

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: WAMBALI, J.A., KOROSSO, J.A. And FIKIRINI, J.A.)**

**CIVIL APPEAL NO. 105 OF 2019**

**IDRISA R. HAYESHI ..... APPELLANT**

**VERSUS**

**EMMANUEL ELINAMI MAKUNDI ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mwanza)**

**(Sumari, J.)**

**Dated the 14<sup>th</sup> day of February, 2014**

**in**

**Land Case No. 23 of 2009**

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**RULING OF THE COURT**

9<sup>th</sup> & 11<sup>th</sup> February, 2022

**WAMBALI, J.A.:**

In Land Case No. 23 of 2009 which was lodged before the High Court of Tanzania at Mwanza, the respondent, Emmanuel Elinami Makundi sued the appellant, Idrisa R. Hayeshi and three others, not parties to this appeal, namely; Permanent Secretary Ministry of Works, the Attorney General and Mwanza City Council who were the first, second, third and fourth defendants respectively. According to the plaint, the respondent claimed the following reliefs: First, a declaration that the first defendant's (the appellant) act of constructing the structure in his plot was illegal and amounted to an act of trespass. Two, the first defendant be ordered to demolish the structure so far

erected in his plot. Three, a permanent injunction order restraining the first defendant or his agent or any person acting under his authority from entering into his plot. Four, the first defendant be ordered to pay him Tshs. 30,000,000/= as general damages for trespass. Five, costs of the suit. Six, any other remedy as the honourable High Court would have deemed fit.

The respondent's claims were strongly contested by the appellant and three others as evidenced by their written statements of defence contained in the record of appeal which they lodged at the High Court before the hearing of the suit.

Be that as it may, at the conclusion of the trial of the suit, after the High Court evaluated the evidence of the parties it decided in favour of the respondent. It further ordered that costs of the suit be borne by the appellant and the fourth defendant (Mwanza City Council), not party to this appeal.

Aggrieved, the appellant lodged the notice of appeal to this Court against the respondent followed by the instant appeal to contest the judgment and decree of the High Court through a memorandum of appeal comprising five grounds of appeal. For the reason which will be

apparent shortly, we do not intend to reproduce the respective grounds of appeal in this ruling.

Before we commenced the hearing of the appeal on 9<sup>th</sup> February, 2022, having thoroughly scrutinized the record of appeal and considered the nature and the circumstances of the appeal before us, we prompted counsel for the parties to respond to a preliminary issue of law. Particularly, we inquired from the counsel on whether the appellant complied with the provisions of Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which requires service of the notice of appeal on persons who may seem to be directly affected by the appeal.

On his part, Mr. Emmanuel John, learned advocate who appeared for the appellant readily conceded that according to the record of appeal, the appellant did not comply with the provisions of Rule 84 (1) of the Rules. He submitted that in the light of the judgment and decree of the High Court in Land Case No. 23 of 2009, there is no doubt that the other three parties mentioned above, are persons who may be directly affected by the appeal. He therefore argued that the notice of appeal ought to have been served on them by the appellant as required under Rule 84 (1) of the Rules. To this end, he conceded that the appeal is incompetent.

In the circumstances, placing reliance in the decision of the Court in **Kantibhai M. Patel v. Dehyabhai F. Mistry** [2003] T.L.R. 437, Mr. John urged us to strike out the appeal for being incompetent.

However, the learned advocate for the appellant pressed us not to order costs in favour of the respondent on the contention that the issue concerning the competence of the appeal was raised by the Court.

Mr. Silwani Galati Mwantembe, learned advocate who appeared for the respondent graciously welcomed the concession of the appellant's counsel that the appeal is incompetent for failure of the appellant to comply with the provisions of Rule 84 (1) of the Rules. He therefore joined hands with the appellant's counsel prayer to have the appeal struck out for being incompetent. Nonetheless, he argued that though the issue concerning the competence of the appeal was raised by the Court, the respondent deserves partial costs. The thrust of Mr. Mwantembe's contention was premised on two points: First, that the appellant's counsel who was duly aware of the position of the law as propounded by the Court in **Khantibhai M. Patel v Dehyabhai F. Mistry** (supra), did not take steps to ensure that there was compliance with Rule 84 (1) of the Rules. Second, that the respondent has also incurred costs for the initial preparation made before the hearing of the appeal.

From the foregoing, it is not doubted that counsel for the parties agree that the instant appeal is incompetent and that the ultimate result is for the Court to strike it out. However, they differ on the issue of costs.

In the first place, we deem it appropriate to revisit the position of the law.

Rule 84 (1) of the Rules, provides as follows:-

*"84(1) An intended 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."*

In view of the dictates of the above reproduced Rule, compliance with the requirement prescribed under that provision is mandatory (see **Hamis Paschal v. Sisi kwa Sisi Panel Beating and Enterprises Ltd**, Civil Appeal No. 165 of 2018 (unreported)).

It is in this regard that in **Khantibhai M. Patel v. Dahyabhai F. Mistry** (supra) the Court considered the import of Rule 77 (1) of the

Tanzania Court of Appeal Rules, 1979 which is currently Rule 84 (1) of the Rules and stated thus:-

*"(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.*

*(v) N/A*

*(vi) N/A*

*(vii) N/A*

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

More importantly, the Court in that decision considered and construed the import of the words "who seem to him" in relation to the

service of the notice of appeal to the person directly affected by the appeal and observed as follows:-

*"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."*

In the premises, considering the nature of the instant appeal, it cannot be disputed that other parties who took part in the proceedings in the High Court, one of whom was condemned jointly with the appellant to pay costs of the suit to the respondent, may seem to be directly affected by the appeal. It is no wonder, we think, that the counsel for the appellant readily conceded to the fact that the appeal is incompetent for non-compliance with the requirement prescribed under Rule 84(1) of the Rules and prayed that the same be struck out. Indeed, the same stand was expressed by the counsel for the respondent.

In the result, we strike out the appeal for being incompetent.

On the other hand, we have seriously considered the contending arguments of the counsel for the parties with regard to the question of costs. Nevertheless, considering the circumstances of the appeal and the way the issue of the appellant's non-compliance with the provisions of Rule 84 (1) of the Rules cropped up, we respectfully order that, for the ends of justice, each party shall bear own costs.

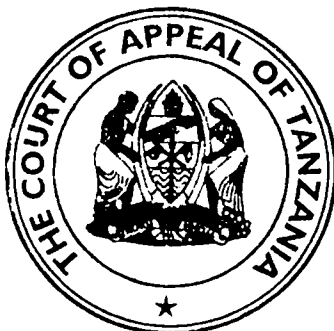
**DATED** at **MWANZA** this 10<sup>th</sup> day of February, 2022.

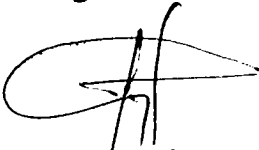
F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

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

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

The ruling delivered this 11<sup>th</sup> day of February, 2022 in the presence of Mr. Emmanuel John, learned counsel for the Appellant and Mr. Silwani Galati Mwantembe, learned counsel for the respondent is hereby certified as a true copy of original.



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