

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

CIVIL APPICATIONL NO. 12 OF 2007

K.S.F. KISOMBE.....APPELLANT

VERSUS

TANZANIA HARBOURS AUTHOTIRY AND
OTHERS..... RESPONDENT

(Application for Leave to amend the record of appeal from the
decision of the High Court of Tanzania at Dar es Salaam)

(Mwaikugile, J.)

Dated 9th September day of December, 2005
in
Civil Case No. 130/2003

.....

17 & 31 August,2007

R U L I N G

KAJI, J. A.:

In a notice of motion made under Rule 104 of the Court of Appeal Rules, 1979, the applicant, K.S.F. Kisombe, through his advocate Mr. Kashumbugu, is moving the court to grant him leave to amend the record of appeal as follows:-

- (a) By removing the name of the first respondent Tanzania Harbours Authority which has been changed by operation of law thereby substituting the name Tanzania Port Authority.
- (b) By allowing the applicant to include important documents in the amended record of appeal which did not appear in the original record of appeal, instead of filing a supplementary record thereafter.

In his brief oral submission based on his affidavit supporting the notice of motion, Mr. Kashumbugu submitted that, when the case started in the High Court, the first respondent was known by the name of Tanzania Harbours Authority. But through operation of law, the Ports Act No.17 of 2004, the name was changed to that of Tanzania Port Authority. He thus prayed for leave to amend the record by removing the name of the first respondent Tanzania Harbours Authority. And by substituting thereat the name Tanzania Ports Authority.

Mr. Kashumbugu further submitted that, while Tanzania Harbours Authority was a specified corporation placed under the second respondent, the Presidential Parastatals Sector Reform Commission, Tanzania Ports Authority is not a specified corporation and therefore not covered by the Presidential Parastatal Sector Reform Commission. He therefore urged the court to remove the name of the second respondent from the record of appeal.

Mr. Kashumbugu further submitted that, in preparing the record of appeal, two important documents were not included. These are: **One:** A letter from Tanzania Harbours Authority to the Registrar National Board of Material Management dated 17/1/1999 signed by the Director General of Tanzania Harbours Authority. **Two:** A letter from Tanzania Harbours Authority- Mkurugenzi wa Utumishi dated 24/3/1999. He therefore prayed for leave to include them in the amended record of appeal (Appeal No.123 of 2005). Dr. Mapunda who appeared for the respondent assisted by Dr. Mhina did not object the removal and substitution of the name of the first respondent, and also the removal of the second respondent from the

record of appeal. However they strongly resisted the move to include the two letters in the amended record of appeal. Dr. Mhina who spearheaded the objection, contended that, Rule 104 of the Court Rules, 1979 under which the notice of motion was made deals with amendment of documents in the record of appeal, and not addition or inclusion of documents in the record of appeal. The learned counsel pointed out that, the procedure for adding or including additional documents in the record of appeal is to file a supplementary record under Rule 92 (3) of the Court Rules, 1979.

Dr. Mhina was therefore of the view that, this application for inclusion of the two letters in the amended record of appeal is misconceived and ought to be dismissed with costs.

As demonstrated above, the respondent's counsel did not object the applicant's prayer to remove the name of the first respondent, Tanzania Harbours Authority, and to substitute thereat the name Tanzania Ports Authority, by virtue of section 81(2) of the Ports Act, 2004. That prayer is therefore granted. The applicant is

granted leave, to amend the record of appeal by removing the name of the first respondent Tanzania Harbours Authority and by substituting thereat the name Tanzania Ports Authority. It was agreed by learned counsel of both parties that Tanzania Ports Authority is not a specified corporation and therefore not covered by the Presidential Parastatal Sector Reform Commission. That being the position the applicant is granted leave to amend the record of appeal by removing from the record of appeal the second respondent, the Presidential Parastatal Sector Reform Commission.

The applicant's prayer for leave to include two letters in the amended record of appeal appears to be an up hill track. Rule 104 under which this application was made reads as follows:-

104. "The court may at any time allow amendment of any notice of appeal or notice of cross – appeal or memorandum of appeal, as the case may be or any other part of the record of appeal, on such terms as it thinks fit"

My understanding of this provision is that, the document which may be allowed to be amended must first be in the record of appeal but with some short falls. It must be in the record which the party wants to rectify the shortfalls. In my view the provision does not contemplate introduction or addition or inclusion of a document which is wanting. If a party is of the view that the record of appeal is defective or insufficient for the purpose of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal as provided for under Rule 92 of the Court Rules, 1979. Mr.Kashumbugu urged the court to invoke its inherent powers under Rule 3 to allow the inclusion of the two letters in the record of appeal if it finds Rule 104 inapplicable. With great respect to the learned counsel, the court can only use its inherent powers under Rules 3 when dealing with any matter for which no provision is made by the Court of Appeal Rules, 1979 or any other written law. In the instant case there is a clear provision for the remedy prayed for, that is, by lodging a supplementary record

containing the said two letters under Rule.92. In that respect I do not think this is an appropriate case to invoke the inherent powers of the court under Rule 3. There is nothing suggesting that the door for using the provisions of Rule 92 is closed. So the applicant can use it if he so wishes.

In the result, and for the reasons stated above, I grant leave to the applicant to amend the record of appeal No. 123 of 2005 by removing the name of the first respondent Tanzania Harbours Authority and by substituting thereat the name Tanzania Ports Authority. I also grant leave to the applicant to amend the record of appeal by removing from the record of appeal the second respondent, Presidential Parastatal Sector Reform Commission. However I refuse to grant leave to the applicant to amend the record of appeal by including or adding the two letters in the record of appeal purportedly under Rule 104 of the court Rules, 1979. The application is partly allowed and partly dismissed to that extent. Costs to abide by the result of the main appeal No. 123 of 2005.

DATED at DAR ES SALAAM this 17th day of August, 2007.

S.N. KAJI
JUSTICE OF APPEAL

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

I.P. KITUSI
DEPUTY REGISTRAR