

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 21 of 2016

MAKOMOLWA MATEPELI SHIJA ----- APPELLANT

VERSUS

MWANAHAMISI ALLY NONGWA (Legal

Representative of KIDAWA SEIF (deceased) ----- RESPONDENT

**(Appeal from the judgment and decree of the High Court of Tanzania, Land
Division at Dar es Salaam)**

(Mutungu, J.)

dated the 19th day of May, 2015

in

Land Case No. 155 of 2010

RULING OF THE COURT

17th & 26th June, 2019

MWANGESI, J.A.:

This ruling is in respect of preliminary objection which has been raised by the respondent to the appeal that has been preferred by the appellant to challenge the judgment and decree of the High Court in Land Case No. 155 of 2010. In the said case, the appellant alongside one Zain Tanzania Limited, were jointly sued by the respondent, a suit which was determined in favour of the respondent. Aggrieved by the decision of the

trial Court, the appellant preferred an appeal which is currently being objected by the respondent.

In objecting the appeal, the respondent lodged two sets of preliminary objections. In the first set which was lodged on the 8th day of June, 2016, the preliminary objection is two limbed, that is:

- 1. The appeal is incompetent as it contravenes the mandatory provisions of Rule 96 (1) (k) of the Tanzania Court of Appeal Rules, 2009 on the ground that the Record of Appeal does not include the copies of exhibits tendered before the trial Court.*
- 2. The appeal is incompetent as it contravenes the provisions of Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 on the ground that, the Notice of Appeal was not served on the party interested in the outcome of the appeal namely, ZAIN TANZANIA LIMITED.*

On the 11th day of June, 2019, the respondent lodged the second set of the preliminary objection titled 'Additional Notice of Preliminary objection', which reads thus:

The appeal is incompetent as it contravenes the mandatory provisions of Rule 96 (1) (f) of the Court of Appeal Rules, 2009 in that, the Record of Appeal does not include the copies of exhibits tendered before the trial Court.

At the hearing of the appeal before us, the appellant had the representation of Mr. Heavenlight Mlinga learned counsel, whereas, the respondent was represented by Ms. Jacqueline Rweyongeza, also learned counsel. As it has been the cherished practice of our Court, before we could deal with the appeal, we had to dispose of the preliminary objection which has been raised first. We therefore invited the learned counsel for the parties to address us on the preliminary objection.

In amplification of the grounds of the preliminary objection, Ms. Rweyongeza, started with the second limb of the first set wherein, she argued that it is a requirement under the provisions of Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (**the Rules**), for the appellant to serve the notice of his intended appeal to all parties, who seem to him to be directly interested or would be affected by the outcome of the appeal. She submitted further that in the suit which is the subject of this appeal,

the appellant was sued by the respondent alongside Zain Tanzania Limited, who is actually the one in occupation of the suit land, after it had installed its communication tower on it. However, in this appeal the said Zain Tanzania Limited, was neither made a party nor was it served with the Notice of Appeal. It was the firm submission of the learned counsel for the respondent that, in so doing, the appellant infringed the provisions of Rule 84 (1) of **the Rules**, and thereby, rendering the appeal to be incompetent. It was therefore her humble prayer that, the same be struck out with costs.

With regard to the first limb of the first set, which was argued together with the second set of the preliminary objection because they are similar, Ms. Rweyongera submitted that the appeal by the appellant is incompetent because, he failed to include in his Record of Appeal, some necessary copies of documents tendered during the trial at the High Court and thereby, going against the mandatory stipulation under the provisions of Rule 96 (1) (f) and (k) of the Rules. When the learned counsel was probed by the Court, as regards the amendment which was made to **the Rules**, by Government Notice No. 344 of 2019, she submitted that in

terms of rule 96 (7) of the Rules, the appellant could seek for adjournment of the hearing of the appeal so that he amends the Record of Appeal by including the omitted ones. It was however her prayer that, in case the Court would be pleased to grant such prayer by the appellant, then the adjournment be made with costs.

On his part, Mr. Mlinga on behalf of the appellant submitted that, the second limb of the preliminary objection in the first set is without basis for the reason that, the appellant served the Notice of Appeal on Zain Tanzania Limited, who is the party with interest to the outcome of the appeal. He referred us on pages 205 and 206 of the Record of Appeal, wherein it has been indicated that service was made through its advocate one ENSafrica Tanzania Limited on the 10th June, 2015.

As regards the other two similar grounds of preliminary objection which concern the missing documents in the Record of Appeal, the learned counsel for the appellant presented two prayers. **First**, that the Court be pleased to adjourn the hearing of the appeal to another date. And **secondly**, that the Court gives him leave to amend the Record of Appeal

by including the missing documents. He premised the prayers under the provisions of Rule 96 (7) of **the Rules**.

Upon dispassionately considering the submissions of the learned counsel from either side, we are in the first place in agreement with the learned counsel for the appellant that, the second limb of the preliminary objection in the first set, is without founded grounds. This was so for the reason that the Record of Appeal is clear at pages 205 and 206 as submitted by Mr. Mlinga that, after lodging his Notice of Appeal on the 27th day of May, 2015, the appellant did on the 10th day of June, 2015 effect service of the Notice of Appeal on the Zain Tanzania Limited, through ENSafrica Tanzania Limited, which is the firm that was representing it in the suit.

Regarding the grounds on the omission of the documents in the Record of Appeal, the law has now been made flexible by the amendment which was brought about by Government Notice No. 344 of 2019 to the Court of Appeal Rules, 2009 whereby, by virtue of sub-rule (7) which was added to Rule 96, in case of omission of some documents in the Record of Appeal, the Court can on its own motion or through an informal application

by the appellant, grant leave to the appellant to include the omitted documents in the Record of Appeal. In that regard, we direct the appellant to amend the Record of Appeal by including the missing documents within a period of thirty (30) days from the date of delivery of this ruling. We further order that the respondent will have its costs for today's adjournment.

Order accordingly.

DATED at **DAR ES SALAAM** this 21st day of June, 2019.

A.G. MWARIJA
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.



A handwritten signature in black ink, appearing to read "A.H. Msumi".

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL