

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)**

**CIVIL APPEAL NO. 77 OF 2016**

**AFRICAN BARRICK GOLD MINE PLC ..... APPELLANT**

**VERSUS**

**COMMISSIONER GENERAL (TRA) ..... RESPONDENT**

**(Appeal from the Judgment and Decree of the Tax  
Revenue Appeals Tribunal sitting  
at Dar es salaam)**

**(Fauz, J.)**

**Dated 31<sup>st</sup> day of March, 2016**

**In**

**Tax Appeal No. 16 of 2015**

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**RULING OF THE COURT**

**9<sup>th</sup> & 20<sup>th</sup> September 2016**

**RUTAKANGWA, J.A.**

The brief undisputed background to this “appeal” as can be gleaned from the parties’ submissions is as follows: The appellant is a company incorporated in the United Kingdom. It owns several entities worldwide, some of which are incorporated in the United Republic of Tanzania.

The appellant’s business entities in Tanzania, include the Bulyanhulu Gold Mine Ltd; the North Mara Gold Mine Ltd, and the Pangea Minerals Ltd.

In March 2010, the appellant was issued by the Business Registration and Licensing Agency (BRELA) with a certificate of compliance under the provisions of the Companies Act, Cap 212. Thereafter, the respondent formally registered the appellant and issued it with a Tax Identification Number (TIN) and VAT Registration number.

Consequent to that, in 2011, the respondent duly conducted an audit investigation in relation to the tax affairs of the appellant's above named business entities for the years 2010 -2013. This investigation involved interviews and exchange of letters and reports. This exercise culminated with the issuing by the respondent, of a tax demand notice dated 8<sup>th</sup> October, 2013, for withholding taxes, stamp duty, SDL and PAYE.

The notice was issued pursuant to the powers conferred upon the respondent under section 139 of the Income Tax Act, 2004 and section 38 of the Value Added Tax Act, 1997. The details of this notice are not of moment for the purposes of this ruling.

The appellant was not happy with the tax demand notice, by which it was requested to, among other things, remit to the respondent an amount of *"USD 81,843,127 exclusive of penalties and interest"* in the form of

*"withholding taxes on dividend payment for the years" 2010 -2013.* It accordingly opted to challenge the respondent's decision by way of an appeal to the Tax Revenue Appeals Board ("the Board"), under section 16 (1) of the Tax Revenue Appeals Act, Cap 408 R.E. 2002. This appeal was duly instituted on 21<sup>st</sup> November, 2013, with the lodging of the Statement of Appeal.

The proceedings in appeal before the Board are regulated by the Tax Revenue Appeals Board Rules, 2001 ("the Rules"). It is partly provided thus in Rule 15 of the Rules:-

*"15(1).....*

*(2) For the purpose of proceedings before it, the Board may:*

*(a) Take evidence on oath,*

*.....*

*(3) At the hearing of an appeal the appellant shall state the grounds of his appeal and **may support them by any relevant evidence.***

*(4) .....*

*(5) At the conclusion of the statement and evidence on behalf of the appellant, the respondent shall be entitled to make such*

*submissions, supported by such relevant evidence, as may be necessary.*

(6) .....

(7) .....

(8) *A witness called and examined by one party may be cross-examined by the opposite party."*

[Emphasis is ours].

In addition to the above provisions of Rule 15, it is further thus provided in Rule 17(1):

*"The Board may call any person to attend at the hearing and give evidence and may order any person to produce any document if it believes that such evidence or document will assist in its deliberations."*

Given the above clear provisions, it is clear to us that proceedings before the Board are essentially in the form of a trial as is always the case in a trial court when exercising original jurisdiction.

Indeed, following the institution of the appeal, the respondent duly filed his Reply to the Statement of Appeal in which he was categorically resisting the appeal.

At the hearing of the appeal, the appellant was represented by Dr. Kibuta Ongwamuhana, learned advocate, who was being assisted by Mr. Alan Kileo and Ms. Salome Gondwe, learned advocates. For the respondent, Mr. Noah Tito, learned advocate, assisted by Mr. Benedict Kessy, a Tax Investigation Officer, had appeared. Six (6) issues were, by consent, agreed on for determination by the Board.

Neither party proffered oral testimony. They preferred to conduct the hearing by way of oral submissions. However, each side tendered documentary evidence to support its or his respective position on the issues agreed upon. This was in accordance with the provisions of Rule 15(3) and (5) of the Rules.

The appellant tendered in evidence a total of 18 documentary exhibits (i.e. exhibits A1 to A 18). On his part, the respondent tendered 20 documentary exhibits (R1-R18). The Board itself, pursuant to the powers conferred upon it under Rule 17(1) of the Rules, called one Mr. Deodatus Mwanyika as a Board witness (BW1). We have found out that in resolving the six issues, the Board relied heavily on all these documentary evidence and made a fleeting reference to the oral testimony of BW1 Mwanyika.

After considering the material evidence before it, the Board unanimously ruled in favour of the respondent.

It held, without any demur that the:

*"Respondent was legally justified to demand the various taxes from the appellant because it is a resident company for taxes purposes."*

The Board further held that the *"[T]he TIN and VRN certificates were legally issued and the appellant was duty bound to file both tax and VAT returns from the date of receipt of those certificates."* Nevertheless, it faulted the respondent in demanding the tax returns of Mr. Mwanyika, whom it had found to be *"in the Senior Management team"* of the appellant company. The appeal was accordingly dismissed with costs.

Dissatisfied with the decision of the Board, the appellant went on appeal to the Tax Revenue Appeals Tribunal ("the Tribunal"). An appeal to the Tribunal is initiated by a notice of intention to appeal issued under Rule 22(1) of the Rules. Rule 22(2) specifically directs that notice of intention to appeal *"shall contain statement (sic) as to whether the appeal is on the whole decision or order or is on a specified matter only"*. We have found

however, the appellant's notice dated 22<sup>nd</sup> July, 2015, (see page 138 of the record of appeal) wanting in these specifics. It only states that ABC Plc *"intends to appeal to the Tax Revenue Appeals Tribunal against the part (sic) of the decision"*. This is only a passing observation, anyway. The legal effect of this remiss of the appellant for the purpose of this appeal is not of relevance. Suffice it to say here that the preferred appeal was resisted by the respondent.

The appeal before the Tribunal was argued by way of written submissions lodged by the same counsel who had appeared in the Board. Both counsel, in their submissions relied heavily on the documentary evidence they had produced before the Board, to bolster their respective stances, in support of and/or in opposition of the appeal.

At the conclusion of the hearing, the Tribunal made its deliberations on 14<sup>th</sup> March, 2016 and its members were to give their written opinions *"on or before 24/3/2016"*, judgment being reserved for 30<sup>th</sup> March 2016. Although the members written opinions are not incorporated in the record of appeal before us, the Tribunal's judgment, which appears to have been unanimous, was delivered on 31<sup>st</sup> March, 2016. The Tribunal generally agreed with the findings and conclusions of fact and law arrived at by the

Board, found the appeal wanting in merit and dismissed it with costs, hence this appeal ("the appeal")

The appeal is premised on section 25 of the Act. This section, in full, reads as follows:-

*"25.-(1) Any person who is aggrieved by the decision of the Tribunal may appeal to the Court of Appeal.*

*(2) An appeal to the Court of Appeal shall lie on matters involving questions of law only **and the provisions of the Appellate Jurisdiction Act and the rules made thereunder shall apply mutatis mutandis to appeals from the decision of the Tribunal**". [Emphasis is ours.]*

The Rules governing appeals to this Court are the Tanzania Court of Appeal Rules, 2009 ("the Court Rules").

Rule 90(1) of the Court Rules requires an appeal to the Court to be instituted within sixty (60) days of the date when the notice of appeal was lodged by lodging a memorandum of appeal, the record of appeal and security for the costs of the appeal. Of great immediate importance to this appeal is Rule 96(1) (2) and (3) of the Court Rules.

The above mentioned sub-rules read thus:-

*"96-(1) 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) an index of all documents in the record with the numbers of the pages at which they appear;*
- (b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by Rule 86, his last known address and proof of service on him of the notice of appeal;*
- (c) the pleadings;*
- (d) the record of proceedings;*
- (e) the transcript of any shorthand notes taken at the trial;*
- (f) the affidavits read and **all documents put in evidence at the hearing, or, if***

*such documents are not in the English language, their certified translations;*

- (g) the judgment or ruling;*
- (h) the decree or order;*
- (i) the order, if any, giving leave to appeal;*
- (j) the notice of appeal; and*
- (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 paragraphs (d), (e) and (f) shall exclude copies of any documents or any of their parts that are not relevant to the matters in controversy on the appeal.*

- (2) For the purposes of any appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court **corresponding as nearly as may be to those set out in sub-rule (1)** and shall contain also the following documents relating to the appeal to the first appellate court-*

- (a) *the order if any giving leave to appeal;*
- (b) *the memorandum of appeal;*
- (c) *the record of proceedings;*
- (d) *the judgment or ruling;*
- (e) *the decree or order;*
- (f) *the notice of appeal;*

*and in the case of a third appeal, shall contain also the corresponding documents in relation to the second appeal and the certificate of the High Court that a point of law is involved.*

*(3) A Justice or Registrar of the High Court or tribunal, may, on the application of any party, direct which documents or parts of documents should be excluded from the record, application for which direction may be made informally”.*

[Emphasis is ours].

The instant appeal was instituted in accordance with the requirements of Rule 90(1) on 3<sup>rd</sup> June, 2016. It was scheduled for hearing on 9<sup>th</sup> September, 2016.

When the appeal was called on for hearing, the parties were represented by the same learned advocates as was the case before the Board and Tribunal. However, before we heard the highlights of counsel on their written submissions, we were anxious to satisfy ourselves on whether there was a competent appeal worth being entertained and determined on merit by the Court. Our anxiety was prompted by the appellant's patent non-compliance with the mandatory provisions of Rule 96(1), (2) and (3) of the Court Rules, in that apart from the fact that the members written opinions were not part of the record of appeal, none of all the documentary exhibits tendered at the trial were incorporated therein.

Rule 96 is very clear and elaborate in sub-rules (1) and (2) on what the record of appeal should mandatorily contain. Some of these are, dispensable as the saving clause shows. But most of them are core or primary documents. Such core documents, according to settled case law, are those listed in items (c) to (k) of sub-rule (1) and (a) to (f) in sub-rule (2). We wish to point out clearly here that the documents itemized in sub-rule (2) are in addition to those mentioned in sub-rule (1).

What then are the legal consequences for failure to include these core documents in the record of appeal? The cases providing an unequivocal answer to this germane question are now legendary.

The case of **Ngoni – Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman** [1959 E.A. 577, is one of the earliest cases reported on the issue. The then Court of Appeal for Eastern Africa categorically held that under the laws of Tanganyika, an appeal is incompetent if it is not accompanied by an extract of a copy of the decree appealed from. It went on to stress that:

*"failure to extract and lodge with the memorandum of appeal to this court a copy of the relevant formal order or decree **is not a mere procedural defect, but goes to jurisdiction and renders the appeal incompetent...**"*

[Emphasis supplied].

The same Court took the same stance shortly before its demise, in the case of **Kiboro v. Posts and Telecommunications** [1974] E.A. 155.

As this Court held in **Royal Insurance Tanzania Ltd v. Kiwengwa Strand Hotel Ltd**, Civil Application No. 128 of 2008 (unreported) while

dealing with an almost identical issue, our current Rules (the Rules) are a replica of the former Court of Appeal Rules, except for the numbering. Indeed, Rule 96 of the Rules, is identical with Rule 85 of those former Rules.

In **Kiboro's case** (supra), the Court had held that:-

*"If a basic document ... is omitted from the original record of appeal, that cannot be introduced into the record of appeal, when the prescribed time has expired. In this case the appellant could only file the omitted decree out of time with leave...."*

In a pertinent observation in **Royal Insurance Tanzania Ltd** (supra), the Court said:-

*"This Court in the cases of **R.E. Hawkins v. P.P. Mwaigomoie, Haruna Mpangaos versus T.P.C. Co. Ltd; Kapinga versus N.B.C. Ltd** (all supra), among many others decided thereafter, has unreservedly adopted the above quoted holding in the **Kiboro** case (supra) and it is therefore part of our law. In **Mpangaos'** case the Court unequivocally ruled that if time had expired, the appellants ought to have resort to rule 8 for extension of time."*

The cumulative effects of these decisions, we find ourselves enjoined to point out, led to the introduction of a totally new provision in the Rules which repealed and replaced the 1979 Court Rules. This is sub-rule (6) of Rule 96, which provides as follows:-

*"Where a document referred to in rule 96(1) and (2) is omitted from the record, the appellant may within 14 days of lodging the record of appeal without leave include the document in the record."*

If no step is taken within the stipulated fourteen days, then the appellant has no other remedy apart from applying to the Court under this provision, for leave to include the omitted document(s) before the purported appeal is called on for hearing.

In dealing with this issue, we are comforted by the fact that courts in other common law jurisdictions have been of the same stance. In the case of **Republic v. Kenya Posts and Telecommunications** [1999]1 E.A. 250, the record of appeal contained a defective copy of the impugned order. Deciding on the competence of the appeal, the Kenya Court of Appeal held that an order or decree appealed from *"is a primary document in the appeal"*.

It went on to hold that incorporating a defective copy of the order or decree in a record of appeal:

*"deprives the order of any validity for the purposes of the present appeal as an order which is mandatorily required by rule 85 (1) (h) of our Rules to be included in the record of appeal. This alone makes the present appeal incurably incompetent and should be struck out...."*

*Our decision in the present appeal, might have been different if we were not dealing with an issue of jurisdiction, but with merely one that involved a deviation from form...."*

[See, also, **Fortunatus Masha v William Shija & Another** [1997] T.L.R. 41.]

The Kenya Court of Appeal position though given before their new Constitution, was re-affirmed with greater emphasis by this Court in the case of **Ami (Tanzania Limited v. OTTU on Behalf of P.L. Assenga & 106 Others**, Civil Appeal No. 76 of 2002 (unreported). We categorically said:

*"The complaint herein is that the appeal is incompetent because of a defective decree in the manner explained earlier on in this ruling. Article 107"*

*A(2) (e) of the Constitution does not in anyway command that procedural rules should be done away with in order to advance substantial justice. Each case will be considered on its own peculiar facts and circumstances (See: Civil Application No. 100 of 2004, **Zuberi Mussa v. Shinyanga Town Council** (unreported); Civil Reference No. 22 of 2005, **China Henan International Cooperation Group v. Salvand K.A. Rwegasira** (unreported). A decree is a vital document in an appeal in terms of Rule 89(2) (2) (v) of the Court Rules, **for without a decree there is no appeal. Such noncompliance is fundamental and goes to the root of the matter and in our humble view, Article 107 A (2)(e) cannot resurrect a non-existent appeal.**"*

[See also, **The Attorney General v. Rev. Christopher Mtikila**, Civil Appeal No. 20 of 2007 (unreported)].

We are, indeed, not oblivious of the naked fact that most of these cited cases concerned omission to include a copy of the decree or order or inclusion of a defective decree or order in the record of appeal. All the same, we are of the settled minds that this fact alone does not detract from the overarching applicability of the *ratio decidendi* in these cases to all other

core or primary documents mentioned in Rule 96(1) and (2) of the Rules. There is a plethora of this Court's decisions to that effect.

Speaking generally, the Court in **Haruna Mpangaos and 902 Others v. Tanzania Portland Cement Co. Ltd**, Civil Appeal No. 10 of 2007 (unreported) said:

*"If the record of appeal containing the essential documents mentioned under Rule 89(1) is not so lodged the appeal will be held incompetent."*

That was in 2008 before the Rules were promulgated.

In both **Fedha Fund and Two Others v. George T. Vargese and Another**, Civil Appeal No. 8 of 2008 and **Juluma General supplies Ltd v. Stanbic Bank (T) Ltd**, Civil Appeal No. 77 of 2011 (both unreported), the Court made it clear that the decision to choose documents relevant for the determination of the appeal is not the prerogative of or optional on the party filing the record of appeal save in situations where such documents are excluded under Rule 96(3).

In **Dodsal Hydrocarbons and Power Tanzania Ltd & Two Others v. Hasmukh Bhagwanji Masrani**, Civil Appeal No. 93 of 2012, (unreported) the Court lucidly said:-

*"It is significant to note here that the provisions of Rule 96(1) (d) are couched in mandatory terms under this Rule, the record of proceedings is a vital document which must mandatorily form part of the record of appeal and omission to include it in the record renders the appeal incompetent."*

The competence of Civil Appeal No. 79 of 2014 between **Mining Agriculture & Construction service LTD v. Paleman Construction Ltd** (unreported) was challenged on account of infringing Rule 96(1) (d), (f) and (g) of the Rules. Exhibits D1(g) –(m), among other documents, were not included in the record of appeal. Counsel for the respondent conceded the glaring omission and forthrightly urged the Court to hold the appeal incompetent and strike it out. The Court sustained the preliminary objection and struck out the incompetent appeal.

In the case of **Mariam Idd v. Abdulrazack Omary Laizer and Rodrick Humphrey Jonas**, Civil Appeal No. 82 of 2014 (unreported), the court succinctly held that:-

*"This Court has always insisted that failure to include a mandatory document in the record of appeal renders the appeal incompetent: See **Niko***

***Insurance (T) v. Joseph O. Kayoma, Civil Appeal  
No. 2 of 2008*** (unreported)".

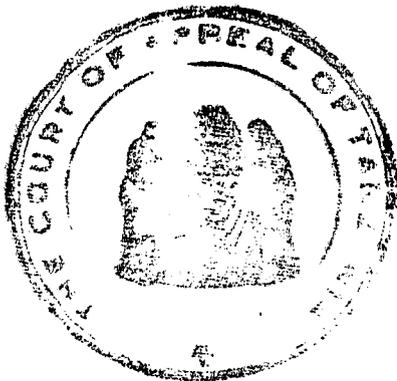
In the appeal before us, counsel for the appellant readily conceded that the record of appeal does not contain all the documentary evidence, indeed the only evidence upon which the impugned judgments were premised. They accordingly left the matter in the discretion of the Court to decide the fate of the appeal in view of the glaring non-compliance with the mandatory requirements of Rule 96 of the Rules.

On his part, Mr. Tito pressed us to be consistent and non-discriminatory. In the light of the clear stance of the law, he urged that the purported appeal be held incompetent and be struck out. He, all the same, did not press for costs.

There is no gainsaying here that the omission to include the documentary evidence tendered at the trial does offend against the mandatory provisions of Rule 96(1) (f) and (2) of the Rules. Again we have no flicker of doubt in our minds that these documents are very necessary for the proper and conclusive determination of the appeal. Being core or primary documents in this purported appeal, failure to incorporate them in the record of appeal, renders the record incurably defective and the appeal

incompetent. On pain of being accused of favoritism and willingly flouting the mandatory provisions of Articles 13(1) and 107A (2) (a) of the Constitution of the United Republic of Tanzania, 1977, if we do not accede to Mr. Tito's submission, we hold without any demur that this purported appeal is incompetent on account of the reasons given above. We accordingly strike it out. Each party to bear its/his own costs.

**DATED at DAR ES SALAAM this 16<sup>th</sup> day of September, 2016.**



**E.M.K. RUTAKANGWA**  
**JUSTICE OF APPEAL**

**S. A. MASSATI**  
**JUSTICE OF APEPAL**

**S.E. MUGASHA**  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

  
**P.W. BAMPIKYA**  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**