



**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MUSSA, J.A., MUGASHA, J.A. And MKUYE, J.A.)**

**CIVIL APPEAL NO. 154 OF 2017**

**NATIONAL BANK OF COMMERCE..... APPELLANT**

**VERSUS**

- |   |                 |                    |
|---|-----------------|--------------------|
| <ul style="list-style-type: none"> <li>1. BASIC ELEMENT LIMITED</li> <li>2. ROBERT SIMON KISENA</li> <li>3. FLORENCE ROBERT MASHAU</li> <li>4. ROBESIKA AGRO-PRODUCTS LIMITED</li> <li>5. SIMON GROUP LIMITED</li> <li>6. LEONARD DOMINIC RUBUYE</li> </ul> | }<br>.....<br>} | <b>RESPONDENTS</b> |
|---|-----------------|--------------------|

(Appeal from the decision of the High Court of Tanzania  
 (Commercial Division) at Dar-es-salaam)

(Sehel, J.)

dated the 20<sup>th</sup> day of April, 2017

in

**Commercial Case No. 127 of 2013**

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**RULING OF THE COURT**

3<sup>rd</sup> & 15<sup>th</sup> May 2018

**MUGASHA, J.A.:**

The appellant sued the respondents jointly and severally under order **xxxv** of the Civil Procedure Act [CAP 33 RE.2002]. She claimed among other things, for the payment of a total sum Tshs. 8,976,130, 984.04 being outstanding amount as at 31/8/2013 of overdraft facility advanced to the

1<sup>st</sup> respondent; Tshs. 1,200,000,000/= being outstanding term loan as at 31/8/2013. The credit facilities were secured by among others, guarantees of the 2<sup>nd</sup> to 6<sup>th</sup> respondents. In the decision handed down on 20<sup>th</sup> April, 2017 the trial judge found the 1<sup>st</sup> respondent solely liable and she was condemned to pay the appellant the stated outstanding sums of the said credit facilities plus interest on the decretal sums. The guarantors 2<sup>nd</sup> to 6<sup>th</sup> respondents were all discharged from liability.

Dissatisfied with such finding, the appellant has appealed to the Court raising six grounds of appeal. However, we shall not reproduce them for reasons which will become apparent in due course.

At the hearing, the appellant was represented by Mr. Beatus Malima, learned counsel whereas the respondent had the services of Ms. Anna Marealle, learned counsel.

The appeal was greeted with a notice of preliminary objection filed on 7<sup>th</sup> February, 2018 on the following point:

*" That the record of appeal is defective and incomplete in contravention of the mandatory requirements of Rule 96(1) of the Tanzania Court of*

*Appeal Rules, G.N 368 of 2009 as it contains exhibits which were not tendered to the Court, also contravenes Rule 96 (g) and (k) of the Tanzania Court of Appeal Rules, 2009.”*

In her brief submission, Ms. Marealle pointed out that the record of appeal lacks a number of documents including: the counter affidavit of the respondent as per order of the trial court; the two Rulings of the trial court indicated at pages 854 and 867 of the record of appeal. She also added that, exhibits P1 and P2 which were tendered in the evidence at the trial are not included in the record of appeal. With the said omitted documents in the record of appeal, Ms. Marealle submitted that, the record of appeal is incomplete and the appeal is rendered incompetent for violating Rule 96 (1) of the Rules. On account of the said shortfalls, she urged us to strike out the incompetent appeal. To back her propositions she referred us to the cases of **COMMISSIONER GENERAL TRA VS JSC ATOMREDMETZOLOTO (AMRZA)**, Civil Appeal No. 101 of 2017, **MASKER LIMITED VS WAJIDALI RAMNAZALI JIWA HIRJI**, Civil Application No. 64 of 2010 and **TENGERU FLOWERS LIMITED VS DAL FOWARDING (T) LIMITED AND 3 OTHERS**, Civil Appeal No. 12 of 2011 ( all unreported).

In all those cited cases she submitted, the Court held in common that, where the record of appeal is incomplete, then the appeal is rendered incompetent deserving to be struck out.

On the other hand and after the respondent's counsel had already argued the preliminary objection, Mr. Malima surprised the Court having contended that, the notice of the preliminary objection was served to the appellant on 23<sup>rd</sup> April, 2018 after she had already filed an application for extension of time to include the omitted documents. He thus urged us to stay the hearing of the appeal pending the hearing of the application as the appellant has already corresponded with the Registrar to reschedule the hearing of the present appeal.

When asked by the Court to submit on the omitted documents, he conceded, but was of the view that those documents have no bearing on determination of the present appeal since the appellant is not contesting the entire judgment. The learned counsel thus urged the Court to overrule the preliminary objection and proceed to dismiss it.

In a brief rejoinder Ms. Marealle reiterated what she had earlier on submitted adding that, the concession by Mr. Malima on the omitted documents signifies that, the appeal is incompetent and deserves to be struck out.

At the outset, we wish to clearly point out that, what is before us is Civil Appeal No 154 of 2017. We are thus not seized with Misc Civil Application No 110 of 2018 which was brought to our attention through a statement from the bar and more so, after the hearing the respondent's arguments on the preliminary objection. This leaves a lot to be desired. Apart from noting that, the appellant's counsel was all out to drag the Court over an extraneous matter, we decline to comment on the matter which is not before us and neither are the related appellant's correspondences with the Registrar.

Reverting back to the preliminary objection raised by the respondent, we are tasked to determine the rival arguments of the parties. While Ms. Marealle argued that the incomplete record of appeal render the appeal incompetent, Mr. Malima classified those documents as being not essential for the determination of the appeal.

We have noted that, at page 854 of the record of appeal, pursuant to the respondents being served with the summary procedure order, it was ordered that a counter affidavit be filed by 18/10/13. However, that document is not incorporated in this record of appeal. Subsequently, page 862 is reflective that a Ruling was delivered granting the respondents leave to defend but it is not in the record of appeal. Furthermore, at page 867 of the record of appeal, another Ruling was delivered on 24/02/2015 by the trial court and it is not included in this record. We were as well not able to trace exhibits P1 and P2 in the record of appeal.

The point for our determination is whether or not the present record of appeal is complete and if so what is the way forward.

What has to be included in the record of appeal is regulated by Rule 96 (1) of the Rules, which stipulates as follows:

*" 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,*

Besides, the modality of exclusion of documents in the record of appeal is regulated by Rule 96(3) of the Rules which provides:

*"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”.*

[See also the case of **JALUMA GENERAL ENTREPRISES VS STANBIC BANK (T) LTD, Civil Appeal No. 77 of 2011** (unreported)]

In the view of the aforesaid, we do not agree with Mr. Malima’s view that the omitted documents are not relevant for the determination of the appeal. We say so because, it is as well settled law that 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 where a party has sought and obtained permission under rule 96(3) - See **FEDHA FUND AND TWO OTHERS VS GEORGE T. VARGHESE AND ANOTHER**, Civil Appeal No. 8 of 2008 , **COMMISSIONER GENERAL OF TRAN VS JSC ATOMREDMETZOLO (ARMZA)** (supra)and **JULUMA GENERAL SUPPLIES LTD VS STANBIC (T) LTD**, Civil Appeal No. 77 of 2011(both unreported). In **DODSAL HYDROCARBONS AND POWER TANZANIA LTD AND TWO OTHERS VS HASKMUKH BHAGWANJI MASRANI**, Civil Appeal No. 93 of 2012 (unreported), we clearly said:

*" It is significant to note here that the provisions of Rule 96(1) (d) are couched in mandatory terms*



*under this Rule, the record of proceedings is a vital document which must mandatorily form part of the record of appeal and omission to include it in the record renders it incompetent.”*

[Emphasis supplied]

In the context of the settled position of the law, the non inclusion of the counter affidavit and the Rulings by the trial court in the present appeal is in violation of Rule 96 (1) (d), (f) and (g) of the Rules. The extent of violation as far as Rule 96 (1) is concerned is to the effect that, the missing documents constitute part of the trial and interlocutory proceedings of the trial court which are essential for the determination of the first and only appeal which takes a form of rehearing and where possible re-evaluation the evidence at the trial. (See **PETERS VS SUNDAY POST [1958] E.A and ONESMO NANGOLE VS DR. STEVEN LEMOMO KIRUSWA AND TWO OTHERS, Civil Appeal No. 117 Of 2017(unreported).**)

In a nutshell, the record of appeal suffers from incompleteness and renders the appeal incompetent. We thus find the preliminary objection merited, uphold it and accordingly strike out the appeal with costs.

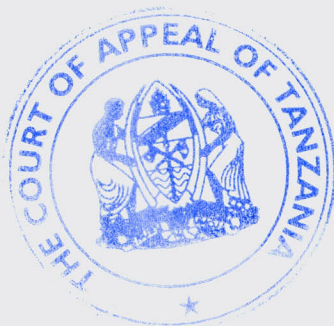
**DATED at DAR-ES-SALAAM** this 10<sup>th</sup> day of May, 2018.

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

S.E.A. MUGASHA  
**JUSTICE OF APPEAL**

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

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



A handwritten signature in black ink, appearing to read "P.W. Bampihya".

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