

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPEAL NO. 71 OF 2015

1. MOHAMED MSANGI  
2. ACCESS BANK TANZANIA LTD } ..... APPELLANTS  
VERSUS

CHARLES ODEN MWAIHOLA .....RESPONDENT

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

(Kihio, J.)

dated the 19<sup>th</sup> day of September, 2014

in

Misc. Civil Application No. 336 of 2014

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RULING OF THE COURT

9<sup>th</sup> & 30<sup>th</sup> Oct. 2018

MKUYE, J.A.:

Before the High Court, the appellants (former applicants/defendants) had through Misc. Civil Application No. 336 of 2014 prayed for the following:

1. *That, a certified copy of the Applicant's Written Statement of Defence in Civil Case No. 215 of 2013, dated and filed in Court on*

*30<sup>th</sup> December, 2013, be served on the respondent/ plaintiff in lieu of the misplaced copy;*

*2. That the certified copy of the Applicants' Written Statement of Defence and the Exchequer Receipt No. 0813723 be given to the High Court for filing in Court's Case File in lieu of the misplaced copy. In the alternative, the original copy of the Written Statement of Defence, which is in possession of the Applicant's Advocate be returned to the Court and the applicants retain the certified copy;*

*3. That the Applicants be allowed to amend their Written Statement of Defence to correct the case number error apparent on the Written Statement of Defence;*

*4. No order to be made on costs.*

The High Court refused the application on account that the joint written statement of defence filed, which was the subject of the appellant's application to amend was not properly filed before the court as it related to Civil Case No. 215 of 2012 instead of Civil Case No. 215 of 2013. It also refused the appellant's prayer to amend the written statement of

defence as there was no such written statement of defence in Civil Case No. 215 of 2013 for which the court could order an amendment. Aggrieved with that decision, the appellants brought this appeal on four grounds which for a reason to be apparent shortly, we shall not reproduce them.

On his part, the respondent has filed a notice of preliminary objection under Rule 107(1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to the effect that:-

- 1) *No appeal lies as what is being challenged was an interlocutory decision and it did not have the effect of disposing of the suit.*
- 2) *The appeal is out of time as it was filed on 17/6/2015, which is over 8 months from 29/9/2014 when the notice of appeal appearing at page 87 was lodged.*
- 3) *The record of appeal is incomplete as while the proceedings giving rise to the present one is interlocutory to Civil Case No. 215 of 2013 the Plaint of (sic) instituting Civil Case No. 215 of 2013 is not included in the record of appeal.*

- 4) *The appeal is bad for being merely academic as the Application before the Trial Court (page 3 of the Record) was defective.*

Before us the appellants had the services of Mr. Casmir Nkuba learned advocate, while Mr. Audax Vedasto, learned advocate represented the respondent.

As the practice of the Court has it, the preliminary objection had to be disposed of first before going into hearing the merits of the appeal. So we allowed the counsel from either side to address us on the preliminary objection, the notice of which was filed on 5/10/2018.

Mr. Vedasto prefaced by arguing that **one**, the appeal is not properly before the Court because it is against an interlocutory order which did not conclude the matter (Civil Case No. 215 of 2013) to its finality. He said, this offends the provisions of section 5(2) (d) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (the AJA) which prohibits appeals from interlocutory orders. **Two**, the appeal was filed out of time and cannot be salvaged by Rule 90(1) of the Rules as the certificate of delay is defective for not showing precisely the number of days excluded as to whether between

29/9/2014 when notice of appeal was filed or on 23/9/2015 when the appellant applied for documents and 22/4/2015 when the documents were supplied to the appellant. On top of that, he contended that the certificate of delay is defective for including the copy of proceedings which was not applied for. **Three**, the record of appeal is not complete for failure to include the plaint which instituted Civil Case No. 215 of 2013 which precipitated the written statement of defence, the subject of this appeal. As to point No. 4, he opted to drop it. At the end, he implored the Court to sustain the preliminary objection and strike out the appeal with costs.

In reply, Mr. Nkumba resisted the point of preliminary objection raised by the respondent for being baseless. On the issue that the appeal was against an interlocutory order, he contended that it was quite proper under section 5(2) (c) of the AJA as it was preceded by a leave to appeal. He said, the ruling appealed against had an effect of final determination of the matter since the appellants were denied their right to defend their case. He referred us to the case of **Tanzania Mortor Services Ltd and Presidential Parastatal Sector Reform Commission v. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005 in support. On the

certificate of delay, he argued that it was in compliance with Rule 90(1) of the Rules as it excludes the days from 23/9/2014 when application for documents was lodged to 22/4/2015 when documents were supplied to appellants. He said, the inclusion in the certificate of delay of the date 29/9/2014 was a mere slip of a pen. He referred us to Civil Application No. 35 of 2011 between **OTTU on behalf of P.L. Asenga and 106 others and 3 Others v. AMI Tanzania Ltd**, (unreported) in support. As to the failure to apply for proceedings, he said, it was a mere slip of a pen.

With regard to the failure to include in the record of appeal the plaint, he argued that it was not a fatal irregularity as the plaint was not relevant to the matters of controversy on appeal. He referred us to Civil Appeal No. 55 of 2003 between **Leila Jalaludin Haji Jamal and Shaffin Jalaludin Haji Jamal**, (unreported) in which the Court ignored the omission from the record of appeal of the pleadings for the substantive suit as it considered them to be not relevant for determination of the appeal which arose from interlocutory proceedings whose pleadings were duly incorporated in the record of appeal. He urged us to dismiss the preliminary objection with costs.

In rejoinder, Mr. Vedasto reiterated what was submitted earlier on.

The issue to be determined by the Court is whether or not the appeal is competent.

To answer the above issue we propose to begin with examining as to whether or otherwise the record is complete.

Rule 96(1) (c) which governs record of appeal provides as follows:-

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*"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 provision of sub-rule (3), contain copies of the following documents-*

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*(a).....*

*(b).....*

*(c) pleadings;*

*(d).....*

*(e).....*

*(f).....*

*(g).....*

(h).....

(i).....

(j).....

(k).....

Our understanding of the above quoted provision is that a party wishing to appeal from the High Court or tribunal in exercise of its original jurisdiction must include in the record of appeal among other documents the pleadings which were used in that court or tribunal.

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In terms of Order VI rule 1 of the First Schedule to the Civil Procedure Code, Cap 33, RE 2002, the "pleading" is defined to mean a plaint or a written statement of defence including a written statement of defence filed by a third party and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII. This means that the plaint is within the pleadings which in view of Rule 96(1) (c) of the Rules is mandatorily required to be incorporated in the record of appeal.

As to which documents can be excluded, Rule 96(1) of the Rules gives guidance. Sub-rule (1) of Rule 96 is subjected to sub-rule (3) which empowers the Justice or Registrar of the High Court or tribunal to waive



some documents to be included in the record of appeal. It does not provide for a party filing the record of appeal to choose documents relevant for the appeal.

The said provision states as follows:

*"(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 which direction may be made informally".*

In the case of **Jamal A. Tamim v. Felix Francis Mkosamali & Another**, Civil Appeal No. 110 of 2012 (unreported), the Court while citing with approval a Kenyan case of **Mohamed Aden Abdi v. Nuru Omar t/a Delta Haulage Services Ltd**, Civil Appeal No. 190 of 2006 (unreported) in which the Court of Appeal of Kenya interpreted Rule 85(1) and (3) of the Kenya Court of Appeal Rules which is in *pari materia* with Rule 96(1) and (3) of the Rules, stated as follows:

*"Clearly the decision as to which documents are to be excluded from the record of appeal is a matter for the superior court under Rule 85(3) of the Court of Appeal Rules and since the respondent did not seek any direction under Rule 85(3) aforesaid, therefore the proviso to Rule 85(1) has to be read with Rule 85 (3)".*

With the above position of the law, it is our finding that the appellant was not in any way allowed in his own accord to decide to exclude the plaint from the record of appeal or to determine its relevance, as he did.

He could have only done so with direction from the Justice or Registrar of the High Court in terms of Rule 96(3) of the Rules.

Mr. Nkuba while relying on the case of **Leila Jalaludin Haji** (supra) claimed that the plaint was not relevant to the appeal. It is however, our considered view that the cited case is distinguishable because the appeal emanated from a decision on a chamber application on security for costs. In this case, the plaint was crucial because the written

statement of defence thereof was the subject matter in the decision appealed against.

It has been in times without number held that failure to include documents provided for under Rule 96(1) of the Rules renders the record of appeal incomplete the effect of which is to render the appeal incompetent before the Court. (See **National Bank of Commerce v. Methusela Magengo**, [ 1996] TLR 394; and **Fortunatus Masha v. William Shija and Another** [1997] TLR 41). In the **National Bank of Commerce's case** (supra) for instance, where the appellant failed to incorporate in record of appeal the order of the High Court appealed against, the Court after having examined the competence of the appeal

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held that:-

*"(i) Under Rule 89(1) (h) of the Court of Appeal Rules 1979, [now Rule 96 (1) (h) of the Rules], it is mandatory for the record of appeal to contain copies of the documents listed therein one of which is the order appealed against.*

*(ii) Since the record of appeal does not incorporate the order appealed against the record is incomplete and the appeal is incompetent."*

In the instant case, the appeal emanates from a Ruling of the High Court (Kihio, J.) which rejected to receive or allow the written statement of defence of the appellants to the plaint which was filed by the respondent. Rule 96(1) (c) which we have cited earlier on, in mandatory terms requires the record of appeal to contain such documents which are listed therein among them being the plaint. As contended by both counsel the plaint has not been included, and the appellants have not applied and granted leave under Rule 96(3) of the Rules to exclude it. As such, it is our finding that the record of appeal is incomplete for failure by the appellant to comply with the mandatory provisions of Rule 96(1) (c) of the Rules.

Given the circumstances, we find merit on point No. 3 of the preliminary objection. We, however, do not find it necessary to deal with the rest of the points of preliminary objection (Nos. 1, 2 and 4) as this

alone suffices to dispose of the matter. The appeal is therefore,  
incompetent before the Court and we accordingly strike it out with costs.

**DATED at DAR ES SALAAM this 25<sup>th</sup> day of October, 2018.**

K. M. MUSSA  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

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

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



A. H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**