

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TANGA**

**(CORAM: KWARIKO, J.A., SEHEL, J.A. And MAIGE, J.A.)**

**CIVIL APPEAL NO. 37 OF 2021**

**BAKARI ALI MSENDA (As administrator of the Estate  
of the late ALI SULEIMANI MSENDA ..... APPELLANT**

**VERSUS**

**HADIJA RASHIDI ..... 1<sup>st</sup> RESPONDENT**

**: TANGA CITY COUNCIL ..... 2<sup>nd</sup> RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania  
at Tanga)**

**(Aboud, J.)**

**dated the 30<sup>th</sup> day of July, 2018**

**in**

**Land Case No. 27 of 2016**

**.....**

**RULING OF THE COURT**

**25<sup>th</sup> & 5<sup>th</sup> May, 2022**

**SEHEL, J.A.:**

Before the High Court of Tanzania at Tanga (the High Court), the 1<sup>st</sup> respondent sued Bakari Ali Msenga (as administrator of the estate of the late Ali Suleimani Kiseto Msenga), the appellant (the then 2<sup>nd</sup> defendant), Tanga City Council, the 2<sup>nd</sup> respondent (the then 1<sup>st</sup> defendant) and one Zuberi Ramadhani (the then 3<sup>rd</sup> defendant) over a right of occupancy of Plot No.

694, Block 'Z' situated at Usagara East in Tanga City (the disputed property). According to the plaint, the 1<sup>st</sup> respondent claimed that she purchased the disputed property from the 3<sup>rd</sup> defendant and the notification of disposition together with the application for approval of disposition was authorized by the Commissioner for Lands on 26<sup>th</sup> June, 2006. That, after completing the transfer procedure, the same was approved by the 1<sup>st</sup> respondent and the said transfer was effected to the 2<sup>nd</sup> respondent.

She thus sought for the following reliefs:- a declaratory order that she was the lawful owner of the disputed property; a declaratory order that the late Ali Suleimani Kiseto Msenga lost his ownership on 27<sup>th</sup> September, 1990 when the disputed property was allocated to the then 3<sup>rd</sup> defendant; an order restraining the appellant, the 2<sup>nd</sup> respondent and Zuberi Ramadhani from interfering the 1<sup>st</sup> respondent with the disputed property; costs of the suit be provided to her and other reliefs as the court may deem fit to grant. In the alternative, she sought for the reliefs that; the 2<sup>nd</sup> respondent be ordered to compensate the 1<sup>st</sup> respondent the sum of TZS. 100,000,000.00 as specific damages for the development made on the disputed property and to allocate her another plot; costs of the suit and other reliefs as the court may deem fit and just to grant.

On the other hand, the appellant and the 2<sup>nd</sup> respondent each filed their separate written statements of defence. The appellant averred that the 3<sup>rd</sup> defendant had no title to pass to the 1<sup>st</sup> respondent because the 2<sup>nd</sup> respondent allocated the disputed property to the late Ali Suleimani Msenga on the 28<sup>th</sup> day of May, 1986 which allocation still subsist.

The 2<sup>nd</sup> respondent admitted to have allocated the disputed property to the then 3<sup>rd</sup> defendant but averred that the allocation was mistakenly made as the initial letter of offer granted to the 1<sup>st</sup> respondent subsisted. The 2<sup>nd</sup> respondent averred further that all the procedures of issuance of offer and transfer of title made to the then 3<sup>rd</sup> defendant were null and void.

After hearing the evidence, the High Court entered judgment in favour of the 1<sup>st</sup> respondent. It declared the 1<sup>st</sup> respondent as the lawful owner; the 2<sup>nd</sup> respondent was ordered to compensate the appellant with another plot equivalent to the one in dispute and both the appellant and the 2<sup>nd</sup> respondent were ordered to pay the costs of the suit.

That decision did not please the appellant. On 27<sup>th</sup> August, 2018, he lodged a notice of appeal against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Zuberi Ramadhani. It is instructive to point out that the said notice shows that it is

intended to be served upon the counsel for the 1<sup>st</sup> respondent and he was actually served with it on 28<sup>th</sup> August, 2018. Thereafter, the appellant filed the present appeal against the above-named respondents advancing seven grounds which for a reason to become apparent shortly, we shall not reproduce them.

Pursuant to Rule 107 (1) of the Tanzania Court of Appeal Rules ("the Rules"), the 2<sup>nd</sup> respondent filed a notice of preliminary objection comprised of the following three points of law: -

*"1. That, the appeal is hopelessly time barred:*

- i) There is a defective Certificate of Delay appearing on page 243 of the record of appeal. The Certificate does not exclude exactly the total number of days delayed by the appellant in computing the 60 days limit within which an appeal is required to be instituted contrary to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 and*
- ii) The letters applying for copy of judgment, decree, proceedings, exhibits and certificate of delay in Land Case No. 27 of 2016 appearing at page 240 and 241 of the record of*

*appeal was not served upon the 2<sup>nd</sup> respondent contrary to Rule 90 (3) of the Tanzania Court of Appeal Rules, 2009.*

- 2. That, the appeal is incompetent and bad in law as the notice of appeal issued was not served to the 2<sup>nd</sup> respondent contrary to Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009.*
- 3. That, the appeal is hopelessly misplaced as it is filed in a wrong registry contrary to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 and the Tanzania Court of Appeal Rules (Sub-registries) (Establishment) Order, 2020 G.N. No. 579 of 2020.”*

At the hearing of the appeal, Mr. Barnaba Luguwa, learned advocate appeared for the appellant. The 1<sup>st</sup> respondent had the services of Mr. Obediendom Chanjarika, learned advocate whereas Messrs. Rashid Mohamed and Lugana Kikala, both learned State Attorneys appeared for the 2<sup>nd</sup> respondent.

As it is the practice of the Court where a preliminary objection is raised, the Court will have to determine it first before going into the merits of the appeal. It is for this reason, we opted not to reproduce the grounds of appeal.

Mr. Mohamed submitted on behalf of the 2<sup>nd</sup> respondent and prefaced his submission by notifying the Court that they will only submit on the 1<sup>st</sup> and 2<sup>nd</sup> points of objection. The 3<sup>rd</sup> point was abandoned.

Submitting on the 2<sup>nd</sup> point of objection, the learned State Attorney was brief and straight to the point that Rule 84 (1) of the Rules requires the appellant to serve the notice of appeal on all persons who seem to him to be directly affected by the appeal. It was his submission that the notice of appeal filed by the appellant which is appearing at page 228 – 229 of the record of appeal, though mentioned the 2<sup>nd</sup> respondent and Zuberi Ramadhani, was not served on them, instead it was served on Mr. Obediendom S. Chanjarika, the learned counsel for the 1<sup>st</sup> respondent. He argued that failure by the appellant to serve them with the notice of appeal rendered the appeal incompetent and liable to be struck out. To buttress his submission, Mr. Mohamed referred us to the case of **Phoenix of Tanzania Assurance Company Ltd v. Jilala Julius Kakenyeli**, Civil Appeal No. 14 of 2007 (unreported). He thus concluded by urging the Court to strike out the appeal with costs.

Mr. Luguwa's reply was equally brief as he conceded to the objection that the 2<sup>nd</sup> respondent and Mr. Zuberi Ramadhani were both not served

with the notice of appeal. Explaining the reason as to why the 2<sup>nd</sup> respondent was not served with the notice of appeal, he submitted that the service of notice of appeal is in the discretion of the appellant to decide which persons seem to him to be directly affected by the appeal as it was held in the case of **CRDB Bank Plc v. Heri Microfinace Limited & Another**, Civil Appeal No. 20 of 2020 (unreported). He explained further that, in exercise of his discretion, the 2<sup>nd</sup> respondent did not seem to the appellant to be a person directly affected by the appeal. At the end, he urged the Court to dismiss the 2<sup>nd</sup> point of the preliminary objection with costs.

In rejoinder, the learned State Attorney reiterated his earlier submission that the appellant ought to serve a notice of appeal to the 2<sup>nd</sup> respondent who would be directly affected by the appeal since she is responsible in the issuance of the right of occupancy. Therefore, he argued, any decision that would be arrived by the Court would affect the 2<sup>nd</sup> respondent. He then distinguished in facts the case of **CRDB Bank Plc v. Heri Microfinace Limited & Another** (supra) with the present appeal that the appellant and the 2<sup>nd</sup> respondent were not severally and jointly sued. Besides, he argued, in the **CRDB's** case, it was warned that each case must

be considered in accordance with its prevailing circumstance. In that regard, he urged us to determine the objection according to the facts of the appeal before us.

On our part, we have carefully considered the arguments made by the learned counsel for the parties. We gather from their submissions that the learned counsel for the appellant does not dispute the obvious fact borne out of the record of appeal that the notice of appeal was not served on the 2<sup>nd</sup> respondent. Nonetheless, he contended that in terms of Rule 84 (1) of the Rules, the appellant has a discretion to decide which persons to serve with the notice of appeal and since it had seemed to the appellant that the 2<sup>nd</sup> respondent would not be affected by the appeal, he decided not to serve her with the notice of appeal.

Essentially, two issues arise for our determination. One, whether the 2<sup>nd</sup> respondent is the person that would not be directly affected by the appeal. Two, whether the appellant has discretion to decide whether the 2<sup>nd</sup> respondent was a person who seemed to him to be not affected by the appeal. In order to adequately determine the two issues, we deem it appropriate to reproduce Rule 84 (1) of the Rules as hereunder: -



*"An intended appellant shall before or within fourteen days after lodging the 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 affected on any person who took no part in the proceedings in the High Court."*

It is noteworthy that rule 84(1) of the Rules is identical to rule 77(1) of the Tanzania Court of Appeal Rules, 1979.

In the case of **Khantibhai M. Patel v. Dahyabhai F. Mistry** [2003] T.L.R. 437, the Court considered and construed the import of Rule 77 (1) of the Tanzania Court of Appeal Rules, 1979. In that appeal, the appellant and the respondent were running a partnership business in a grain milling firm known as Mini Millers. At some stage, the appellant retired from the partnership and the respondent transformed the firm into a limited liability company known as Mini Millers Limited. The appellant unsuccessfully sued the respondent for the share of profits, nullification of transfers of the landed properties, costs and other reliefs. He thus filed an appeal. The competency of that appeal was challenged by the respondent. He raised a preliminary objection comprised two points of law. One of the points was

that since one of the prayers in the appeal sought to nullify the transfer of the landed properties, the appellant ought to have served a copy of the notice of appeal on Mini Millers Ltd. Discussing as to whether the appellant had obligation to serve the notice of appeal to Mini Millers Ltd, the Court held: -

*"(iv) What Rule 77(1) means is that persons who should be served are those persons who took part in the proceedings of the High Court, and those who did not take part in the proceedings but who stand to be directly affected by the appeal; besides, **there may be persons who took part in the proceedings but who need not be served if they do not seem to be directly affected by the appeal.**"*  
*[Emphasis added].*

It further held: -

*"(viii) Where a person is shown to be directly affected by an appeal, there is no discretion but to serve that person with the notice of appeal and where, as is in this case, that person took no part in the proceedings in the High Court, it is the Court of Appeal, rather than the appellant, which is vested with power to direct that service need not be affected on that*

*person; Rule 77(1) does not constitute the appellant to be a judge in his own cause."*

As to the meaning of the words "*all persons who seem to him to be directly affected by the appeal*", the Court said: -

*"On the face of it, seems to be 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 expression 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].

It follows then that generally, the appellant is mandatorily required to serve notice of appeal to all persons who took no part in the proceedings in the High Court but "seem to him" to be directly affected by the appeal, except where the Court, on *ex parte* application, directs that service need not be effected on them. Further, for those parties who took part in the proceedings in the High Court but who need not be appealed against and,

therefore, need not be served if they do not seem to be directly affected by the appeal. But where they will be affected, they ought to be served with the notice of appeal.

