

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

**(CORAM: MKUYE, J.A., SEHEL, J.A. And GALEBA, J.A.)**

**CIVIL APPEAL NO. 116 OF 2021**

**DR. SALUM ALI CHAMBUSO ..... APPELLANT**

**VERSUS**

**PAULO ELIAS MARO ..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania  
Dar es Salaam District Registry at Dar es Salaam)**

**(Mihayo, J.)**

**dated the 28<sup>th</sup> day of February, 2007**

**in**

**Civil Appeal No. 191 of 2004**

.....

**RULING OF THE COURT**

26<sup>th</sup> Oct. & 5<sup>th</sup> November, 2021

**SEHEL, J.A.:**

This is a ruling on application to file an amended record of appeal and a supplementary record of appeal made under Rules 111 and 96 (7), respectively of the Tanzania Court of Appeal Rules ("the Rules").

Before going into the merits of the application, we find it necessary to give brief facts relevant to the present application. The respondent unsuccessfully sued the appellant and one, Ali Salum Hoti @ Ali Kuku (hereinafter to be referred to as 'the seller'), not a party to the present

appeal, before the Resident Magistrate's Court of Dar es Salaam at Kisutu (the trial court). The respondent claimed that he was a lawful owner of an unsurveyed piece of land, adjacent to the Field Force Unit (FFU), situated at Ukonga Mombasa within the Dar es Salaam region (the disputed property) on account of sale agreement entered between him and the seller on 28<sup>th</sup> March, 1993 at a price of TZS. 350,000.00. After the sale agreement, the respondent started initiatives to survey the disputed property. However, sometime in 1995 he was surprised to find that the appellant was developing the disputed property. Upon inquiry, he was informed that the appellant bought it from the seller.

On his part, the appellant disputed the claim. The written statement of defence, filed jointly by the appellant and the seller, averred that the appellant bought the disputed property from the seller after the extinguishment of the sale agreement entered between the respondent and the seller. It further averred that following a discharging of the seller under section 225 (5) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) on a criminal charge of obtaining money by false pretence preferred by the respondent in Criminal Case No. 605 of 1994, the money which the respondent paid to the seller was deposited into court.

It was the case of the respondent that after he had bought the disputed property, he heard rumours that the piece of land belonged to FFU. Believing that he was coned, he instituted criminal proceedings against the seller. He therefore maintained, in his rejoinder, that he was the lawful owner of the disputed property and that the criminal case had no relation with his civil claim against the appellant and the seller.

At the end of the trial, the trial court dismissed the suit and declared the appellant to be a lawful owner of the disputed property. Aggrieved with such dismissal, the respondent appealed to the High Court whereby his appeal was allowed and he was declared the lawful owner of the disputed property.

The appellant was aggrieved. The record shows that on 9<sup>th</sup> May, 2008 the notice of appeal lodged by the appellant was stuck out. After several attempts to appeal to this Court, on 21<sup>st</sup> May, 2020 vide Miscellaneous Civil Application No. 69 of 2019 the appellant was granted extension of time to lodge notice of appeal and to apply for a leave to appeal to the Court. Thereafter, the appellant lodged the present appeal.

For a reason shortly to be unveiled we shall not reproduce the grounds of appeal.

When the appeal was called on for hearing on 26<sup>th</sup> October, 2021, Mr. Isaac Nassor Tasinga, learned advocate appeared for the appellant whereas the respondent appeared in person, he had no legal counsel to represent him.

Before the hearing of the appeal could proceed in earnest, the Court invited parties to address it on the competency of the appeal regard being had to the fact that the seller who was all along been a party in the courts below was not a party in the present appeal; and the notice of appeal together with the pleadings in the application for leave are missing in the record of appeal.

Mr. Tasinga readily conceded to the defects that the notice of appeal, the chamber summons and affidavit in support of the application for leave to appeal are not included in the record of appeal. He also admitted that the seller was not a party in the present appeal. He explained to the Court the reason that led to the omission of the name of Mr. Ali Salum Hoti @ Ali Kuku in this appeal, was because he was not made a party even in the

High Court in the application for extension of time and leave to appeal because he died some years ago and it was not easy to secure his legal representative. Given the patent omissions, Mr. Tasinga prayed under Rule 111 of the Rules to amend the memorandum of appeal and any other documents contained in the record of appeal in order to reflect the name of the seller. He also sought leave under Rule 96 (7) of the Rules to file the supplementary record of appeal to include the omitted documents.

The respondent replied that even though the seller is dead, the appellant ought to have looked for an administrator of the deceased's estates and made him a party in the proceedings below and in this appeal. In short, he did not object to both prayers, to amend the memorandum of appeal and any other documents in the record of appeal and to file supplementary record of appeal. He added that the appellant also purposely omitted some of his documents like his counter affidavit which he said they were supposed to be included in the record of appeal.

Mr. Tasinga briefly re-joined that the respondent is also at liberty to file supplementary record of appeal if he thinks that there are necessary documents omitted in the record of appeal.

Undoubtedly, the appeal before us is incompetent given that one of the parties who participated in the proceedings before the trial court and his name appeared in the first appellate court is not a party in the present appeal. This is in contravention to Rule 84 (1) of the Rules.

Mr. Tasinga was of the view that the omission to include the name of Mr. Ali Salum Hoti @ Ali Kuku in the memorandum of appeal and in the application for extension of time can be remedied and as such, he invited us to invoke Rule 111 of the Rules and allow him to file amended record of appeal. For ease of reference, we think, it is important to reproduce the provisions of Rule 111 of the Rules that stipulates:

*"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."*

In the case of **General Manager Kahama Mining Corporation Limited v. Kheri Kadu**, Civil Application No. 13 of 2015 (unreported), the Court defined the word "amend" as appearing in Rule 111 of the Rules to mean:

*"...if you amend something that has been written as a law, or something that is said you change it in order to improve it or make it more accurate."*

Further, in **Black's Law Dictionary**, 9<sup>th</sup> Edition published by Thomson Reuters at page 94 defined the word "amend" as follows:

- "1. To make right; to correct or rectify (e.g amend the order to fix a clerical order).*
- 2. To change the wording of; specify, to formally alter (a statute, constitution, motion, etc) by striking out, inserting, or substituting words (e.g amend the legislative bill)"*

It is in that respect that in the case of **FINCA Tanzania Ltd v. Wildman Masika and 11 Others**, Civil Appeal No. 173 of 2016 (unreported), the Court held:

*"We have no doubt that Rule 111 of the Rules allows the Court at any time to allow amendments 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 on such terms as it thinks fit. In this regard, we are settled that any desired amendment must be for the purpose of enabling the Court to determine the real question in*

*controversy between parties. In allowing amendments, the Court aims to do justice to the parties. Thus, in order to adhere to this quest for justice, the Court must always look at the circumstances of each particular appeal, and exercise its discretion guided by certain factors; including, the need for amendments, the nature and extent of the amendments, the party's conduct, whether the hearing has commenced, the risk of the requested amendment (whether the appeal may be derailed from its normal route), the prejudice if any to the other party, and the type of amendments sought."*

We affirm the above holding.

Now looking at the circumstances of the present appeal, the nature, type and extent of the amendment prayed by Mr. Tasinga goes beyond our mandate. Apparently, Rule 111 of the Rules does not empower the Court to allow a party to amend documents in the terminated proceedings or judgment of the lower court to implead a party who did not participate in such proceedings. Had it been that the seller was a party in the two proceedings before the High Court, that is, in the application for extension of time and leave to appeal, and his name was accidentally omitted, we



would have perfectly granted the prayer to amend the notice of appeal, the memorandum of appeal and any other documents in the record of appeal. But since he was not a party and he did not participate in those proceedings, we cannot at the stage of the appeal order for his name to be included in the terminated lower court proceedings. For that reason, we are constrained to decline the invitation made by Mr. Tasinga that we should allow the appellant to amend the terminated Miscellaneous Civil Application No. 69 of 2019 and Miscellaneous Civil Application No. 261 of 2020 to implead Mr. Ali Salum Hoti @ Ali Kuku who did not participate in those proceedings. With respect, we find that Rule 111 of the Rules had been cited out of context. Accordingly, we hold that we have no power under Rule 111 of the Rules to grant the prayer sought by Mr. Tasinga.

Regarding the prayer to file a supplementary record of appeal, Rule 96 (7) of the Rules permits the Court to grant leave to the appellant to lodge a supplementary record of appeal to include omitted documents but even if we grant the prayer, the appeal would still be incompetent for the reason we stated herein. Unfortunately, leave to file supplementary record of appeal would not salvage the incompetent appeal as the seller would

still not be a party in the appeal. In that respect, we decline the prayer to file supplementary record of appeal.

In the end, we find that the appeal is incompetent before us. It is hereby struck out. We make no order as to costs because the issue was raised by the Court.

**DATED at DAR ES SALAAM** this 4<sup>th</sup> day of November, 2021.

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

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

The Ruling delivered on this 5<sup>th</sup> day November, 2021, in the presence of Appellant and Respondent who appear in person, is hereby certified as a true copy of the original.

