

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MMILLA, J.A. MWANGESI, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 209 OF 2016

NGERENGERE ESTATE COMPANY LIMITED.....APPELLANT

VERSUS

EDNA WILLIAM SITTA.....RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania (Land Division) at Dar es Salaam)**

(Mutungu, J.)

dated the 9th day of May, 2013

in

Consolidated Miscellaneous Land Applications no. 43 and 71 of 2011

RULING OF THE COURT

24th August & 7th September, 2018

KWARIKO, J.A.:

The appellant filed this appeal against the decision of the High Court of Tanzania Land Division at Dar es Salaam (Madam B.R. Mutungu, J) dated the 9th day of May, 2013.

When this appeal was called on for hearing on 24/8/2018 the appellant was represented by Mr. Audax Kahendaguza Vedasto, learned advocate while the respondent enjoyed the services of Mr. Melekzedek

Lutema, assisted by Ms. Dora Malaba learned advocates. However, before the matter proceeded for hearing this Court first sought to satisfy itself on the competence or otherwise of the appeal, the focus being on the missing pages 11, 12 and 13 from one of the annexures titled *TUZO*. In so doing the court invited the parties to address it on this omission.

On his part Mr. Vedasto while appreciating that truly the record of appeal has some pages missing from the annexed document, he nevertheless argued that the same does not amount to the incompleteness of the record of appeal since the missing pages were not in that attachment before the High Court hence the document was incomplete then as it appears today.

Mr. Vedasto argued further that, Rule 96 (1) (f) of the Tanzania Court of Appeal Rules, 2009 (the Rules), explains what should be included in the record of appeal and since they put that document as it were they had properly prepared the record. That, Rule 96 (3) of the Rules refers to documents which are required to be put under Rule 96 (1) & (2) of the Rules. In that case, he argued, it must be established that the omitted document was part of the document which were supposed to be included

in the record made. Thus, Rule 96 (1) & (2) is inapplicable here since those pages were missing from the beginning. He concluded that, there is a recent authority which says that not every missing document may render the appeal incompetent, but core document may so render.

Mr. Lutema strongly opposed the foregoing arguments by his learned friend, that, it is not true that the missing document was missing from the beginning. He argued that the advocate's statement from the bar does not constitute evidence but mere allegations which cannot be relied upon, and if at all, the matter ought to have been raised in the High Court and ought to have been on record but the appellant's counsel did not do so. In the alternative the appellant's counsel ought to have complied with the provisions of Rule 96 (3) of the Rules by applying for exclusion but that was not done. That, the missing document is not core document is mere speculation.

In conclusion, Mr. Lutema argued that since the appellant's counsel did not do what is required in law the incompleteness of the record is his responsibility. Thus, the record of appeal is incomplete which makes the appeal incompetent which is liable to be struck out with costs.

In his rejoinder submission Mr. Vedasto argued that the issue raised by the court is a question of fact, that is why he maintained that they received the document as it is now. And the respondent did not avail them with any law that they were supposed to raise objection as to the incompleteness of the affidavit filed by the respondent. To that end he argued that there are authorities which are to the effect that an objection which cannot have the effect of finally determining the case cannot be raised.

After careful consideration of the contending submissions by the counsel for the parties we are of the view that Rule 96 (1) and (2) of the Rules is clear on what the record of appeal to this court as the case may be, should contain. It provides 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 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.

(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 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.”

It is evident therefore, that the Rules provide that among other documents, the record of appeal should contain affidavits read and all documents put in evidence at the hearing (sub-rule (1) (f)).

As rightly submitted by Mr. Lutema this court is far from buying the allegation that the document was as it is now since that statement requires

proof which is not the concern of this Court at this stage. Instead, Mr. Vedasto being a trained lawyer and officer of the court ought to have seen, if at all, that the affidavit filed by the respondent was incomplete and should have raised the matter before the High Court so that the same could be put on record. Thus, it is too late in the day to front that complaint at this stage. This does not oblige one to cite any law to back up the assertion as demanded by Mr. Vedasto since it simply goes to the completeness of the said annexure in the affidavit before the High Court.

Further, Mr. Vedasto seems to suggest that the missing document is not important to render the appeal incompetent as it was said in some recent authorities. This court is of the considered view that the parties have no mandate to choose which documents are important and which ones are not. As such powers are vested by law to a Justice or the Registrar of the High Court or tribunal in terms of Rule 96 (3) of the Rules which says thus;

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.

The cited rule was discussed by the Court in the case of **AFRICAN BARRICK GOLD MINE PLC v. COMMISSIONER GENERAL (TRA)**, Civil Appeal no. 77 of 2016 at Dar es Salaam (unreported) which quoted with approval its earlier decisions in the cases of **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) where it was held inter alia thus;

".....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)."

Therefore, if Mr. Vedasto found the document in question ought to be excluded from the record he ought to have complied with Rule 96 (3) of the Rules. Otherwise, the learned counsel ought to utilize avenue

provided under sub-rule (6) of Rule 96 of the Rules which is self-explanatory thus;

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.

Perusing the record of appeal the appellant did nothing to comply with the law hence he is now estopped from alleging orally that the document in question is of no any importance.

However, we have taken time to go through the authorities that Mr. Vedasto filed. We find the decision of this Court in **CRDB BANK LIMITED v. ISSACK B. MWAMASIKA & TWO OTHERS**, Civil Appeal no. 135 of 2017 at Dar es Salaam (unreported) to be distinguishable from the present case. This is so because the missing pages 2, 4, 6 and 8 in the record of appeal in that case was later filed by the respondent through their supplementary record; that is when the notion of shared responsibility arose as it was held in the case of **DORIS M. WANJIRU KINUTHIA & 2 OTHERS v. NDIRANGU [2015] eKLR**. That case dealt with the scope of Rule (1) of the Court of Appeal of Kenya Rules, which is

pari materia with Rule 99 (1) of the Rules. That is why the Court said in **MWAMASIKA's** case that;

"We think the pages that are missing from exhibit P11 should not lead to the drastic action of making the entire record of appeal incompetent where, as in this appeal, a supplementary record has filled-in the gap of the pages that were missing pages from exhibit P11'.

On the contrary, in our case, the missing pages are completely out of the record and also we cannot shoulder the respondent with responsibility in respect of the missing pages because it was not proved that she was the cause.

However, on a reflection regarding the present case and consequence of the missing document, we have found that the same is inconsequential to the core dispute between the parties. We have thus found that the absence of the missing document would not occasion injustice to either party. This position was taken by this court in the case of **MANENO MENGI LIMITED & 3 OTHERS v. FARIDA SAID NYAMCHUMBE & ANOTHER** [2004] T.L.R 395 cited by Mr. Vedasto where it was said thus;

"...irregularities or non-compliance which do not go to the root or substance of the matter can be overlooked provided there is substantial compliance with the rule read as a whole and no prejudice is occasioned".

For the foregoing, we think, the anomaly which was raised by the Court *suo motu* is not fatal. We hereby order that the hearing of the appeal proceeds for determination on merit on a date to be fixed by the Registrar. We make no order as to costs.

Order accordingly.

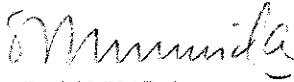
DATED at **DAR ES SALAAM** this 5th day of September, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL