

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CIVIL APPLICATION NO. 13 OF 2015

THE GENERAL MANAGER KAHAMA

MINING CORPORATION LIMITED.....APPLICANT

VERSUS

KHERI KADU .....RESPONDENT

(Application arising from the Judgment and decree of the High Court of  
Tabora at Tabora)

(Mjemmas, J.)

Dated the 5<sup>th</sup> day of November, 2014

In

Civil Case No. 1 of 2006

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**RULING OF THE COURT**

13<sup>th</sup> & 22<sup>nd</sup> April, 2016

**MWARIJA. J.A.:**

By a notice of motion filed on 20/4/2015, the applicant brought this application seeking for the following:-

*"1. The Court may be pleased to allow amendment of part of the record of appeal so that the appellant can supplement the written*

*submissions on the preliminary objection by parties to the case before the Trial Court as part of the records of appeal.*

*2. And for an order that the costs if and incidental to this application abide by the result of the said appeal."*

The application which is supported by the affidavit of the applicant's counsel, Yusuf Sheikh, learned counsel is shown to have been brought under Rule 111 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Upon service on him of a copy of the application, apart from filing his affidavit in reply, the respondent filed a notice of preliminary objection challenging the competence of the application. The objection is to the following effect:-

*"The application to amend is wrongly filed under Rule 111 of the Tanzania Court of Appeal Rules, 2009 as there is no record that could be amended."*

When the application was called on for hearing on 13/4/2016, we decided to consider first, the preliminary objection. Mr. Yusuf Sheikh, learned counsel appeared for the applicant while the respondent had the services of Mr. Kamaliza Kayaga, learned counsel.

Submitting in support of the preliminary objection, Mr. Kayaga argued that the application is incompetent for having been brought under inapplicable provision of the Rules. He said that Rule 111 which must be read with Rule 20, applies to amendment of documents which are already filed in Court. He contended that since the gist of the application is to file a missing part of the record, that is, the written submissions filed in support of the preliminary objection in the trial Court, the applicable provision is Rule 96 (6). This, he said, is because what the applicant seeks to be granted is leave to file part of the proceeding which is missing in the record of appeal. He prayed that the application be struck out with costs.

In response, at first Mr. Sheikh opposed the preliminary objection by arguing that the application is competent because his interpretation of Rule 111 was that it allows amendment of a record of appeal by filing a missing document or part of the record. However, on reflection he conceded that

inclusion of a missing document or part of the proceeding in the record of appeal does not amount to amendment of the record and that therefore, the application was, for that reason, brought under inapplicable provision of the Rules. He therefore conceded that the application is incompetent thus liable to be struck out. He however prayed that the costs should abide the outcome of the appeal.

In rejoinder, Mr. Kayaga pressed for costs arguing that the applicant was served with the preliminary objection long before the application was fixed for hearing. As a result he said, his client has incurred expenses including the costs of travelling to attend the hearing.

From what has been submitted by the learned counsel for the parties, we agree that the application was brought under a wrong provision of the Rules. Rule 111 under which the application was brought states as follows:-

*"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, as such terms as it thinks fit."*

Properly interpreted, the provision empowers the Court to allow any party to amend the document named in that provision or any other part of the record. This means that there must be in existence, a record of appeal filed in Court for a prayer to amend to be granted. According to **Collins COBUILD Advanced Learner's Dictionary**, 2006, the word "amend" is defined as follows:-

*"If you amend something that has been written such as a law, or something that is said **you change it in order to improve it or make it more accurate.**"* [Emphasis added].

Where therefore, like in this application, a party seeks to be allowed to file a missing document in the record of appeal which has already been filed in Court, the process amounts to an inclusion of that document, not amendment of the existing record. For this reason therefore, as submitted by Mr. Kayaga, the applicable provision is Rule 96 (6) which provides 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."*

The Rule allows an appellant to include in the record of appeal, any of the documents stated under Rule 96 (1) and (2) which was omitted at the time of filing the record of appeal. The missing document or part of the record can thus be included without leave of the court if it is done within 14 days from the date of filing the record. It is implicit that after expiry of the prescribed period of 14 days, the appellant has to apply for extension of time. - See the case of **Ms. Henry Leonard Maeda & Anr. v. Ms John Anael Mongi & Anr.**, Civil Application No. 31 of 2013 (unreported).

Given the above stated reasons, we find the application incompetent for non-citation of enabling provision of the Rules. As to the costs, the principle is that the same follows event. A successful party cannot be denied the costs incurred in the case without sufficient reason. We do not

see any reason for so doing. In the event, the application is hereby struck out with costs.

**DATED at TABORA** this 21<sup>st</sup> day of April, 2016.

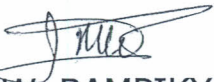
S.A. MASSATI  
**JUSTICE OF APPEAL**

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

A.G. MWARIJA  
**JUSTICE OF APPEAL**

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



  
P.W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**