

**IN THE COURT OF APPEAL OF TANZANIA**

**AT KIGOMA**

**(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)**

**CIVIL APPEAL NO. 473 OF 2020**

**TANZANIA REDCROSS SOCIETY ..... APPELLANT**

**VERSUS**

**SUPER MAGALA INVESTMENT AND  
GENERAL SUPPLY ..... RESPONDENT**

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

**(Matuma J.)**

**Dated the 4<sup>th</sup> day of August, 2020**

**in**

**Civil Case No. 6 of 2019**

**.....**

**RULING OF THE COURT**

**3<sup>rd</sup> & 8<sup>th</sup> June, 2022**

**WAMBALI, J.A.:**

This appeal arises from the judgment of the High Court of Tanzania at Kigoma in Civil Case No. 6 of 2019 which was delivered on 4<sup>th</sup> August, 2020 in favour of the respondent, Super Magala Investment & General Supply.

Briefly, the background of the parties' dispute can be traced from the construction contract which was entered into between them towards the end of the year 2018 and early 2019. The

agreement was for construction work of buildings for living quarters within Mtendeli refugees camp and Makere Nyarugusu respectively.

It is noteworthy that after the High Court heard the evidence for both sides, it entered judgment for the respondent, and ordered the appellant, Tanzania Red Cross Society (TRCS) to pay the respondent: TZS.241,163,004.42 being the outstanding balance of the unpaid debt; TZS.30,000.00 for each day from 12<sup>th</sup> April, 2019 when the construction work was suspended to the date of judgment, and also from that date until the date when the respondent would withdraw the watchmen from the site and the appellant replaces them but not exceeding fourteen days from the date of judgment; and TZS.10,000,000.00 as general damages for breach of contract.

The appellant is dissatisfied by the judgment and decree of the High Court; hence she has approached the Court to contest it armed with six grounds of appeal as reflected in the memorandum of appeal lodged on 2<sup>nd</sup> September, 2020. Nonetheless, for the purpose of this ruling and the reason to be apparent shortly, we do not intend to recite the respective grounds of appeal herein below.

Basically, at the very outset, when the appeal was placed before us for hearing on 3<sup>rd</sup> June, 2022, Mr. Ignatus Rweyemamu

Kagashe, learned advocate who appeared to represent the respondent, sought leave of the Court, which we granted, to argue two preliminary points of law with regard to the competence of the appeal. These are; first, that the notice of appeal is defective for indicating that it has been preferred against the judgment and decree of the High Court in Land Appeal No. 45 of 2012 instead of Civil Case No. 6 of 2019. Mr. Kagashe added that unfortunately, even the record of appeal and the memorandum of appeal indicate that the appellant's appeal is against Civil Case No. 6 of 2020 instead of Civil Case No. 6 of 2019.

In this regard, relying in the decision of the Court in **Emanuel Funga v. Halmashauri ya Kijiji cha Mvumi Mission**, Civil Appeal No. 350 of 2019 (unreported), the learned advocate strongly pressed the Court to strike out the appeal with costs on the contention that as the notice of appeal is defective it renders the appeal incompetent.

Secondly, it was the argument of Mr. Kagashe that though the appellant was granted leave by the Court on 12<sup>th</sup> July, 2021 in terms of rule 96(7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to lodge a supplementary record of appeal to include the

missing documents, particularly exhibits P1, P2, P3, P4, P5, P6, P7, P8, P9, D1, D2 and D3 and complied by lodging it on 20<sup>th</sup> December, 2021, within sixty days as ordered by the Court; she has not included all the exhibits, namely some letters associated with exhibit D3 which were relied on by the trial court in determining the case. In the circumstances, the respondents' counsel submitted that as the appellant was granted opportunity to lodge all the missing documents but failed, the appeal is incompetent for having an incomplete record of appeal as she cannot be granted another chance to remedy the irregularity. He therefore implored us to strike out the appeal with costs for being incompetent. To support his submission, he referred us to the decision of the Court in **Nakomolwa Matepeli Shila v. Mwanahamisi Ally Nongwa (Legal representative of Kidawa Seif-deceased)**, Civil Appeal No. 21 of 2016 (unreported).

In response, Mr. Thomas Matatizo Msasa, learned advocate, who appeared for the appellant readily conceded to both irregularities and omission pointed out and explained by Mr. Kagashe. Nevertheless, he argued that the decision of the Court in **Emanuel Funga v. Halmashauri ya Kijiji cha Mvumi Mission**

(supra) is distinguishable in the circumstances of the appeal at hand. He stated that the distinction is premised on the fact that in the former appeal the Court struck out the appeal because no notice of appeal was lodged after the appellant was granted extension of time to lodge it, and thus the appeal lacked the foundation to stand, which is not the case in the instant appeal. Besides, he argued, the defects in the notice of appeal can be cured by effecting amendment upon application of the appellant or by the Court's own motion in terms of rules 83(7) and 111 of the Rules.

Mr. Msasa did not however have any qualm with the decision of the Court in **Nakomolwa Matepeli Shila** (supra) in respect of the consequences which should follow, upon failure of an appellant to comply with the order of the Court by lodging the complete supplementary record of appeal which includes all the envisaged missing documents. To this end, he prayed that the appeal be struck out with no order as to costs on the contention that he was instructed by the appellant to take charge of prosecuting the appeal few days before it was called on for hearing, and that the mistake leading to the missing record was done by the appellant's previous advocate.

Rejoining, Mr. Kagashe emphasized that the respondent be granted costs as the reason advanced by Mr. Msasa is unfounded.

For our part, we firstly agree with Mr. Msasa that though the notice of appeal, the record of appeal and the memorandum of appeal are defective for indicating a different number of the case, the judgment of which is sought to be contested on appeal, the anomaly can be remedied upon application of the appellant or the Court's own motion by effecting the requisite amendments in terms of rules 83(7) and 111 of the Rules. In the circumstances, the irregularities cannot render the appeal incompetent to the extent of being struck out. We also agree with him that the decision of the Court in **Emanuel Funga v. Halmashauri ya Kijiji cha Mvumi Mission** (supra) is not applicable in the circumstance of the irregularities in the instant appeal.

Next for our consideration and determination is the issue of failure of the appellant to lodge a supplementary record of appeal which includes all the relevant documents as ordered by the Court.

There is no dispute as conceded by Mr. Msasa that the supplementary record of appeal lodged by the appellant on 20<sup>th</sup> December, 2021 does not contain all the missing documents,

particularly, those associated with exhibit D3, which are crucial for the determination of the appeal.

On the other hand, it is settled in terms of rule 96(8) of the Rules, that an appellant who is granted leave under sub-rule 7 to lodge a supplementary record of appeal but fails to do so cannot be granted another leave. For clarity, the respective rule provides:

*"96(8) where leave to file a supplementary record under sub-rule (7) has been granted, the Court shall not entertain any similar application on the matter."*

Faced with an akin situation in **Puma Energy Tanzania Limited v. Ruby Rodway (t) Limited**, Civil Appeal No. 35 of 2018 (unreported), 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 rule 96(8) of the Rules..."*

Therefore, parties who are granted leave in terms of Rule 96(7) to lodge a supplementary record should show diligence in ensuring that they lodge the same timely and without omitting any

document which was the subject of the order of the Court. This is so because, the provisions of Rule 96(8) envisage, we hold, both situations, that is, failure to lodge a supplementary record within the prescribed period or lodging an incomplete supplementary record contrary to the order of the Court. Besides, the failure to comply with the order of the Court without plausible explanation, like in the appeal at hand, is in our opinion lack of seriousness on the party who is granted the requisite leave. We wish to reiterate what the Court stated in **Nakomolwa Matapeli Shila** (supra) that:

*"... when a party who was granted leave to file supplementary record does not do so, it shows lack of seriousness on their part to prosecute the appeal..."*

Similarly, we think the observation applies in the circumstances of the instant appeal as the appellant has no plausible explanation on why she failed to include all relevant documents despite being given that opportunity in the previous session of the Court.

From the foregoing and considering the concession of the appellant's counsel, we sustain the second preliminary point of law



and hereby strike out the appeal which contains incomplete record of appeal for being incompetent.

On the other hand, having carefully considered the issue of costs, we are of the decided view that in the circumstances of this appeal, we make no order as to costs.

**DATED** at **KIGOMA** this 7<sup>th</sup> day of June, 2022.

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

P. M. KENTE  
**JUSTICE OF APPEAL**

The Judgment delivered this 8<sup>th</sup> day of June, 2022 in the presence Mr. Thomas Matatizo Msasa, learned Counsel the Appellant and Mr. Ignatius Kagashe, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**