

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

**(CORAM: LUANDA, J.A., MWARIJA, J.A. And MKUYE, J.A.**

**CIVIL APPEAL NO. 1 OF 2015**

**ROWLAND FAINI SAWAYA T/A SAWAYA BUS ..... APPELLANT  
VERSUS**

**The Administrator of the Estate of CORNELL K. TARIMO**

**(Deceased) ..... 1<sup>st</sup> RESPONDENT**

**THE NATIONAL INSURANCE CORPORATION (T) LTD .....2<sup>nd</sup> RESPONDENT**

**(Appeal from the judgment and decree of the High  
Court of Tanzania at Moshi.)**

**(Mchome, J.)**

**dated the 15<sup>th</sup> day of October, 2004**

**in**

**Civil Case No. 12 of 1998**

.....

**RULING OF THE COURT**

18<sup>th</sup> September & 3<sup>rd</sup> October, 2017

**LUANDA, J.A.:**

The above named appellant is appealing against the decision of the High Court of Tanzania sitting at Moshi which awarded a sum of money to the late Cornell K. Tarimo namely Tsh 276,000/= and Tsh 50,000,000/= with interest as special and general damages respectively arising from an accident. The High Court found the appellant, being the owner of a bus, was liable for negligence of his driver one Raziel Ngowi who caused the

accident. The National Insurance Corporation (NIC) (2<sup>nd</sup> respondent) was joined as a third party. The NIC, who were duly served, did not enter appearance on the date of hearing of this appeal. In terms of Rule 112(2) of the Court of Appeal Rules, 2009 (the Rules) we decided to proceed with the hearing of the appeal in absence of the NIC.

When the appeal was called on for hearing, Mr. Hurbert Nyange, learned counsel for the appellant informed the Court that the hearing date had been set prematurely as when he was preparing written submission, he discovered an amended plaint is missing and so he applied for the supply of the same which is yet to be supplied despite his follow ups through his letters of March, 2015 and June, 2016 with a view to amending the record of appeal. He thus prayed that the appeal be adjourned.

Despite the prayer for an adjournment made and without going into its propriety, the Court drew the attention of Mr. Nyange that the record of appeal lacked the application for an extension of time to file notice of appeal out of time which enabled the appellant to file this appeal. Mr. Nyange said that it is not necessary to include those proceedings in the record of appeal.

On the other hand Mr. John Laswai, learned advocate who appeared for “unknown 1<sup>st</sup> respondent” (his name is not stated in the record) and whose appearance was challenged by Mr. Nyange, that he did not comply with Rule 32(1) of the Rules, strongly resisted the application for an adjournment. Mr. Laswai who took over the conduct of this appeal from a law firm going by the name of Kipoko & Co. Advocates did not lodge a notice of change of advocate as mandated by Rule 32(1) of the Rules. It is the submission of Mr. Nyange that in view of the word “shall” which is deployed in Rule 32(1) of the Rules, Mr. Laswai has no right to appear for the 1<sup>st</sup> respondent.

In response to the issue raised by the Court, Mr. Laswai said that the proceedings for an application for an extension of time ought to be included in the record of appeal. Mr. Laswai then raised a number of irregularities which go to the competency of the appeal. However, we need not bother ourselves in narrating them as we are of the firm view that the ground we have raised is enough to dispose of this appeal.

However, before we go to the point we have raised, we wish to say a word about failure on the part of Mr. Laswai to give notice of change of advocate as demanded by Rule 32(1) of the Rules.

The question we asked ourselves is what is the effect of such non-compliance in the circumstances of this case.

Rule 32(1) of the Rules reads as follows:-

*"32-(1) Where any party to an application or appeal changes his advocate or having been represented by an advocate, decides to act in person or, having acted in person engages an advocate, he shall as soon as practicable, lodge with the Registrar notice of the change and shall serve a copy of the notice on the other party appearing in person or separately represented, as the case may be.*

There is no doubt at all that the Rule is couched in mandatory terms. It requires that it must be complied with. But in this case Mr. Nyange did not attempt to say how the omission had prejudiced his client. For instance, he did not say he could not serve the 1<sup>st</sup> respondent following that change of advocate. Mr. Nyange told the Court that so far he has yet to file his written submission. In actual fact he has not filed any document

which is required to be served upon the other party. Had he said so probably we would have had considered it to have prejudiced his client. **In Maneno Mengi Ltd and 3 others V Farida Said Nyamachumbe,** (2004) TLR 391 this Court said as follows.

*"Suffice it for us to observe that not in every situation that an irregularity or non-compliance with a rule renders the appeal incompetent simply because the word "shall" is used in the rule. As held by a single Judge of this Court in **VIP Engineering and Marketing Limited v Said Salim Bakhressa Limited**, Civil Application No. 47 of 1996 (unreported) 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.*

Since in this case, we have shown the non – compliance of giving notice of change of advocate did not prejudice the appellant in any way, the omission is not fatal at all.

Turning to non inclusion of the proceedings in connection with extension of time to file a notice of appeal out of time, we have no flicker

of doubt that in terms of Rule 96(1) (d) of the Rules those are necessary documents which must be included in the record of appeal. We think the reason behind this requirement is that this being a superior Court of the Land would like to see whether the lower court was properly moved and followed the law. This is possible if the aforestated documents are included as part and parcel of the record of appeal for the Court to peruse with a view to satisfying itself whether the law was followed. To deprive the Court from perusing the said documents is dangerous as we might end up in handing down illegal decisions. This should not be allowed to happen.

With due respect to Mr. Nyange, a copy of the application for extension of time to file a notice of appeal is a necessary document falling under Rule 96 (1) (d) of the Rules. It must be included in the record of appeal.

Since those documents are missing in the record, the appeal is incompetent. An appeal which is incompetent is liable to be struck out; it cannot be adjourned.

That said, the appeal is struck out with no order as to costs.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 28<sup>th</sup> day of September, 2017.

B. M. LUANDA  
**JUSTICE OF APPEAL**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

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

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

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