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

**(CORAM: MUSSA, J.A., MUGASHA, J.A., AND MWAMBEGELE, J.A.)**

**CIVIL APPEAL NO. 96 OF 2012**

**TANZANIA TEACHERS UNION ..... APPELLANT**

**VERSUS**

**CHIEF SECRETARY**

**HON. MINISTER, PRESIDENT'S OFFICE, PUBLIC SERVICE MANAGEMENT** ..... **RESPONDENTS**

**GENERAL SECRETARY, MINISTRY OF EDUCATION AND VOCATIONAL TRAINING**

**[Appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam (Labour Division)]**

**(Wambura, J.)**

**Dated the 2nd day of August, 2012**
**in**
**Miscellaneous Application No. 96 of 2012**

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## RULING OF THE COURT

22nd August & 8th September, 2017

**MWAMBEGELE, J.A.:**

When the appeal was called on for hearing on 22.08.2017 Mr. Sylvester Mwakitalu, the learned Principal Sate Attorney who appeared for the respondents, rose to address us on the preliminary objection, notice

of which had earlier been lodged on 16.08.2017 in terms of Rule 107 of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules"). The Preliminary Objection was resisted by Mr. Simon Gabriel Mnyele, the learned counsel who represented the appellant.

The Preliminary Objection (henceforth "the PO") is composed of two points couched thus:

1. *The Appeal is incompetent and bad in law for contravening the provisions of Order XX Rule 7 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002; and*
2. *The Appeal is incompetent and bad in law for contravening the provisions of rule 96 (1) (d) of the Tanzania Court of Appeal Rules, 2009.*

Addressing us on the first point of the PO, Mr. Mwakitalu submitted that the provisions of Order XX rule 7 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 have been flouted in that in that the dates of the ruling of the High Court (Labour Division) intended to be challenged and of the decree thereof do not tally. He submitted that the date of the

ruling is 01.08.2012 while the date of the decree is 02.08.2012. This discrepancy, he submitted, was fatal and made the appeal incompetent. On this proposition, he cited to us **Mwajuma Ahmada Mzee v. Hadia Ahmada Mzee & 2 Others**, Civil Appeal No. 122 of 2015 and **Simon Nchagwa v. Majaliwa Bande**, Civil Appeal No. 126 of 2008 (both unreported). In the two cases, like in the instant, the dates of the decisions and that of the decrees did not tally and the Court in both instances held that the appeals were incompetent and proceeded to strike them out. The learned counsel thus asked us to do as the Court did in those cases.

Asked by the Court what the dates "26/07/2012 & 02/08/2012" appearing at the top of the Ruling signified, the learned Principal State Attorney responded that he did not know and any answer thereof would be speculation. When the court brought to the attention of the learned Principal State Attorney that the record at page 83 showed that the impugned Ruling was pronounced on 02.08.2012, he did not deny that glaring fact on record. However, the learned Principal State Attorney was quick to state that the date on which the Ruling was pronounced ought to

have been apparent on the Ruling itself; not the record of proceedings. On this score, he reiterated that the appeal should be struck out.

Submitting on the second point, Mr. Mwakitalu stated that the provisions of rule 96 (1) (d) of the Rules were offended against in that the Ruling at page 85 of the record shows that the court made several orders on 27.07.2012 but the record is devoid of the proceedings of that date. The learned Principal State Attorney placed reliance on our unreported decision of **The Attorney General v. Jackson s/o Ole Nemeteni @ Ole Saibul @ Mdosi @ Mjomba Mjomba & 19 Others**, Consolidated Civil Appeal No. 35 and 41 of 2010 to state that the omission to incorporate in record of appeal the proceedings of 27.07.2012 made the record incomplete and rendered the appeal incompetent. Again, he urged us to strike out the appeal.

Responding, Mr. Mnyele submitted in respect of the first point that the record is quite clear that the ruling intended to be challenged was delivered on 02.08.2012; the date of the drawn order. He conceded that the date of delivery of the ruling does not appear in the Ruling but the learned counsel argued that as the record is clear on the date on which

the Ruling intended to be challenged was pronounced, he asked the Court to engage rule 111 of the Rules and order an amendment thereof. Failure to include the date in the Ruling on which it was pronounced was, he stated, a *lapsus calami* which the Court could even act *suo motu* to order rectification.

On the second point, Mr. Mnyele conceded that the proceedings of 27.07.2012 are not incorporated in the record of appeal and wondered why they were skipped. However, the learned counsel was quick to state that the skipped proceedings are not essential for the determination of the present appeal. In any case, the Court was urged to engage rule 4 (1) of the Rules and, in the interest of justice, to depart from the application of rule 96 (1) (d) of the Rules. This course of action, he argued, would not offend the respondents as what transpired on 27.07.2012 is very clear in the impugned Ruling and added that the course enhanced the interests of justice.

Alternatively Mr. Mnyele urged us to go to the original record of the case and find out what transpired on that date.

The learned counsel thus urged the Court to overrule both points of objection.

In a short rejoinder, Mr. Mwakitalu submitted that the Court cannot apply rules 4 (1) and 111 of the Rules because the appellant did not act diligently. On this point, the learned Principal State Attorney urged the Court to follow **Jackson s/o Ole Nemeteni @ Ole Saibul @ Mdosi @ Mjomba Mjomba & 19 Others** (supra) in which the Court .

We have considered the learned rival arguments by both counsel for the parties. For reasons that will be apparent in the course of this ruling, we find it apt to start with the determination of the second point of objection. This is a complaint over noncompliance with the provisions of rule 96 (1) (d) of the Rules; lack of the proceedings of 27.02.2012 in the record of appeal.

On this point, luckily, the parties are at one that the provisions were not complied with. The only argument on which the parties are at issue, is whether the ailment is fatal to the appeal. While Mr. Mwakitalu is of a firm view that the ailment is fatal and makes the record incomplete and

consequently renders the appeal incompetent, Mr. Mnyele, on the other hand, also with equal firm view, thinks the ailment is inconsequential in that it is not essential for the determination of the appeal particularly basing on the fact that what transpired on that date has sufficiently been explained in the impugned Ruling. Mr. Mnyele did not stop there; he was also of the view that the Court, under rules 4 (1) and 111 of the Rules, can dispense with the application of the rule for the ends of justice. Alternatively, Mr. Mnyele urged the Court to have a glance at the original record of the case with a view to seeing what transpired on the date.

Having dispassionately considered the point and having gone through the authorities on the point, we, with unfeigned respect to Mr. Mnyele, are inclined to disagree with him. With equal unfeigned respect, we are ready to accede Mr. Mwakitalu's contention to the effect that the infirmity makes the record incompetent and renders the appeal incompetent. We shall demonstrate.

As already stated, Mr. Mnyele urged us to forbear with the application of rule 96 (1) (d) of the Rules, but unfortunately, the learned counsel, despite citing rules 4 (1) and 111 of the Rules did not cite to us

any case law on the point. However, we think the learned counsel had in mind the cases of **Chama cha Walimu Tanzania v. the Attorney General**, Civil Application No. 151 of 2008, **Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu**, Criminal Application No. 6 of 2012, **Dainess Muhagama v. Togolani Mbuso**, Civil Appeal No. 15 of 2013, **Tanzania Heart Institute v. The Board of Trustees of NSSF**, Civil Application No. 109 of 2008 and **Mkuki James Kiruma v. R.**, Criminal Appeal No. 163 of 2012 (all unreported). In all those cases, the Court ordered the incompetent appeal/application to proceed to hearing despite the shortcomings complained of by way of preliminary objections. But, as we observed in **Shaban Fundi v. Leonard Clement**, Civil Appeal No. 38 of 2014 (unreported) that power is exercised by the Court very sparingly, particularly in matters of public interest cases. Having considered the circumstances of the present matter, we have come to the considered view that the circumstances and facts obtaining in this case do not fall within the ones prevailing in the cases we reservedly exercised such powers.

In a bid to justify our stance, we take the liberty to reproduce rules 4 (1) and 111 of the Rules under which the learned counsel for the appellant advised us to rely in engaging rule 4 (1) of the Rules to dispense

with the application of rule 96 (1) (d) of the Rules. Sub-rule (1) of rule 4 reads:

> *"The practice and procedure of the Court in connection with appeals, intended appeals and revisions from the High Court, and the practice and procedure of the Court in relation to review and reference; and the practice and procedure of the High Court and tribunals in connection with appeals to the Court shall be as prescribed in these Rules or any other written law, but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interests of justice."*

And rule 111 of the Rules provides:

> *"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."*

Despite the fact that we agree with Mr. Mnyele that rule 4 (1) of the Rules bestows upon us with the powers he beckons us to exercise, we, with respect, do not think the provisions of rule 111 of the Rules fall within the request of the learned counsel. As seen in the provisions cited above, that power to allow amendment is reserved for amendment of the "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". We have pondered over the matter very closely and we must confess that the point has substantially exercised our minds. Having so deliberated, we do not think such powers extend to amendment of the proceedings which the court did not include in the proceedings. We say so because what Mr. Mnyele asks us to do is to amend or order amendment of the proceedings which did not include the proceedings of 27.07.2012. In spite of the fact that we are sure that the ailment was occasioned by the court, we do not think we will be legally justified to order such inclusion. We are of the stance because the learned counsel for the appellant certified the record of appeal as correct. Had he taken

care of reading the proceedings of the court leading to the impugned judgment, he would not have failed to discover the anomaly and take necessary steps to have it rectified. That he did not do before certification and he is himself to blame. For this reason, we decline the invitation extended to us by Mr. Mnyele.

As an extension to the above determination, even if we would have allowed such amendment, which we have just declined, we would not have entertained the appeal, for, we do not think the record of appeal would be free from any other ailment. During the hearing, we prompted on Mr. Mwakitalu, learned Principal State Attorney as to what appears at page 83 of the record which shows that the High Court adjourned the matter and ordered to "resume after 30 minutes". However, the record is silent on whether the court resumed and, if it did, what transpired on resumption. Mr. Mnyele intimated to us that he was there on the material day and that the court did not resume but that they were told that the Ruling would be delivered on 02.08.2012. That part is, as well, missing in the record of appeal. As bad luck would have it, Mr. Mnyele did not submit on this shortcoming.

The foregoing takes us to the consideration of Mr. Mnyele's prayer to the effect that we should go to the original record of the case to see what transpired on 27.07.2012. Again, with unfeigned respect, Mr. Mnyele's prayer is clear testimony that the record of appeal is incomplete. We were confronted with an akin situation in the recent past in **Abubakar Himid v. Edward Nyelusye**, Civil Appeal No. 70 of 2010 (unreported) whose judgment the Court pronounced on 28.07.2017 at Dar es Salaam. In that case, the Court was advised to peruse the original record of the case in order to rectify the anomaly complained of by the respondent. We observed at page 4 of the typed Ruling that:

> *"... in hearing appeals the Court consists of three judges (collegial Court) (see rules 27 and 28 of the Rules) hence it would be very inconvenient for the justices to use the original record simultaneously. Such record is reserved for reference by the Court in case of any uncertainty in the contents of the record of appeal"*

In the light of the foregoing we find ourselves loathe to go to the record of appeal to see what transpired on 27.07.2012 and resolve the shortcoming. And, as already said above, the prayer is clear testimony by the appellant that the record of appeal is incomplete. For being incomplete, the appeal is rendered incompetent. On this stance, we are not reinventing the wheel in this case. We have so held in a plethora of authorities; that an incomplete record renders an appeal incompetent – see: **African Barrick Gold Mine PLC v. Commissioner General TRA**, Civil Appeal No. 77 of 2016, **Mazher Limited v. Wajidali Ramzanali Jiwa Hirji**, Civil Appeal No. 64 of 2010, **Badugu Ginning Company Limited v. Silwani Galati Mwantembe & 3 Others**, Civil Appeal No. 91 of 2012 and **Pendo Masasi v. Tanzania Breweries Ltd**, Civil Appeal No. 20 of 2014; all unreported, to mention but a few.

In the same parity of reasoning, we do not accede to the contention of Mr. Mnyele for the appellant that the proceedings of 27.07.2012 are not relevant for the determination of the present. We state so because in order to know whether or not the proceedings are not relevant for the determination of the appeal can be justifiably determined after their presence in the record of appeal.

The second point of preliminary objection is therefore sustained. For this reason, the second point having been overruled, we do not find it necessary to determine the first point of objection, for, that course will not serve any useful purpose on the fate of the appeal.

This incompetent appeal is struck out with costs.

Order accordingly.

**DATED** at **DAR ES SALAAM** this 31st day of August, 2017.

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

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

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

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

A. H. MSUMI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**