It is in that respect, this Court in the case of **CRDB Bank Pic v. Heri Microfinace Limited & Another** (supra) found that the appellant's failure to serve a notice of appeal to the former 2<sup>nd</sup> defendant did not render the appeal incompetent. In that appeal, the appellant advanced a loan to the Heri Microfinance Limited (the 1<sup>st</sup> respondent) to the tune of TZS. 650,000,000.00 to be repaid within a period of twelve months. The loan was secured by a mortgage of the landed properties of Cassiano Lucas Kaegele (the 2<sup>nd</sup> respondent). It transpired that the 1<sup>st</sup> respondent defaulted thus the appellant exercised her powers of sale of the mortgaged properties through Kimbembe Auction Mart Ltd (the former 2<sup>nd</sup> defendant). Dissatisfied with the appellant's move, the respondents successfully sued the appellant, the former 2<sup>nd</sup> defendant and the former 3<sup>rd</sup> and 4<sup>th</sup> defendants who purchased the properties. Among the reliefs awarded, the appellant and the former 2<sup>nd</sup> defendant were severally and jointly ordered to pay the respondents a total sum of TZS. 2,000,000.00 as general damages with interest of 8 % per annum from the date of judgment to the date of full satisfaction of the

same. Aggrieved by that decision, the appellant filed an appeal against the respondents. The appeal faced a four-point notice of the preliminary objection. One of the points was that the appeal was incompetent for failure to serve the notice of appeal to the former 2<sup>nd</sup> defendant who might be affected by the intended appeal. Having revisited the record of appeal and Rule 84 (1) of the Rules, the Court observed that the former 2<sup>nd</sup> defendant took part in the proceedings but did not appeal against and despite that the appellant was aware that they were condemned together with the former 2<sup>nd</sup> defendant to pay the respondents, she did not involve her in the appeal. Given that circumstance, the Court found that the former 2<sup>nd</sup> defendant was not directly affected by the failure to serve her with the notice of appeal. Accordingly, it dismissed that preliminary point of law.

The case of **CRDB Bank Plc v. Heri Microfinace Limited & Another** (supra) is distinguishable in facts with the appeal which is before us. In this appeal, the 2<sup>nd</sup> respondent was not severally and jointly sued with the appellant. She was sued for double allocating the disputed property. Although she was adjudged to pay costs of the suit severally and jointly with the appellant, she was individually ordered to compensate the appellant with an alternative plot equivalent to the one in dispute. As correctly submitted

by Mr. Mohamed, any decision to be arrived by the Court would obviously affect the 2<sup>nd</sup> respondent who issued the disputed property. For the sake of argument, if the appellant succeeds in his appeal, it would require the 2<sup>nd</sup> respondent to nullify the title issued to the 1<sup>st</sup> respondent. In that circumstance, we are satisfied that the 2<sup>nd</sup> respondent who took part in the proceedings would be directly affected by the appeal. We are also satisfied that in terms of Rule 84 (1) of the Rules, since the 2<sup>nd</sup> respondent would be affected by the appeal, the appellant was mandatorily required to serve on the 2<sup>nd</sup> respondent with the notice of appeal. Moreover, where a person is impleaded in the notice and the record of appeal, like the 2<sup>nd</sup> respondent herein, that person is deemed to be directly affected by the appeal. As such, in the circumstance of the appeal before us, the appellant has no discretion but to serve the 2<sup>nd</sup> respondent with the notice of appeal. Failure to serve the notice of appeal to the 2<sup>nd</sup> respondent rendered the present appeal incompetent (see **Phoenix of Tanzania Assurance Company Ltd v. Jilala Julius Kakenyeli** (supra) and **Hamis Paschal v. Sisi kwa Sisi Panel Beating and Enterprises Ltd**, Civil Appeal No. 165 of 2018 (unreported)). We thus find merit in the second preliminary point of objection.

Having found merit in the second point of law, we do not see the need to go into the argument relating to Zuberi Ramadhani and the certificate of delay, since this objection is enough to dispose of the appeal.

In the end, we accordingly sustain the second point of the preliminary objection and proceed to strike out the incompetent appeal with costs.

**DATED at TANGA** this 29<sup>th</sup> day of April, 2022.

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

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

This Ruling delivered this 5<sup>th</sup> day of May, 2022 in the presence of Mr. Obediodum Chanjarika, Advocate for the 1<sup>st</sup> respondent, also holding brief for Mr. Barnaba Luguwa, Advocate for the 1<sup>st</sup> appellant and Mr. Rashid Mohamed, State Attorney for the 2<sup>nd</sup> respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**