

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: MBAOURK, J.A., MUSSA, J.A., And JUMA, J.A.,)**

**CIVIL APPEAL NO. 52 OF 2014**

**TANZANIA BREWERIES LIMITED.....APPELLANT**

**VERSUS**

**JONATHAN KALAZE .....RESPONDENT**

**(An appeal from the decision of the High Court of  
Tanzania at Mwanza)**

**(Sumari, J.)**

**Dated 21<sup>st</sup> day of September, 2012**

**in**

**Civil Appeal No. 38 of 2010**

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**RULING OF THE COURT**

5<sup>th</sup> & 9<sup>th</sup> September, 2014

**MBAROUK, J.A.:**

When the appeal was called on for hearing, the Court wanted to satisfy itself as to the propriety of the record of appeal having noted that the same was incomplete. That concern prompted the Court to raise the point suo motu to Mr. Rosan Mirambo, learned advocate for the appellant.

The centre of our concern arose after having noted that in the judgment of the trial Resident Magistrate's Court in Civil Case No. 51 of 2007 found at page 69 of the record of appeal, the trial magistrate noted to have stated as follows:-

*" Again the process after filing this suit the plaintiff prosecuted case and plaintiff's case on 10<sup>th</sup> day of November, 2008 and Mr. Bahebe advocate was called for defence as the advocate of the Defendant. **However he couldn't manage apart from various adjournments. On 28/7/2010 the court was ready but Mr. Shimbo advocate for the Defendant failed to bring witnesses for the Defendant and prayed to close defence case.**" (Emphasis added).*

However, the record of appeal in the instant appeal is missing all that part of proceedings showing that there were various adjournments. Also part of the proceedings which shows that Mr. Shimbo, advocate for the defendant failed to bring his witnesses and prayed to close the defence case was also missing.

Furthermore, this Court also found at page 59 of the record of appeal, that the trial court ordered the parties to argue the preliminary objection by way of written submissions, but the record of appeal does not contain neither copies of those written submissions nor a copy of the ruling of that preliminary objection.

At the hearing, Mr. Mbwambo vehemently argued that the documents which are missing in the record of appeal are not vital and unnecessary for the determination of this appeal. After all, he added that, the missing documents even if left out, they have no impact on the judgment of the trial court and have not prejudiced the respondent. Having submitted that, Mr. Mbwambo urged us to allow the appeal to proceed for hearing as the defects are not fatal and what is contained in the record of appeal is enough to dispose of the appeal. He relied upon the proviso to Rule 96(1) of Court of Appeal Rules, 2009 (the Rules) to support his argument.

It seems that even in his written submission, Mr. Mbwambo noted the said anomaly where he stated that, he

inadvertently omitted page 7 of the original record which is part the trial court's proceedings. But the fact is that as pointed out earlier, even page 9 which should have contained the proceedings after 20/1/2009 until the day when the trial court ordered the closure of defence case and reserved the the delivery of the judgment is also missing.

On his part, Mr. Salum Amani Magongo, learned advocate for the respondent, submitted that the referred missing page 7 of the proceedings of the trial court is very vital as it should have contained the proceedings relating to the examination in chief and cross-examination of the plaintiff who was the only witness in the plaintiff's case. Mr. Magongo, then submitted that, the effect of not being provided with the said missing parts of the record of proceeding is to deny the respondent his right to be heard fully, which is against a fair play and against the rules of natural justice.

He also referred us to page 115 of the record of appeal where the High Court Judge referred in her judgment what

have been stated in the written submission lodged by Mr. Bantulaki, the then the counsel for the respondent, but the record of appeal do not contain such copies of the respondent's written submission. Mr. Magongo further submitted that, the pointed out anomalies have surely prejudiced and affected the respondent having not been provided with complete record of appeal. He then urged us to find, that the defects render the appeal incompetent, hence, the same should be struck out with costs.

In his brief re-joinder submission, Mr. Mbwambo referred us to Rule 99(1) of the Rules, and submitted that according to his understanding, Rule 99(1) of the Rules requires the respondent when there are such anomalies, he/she is under the duty to lodge in Court such missing documents. In other words, Mr. Mbwambo wanted to put the blame to the respondent for his failure to bring the missing document as per the requirement under Rule 99(1) of the Rules.

As for costs, Mr. Mbwambo submitted that, if the court finds that the record of appeal is incompetent, his client should not be condemned to costs, because the matter was raised by the Court *suo motu*.

As pointed out earlier, the centre of controversy in this appeal is the concern of the Court to the effect that the record of appeal is missing some parts of the record of proceedings and the respondent's written submission referred by the High Court Judge in her judgment. For that reason, this has prompted us to examine closely the requirements relating to the filing of the record of appeal in the Court of Appeal Rules, 2009.

It is a fact that as this appeal arises from the High Court in its appellate jurisdiction, hence we are of the opinion that the applicable Rule is Rule 96 (2) of the Rules which provides as follows:-

*"For the purpose of any appeal from the High Court in its appellate jurisdiction, the record of appeal shall*

*contain documents relating to the for proceedings in the trial court corresponding as nearly as may be to these set out in sub-rule (1) and shall contain also the following documents relating to the appeal to the first appellate court:-*

- (a) .....
- (b) .....
- (c) the record of proceedings;**
- (d) .....
- (e) .....
- (f) .....".

(Emphasis added).

As shown earlier herein above, the record of appeal contains several missing parts of the record of proceedings, ruling and written submission. Some missing parts includes record of proceedings concerning examination in chief and cross examination of the appellant who was the sole witness in the plaintiff's case. Despite the glaring truth that the

record of appeal has not complied with the requirements of Rule 96 (2) (c) of the Rules to which Mr. Mbwambo has not disputed, but he strongly maintained that all those missing parts of proceedings of the trial court are not vital parts of the record of proceedings and they can safely be left out without affecting the result of the decision of the trial court.

However, when we reminded Mr. Mbwambo, the existence of Rule 96 (3) of the rules, he still maintained his position that the defects are not fatal and have not prejudiced the respondent. Rule 96 (3) of the Rules stipulates that:-

*"A Justice or Registrar of the High Court or tribunal, may, on application of any party, direct which documents or parts of document should be excluded from the record, application for which direction may be made informally."*

That position of the law has been emphasized in various decisions of this Court. For example, see **Fedha Fund**



**Limited and Two Others vs. George T. Verghese and Another**, Civil Appeal No 8. Of 2008, **Mariam Iddi (As Administratrix of the Estate of the late Mbaraka Omari) vs. Abdulrazack Omari Laizer (As Administrator of the Estate of Abubakar Omari) and Another**,. Civil Appeal No. 20 of 2013, **Wilson Tarimo vs. Nic Bank (T) Limited (formerly known as Savings and Finance Commercial Bank Limited) Civil Appeal No. 53 of 2014** (All unreported).

**In Fedha Fund Limited and Two Others** (supra) this Court has given more interpretation of Rule 96 (3) previously Rule 89 (3) of the old Court of Appeal Rules, 1979 and stated as follows:-

*"....., the decision to choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal. Under rule 89 (3) of the Court Rules, it is either*

***a Judge or a Registrar of the High court who, on an application by a party, has to direct which documents to be excluded from the record of appeal. Since the learned advocate for the appellant did not obtain such leave, it was mandatory for him to file the documents.***”(Emphasis added).

We are of the opinion that, advocate for the appellant in the instant case had no option of his own to omit or decide which parts of the missing record of proceedings are not relevant without having first complied with the requirements under Rule 96 (3) of the Rules. Mr. Mbwambo had an option to correct the defect if he had complied with the requirements stated *under Rule 96 (6) of the Rules which states as follows:-*

*"Where a document referred to in rule 96 (1) and (2) is omitted from the record, the appellant may within 14 days*

*of lodging the record of appeal without  
leave include the document in the  
record."*

However, the advocate for the appellant, instead he wanted to share the blame with the respondent having contended that according to Rule 99 (1) of the Rules the respondent too has a duty to lodge a supplementary record of appeal containing copies of any further documents or additional part of document required for proper determination of the appeal. However, we are of the opinion that as far as this appeal was lodged by the appellant, hence he is the one who is under the duty to file a proper record of appeal so as to move the Court properly.

We are increasingly of the view that as far as the record of appeal has omitted documents referred to in Rule 96 (2) of the Rules, and as far as there is no order of the Court to comply with the requirements under Rules 96 (3) of the Rules to exclude those omitted documents from the record of appeal, the same remains defective and hence incompetent.

For that reason, we are constrained to strike out the appeal.  
In the event, the appeal is hereby struck out. Each party to  
bear his costs as the matter was raised by the court *suo*  
*motu*.

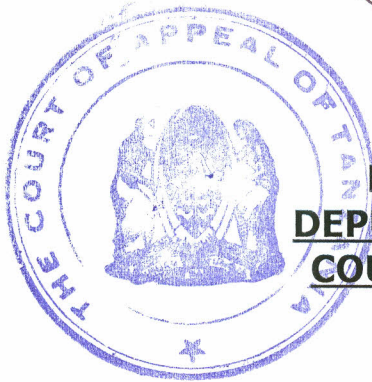
**DATED** at **MWANZA** this 8<sup>th</sup> day of September, 2014.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

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

I. H. JUMA  
**JUSTICE OF APPEAL**

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



  
M.A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**