- Docs to be accompanied by Notice of Appeal Pg. 3 - Rule 96 (1)(k)

IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUNUO, J.A., KIMARO,J.A., And MJASIRI, J.A.)

CIVIL APPEAL NO.29 OF 2011

1. **PETRO NYASA**
2. **JULIUS NSAMBI**
3. **PASI SANI**
   & OTHERS

.....**APPELLANTS**

VERSUS

1. **SIMON DOMELA**
2. **THE DISTRICT NATIONAL RESOURCES OFFICER URAMBO DISTRICT**
3. **THE DISTRICT COMMISSIONER URAMBO DISTRICT**
4. **THE HON. ATTORNEY GENERAL**

.....**RESPONDENTS**

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Mujulizi, J.)

dated 8th October, 2010

in

Civil Case No. 9 of 2010

.....

RULING OF THE COURT

24 & 28 May, 2012

KIMARO, J.A.:

When the appeal was called on for the hearing today, the parties were represented by Mr. Kamaliza Kayaga, learned advocate holding the brief of Mr. Mtaki, learned advocate for the appellants, and Mr. Pius Mboya , learned Principal State Attorney for the

- Notice of Appeal that does not tally in dates with the decree Appealed from Pg. 4 - -

respondents. Mr. Kayaga prayed for an adjournment on the ground that Mr. Mtaki travelled out of the country and he had no instructions to proceed with the hearing.

The learned Principal State Attorney objected to the adjournment on the ground that there was no appeal to adjourn because of a variance in the date of the decree and the notice of appeal. The learned Principal State Attorney said that the notice of appeal shows that the appellant is appealing against a judgment which was pronounced on 8th October, 2010 while the decree does not show when the judgment was pronounced but shows that it was given on 6th day of October, 2010. He prayed that the appeal be struck out.

The learned advocate for the appellants conceded that the decree and the notice of appeal are in variance but at first, he insisted on his prayer for adjournment contending that the appellant can seek for amendment of the memorandum of appeal. However on reflection, he conceded that the position of the Court on appeals which are not properly filed before it has been to strike out the appeal.

Admittedly, the date on the notice of appeal at page 135 of the record of appeal and the decree at page 134 are at variance. The learned Principal State Attorney pointed out correctly that the notice of appeal shows that the appellants are appealing against a judgment that was delivered on 8th October, 2010 but the decree of the judgment they seek to impugn at page 134 does not show when it was delivered but it was signed on 6th October, 2010.

Under Rule 96(1) (h) of the Court of Appeal Rules, 2009 the record of appeal must mandatorily be accompanied by the decree or the order appealed from. The notice of appeal must comply substantially with Form D to the First Schedule of the Rules. Form D shows that one of the conditions which the appellant must comply with in giving the notice of appeal is to give the date when the judgment sought to be appealed from was given. The relevant portion of Form D reads:

NOTICE OF APPEAL

TAKE NOTICE that .....being dissatisfied with the decision of **Honourable Mr. Justice ..... given**

at.....on the ....day of .....20.....intends to appeal to the Court of Appeal of Tanzania ... (Emphasis ours).

As mentioned earlier, although the decree does not show when the judgment was pronounced, it shows that it was given on 6th October 2010 and not on 8th October 2010 as indicated in the notice of appeal. The provisions of Rule 96(1) are coached in mandatory terms, meaning that the appellant must comply with the requirements. Section 53(2) of the Interpretation of Laws Act [CAP2 R.E.2002] says that:

> *"When in a written Law the word "shall "is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

This Court has repeatedly held in several cases that, for an appeal to be competent, the memorandum of appeal must be valid. Where the memorandum of appeal is defective for failure to comply with the mandatory requirements as given in the Court of Appeal Rules, 2009 the appeal becomes incompetent and cannot therefore be adjourned.

In **Edward Bawacha & three others V The Attorney General** Civil Application No.128 of 2006 the Court found the application which was before it incompetent for citing a wrong provision of the law. In deciding an application for the adjournment of the application the Court cited with approval the case of **Leons Silayo Ngalai V Hon. Justine Alfred Salakana** , Civil Appeal No. 38 of 1996 and refused to adjourn the application. In the case of **Leons Silayo**, the Court held that:

> *"An incompetent appeal amounts to no appeal....Under such circumstances what the court does is to strike out the purported appeal off the register."*

A similar position was also taken by the Court in the case of **Ghati Methusela V Matiko Marwa Mariba** Civil Application No.6 of 2006(unreported).

Since the notice of appeal does not tally in dates with the decree appealed from, it makes the memorandum of appeal invalid and hence the appeal before us is incompetent and hence there is no appeal to adjourn. It is struck out with costs.

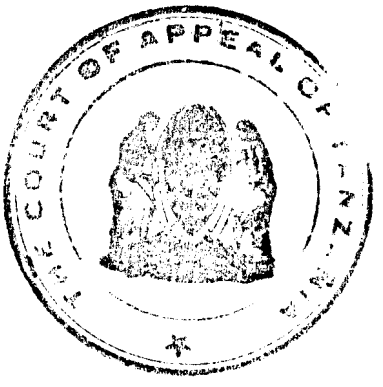
DATED at **TABORA** this 25th day of May, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



(Z.A. Maruma)
DEPUTY REGISTRAR
COURT OF APPEAL