

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 117 OF 2017

ONESMO NANGOLE.....APPELLANT

VERSUS

1. DR. STEVEN LEMOMO KIRUSWA.....1ST RESPONDENT

2. THE HON ATTORNEY GENERAL.....2ND RESPONDENT/1ST NECESSARY PARTY

3. THE RETURNING OFFICER FOR

LONGIDO PARLIAMENTARY

CONSTITUENCY.....3RD RESPONDENT/2ND NECESSARY PARTY

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

(Mwangesi, J.)

dated the 29th day of June, 2016

in

Misc Civil Cause No. 36 of 2015

RULING OF THE COURT

14th & 31st August, 2017

MUGASHA, J.A.:

In the General Election of 2015, four political parties namely: **ACT** Wazalendo, **CCM**, **CHADEMA** and **CUF** each sponsored a candidate to contest for parliamentary election of Longido Constituency. The declaration of election results were that, the appellant **ONESMO NANGOLE**, of the **CHADEMA** candidate was declared winner. The first respondent **DR. STEVEN**

LEMOMO KIRUSWA who was vying under the **CCM** ticket lost the election. Dissatisfied with the election results, the first respondent successfully petitioned in the High Court seeking to have the election results annulled. The election was annulled subsequent to which the appellant appealed to the Court.

We find it worthwhile to state that, the appellant initially lodged Civil Appeal No. 129 of 2016 which was struck out on account of incompetence. Thereafter, the appellant having successfully sought and obtained extension of time to file notice of appeal, filed the notice of appeal and ultimately the present appeal.

When the appeal was called on for hearing on 14th August, 2017, it was confronted by preliminary points of objection raised by the learned counsel for the first respondent to the following effect:

1. The record of Appeal is incompetent for not having included the following:
 - a. Transcript of mobile phone recording and/or iPhone mobile as copied in the Flash Disk tendered at the trial as Exhibit "P4" at page 1848 – 1485 of the record of appeal.

- b. Transcript of recording of and/ or telephone handset make TECNO tendered at the trial as Exhibit "P8" at page 1549 of the record of appeal.
2. The lifespan of one year from the date first notice of appeal was lodged has expired as prescribed by section 115(3) of the National Elections Act, [CAP 343 RE. 2002] and there has been no extension of time extending the lifespan.

The appellant was represented by Mr. Tundu Lissu and Mr. Peter Kibatala, learned counsel. Dr. Masumbuko Lamwai and Mr. Daudi Haraka, learned counsel represented the first respondent. The 2nd and 3rd respondents were represented by Mr. Daudi Kakwaya learned Principal State Attorney and Mr. Fortunatus Muhalila learned State Attorney.

Addressing the first preliminary point of objection which is twofold, Dr. Lamwai submitted that the record of appeal is incomplete as it lacks two exhibits (P4 and P8) which were produced and admitted in the evidence at the trial. He pointed out that the two exhibits were electronic recordings namely: the flash disk which was produced by the first respondent who played a clip he had recorded using his mobile phone.

With leave of the trial court, the clip was played and exhibited in the flash disk. He added that, a TECNO Mobile phone was as well admitted as Exhibit P8, but it is not listed as among the exhibits in the index of the record of appeal which also adds on the incompleteness of the record of appeal.

The learned counsel further submitted that, the two admitted exhibits relied upon by the trial Judge constitute documentary evidence in terms of section 3 (1) of the Evidence Act ,[Cap 6 RE.2002] (the Evidence Act) and they ought to have been before the Court for the determination of the appeal. As such, Dr. Lamwai submitted, the appellant ought to have applied to be supplied with those exhibits by the District Registrar and incorporate them in the record of appeal as required by Rule 96(1) (k) of the Court of Appeal Rules, 2009 (the Rules). He added, since the appellant did not invoke rule 96 (3) of the Rules to request the Registrar to have the two exhibits excluded from the record of appeal, in the absence of any direction by the Registrar, the appellant cannot rely on the exclusion thereon. The learned counsel reiterated his earlier prayer that the record of

appeal is incomplete and makes the appeal incompetent warranting it to be struck out with costs.

Dr. Lamwai also argued the second ground of the preliminary point of objection which hinges on jurisdiction of the Court on the ground that, the lifespan of the appeal has expired. He submitted that, irrespective of the striking out of the initial appeal, the lifespan of the present appeal commenced at the filing of the first notice of appeal on 6th July, 2016 which did set in motion the appeal process whereby the present appeal is deemed to have been filed on that date.

The learned counsel argued that, after the initial appeal was struck out, the subsequent extension of time to file notice of appeal granted by the High Court did not extend the lifespan of the appeal. Besides, extension of lifespan is applicable to petitions and not appeals. He supported his proposition, arguing that the legislature deliberately intended a constituency seat should not be vacant for more than two and a half years which entails determination of the petition, the appeal and Minister's extension of six (6) months if the petition is not finalized within a year. He added that, if this period is not observed and since the Constitution bars conducting a by election if the remaining lifespan of parliament is one

year, the subjects of Longido Constituency will remain without a member of Parliament for the whole term of five years. On account of the expiry of the lifespan of the appeal, he urged the Court to reject the appeal.

On the other hand, Mr. Kibatala, learned counsel for the appellant submitted that the lifespan of the present appeal is in accordance with section 115 (3) of the National Elections Act, Chapter 343 of the Revised Edition (the NEA). He pointed out that after the dismissal of the initial appeal, there was nothing before the Court thereafter. As such he argued, the lifespan of the present appeal commenced with the lodging of the memorandum of appeal in terms of rule 90 (1) of the Rules. Pertaining to the extension of time to file notice of appeal granted by the High Court it has not offended the provisions of section 115(3) of the NEA and urged the Court to overrule the preliminary objection.

Responding on the non inclusion of exhibits P4 and P8 in the record of appeal, he submitted that, these were physical exhibits. He argued that, those exhibits are neither documents within the meaning of Rule 96(1) (k) of the Rules nor exhibits under the Evidence Act. As such, he submitted, the appellant could not request the Registrar to make transcripts thereof.

Mr. Kibatala was of the view that, since physical exhibits are not covered by it under the Evidence Act or the Rules, he asked the Court to give directions on the inclusion in the record of appeal. He added that, the 1st respondent having filed the notice of cross appeal, he was duty bound to prepare a supplementary record.

In the alternative, the learned counsel submitted that, in the event the Court finds the record of appeal incomplete, instead of striking it out, it can order the appellant to furnish the supplementary record and proceed to determine the appeal on merits considering that, this is an appeal arising out of the election petition. To support his propositions he referred to among others the decisions of the Court of Appeal of Kenya and Uganda which cherish the principle of dispensing justice without being impeded by technicalities and upholding substantive justice. These cases are: **LEDAMA OLEKINA VS SAMUEL KUINTAI TUNAI AND 9 OTHERS**, Civil Appeal No.286 of 2013 and **SAGGU VS ROADMASTER CYCLES (U) LTD [2002] 1 E.A. 258**. As such, Mr. Kibatala prayed for the dismissal of the preliminary objection, with an order for the appellant to file supplementary record in order to cure the incompleteness of the record.

The learned State Attorneys for the 2nd and 3rd respondents had no comment on the preliminary points of objection.

In his brief rejoinder, Dr. Lamwai argued that, filing supplementary record of appeal is not mandatory as it is the record of appeal. Thus, irrespective of the cross appeal, the first respondent was not duty bound to file the record of appeal. He urged the Court not to rely on the Kenyan and Ugandan cases cited by the appellant and instead rely on its own developed jurisprudence in the area covering incompleteness of the record of appeal and lapse of time of the present appeal. However, Dr. Lamwai did not cite to us the cases he had in mind.

From the rival contentions of the parties the issues for determination of the preliminary points of objection are as follows:

1. Whether the record of appeal is incomplete for non inclusion of the Exhibits P4 and P8 (flash disk and **TECNO** mobile phone).
2. Whether or not the lifespan of the appeal has expired.

We have opted to start with the preliminary point questioning our jurisdiction to determine the appeal because it has a bearing on the determination of the preliminary point of objection on the incompleteness

of the record. If this point of objection sails through, the first point of objection cannot be determined.

We deem it pertinent to point out here that, before 2000, the lifespan of the petition was by statute fixed to two years. The Court had the opportunity of reckoning the lifespan in the case of **WILBROAD PETER SLAA VS ARUSHA KALWA AND FIVE OTHERS**, [1999] T.L.R 85 as follows:

"According to section 115(2) of the Elections Act 1985, the obligation of the High Court to hear and determine an election petition within two years operates only when the election petition is before that court and not when it is lawfully before another court; the two year period excludes the time when the petition goes to the Court of Appeal on appeal from rulings and orders."

By then, the NEA did not have a specific timeline within which to determine appeals against the decisions of the High Court in election petitions. In the case of **CHARLES MUGUTA KAJEGE VS MUTAMWEGA BHATT MUGAHYWA**, Civil Appeal No. 39 of 2008 (unreported) concerned about the absence of the timelines to determine an election appeal the Court said:

*" The other observation we have is for the Attorney General to revisit section 115(2) of the Elections Act, 1985, **so that both election petitions and appeals should not take more than two years otherwise the provisions for election petitions constitute a mockery of democracy.** Because of the election petition, and the resulting appeal, the Mwibara constituency has been deprived of a representative for the last three years and nine months now."*

[Emphasis supplied]

In 2010, vide Written Laws (Miscellaneous Amendment) Act No. 7, the NEA was amended and the two year lifespan of the petition was changed as section 115 now reads as follows:

*" 115- (1) Every election petition shall be presented within thirty days from the date of the declaration for results of the election by the Returning Officer.
(2) The court shall hear and determine a petition within twelve months from the date of lodging the appeal.*

(3) The court shall hear and determine an appeal within twelve months from the date of lodging the appeal.

(4) An appeal lodged pursuant to this section shall lie to the Court of Appeal.

(5) Where the election case is unlikely to be determined within twelve months, the Minister responsible for legal affairs may, after the consultation with the Chief Justice and by notice published in the Gazette extend the prescribed time for further period not exceeding six months as he shall determine.”

With the said amendment, it is vivid that the Court must determine an appeal within twelve months from the date of its lodging to the Court. For reasons which will become apparent later, in our considered view, the concern of the Court to expedite the disposal of the election trials raised by the Court in the case of **CHARLES MUGUTA KAJEGE VS MUTAMWEGA BHATT MUGAHYWA** (supra), was not fully taken on board by the amendments.

We are aware that, an appeal to the Court against the decision of the High Court in the election petition is a constitutional right under article

83(4) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) and section 115(4) of the NEA. Moreover, the timeline within which to dispose of the appeal within one year is also a creature of section 115 (3) of the NEA. It is as well clear that, article 117 (3) of the Constitution and section 4 of the Appellate Jurisdiction Act, [CAP 141 RE.2002] clothe the Court with jurisdiction to determine appeals from the High Court which include appeals emanating from election petitions. The manner of lodging and prosecuting the appeal to the Court is regulated by the Rules. For a clear understanding and bearing in mind the present appeal, we wish to point out a few processes which are regulated under the Rules:

One, an appeal to the Court is preceded by the notice of appeal whereby in terms of Rule 83(1) of the Rules, it must be lodged at the High Court not later than thirty (30) days from the date of the decision desired to be appealed against.

Two, Rule 90(1) of the Rules, requires an appeal to be instituted within sixty (60) days from the date of notice of appeal upon the presentation of a memorandum of appeal in quintuplicate; the record of appeal in quintuplicate and; security for costs of the appeal. Save that,

where the desirous appellant applies for a copy of the High Court proceedings within thirty (30) days of the date of impugned decision there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of such copies to the appellant.

Three, upon institution of an appeal, in terms of rule 19(3) of the Rules, the same shall be allotted a unique number with reference to particular calendar year. This facilitates the identification of a particular appeal.

Four, in terms of rule 94 of the Rules, a respondent who desires to have a portion of the trial court's decision varied or reversed must give notice of cross appeal not later than thirty (30) days from the date of service of the Memorandum of Appeal.

Five, Rule 106 (1) of the Rules, requires *inter alia* an appellant to file written submissions in support of the appeal or the cross appeal as the case may be within sixty (60) days after lodging the appeal.

Six, Rule 106 (8) of the Rules requires a respondent to file a reply to the submissions not later than thirty (30) days from the date of service upon him by the appellant.

Seven, under Rule 107(1) of the Rules, the respondent intending to rely on a preliminary objection must give the appellant three clear days notice setting out grounds of objection such as specific law, principle or decision relied upon.

In the matter under scrutiny, it is not in dispute that the initial Civil Appeal No. 129 of 2016 was instituted after the appellant filed notice of appeal on 5th July, 2016. However, the appeal was struck out on 23rd February, 2017 on account of non compliance with the Court order which required the appellant to amend the record by joining the necessary parties but instead added new matters in that record. Subsequently, having sought and obtained extension of time to file notice of appeal to the Court, the appellant filed the present Civil Appeal No. 117 of 2017 on 25th July, 2017.

The contentious issue is whether the initial notice of appeal has a bearing in reckoning the lifespan of the present appeal. Having

dispassionately considered the issue, our answer is in the negative. We say so because: **One**, after Civil Appeal No. 129 of 2016 was struck out, the record of appeal and the notice of appeal were as well struck out and the appellant could have sought the appeal process afresh. In **WILLIAM SHIJA VS FORTUNATUS MASHA [1997] T.L.R n 213**), this Court had the occasion to consider the effect of striking out an appeal whereby, after the election appeal was struck out, the applicant sought extension of time to file notice of appeal which was objected to by the respondent. The Court held:

" Applicant was correct in contending that when the appeal had been struck out the notice of appeal was also struck out: in that situation if a party still wished to appeal a fresh application had to be filed in the High Court seeking extension of time in which to give notice of appeal."

Two, the filing of the present appeal came into being after the appellant sought and obtained extension of time to lodge a new notice of appeal. **Three**, the present appeal did not resurrect the non-existent notice of appeal which disappeared together with Civil Appeal No. 129 of 2016 which was struck out. **Four**, The position would have been different if Civil

Appeal No. 129 of 2016 was dismissed for want of appearance and then restored in terms of Rule 112 (1) of the Rules because upon restoration it would have retained the first notice of appeal, same case number and the calendar year at the time it was filed in terms of Rule 19(3) of the Rules.

Therefore, we do not agree with Dr. Lamwai's submission on reckoning the lifespan of this appeal to the struck out notice which is not compatible with the Rules because, **One**, it presupposes to resurrect the non-existent notice of appeal which has no room in the present appeal which was preceded by its own notice of appeal. **Two**, the submission is in violation of section 115 (3) of the NEA which provides:

" The court shall hear and determine an appeal within twelve months from the date of lodging the appeal."

[Emphasis ours]

The clear wording of the provision is unambiguous and reflective of the legislative intent that the lifespan of an appeal before the Court is twelve months from the day it is lodged. In this regard we wish to repeat what we said in **REPUBLIC VS MWESIGE GEOFFREY AND ANOTHER**, Criminal Appeal No. 355 of 2014:

" when the words of a statute are unambiguous " judicial inquiry is complete" there is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation because the courts must presume that a legislature says in a statute what it means and mean in a statute what it says."

(See also **BP TANZANIA VS THE COMMISSIONER GENERAL OF THE TANZANIA REVENUE AUTHORITY**, Civil Appeal No. 125 of 2015)

We wish to add that, apart from the NEA creating the right of appeal to the Court and lifespan of an appeal before the Court, the rest is the domain of and governed by the AJA and the Rules. This is cemented by the limited mandate delegated to the Chief Justice under section 117(1) of the NEA. He is mandated only to make Rules regulating the procedure and practice of the petitions and applications before the High Court. The mandate does not extend to the appeals to the Court.

In addressing the concern of constituencies remaining unrepresented in Parliament during the pendency of an appeal before the Court, since the lifespan of the appeal is regulated by the NEA, we wish to reiterate the

observation we made to the Attorney General in **CHARLES MUGUTA KAJEGE VS MUTAMWEGA BHATT MUGAHYWA** (supra). It was to the effect that, in order not to deprive the citizenry of a representative in Parliament for a long time, both election petitions and appeals thereof should not take more than two years otherwise the provisions for election petitions constitute a mockery of democracy. As earlier stated, the 2010 amendments did not accommodate the crucial concern.

The present appeal is about three months old, less than a year before the Court which is within the confines of section 115(3) of the NEA. Thus the appeal is not time barred and the Court has jurisdiction to entertain it. Thus, the unmerited preliminary objection is overruled.

As to whether or not exhibits P4 and P8 are documents, Dr. Lamwai submitted that they are documents within the meaning of the Evidence Act and Rule 96(1) (k) of the Rules. This was vigorously resisted by Mr. Kibatala. However, the learned counsel for the appellant prayed in the alternative to be given opportunity to furnish supplementary record and the appeal be heard on merits just in case we are minded to uphold the preliminary point of objection.

It is hard to ignore that, micro to mega business transactions involving computer media received recognition at global and local levels around the 4th quarter of the 20th century. Therefore, from the very nature of electronic transactions, the law had to undergo significant changes in order to embrace the development to ensure that, electronic transactions entries by use of computers and other related devices are not only recognized but protected and the users are not exposed to risk. Our country was not left behind as witnessed by the following:

One, The Court appreciated the development in communication technology as underscored in the case of **TANZANIA COTTON MARKETTING BOARD VS GOGECOT COTTON COMPANY SA [1997]** T.L.R 165 having interpreted widely words "registered post" to take into account current development in communication technology such as courier post services. This was followed by the High Court decision which was called upon to determine the admissibility of electronic evidence in **TRUST BANK LTD VS LE-MARSH ENTERPRISES LTD, JOSEPH MBUI MAGARI, LAWRENCE MACHARIA**, Commercial Case No. 4 of 2000, (High Court Commercial Division). The court decided that electronic evidence is good evidence thus departing from the strict rule of best evidence.

Two, however, the above stance of case law received limited recognition following the amendment of the Evidence Act vide Miscellaneous Written Laws Amendment Act No. 15 of 2007 which legislated on the admissibility of electronic evidence in criminal cases. **Three**, later the Evidence Act was amended vide Miscellaneous Written Laws Amendment Act No. 3 of 2011 to allow the testimonial account of a witness to be given through video conference and teleconference.

Currently, all the above developments are embraced in the Electronic Transactions Act, No. 13 of 2015 (the ETA) whereby its long title categorically states as follows:

" An Act to provide for the legal recognition of electronic transactions, e-Government services, the use of information and Communication Technologies in collection of evidence, admissibility of electronic evidence, to provide for the use of secure electronic signatures; and to provide for other related matters."

The ETA avails following definitions under the interpretation section 3:

“Computer system” means a device or combination of devices, including network, input and output devices capable of being used in conjunction with external files which contain computer programmes, electronic instructions, input data and output data that perform logic, arithmetic data storage and retrieval communication control and other functions.”

“ data” means any information presented in an electronic form.”

“data message” means data generated, communicated received or stored by electronic, magnetic optical or other means in a computer system or for transmission from one computer system to another.”

“ electronic communication” means any transfer of sign, signal or computer data of any nature transmitted in whole or in part by a wire, radio,

electromagnetic, photo electronic, photo optical or in any other similar form."

*" **electronic record**" means a record stored in an electronic form.*

Under the ETA a flash disk and mobile phone are recognized as output devices in a computer system which can capture, receive, store and transmit electronic data. The enactment of the ETA consequentially amended a series of legislation including the Law of Contract Act [Cap 345] RE. 2002 whereby, contract agreements in electronic form were recognized. Also and for the purpose of the matter under scrutiny, the Evidence Act was amended as follows:

Section 3 now defines the word "*document*" to mean- *any writing, handwriting, typewriting, printing, Photostat, photography, computer data and **every recording upon any tangible thing, any form of communication or representation including electronic form, by letters, figures, marks or symbols or more than of these means, which may be used for the purpose of***

recording any matter provided that the recording is reasonably permanent and readable".

[Emphasis supplied]

Under section 19 of the Evidence Act, admission is now defined as follows:

*" An admission is a statement, oral, **electronic** or documentary, which suggests any inference as to a fact in issue or relevant fact and which is made by any of the persons and in the circumstances hereinafter mentioned."*

[Emphasis supplied]

Under section 34 the Evidence Act, admissible statements of persons who cannot be called as witnesses includes electronic statement. Furthermore, section 64 of has been amended by introducing section 64 A (1) (2) and (3) which state as follows:

"(1) In any proceedings electronic evidence shall be admissible.

(2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transactions Act, 2015.

(3) For the purposes of this section: electronic evidence " means any data or information stored in electronic form or electronic media or retrieved from a computer system which can be presented as evidence."

The said amendments in the Evidence Act, recognize a flash disk and mobile phone as tangible devices which can capture record, store electronic data on documentary account of memorable past events. Such electronic data is permanent, readable and is admissible in evidence constituting electronic documentation.

In addition, bearing in mind electronic record, "record" in general is defined in Black's Law Dictionary by Bryan Garner, 9th edition at page 1387 as follows:

" 1. A documentary account of past events

designed to memorise those events.

2. Information that is inscribed on tangible

*medium or that having been stored in an
electronic or other medium is retrievable in
perceivable form.*

3. Minutes.

*4. The official report of proceedings in a case,
including filed papers, a verbatim transcript of
the trial or hearing (if any) and tangible
exhibits.”*

In view of the stated developments, the courts can no longer close its eyes on the mysteries of the computers media and the related tangible devices wherein electronic data capture can be stored electronically.

In view of the aforesaid, we are settled in our minds that a flash disk and tecno mobile phone are documents and tangible exhibits containing memorable account of what was presented in the evidence during trial. As such they constitute part of the trial proceeding as reflected at pages 1485 and 1549. In this regard, this being a first appeal, those exhibits ought to

have been part of the record of appeal. The record of appeal is regulated by Rule 96(1), (3) and (6) of the Rules which provide:

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 the 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.

(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.

(6) 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.

Rule 96(1) is very clear and elaborate on what the record of appeal should mandatorily contain. The core or rather primary documents are those listed in items (c) to (k). - See **AFRICAN BARRICK GOLD MINE PLC VS COMMISSIONER GENERAL (TRA)**, Civil Appeal No. 77 of 2016 (unreported).

Rule 96(6) provides:

" 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 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 for leave to the Court under this provision to include the omitted documents before the purported appeal is called for hearing. The appellant did not do so and he is himself to blame.

It is as well settled law 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 where a party has sought and obtained permission under rule 96(3) - See **FEDHA FUND AND**

TWO OTHERS VS GEORGE T. VARGHESE AND ANOTHER, Civil Appeal No. 8 of 2008 and **JULUMA GENERAL SUPPLIES LTD VS STANBIC (T) LTD**, Civil Appeal No. 77 of 2011(both unreported). Failure to include core or primary documents in the record of appeal makes the record incomplete and renders the appeal incompetent. In **DODSAL HYDROCARBONS AND POWER TANZANIA LTD AND TWO OTHERS VS HASKMUKH BHAGWANJI MASRANI**, Civil Appeal No. 93 of 2012 (unreported), we clearly 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 it incompetent."

In **MINING AGRICULTURE AND CONSTRUCTION SERVICE LTD VS PALEMAN CONSTRUCTION LTD**, Civil Appeal No. 79 of 2014 (unreported), the record of appeal omitted among others, exhibits D1 (g) to (m). The competence of the appeal was challenged on account of contravening Rule 96 (1) (d) of the Rules among others. Since the glaring omission was

conceded to by the appellant the Court sustained the preliminary point of objection and struck out the incompetent appeal.

It is settled that, exhibits P4 and P8 are documents in terms of the Evidence Act and in electronic form in the ETA. Non inclusion of those exhibits in the present appeal, is in violation of Rule 96(1) (d) and (k) of the Rules. The extent of violation as far as Rule 96 (1) (d) is concerned is to the effect that, the missing exhibits are documents and constitute part of the proceedings at the trial making the Court not seized with the entire proceedings of the trial. The missing proceedings are essential for the determination of the first and only appeal which takes a form of rehearing and where possible re-evaluating the evidence at the trial. (See **PETERS VS SUNDAY POST [1958] E.A 424**).

In a nutshell, the record of appeal suffers from incompleteness and renders the appeal incompetent. We are not in agreement with Mr. Kibatala to avail the appellant leave to bring supplementary record. We say so because the law is settled that, to file supplementary record of appeal is no answer to an objection regarding competency of the appeal. The position is that once notice of preliminary objection is lodged, the time to remedy the deficiency complained of lapses. (See **MTALE VS KERMAL**

[1983] TLR n. 50). Similarly, in **NBC HOLDING CORPORATION VS MAZIGE MAUYA AND ANOTHER**, Civil Appeal No. 36 of 2004 we said:

*“ With regard to pending appeals **not yet scheduled for hearing**, parties would be well advised to resort to Rule 92 (3) of the Court of Appeal Rules of 1979 to rectify defects and regularize the same in conformity with the law.”*

[Emphasis supplied]

In the light of the cited decisions to which we fully subscribe, the prayer to bring supplementary record cannot be remedied because it is tantamount to pre-empting the preliminary objection. In addition, supplementary records in Civil Appeals are governed by Rule 99(1) of the Rules which permits only the respondents to file supplementary records upon satisfying conditions stated there under. As such, we cannot grant the appellant that which the law does not permit. Moreover, appellant neither invoked avenues under Rules 96 (3) and (6) of the Rules. Besides, this being a first appeal, it remains to be regulated by the Rules save for the timelines to dispose the appeal which lies with the NEA. Therefore, we

do not accede to Kenyan and Ugandan cases cited by Mr. Kibatata for the main reason that, the position in our jurisdiction is well settled. As such, we decline to introduce discriminatory standards on election appeals as impressed by Mr. Kibatata.

All said and done the present appeal is incompetent on account of incompleteness of the record of appeal. The appeal is hereby struck out with costs to the 1st respondent and his two advocates.

DATED at DAR ES SALAAM 25th day of August, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL