

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MBAROUK, J.A., MUGASHA, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 138 OF 2015

**PETRINA ALOYCE (As Administratrix of the Estate
of the late Anastazia Emmanuel Masonganya) APPELLANT**

VERSUS

CHRISTINA LEONARD NYUMAYINZU RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania Tabora)

(Rumanyika, J.)

Dated the 27th day of August, 2014

in

Land Appeal No. 38 of 2010

RULING OF THE COURT

26th & 28th September, 2017

MWAMBEGELE, J.A.:

Against this appeal filed by Petrina Aloyce (as administratrix of the estate of the late Anastazia Emmanuel Masonganya), the respondent, through a law firm going by the name K. K. Kayaga Advocates, filed two sets of preliminary objections. The first set comprises two points and it was filed on 23.11.2015. It reads:

1. The appeal is incompetent as the Memorandum and the Record of Appeal were served on the respondent on 19.11.2015 after lapse of 14 days beyond the prescribed time contrary to the mandatory provisions of Rule 97 (1) of the Tanzania Court of Appeal Rules, 2009; and
2. That the Memorandum of Appeal and the Record of Appeal contravene the mandatory provisions of Rule 12 (4) of the Tanzania Court of Appeal Rules, 2009.

The second set which was filed on 20.09.2017, is composed of only one point. It reads:

1. The Record of Appeal is incomplete as the necessary Application and Written Statement of Defence/Reply to the Application before the District Land and Housing Tribunal in Land Application No. 35 od 2006 are missing in the Record Appeal in breach of Rule 96 (2) (c) of the Tanzania Court of Appeal Rules, 2009.

The two sets of preliminary objections were heard on 26.09.2017 during which the respondent had the representation of Mr. Kamaliza Kamoga Kayaga, learned counsel and the appellant appeared in person, unrepresented. She therefore fended for herself.

It was Mr. Kayaga for the respondent who kicked the ball rolling in arguing the preliminary objections. However, we wish to state at this juncture that during the hearing, the learned counsel opted to drop the second ground having realized that he would not successfully sail it through. The respondent therefore was left with one ground of preliminary objection in each set.

In his arguments on both sets of the preliminary objection, Mr. Kayaga was very brief but to the point. On the ground in the first set, the learned counsel submitted that the Memorandum and Record of Appeal were filed on 30.10.2015 but were served upon the respondent on 19.11.2015 which was contrary to the mandatory provisions of Rule 97 (1) of the Tanzania Court of Appeal Rules, 2009

(the Rules) which sets a time limit of seven days after the filing. On this premise, Mr. Kayaga urged the Court to strike out the appeal.

On the second ground (which is the subject of the second set), Mr. Kayaga, submitted that the Record of Appeal is incomplete because it lacked the pleadings filed in the District Land and Housing Tribunal; namely, the Application and the Written Statement of Defence/reply to the Application. He clarified that the same was evidenced by the Index of Contents of the Record of Appeal where items 5 and 6 regarding Application and Reply to the Application are indicated as "NIL". The incomplete record, he submitted, rendered the appeal incompetent. In the premises, the learned counsel submitted, the appeal should be struck out with costs.

On her part, the appellant conceded to the defects pointed out by Mr. Kayaga for the respondent. However, she was quick to pray that she should be allowed to withdraw the appeal and file a fresh one after engaging an advocate for that purpose. On the question of costs, she prayed that no order should be made as to costs because she has no money to pay as costs.

In his short rejoinder, Mr. Kayaga prayed that costs should follow the event. However, on reflection, the learned counsel decided to leave the matter in the wisdom of the Court.

We have considered the matter. The preliminary points of objection, having been conceded to by the appellant, we will not have much hassle over it. Indeed, as Mr. Kayaga for the respondent submitted, the provisions of Rule 97 (1) of the Rules, provide in no uncertain terms that an appellant shall serve upon the respondent copies of the memorandum of appeal and the record of appeal before or within seven days after lodging the same in the appropriate registry. Let the subsection speak for itself:

"The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of Rule 86".

For the avoidance of doubt, Rule 86 provide for the requirement of the respondent to give the address for service after being served with a Notice of Appeal.

It is no doubt that by the use of the word "shall", in terms of the provisions of section 53 (2) of the Interpretation Act, Cap. 1 of the Revised Edition, 2002, the sub-rule has been couched in mandatory terms compliance of which is imperative. It follows that failure to comply with Rule 97 (1) of the Rules makes the present appeal incompetent.

The foregoing discussion would have sufficed to dispose of this matter but, for completeness, we find it apt to determine on the second ground as well.

As rightly submitted by Mr. Kayaga and readily conceded by the appellant, the record of appeal does not contain the pleadings in the District Land and Housing Tribunal. The Application, the Written Statement of Defence and the reply thereof, if any, are missing in the Record of Appeal. This makes the Record of Appeal incomplete

as such documents are mandatory to appear in the Record of Appeal as stipulated by Rule 96 (2) of the Rules. This sub-rule stipulates that:

"... the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) ..."

There is a long and unbroken chain of authorities of this Court which provide that omission to include in the record of appeal documents enumerated under Rule 96 (1) and (2) of the Rules is fatal and makes the appeal incompetent – see: **Mazher Limited v. Wajidali Ramzanali Jiwa Hirji**, Civil Appeal No. 64 of 2010, **Badugu Ginning Company Limited v. Silwani Galati Mwantembe & 3 ors**, 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 case at hand, the appellant ought to have included in record of appeal pleadings at the trial court as dictated by the provisions of Rule 96 (2) of the Rules failure of which makes the record of appeal incomplete and, consequently, renders the appeal incompetent.

It may not be irrelevant to point out also that the record of appeal shows at page 33 in the District Land and Housing Tribunal, a preliminary objection was filed and was ordered to be disposed of by written submissions. The preliminary objection, the written submissions thereof as well as the Ruling are not part of the record of appeal. This ailment lands the present appeal in the same category of being incompetent.

We have thought over the appellant's prayer of allowing her to withdraw the appeal after the concession find ourselves loathe to accede to her prayer for the obvious reason that taking that course would have the effect of pre-empting the preliminary objection raised by the respondent, a course which we have all along been discouraging. There is a long list of cases on the point. One such

case is **Mary John Mitchell v. Sylvester Magembe Cheyo & others**, Civil Application No. 161 of 2008 (unreported) in which we reiterated our earlier position we stated in **Method Kimomogoro v. Board of Trustees of TANAPA**, Civil Application No. 1 of 2005 (also unreported) in the following terms:

"This court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of."

See also: **Shahida Abdul Hassanali Kassam v. Mahedi Mohamed Gulamali Kanji**, Application No. 42 of 1999 (Unreported), **Almas Iddie Mwinyi v. National Bank of Commerce & Another** [2001] TLR 83, **the Minister for Labour and Youth Development and Shirika la**

Usafiri DSM v. Gaspa Swai & 67 others

[2003] TLR 239 and **Frank Kibanga v.**

ACCU Ltd, Civil Appeal No. 24 of 2003 (all unreported), to mention but a few.

In the light of the above authorities, the prayer by the appellant to be allowed to withdraw the appeal after the preliminary objection and the concession thereof is, for the reasons stated, refused.

Regarding costs, we are alive to the general principle that they normally follow the event. However, as Mr. Kayaga did not strenuously press for them and left the wisdom of the Court to prevail, we are of the considered view that this being a matter stemming from the administration of estates and any order as to costs will have the effect of depleting the estates, justice will smile if each party is ordered to bear its own costs.

The above said and done, the present appeal is struck out with
no order as to costs.

Order accordingly.

DATED at **TABORA** this 27th day of September, 2017.

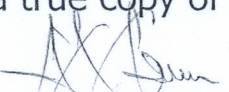
M. S. MBAROUK
JUSTICE OF APPEAL

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