rightly stated by Mr. Daudi. Although it popped up in the form of a preliminary objection, the Single Justice acted on the submission of the learned counsel to the effect that the appellant had not applied to be supplied with copy of proceedings since she had referred to a wrong case (Civil Case No. 10 of 2015) in the letter of application for proceedings and the notice of appeal. In the end, the Single Justice found that the shortcoming was under the typing error category which could be glossed over by the Court.

Much as we do not find any reason to fault the Single Justice's finding, and because the instant appeal does not touch upon the said

Civil Application No. 194/ 09 of 2019 we ask ourselves whether such omission, assuming that it was not dealt with in Civil Application No. 194/09 of 2015, it is not curable at all. This challenge has led us to Rule 111 of the Rules which states:

> *"The Court may* ***at any time allow amendment of any notice of appeal, 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* ". [Emphasis added].

The above cited provision empowers the Court to allow a party to amend the notice of appeal, notice of cross appeal or memorandum of appeal at any time. This means that, where there is any anomaly in any of the said documents, it can be cured by Rule 111 of the Rules which allows amendment to be affected to them upon the Court's order.

Given the circumstances, we go along with the Single Justice's finding that, the wrong citation of the case number was a typing error which can be glossed over. In any case, apart from the omission being inadvertent and has not occasioned failure of justice, yet, the Court may allow the appellant to amend it under Rule 111 of the Rules.

The second point of PO is on failure to serve the copy of notice of appeal to the former 2nd defendant being likely to be affected by the appeal. We are alive that Rule 84 (1) of the Rules requires among others the intended appellant within fourteen days after lodging the notice of appeal to serve copies thereof to all persons who are likely to be directly affected by the appeal. The said provision states as follows:

> *"84 (1) An appellant shall, before or within fourteen days after lodging a notice of appeal,* ***serve copies of it on all persons who seem to him to be directly affected by the appeal****; but the Court may, on an ex-parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court."* [Emphasis added].

The thrust of the above cited provision is that **one**, the notice of appeal is to be served on the other parties within fourteen days after being lodged in Court. **Two**, the notice of appeal is to be served on those who took part in the proceedings and those who, though were not parties, seem or are likely to be directly affected by the appeal. In our view, from the wording of the provision cited above, the determination of a party/parties who seem to be directly affected by the appeal is in the discretion of the intended appellant. **Three**, those who took part in

the proceedings but seem not to be directly affected by the outcome of the appeal need not be served. **Four**, the Court is given a discretion on *ex parte* application to direct a notice not to be effected on a person who did not take part in the proceedings in the High Court.

We are aware that in numerous decisions, this Court has held that non-compliance with Rule 84 (1) of the Rules or rather failure by the appellant to serve a notice of appeal on persons who seem to be directly affected with the appeal renders the appeal incompetent and liable for being struck out - (See **Hamis Pascal v. Sisi kwa Sisi Panel Beating and Enterprises**, Civil Appeal No. 65 of 2018; **Phoenix of Tanzania Assurance Company Ltd v. Jilala Julius Kakenyeli**, Civil Appeal No. 14 of 2017; and **Idrisa R. Hayeshi v. Emmanuel Elinami Makundi**, Civil Appeal No. 105 of 2019 (all unreported). For instance, in the case of **Hamis Pascal** (supra), the Court went further while citing the case of **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] TLR 437 to show that though the words used in that provision such as *"who may seem to him to be directly affected by the appeal"* may appear to be discretional, the party did not have such discretion. Then the Court stated that:

> *"On the face of it, (service of notice of appeal) seems to lie in the discretion of an intended*

appellant to decide which persons "seem to him" to be directly affected by the appeal. However, it is long established in judicial interpretation that words and expressions which ***prima facie appear permissive may in certain circumstances assume an imperative character****. The test is whether there is anything that makes it the duty of the person on whom the power is conferred to this or that to exercise the power. When the power is coupled with duty it ceases to be discretionary and becomes imperative."* [Emphasis added].

We don't have qualms with the position taken by the Court in **Kantibhai M. Patel's** case (supra) on the imperativeness of the provisions of Rule 84 (1) in certain circumstances and not always. Nevertheless, we think, each case must be considered in accordance with its prevailing circumstances. There is no doubt, in this case, that the former 2nd defendant, Kimbembe Auction Mart Limited took part in the proceedings as were severally and jointly sued by the respondents together with the appellant and two other defendants. It is also not in dispute that after a full trial the High Court found in favour of the respondents and adjudged the appellant and the former 2nd defendant among others jointly and severally to pay the plaintiffs (respondents) a

total of Tanzania Shillings Two billion (TZS 2,000,000,000/=) as general damages with interest of 8% per annum from the date of judgment to the date of full satisfaction of the same. However, as was submitted by Mr. Daudi, and rightly so in our considered view, although the former 2nd defendant was condemned as such, she never intended to appeal as she neither lodged a notice of appeal nor filed an appeal to this Court. Also, her counterpart, the appellant, despite the fact that she was aware that they were condemned together to pay the said amount did not bother to involve her co-defendant in the appeal, thus, she lodged her notice of appeal on her own and appealed to this Court alone.

This can be construed that **one**, in the circumstances of the case, she was neither aggrieved with that decision nor considered by the appellant that she might be affected by the outcome of the appeal. **Two**, having regard to the fact that the former 2nd defendant had acted under the instructions of appellant, perhaps joining her in the appeal would have attracted other expenses which in reality would have to be met by the appellant alone. It is for these reasons we find this is a situation in which the former 2nd defendant was not directly affected by the appeal by the failure to serve her with the notice of appeal and, thus, the case of **Kantibhai M. Patel** (supra) is distinguishable to the

case at hand. **Three,** we wonder whether there was any prejudice to the respondents following the failure to serve the notice of appeal to the former 2nd defendant. This is so because, should the appeal succeed, the former 2nd defendant will benefit out of that; and in the event the appeal fails both appellant and the former 2nd defendant will remain judgment debtors. Although, there is no specific provision in our Rules covering this aspect, prudentially, we take inspiration from the provisions of Order XXXIX rule 4 of the Civil Procedure Code [Cap 33, R.E. 2019] which carry an almost similar spirit we have stated above. The said provision states as follows:

> *"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants,* ***any one of the plaintiffs or of the defendants may appeal from the whole decree,*** *and* ***thereupon the Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."*** [Emphasis added]

Thus, be it as it may, we find the appellant's failure to serve a notice of appeal to the former 2nd defendant in the circumstances of this

appeal did not render the appeal incompetent. Therefore, we find that the 2nd point of PO is devoid of merit and we dismiss it.

We now turn to the 3rd point of PO that the record of appeal is incomplete for failure to include in the record of appeal the written submissions used in the application for extension of time in which case Rule 96 (1) (k) of the Rules was not complied with. The said Rule provides as follows:

> *"For the purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3), contain copies of the following documents:*
>
> > *"(a) ...*
> >
> > *(b) ...*
> >
> > *(c) ...*
> >
> > *(k) such other documents, if any,* ***as may be necessary for the proper determination of the appeal,*** *including any interlocutory proceedings which may be directly relevant, save that the copies referred to in paragraph (d), (e) and (f) shall exclude copies of documents or any of their parts that are not relevant to the*

matters in controversy on the appeal."
[Emphasis added].

The thrust of this provision is for the inclusion in the record of appeal of the documents which are necessary or relevant for the determination of appeal. The test is whether the written submissions in the application for extension of time are necessary for the proper determination of the appeal before us. On the other hand, looking critically on the said provision it seems to us that even the determination of the relevance of the documents to be included in the record of appeal is discretional on the party as there is no provision of the law prescribing the criteria for a party to make such determination, which means that the documents earmarked under paragragh (k) may or may not be included in the record as they may not occasion any harm to the record of appeal. We think, this is a reason why in the case of **Leila Jalaludin Haji Jamal** (supra) cited in **Mondorosi Village Council and 3 Others** case (supra), the Court ruled that the plaint and written statement of defence were not necessary in the appeal against the ruling relating to security for costs.

But again, we are mindful of the fact that in 2019 the Rules were amended vide the Tanzania Court of Appeal (Amendments) Rules 2019 (GN No. 344 of 2019) to add subrule (6) and (7) which read as follows:

"(6) Where a document referred to in Rule 96 (1) and (2) is omitted from the record of appeal, the appellant may within fourteen days of lodging the record of appeal, without prior permission and thereafter, informally, with the permission of the Registrar, include the document in the record of appeal by lodging an additional record of appeal.

(7) 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."

It means that, according to subrules (6) and (7) of Rule 96 where any relevant documents are omitted from the record of appeal there are three options which the appellant may take. **One**, the appellant is permitted within fourteen days of the lodgement of the record of appeal informally without permission from anybody to lodge additional record of appeal which includes the omitted documents. **Two**, the appellant, after the period of fourteen days has lapsed, with the permission of the Registrar may lodge additional record of appeal. **Three**, at the hearing of the case, either on the Court's own motion or upon informal

application, the appellant may be granted leave to file a supplementary record of appeal which includes the missing documents.

In this case, we agree with the parties that the written submissions relating to the application for extension of time (Civil Application No. 194/09 of 2019) were not included in the record of appeal. However, it is our considered view that, much as those written submissions may not be necessary for the determination of the appeal at hand, the options prescribed under subrule (6) and (7) of Rule 96 (1) of the Rules could still be invoked to salvage the appeal. Since considerable time from when the appeal was instituted has lapsed, we think, Rule (6) may not be of relevance at the moment but Rule 96 (1) (7) is more appropriate in the circumstances.

In the case of **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**, Civil Appeal No. 3 of 2018 (unreported), the Court was confronted with a scenario where the appellant omitted to include some documents in the record of appeal. Upon application to the Court, it allowed the appellant to supply the missing documents by way of a supplementary record.

In the matter at hand, we think the omission is not fatal to the appeal in view of the remedy provided for under Rule 96 (7) of the

Rules. In which case, we are of the finding that the anomaly in the 3rd point of objection does not vitiate the appeal.

In the final event, much as we have partly upheld the 1st and 3rd points of objection, we do not agree with Mr. Lamwai's proposition to strike out the appeal on those grounds since it is our considered view that they are curable and most importantly they have not occasioned any injustice to the respondents. Even the case of **Mondorosi Village Council and 3 Others** case (supra) which he cited earlier on is not applicable in the circumstances of this case.

We thus, under rule 111 of the Rules order that the appellant should file an amended notice of appeal which will show the correct type of the case which is Land Case No. 10 of 2015 instead of Civil Case No. 10 of 2015. Also, in terms of Rule 96(7) of the Rules we order that, the appellant should file a supplementary record of appeal which will include the written submissions for and against the application for extension of time in Civil Application No. 194/09 of 2019. We further direct that the said documents should be lodged within thirty days from the date when this Ruling is delivered.

As to the 2nd point of objection, in view of what we have endeavoured to explain, we are satisfied that it does not render the appeal incompetent. We thus, hereby dismiss it with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 25th day of March, 2022.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

P. J. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 29th day of March, 2022 in the presence of Mr. Laurent Leonard, learned counsel for the appellant and Mr. Roman Selasini Lamwai, learned counsel for the Respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL