

**IN THE COURT OF APPEAL OF TANZANIA**

**AT SUMBAWANGA**

**(CORAM: KOROSSO, J.A., MWAMPASHI, J.A., And MASOUD, J.A.)**

**CIVIL APPEAL NO. 20 OF 2020**

**CRDB BANK PLC .....APPELLANT**

**VERSUS**

**HERI MICROFINANCE LIMITED .....1<sup>ST</sup> RESPONDENT**

**CASSIANO LUCAS KAEGELE .....2<sup>ND</sup> RESPONDENT**

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

**(Mgetta, J.)**

**dated the 08<sup>th</sup> day of September, 2017**

**in**

**Land Case No. 10 of 2015**

**.....**

**RULING OF THE COURT**

*12<sup>th</sup> & 19<sup>th</sup> March, 2024*

**KOROSSO, J.A.:**

The ruling is for the determination of preliminary points of objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in a notice of preliminary objection filed on 29/9/2023. The notice of preliminary objection alludes to three points of objection which paraphrased state:

1. That the notice of appeal filed on 6/4/2022 is defective for contravening the Order of the Court dated 29/3/2022 which had ordered that the amendment to the notice of appeal be only in respect of the case number, whereas the filed amended notice of appeal extends beyond that order without any such directions having also excluded the parties

in the original notice, Mselem N. Suleiman, Safari General Business Co. Ltd and Kimbembe Auction Mart Ltd. (the 3<sup>rd</sup> and 4<sup>th</sup> defendants in the original trial) who ought to have been served with the copy of notice of appeal.

2. That the appeal contravenes the principle laid in **Jenga Said and 258 others v. Blanket Manufacturer, Treasury Registrar and The Attorney General**, Civil Application No. 668/01 of 2021 as the appellant omitted the names of Mselem N. Suleiman and Safari General Business Co. Ltd on the amended Notice of Appeal as well as the Memorandum of Appeal, whilst the proceedings, judgment and decree in the record of appeal in respect of Land Case No. 10 of 2015 show that in the original trial proceedings, Mselem N. Suleiman and Safari General Business Co. Ltd were the 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively.
3. The appeal contravenes section 84(1) of the Tanzania Court of Appeal Rules, 2009, as the record of appeal, including the supplementary record of appeal refers to only three parties, namely CRDB Bank PLC, Heri Microfinance Limited and Cassiano Lucas Kaegele and omitting the other two parties as submitted in point of objection number 2 above. The omitted parties are directly and substantially affected by the results of the appeal as they are the ones who are alleged to be the successful bidders in the auction of the mortgaged properties. The auction which

the impugned judgment subject of the appeal declared to be illegal, and nullified the sale.

As is the normal practice, where there are preliminary points of objection raised, the Court addresses those first. A direction which we also venture to undertake. However, we find it prudent to first give the background to the appeal, albeit in brief, for a better understanding of its context. The appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents entered into an agreement, whereby, the appellant granted a loan to the 1<sup>st</sup> respondent of Tshs. 650,000,000/= to be repaid within twelve months. As consideration, the 2<sup>nd</sup> respondent offered as security for the loan his landed properties located in Sumbawanga Municipality, Plots No. 112 and 114 Block "J" CT. No. 265 DLR Kiwelu Street; Plot No. 7 Block "H" (HD) CT. No. 3602 MBYR along Mbeya Road and Plots No. 52 and 53 Block "P" (LD) CT No. 17580 MBYLR Bomani area. The 1<sup>st</sup> respondent defaulted in payment and to rescue the situation, the parties to the agreement agreed to restructure the loan payment schedule and entered into a new agreement. At the time of rescheduling it, the loan balance was Tshs. 483,574,673/59. In the new agreement, the loan payment schedule was for the 1<sup>st</sup> respondent to service the loan within twenty-four (24) months.

It transpired that notwithstanding the loan payment schedule restructuring, the 1<sup>st</sup> respondent defaulted in payment which prompted the appellant to exercise powers of sale of the mortgaged properties through

Kimbebe Auction Mart Ltd. The respondents were aggrieved by the said sale, and thus instituted Land Case No. 10 of 2015 in the High Court of Tanzania, at Sumbawanga, against the appellant, Kimbebe Auction Mart Ltd, Mselem N. Suleiman and Safari General Business Co. Ltd (the buyers of the mortgaged properties) as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively. The relief sought by the respondents in the suit included; a declaration that the sale of the mortgaged properties by public auction was illegal and thus null and void *ab initio*; an order that the loan account statement be reconciled; general damages for loss of goodwill, business disruption and disturbances; costs; and any other relief that the Court may grant.

The trial court entered judgment and decree in favour of the respondents. It decreed that; one, the sale of the two landed properties (houses) is null and void. Two, that the 1<sup>st</sup> and 2<sup>nd</sup> defendants pay the respondents a total sum of Tshs. 2,000,000,000/= as general damages with interest of 8% per annum. Three, that the 3<sup>rd</sup> and 4<sup>th</sup> defendants be refunded their respective purchase prices. Four, that the position of the parties remains as it was before the sale, requiring the respondents to repay the outstanding loan balance upon this being reconciled between the respondents and the appellant; and five costs of the suit be paid by the appellant and 2<sup>nd</sup> defendant.

The appellant was aggrieved by the decision and hence preferred an appeal to this Court which is before us for hearing. The appeal was preceded

by a notice of appeal filed on 12/9/2017 found on page 242 of the record of appeal. We find it apt not to reproduce the grounds of appeal at this juncture and now venture into the determination of the preliminary points of objection raised as alluded to earlier.

It should be noted that the notice of preliminary objection before us came about upon filing of the supplementary record by the appellant purportedly in compliance with the order of the Court in a ruling that determined the previous preliminary points of law raised by the respondents, which was delivered on 29/3/2022. The said ruling of the Court addressed the following points of objection. **One**, challenge on the competence of the appeal, for reason that essential information was not included in the notice of appeal as per Form D in the First Schedule to the Rules in contravention of rule 83(6) of the Tanzania Court of Appeal Rules, 2009 (the Rules). That the anomaly rendered the notice of appeal incompetent. **Two**, that the appeal is incompetent for failure to serve the notice of appeal to the former 2<sup>nd</sup> defendant who is likely to be affected by the outcome of the appeal in contravention of rule 84(1) of the Rules. **Three**, incompetency of the appeal because the appellant failed to include in the record of appeal some documents which were used by the Court and thus offending rule 96(1)(k) of the Rules. The omitted documents included the written submissions used in the application for an extension of time to lodge the instant appeal.

The Court overruled the preliminary objections and held that any errors discerned are curable. In consequence, in terms of rule 111 of the Rules, it granted leave to the appellant to amend the anomalies discerned in the notice of appeal. The Court also held that since the trial court adjudged the appellant and the former 2<sup>nd</sup> defendant among others jointly and severally to pay the respondents (then plaintiffs) general damages with an interest, and that there was no evidence that the 2<sup>nd</sup> defendant had the intention to appeal despite the contents of the decree, it thus construed that the 2<sup>nd</sup> defendant was either not aggrieved, or her joinder would have added expenses to the appellant, as the 2<sup>nd</sup> defendant had acted under its instructions. In addition, it held that there was no discerned prejudice to the respondents following the 2<sup>nd</sup> defendant not being served with the notice of appeal, and that such failure did not render the appeal incompetent. Furthermore, the Court found that some relevant documents arising from Civil Application No. 194/09 of 2019 were omitted from the record of appeal and thus in terms of rule 96(7) of the Rules ordered the appellant to file supplementary record of appeal within thirty days of the Order. Indeed, the appellant on 22/4/2022 did file the supplementary record of appeal.

When the appeal came for hearing today 12/3/2024, the appellant was represented by Mr. Zacharia Daudi, learned Advocate, while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Messrs. George Mushumba, Mathias Budodi and Roman Selasini Lamwai, learned Advocates.

When called upon to expound on the points of preliminary objection raised, Mr. Lamwai who took the lead in submitting for the respondents, chose to start by expounding the second point of objection which challenges non-joinder of the 3<sup>rd</sup> and 4<sup>th</sup> defendants from the trial, in this appeal. He argued that the judgment and decree of the High Court being challenged clearly implicated the said parties, Mselem Selemani and Safari General Co. and thus excluding them in the notice of appeal and memorandum of appeal renders the appeal incompetent. He argued that the anomaly is further amplified by the fact that the omitted parties are said to be the buyers of the mortgaged properties, thus with interest in any decision of the Court in the appeal. He contended that this omission is incomprehensible since the appellant and the omitted parties had filed a joint written statement of defence at the trial, and it extends to almost all the important documents relevant to the appeal, including the notice of motion that sought an extension of time to file the appeal out of time, which founds the instant appeal.

The learned counsel asserted that their exclusion particularly in the notice and memorandum of appeal, raises unanswered questions. According to Mr. Lamwai, considering that this appeal is founded upon being granted leave to file it out of time in Civil Application No. 194/09 Of 2019, it is imperative to consider that the omitted parties in this appeal who were the 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> defendants at the trial were also not parties in that

application and thus denied the right to be heard. The learned counsel found it opportune to also apologize to the Court for bringing the issue at this juncture, stating that they just noticed the anomaly when preparing themselves for the appeal hearing upon going through the filed supplementary record. He further contended that what this translates to is the fact that the omission of parties who will be directly and substantially affected by the appeal (having been excluded thus in the notice of appeal found in the supplementary record) contravenes the provision of rule 84 (1) of the Rules and renders the instant appeal redundant.

According to the learned counsel, the remedy available where the Court grants leave to amend the notice of appeal under rule 111 of the Rules cannot apply in the present appeal because all the proceedings to institute it also excluded the said parties. To fortify his contention, he cited the case of **Dr. Salum Ally Chambuso v. Paulo Elias Kimaro**, where the Court addressed complications that arise when necessary, parties are omitted, refused to order for amendment of the documents initiating the appeal, and struck out the appeal. He thus urged us to be inspired by the said decision and find the same in the instant appeal and strike it out.

On the argument that this concern was raised and addressed by the Court in its determination of the initial preliminary objection points, Mr. Lamwai adamantly countered it. He argued that when determining the earlier notice of preliminary objection, the Court only addressed concerns related to



failure to serve the notice of appeal to the 2<sup>nd</sup> defendant, the auctioneer. Whilst, the preliminary objections being considered now relate to the omission of the defendants at the trial apart from the appellant, particularly the 3<sup>rd</sup> and 4<sup>th</sup> defendants who allegedly are the buyers of the mortgaged properties, and are thus essential parties to the appeal since they will be directly and substantially affected by any decision on this appeal. He further contended that the distinction between the preliminary objection points previously before the Court and those currently being considered is obvious as the ruling of the Court that determined the previous preliminary objection points shows what was addressed there with respect to the 2<sup>nd</sup> defendant includes the consequences of non-service of the notice of appeal and not the issue of omitting parties who will be substantially affected by the appeal and were parties in the trial founding the appeal.

In amplifying the first preliminary point of objection, the learned counsel for the respondent's complaint was on the appellant's failure to comply with the order of the Court having amended the notice of appeal beyond the directives of the Court found in its ruling delivered on 29/3/2022. He maintained that the said ruling addressed the complaint that the notice of appeal did not reflect the correct High Court case number, Land Case No. 10 of 2015 and had instead cited Civil Case No. 10 of 2015. Whilst, conceding that in the said ruling the Court observed that the defect was not fatal, however, what was ordered was the amendment of the notice of appeal so

that the proper High Court case number is reflected. The learned counsel contended that to their astonishment, in the amended notice of appeal, the appellant modified the whole notice of appeal, as can be found on page 245 of the supplementary record. That, the appellant also apart from excluding the name of the 2<sup>nd</sup> defendant also did omit the names of the 3<sup>rd</sup> and 4<sup>th</sup> defendants as parties to be served with the notice of appeal. An action which, he argued went beyond the scope of the amendment ordered and cited the case of **Consolidated Holdings Holding Corporation v. Nyakato Soap Industries Ltd.**, Civil Appeal No. 116 of 2021 (unreported) to reinforce his argument. He concluded stating that in the circumstances the only available remedy is to strike out the appeal and urged us to proceed thus.

In response, Mr. Daudi commenced by voicing his objection to the preliminary points of objection for lack of merit. However, he conceded that; **one**, at the trial, all the defendants, which included the appellant were represented by the same chamber of advocates and had one joint written statement of defence. **Two**, that the High Court decision did affect all the defendants at the trial. He implored the Court to overrule the objection raised since the said objection was dealt with by the Court in the preliminary objection points which were raised by the respondents earlier, and which had already been determined, and overruled in a ruling dated 29/3/2022.

The learned counsel for the appellant argued that the reason advanced by the Court to overrule the said preliminary objection was that the 2<sup>nd</sup>

defendant in the trial was not affected by the High Court decision therefore there was no need to serve her with the notice of appeal filed by the aggrieved appellant. He asserted that the issue under contention is whether the omitted defendants were prejudiced by the High Court's decision. On his part, he argued that there was no prejudice on their part since it is the appellant who would have borne all the costs anyway for the granted reliefs that is, general damages, interest and cost of the suit and not the other defendants. He therefore urged us to find that the omission to include all the defendants in the instant appeal will not affect the parties materially, and that the point of objection has no substance.

Concerning the point of objection of the appellant having gone beyond the scope of the directives of the Court on the amendments to the notice of appeal, Mr. Daudi claimed this to have no merit because even if it was to be considered, it is a minor infraction which does not render the amended notice of appeal incompetent. He assigned two reasons; **one**, the added words in the amended notice of appeal do not prejudice the parties; and **two**, the case number of the trial is what was targeted in the amendment which did not however bar the appellant from examining the notice of appeal as a whole. Mr. Daudi further argued that his understanding of the order of the Court to amend the notice included scrutinizing and rectifying any errors in the notice of appeal including its title. According to him, the omission of some of the parties who were part of the High Court Land Case No. 10 of 2015, as

contended did not contravene the order of the Court to amend the notice of appeal.

In respect of the cases cited by the learned counsel for the respondents, the learned counsel for the appellant urged us to find them to be distinguishable. It was his contention that the preliminary point of objection is an afterthought since if it was important the respondents should have raised it during the hearing of the application for reference where all the parties took part. He however conceded that the proceedings of the said application are not part of the record of appeal.

Submitting in the alternative, Mr. Daudi stated that if the Court finds that the omission of the names of the other defendants from the notice of appeal and the memorandum of appeal as discussed herein is a concern, the Court should be minded to invoke the overriding objective principle engrained in section 3A of AJA and rule 111 of the Rules to allow the appellant to amend the notice and memorandum of appeal. According to him, such an order will allow the hearing of the appeal to proceed on merit upon compliance with the envisaged amendments as prayed. He implored the Court to take account of the substantial amount involved which was improperly granted as general damages to the respondents, and the fact that a viable public financial institution is involved and is impacted by the prolonged litigation.

The rejoinder by the learned counsel for the respondents was essentially to reiterate the prayers advanced in the submission in chief. Mr. Lamwai urged the Court not to consider the last prayer by the learned counsel for the appellant, since a party being a public financial institution should not warrant any sympathy from the Court. He objected to the contention that the point of objection related to non-joinder in the instant appeal of the defendants from the trial court was dealt with in the ruling of the Court dated 29/3/2022. He argued that, the issue before the Court then was failure to serve the notice of appeal to the 2<sup>nd</sup> defendant only. On the assertion that no injustice has been occasioned in the omission of some of the parties in the appeal as claimed, he argued that rule 84 (1) of the Rules is clear, that all parties involved and affected by a decision should be served with a notice of appeal, and it is upon the concerned parties to decide whether they want to respond or not since service of the notice of appeal to the affected parties is founded on a legal provision and expected to be complied.

On the amendments made by the appellant in the notice of appeal found in the supplementary record of appeal, he argued that what the respondents are challenging is not the structure of the notice, but the added amendments which were not directed by the Court in its ruling. That any alterations to the notice of appeal should be those directed by the Court and not otherwise. Mr. Lamwai adamantly objected to claims that the preliminary

points of objection raised and under scrutiny are an afterthought on the part of the respondents, since they were not raised during the hearing of an application for reference. He submitted that the points of objection raised could not have been raised there, since, in an application for reference what is addressed is technical errors discerned in the exercise of jurisdiction. Therefore, the appeal is the best forum to bring forth issues such as the omission of necessary parties as is the case.

The learned counsel for the respondents urged the Court not to consider the alternative prayer by the counsel for the appellant that the overriding objective principle be invoked, he argued that the omission to exclude important parties is a serious and fatal irregularity since it affects the rights of the omitted parties and cited the case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017 (Unreported). He further argued that the overriding objective principle should not be used to supersede mandatory provisions of the law as also observed in the case of **Dr. Salum Ali Chambuso v. Paulo Elias Maro**, Civil Appeal No. 116 of 2021 (Unreported). He thus implored us not to accept the invitation to invoke the overriding objective principle in the instant appeal. He concluded by imploring us to find the appeal incompetent and strike it out.

We have considered the rival submissions from the learned counsel, the record of appeal and the cited authorities in support of arguments and

contentions thereof. In addressing the first point of preliminary objection, it is evident from the submissions of the counsel for the contending parties that essentially, they do not differ on the fact that the appellants were granted leave to amend the notice of appeal and that the amendments include more than those related to title of the trial court case number. However, they depart on the scope of the amendments ordered by the Court. While the learned counsel for the appellant claims that the amendments were not only confined to amending the title of the case but required a holistic approach to it by also amending other anomalies, the learned counsel for the respondents contends otherwise that the appellants went beyond the threshold of what the Court ordered. The learned counsel for the appellant also urged us to find that even if we agree with the learned counsel for the respondents' assertions, we should find the infraction curable and invoke the overriding objective principle.

We have gone through the amended notice of appeal found in the supplementary record, and certainly, the amendments have gone beyond amending the title from Civil Case No. 10 of 2015 to Land Case No. 10 of 2015 as found in the order of the Court, but the address for services of the former 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have also been removed. It is well settled that orders of the Court are to be respected and implemented. In **Karori Chogoro v. Waitihache Menengo**, Civil Appeal No. 164 of 2018 (unreported) the Court held: *"Court orders should be respected and complied*

*with...*" The same sentiment was expressed in **Olam Tanzania Limited v. Halawa Kwilabya**, Civil Appeal No. 17 of 1999 (Unreported), where we stated:

*" ... Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them... Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos".*

The above being the position, it is thus not expected for a party not to comply with an Order of the Court. In the present case, the order of the Court which we reproduced earlier, did not give room for the appellant to remove or add anything in the notice of appeal apart from amending the title of the case. In removing the names of the other former defendants in the amended notice of appeal without leave was essentially non-compliance with the said order. The issue that arises, is whether the appellant's failure to fully comply with the same is fatal and renders the appeal incompetent as prayed by the counsel for the respondents.

Understanding that in allowing amendments the Court aims to do justice to the parties, we are of the view that in the circumstances of the instant appeal, the question will be best addressed when determining the



second and third points of objection on contravention of rule 84(1) of the Rules and failure to include the former 3<sup>rd</sup> and 4<sup>th</sup> defendants in notice and memorandum of appeal while they are directly and substantially affected by the results of the appeal.

Delving into the second and third preliminary points of objection, certainly, the fact that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants at the trial were not served with the notice of appeal is not controverted neither is the fact that their names are not included in the notice and memorandum of appeal. The appellant's counsel contends that it was not necessary and relied on the decision of the Court in the earlier ruling when addressing failure to serve the notice of appeal to the 2<sup>nd</sup> defendant and ruled that under the circumstance it was not fatal. Relying on the above, the learned counsel for the appellant thus argued that the issue had already been decided by the Court.

The respondent's counsel on the other hand contends that rule 84(1) of the Rules states clearly that all parties to the suit have to be served with notice of appeal, and it is upon each one of them to decide whether to be part of the appeal or not. He argued that not including them even in the other processes to appeal denied them the right to be heard. He also objected that this issue has been decided by the Court arguing that the earlier decision was on the failure to serve the notice of appeal to the former 2<sup>nd</sup> defendant and not omission of the former 3<sup>rd</sup> and 4<sup>th</sup> defendants in the notice of appeal and memorandum of appeal as parties to the appeal since he

claimed they would be directly affected with its decision being the buyers of the mortgaged properties, subject of the appeal.

We find it apposite to examine the deliberations of the Court on the issue of failure to serve the notice of appeal to the Kimbembe Auction Mart Ltd. In that ruling, the Court considered the fact that the former 2<sup>nd</sup> defendant never showed intention to appeal as she neither lodged a notice of appeal nor filed an appeal to the Court, leading it to construe that the former 2<sup>nd</sup> defendant was neither aggrieved nor considered by the appellant as one who might be affected by the outcome of the appeal. The Court also considered the fact that as the 2<sup>nd</sup> defendant had acted under the instructions of the appellant, joining her in the appeal would have perhaps attracted other expenses which in reality would have to be borne by the appellant alone. The Court also was of the view that in the circumstances, failure to serve the notice of appeal to the former 2<sup>nd</sup> defendant did not prejudice the respondents for reason that; *"should the appeal succeed, the former 2<sup>nd</sup> defendant will benefit out of that and in the event the appeal fails both appellant and the former 2<sup>nd</sup> defendant will remain judgment debtors"*. It is obvious that there was no deliberation on the omission of the former 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the notice and memorandum of appeal.

Certainly, in discussing failure to serve notice to the 2<sup>nd</sup> defendant, we are of settled mind that the Court somewhat also alluded to the similar situation that faced the 3<sup>rd</sup> and 4<sup>th</sup> defendants faced by not being served with

the notice of appeal. The question though is whether the reasons that prompted the Court to find that non-service of the notice of appeal to the 2<sup>nd</sup> defendant can also be addressed squarely with the 3<sup>rd</sup> and 4<sup>th</sup> defendants and whether they also apply to not being joined as parties to the appeal in the notice and memorandum of appeal. At this juncture we reproduce rule 84(1) for ease of reference.

*"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 proceeding in the High Court".*

We are aware that the Court, in the earlier ruling had considered the thrust of rule 84(1) of the Rules as being: **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 to 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. **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**, that the Court is given discretion on *exparte* application to direct a notice not to be effected on a person who did not take part in the proceedings in the High Court. Thus, in deciding on the

objection before it, it was guided thus and we reaffirm the said observations and shall be guided thus in our deliberations.

There are also various decisions of this Court regarding the remedy where there is non-compliance with rule 84(1) of the Rules. In the wake of the application of the overriding objective principle in the case of **Gaspar Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017 (Unreported), the Court held that in the light of threshold set in **Mukisa Biscuit Manufactures Ltd. v. West End Distributors Ltd**, [1969] E.A. 696 on what is a preliminary objection, failure to serve a notice of appeal within the time prescribed to the opposing party is not strictly a point of law since its determination requires evidence. Attention should be to the fact that each case be determined as per its own circumstances.

It suffices to say that the issue before us for determination is not on non-service of the notice of appeal to the 3<sup>rd</sup> and 4<sup>th</sup> respondents as was in the previous ruling with respect to the former 2<sup>nd</sup> defendant, but non joinder of parties who are likely to be affected with the appeal. Therefore, to that extent the finding in our earlier ruling is distinguishable since the thrust of the point of objection before us differs to the one earlier determined. We are aware that in our previous decision we discussed the thrust of rule 84(1) of the Rules which has already been discussed above. Apart from the time required to serve the notice of appeal to other parties, which we have already

dealt with, rule 84(1) of the Rules also addresses those to be served with the notice of appeal. That, the notice of appeal be served to those who are likely to be directly affected by the appeal. Important to understand that a notice of appeal initiates the appeal. It is a notification to likely parties of the intended appeal. Thus, once served, it invariably expresses being part of the intended appeal.

In the present case, the appellant decided that the 3<sup>rd</sup> and 4<sup>th</sup> defendants should not be served with the notice of appeal and thus not be joined as parties to the appeal. Understanding that rule 84(1) of the Rules gives discretion to the person initiating the appeal to decide whom to serve the notice of appeal, the duty to serve those who would be directly affected by the intended appeal remains imperative. Therefore, it is upon the intended appellant when exercising his discretion to exercise that discretion with the confines of the thrust of rule 84(1) of the Rules. The question now is whether, in the circumstances of the case, that discretion was properly exercised by the appellant.

In the instant appeal, there is no doubt that the 3<sup>rd</sup> and 4<sup>th</sup> respondents would be directly affected by the appeal since they are the buyers of the mortgaged properties subject to the suit and thus the appeal. While understanding that it was upon the appellant to decide who to join, in the circumstances, denying the buyers of the said mortgaged property to be heard on the appeal which will be determining the same we find, was

improper. Their non joinder will result in their not being part of determination of properties they have an interest in. The impugned decree declared the sale of the mortgaged properties null and void. The order found on page 237 was that, *“the defendants are also ordered to pay the plaintiffs a total sum of Tanzania shillings two billion (TZS 2,000,000/=) as general damages with interest of 8% from the date of judgment to the date of full satisfaction of the same”*. It did not specify which defendants. Although there is also an order for *“the 3<sup>d</sup> and 4<sup>th</sup> defendants be refunded of their respective purchase price. The position of the parties remained as it was before the sale ...”*.

The joinder of parties is not an issue directly addressed in the rules governing procedure of the Court, but rule 84(1) of the Rules ascertains that those parties with interest must be served with a notice of appeal, so that they are aware of institution of an appeal. The provision presupposes, notification to all those who were part of the original matter and it is envisaged those notified and do not show interest may be left aside, which was not the case in the present appeal. It is also on the record that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were also omitted in the proceedings seeking leave to appeal and extension of time to appeal out of time. We are of the view that their omission deprived them the opportunity to be heard on appeal.

The right to be heard in any proceedings is paramount and this cannot be overstated enough. In **John Morris Mpaki vs. NBC Ltd and Ngalagila Ngonyani**, Civil Appeal No. 95 of 2013 (unreported), we held;

*"... it is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard..."*

Similarly, in **Abbas Sherally vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 133 of 2002 (unreported), the Court held:

*"That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard [ because the violation is considered to be a breach of the principles of natural justice"*

The learned counsel for the appellant urged us to invoke the overriding objective principle if we find that omitting the former defendants in the notice and memorandum of appeal and all processes leading to the appeal was fatal. In **Puma Energy Tanzania Limited v. Roadways (T) Ltd**, Civil Appeal No.3 of 2018, the Court held that the overriding objective was not designed to blindly disregard mandatory procedural requirements going to the root of the matter before the Court. (See also, **Mondorosi Village Council and 2 Others** (supra) and **Njake Enterprises Ltd v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (unreported))

This court's perspective is that omitting the 3<sup>rd</sup> and 4<sup>th</sup> defendants in the notice of appeal and memorandum of appeal, parties who were parties to

the original suit and are directly and substantially affected by the appeal as shown herein goes to the fundamental principle of the right to be heard, and cannot be overridden by the oxygen principle.

All in all, we sustain the preliminary point of objection. The appeal is thus struck out, being incompetent. In the circumstances, each party to bear its own costs.

Order Accordingly.

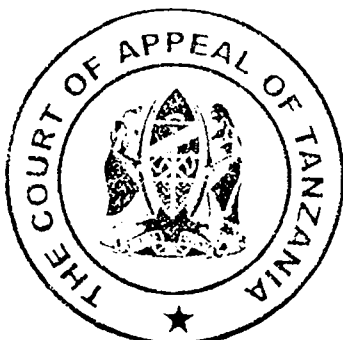
**DATED** at **SUMBAWANGA** this 19<sup>th</sup> day of March, 2024.

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

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

B. S. MASOUD  
**JUSTICE OF APPEAL**

This Ruling delivered on 19<sup>th</sup> day of March, 2024 in the presence of Mr. Mathias Budodi, learned counsel for the respondents also holding brief for Mr. Zakaria Daudi, learned counsel for the appellant, is hereby certified as a true copy of original.



A handwritten signature in black ink, appearing to read "A. L. Kalegeya".

A. L. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**