IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MBAROUK, J.A, MZIRAY J.A And NDIKA, J.A.)

CIVIL APPEAL NO. 186 OF 2016

ALI VUAI ALI..... APPELLANT

VERSUS

SUED MZEE SUED.....RESPONDENT

(Appeal from the decision of the High Court of Zanzibar at Zanzibar)

(Makungu, C.J.)

dated 28th day of July, 2015

in

Civil Appeal No. 05 of 2014

RULING OF THE COURT

27th & 30th November, 2017

MBAROUK, J.A:.

When the appeal was called on for hearing, it transpired that the learned advocate for the respondent had earlier on 24-11-2017 filed his notice of preliminary objections to the following effect:-

1. That the appeal is incompetent for want of service of the memorandum and record of appeal on the respondent, Contrary to Rule 97(1) of the Tanzania Court of Appeal Rules, 2009.
2. That the appeal is incompetent for want of inclusion of relevant counter affidavit against Application for leave to appeal and other important documents for deciding the appeal contrary to Rule 96 (1) (k) of the Tanzania Court of Appeal Rules, 2009.
3. That the appeal is incompetent for being made against a dead person without substitution of his legal representative since the inception of suit in the District Court, contrary to Rule 92(1) of the Tanzania Court of Appeal Rules, 2009 and

section 177 of the Succession Decree Cap. 21 of the Revised Laws of Zanzibar.

4. That the appeal is incompetent for want of written submissions in support of it, contrary to Rule 106 (1) & (7) of the Tanzania Court of Appeal Rules, 2009.
5. That the appeal is incompetent for want of proper name of the Judge, Contrary to Rule 93 (3) of the Tanzania Court of Appeal Rules, 2009.
6. That the appeal is incompetent for being res judicata and abuse of the Court process as it is being re-litigated as the matter was finished in Civil Appeal No. 72 of 1998 of the Court of Appeal and various other matters before the High Court of Zanzibar Regional Court, and District Court.

As per the practice of this Court, where there is a notice of preliminary objection filed in a matter before the Court, we opted to proceed with the hearing of the objections raised first before hearing the appeal. For that reason, we directed Mr. Salim Mnkonje, learned advocate who represented the respondent to submit on his objection especially the 2nd point of the preliminary objection which may dispose of the appeal for being incompetent.

Mr. Mnkonje complied with the directions of the Court and briefly argued that the appellant has failed to annex a copy of an application for leave to appeal in Civil Application No. 16 of 2015 lodged before the High Court of Zanzibar. However, the Court noted that instead of citing Rule 96 (2) of the Court of Appeal Rules, 2009 (the Rules), Mr. Mnkonje wrongly cited Rule 96 (1) of the Rules as the provision of the Rules which has been contravened. This is because, this appeal does not arise from the High Court on its original

jurisdiction, instead it arose from the High Court in its appellate jurisdiction. For that irregularity on wrong citation, the submissions made by Mr. Mnkonje on the respondent's preliminary objection rested there.

However, on the same premise of the irregularity concerning missing documents in the record of appeal, the Court *suo motu* wanted to satisfy itself as to whether the appeal is competent as it has failed to include some important documents in the record of appeal contrary to Rule 96 (2) of the Rules. The following are the identified documents which we have found them missing in the record of appeal:-

1. Written Statement of Defence (WSD) of Civil Case No. 5 of 2010 in the District Court of Zanzibar at Mwanakwerekwe.

2. Proceedings of Civil Case No. 5 of 2010 in the District Court of Zanzibar at Mwanakwerekwe.
3. Proceedings of Civil Appeal No. 4 of 2012 before the Regional Magistrates' court of Zanzibar at Vuga.
4. Pleadings of Civil Case No. 3 of 1998 before the District Court of Zanzibar at Vuga.
5. Proceedings of Civil Case No. 3 of 1988 before the District Court of Zanzibar at Vuga.
6. Memorandum of Appeal of Civil Appeal No. 18 of 1995 before the Regional Magistrates' Court of Zanzibar at Vuga.

The omission raised by Mr. Mnkonje apart, we thought it necessary to invite the parties herein to address us on the apparent omission of the documents enumerated above.

Both, the representative of the appellant Mrs. Fatma Said Ali who we earlier on allowed her to represent her husband as the holder of the power of attorney who after having seen him we were satisfied that he was sick and unable to proceed on his own and Mr. Mnkonje readily conceded to the defect/irregularity identified by the Court.

We are of view that, the omission not to include those documents in the record of appeal offends the compulsory requirement of Rule 96 (2) read together with sub-rule (1) (k) of Rule 96 of the Rules. A plethora of authorities of this Court have decided that failure to include documents which are necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant, renders the appeal incompetent.

In **Aeshi Hilary and Three Others v. Norbert Joseph Yamsebo,** Consolidated Civil Appeals Nos. 55 and No. 65 of 2012, **Fedha Fund Limited and Two Others v.**

George T. Varghese and Another, Civil Appeal No. 8 of 2008 and **Jaluma General Supplies v. Stanbic Bank (T) Ltd,** Civil Appeal No. 77 of 2011 (all unreported), this Court struck out those purported record of appeals which failed to contain the documents listed under Rule 96 of the Rules.

In **Fedha Fund Ltd and Two Others** (supra), this Court stated as follows:

> *"... the decision of choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal under Rule 89 (3) [now Rule 96 (3)] of the Court Rules, it is either a Judge or a Registrar of the High Court who, on 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....".

In **Jaluma General Supplies** (supra), this Court held that:

"The issue is whether or not the document, having been adopted as part of the proceedings, should or should not have formed part of the record of appeal in terms of Rule 96 (1) (d). On this, Mr. Kesaria is correct that the document ought to have formed part of the record of proceedings under para (d) of sub rule (1) of Rule 96. It is not, therefore, correct to say that the failure to include the document is inconsequential because the issues are reflected in the judgment. This reasoning is incorrect because the Court Rules make a

distinction between the record of proceedings and the judgment – See Rule 96 (1) (d) and (g), respectively. In this sense, in a record of appeal both have to appear as a separate documents...."

Since the aforementioned documents were part and parcel of those suits in the courts below, and as they are missing in this record of appeal, that renders the appeal incompetent for contravening the requirements under Rule 96(2) read together with sub-rule (1) (c) (d) and (k) of the Rules as they ought to have formed part of the record of appeal.

We are of the considered opinion that without going to examine the other issues raised by the learned advocate for the respondent, this point alone can dispose of the appeal. Dealing with those other issues will be just an academic exercise. In the circumstances, the appeal is incompetent,

we therefore strike it out with no order as to costs as we raised the matter *suo motu.*

DATED at **ZANZIBAR** this 29th day of November, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSITCE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL