IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KILEO, J. A., And KALEGEYA, J. A.)

CIVIL APPEAL NO. 10 OF 2007

HARUNA MPANGAOS AND 902 OTHERS..... APPELLANTS

VERSUS

TANZANIA PORTLAND CEMENT CO. LTD ..... RESPONDENT

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

(Manento, J.K)

dated 26th day of October, 2006
in
Civil Case No. 173 of 2003

JUDGMENT OF THE COURT

25th February, 2008 & 13th March, 2008

MSOFFE, J.A:

This is a dispute over pieces of land comprising of Plots Numbers 1,4, and 7, Wazo Hill Area, otherwise referred to as Tanzania Portland Cement Company's Industrial Plots at Wazo Hill, located at Tegeta and Boko areas within Kinondoni District in Dar es Salaam Region. The land is currently surveyed and owned under a Right of Occupancy by virtue of Certificate of Title No. 42336. In the High Court of Tanzania at Dar es Salaam the respondent Company successfully sued the appellants

for, among other things, a declaration that it is the owner of the land in dispute. Aggrieved, the appellants preferred this appeal.

For purposes of our decision in the matter, the following brief background information is necessary. The record of appeal was lodged on 1/2/2007 without a properly dated decree. On 26/11/2007 Mr. Mabere Marando wrote a letter Ref. No. MM/HM/2007/1 to the Registrar of the High Court requesting for a properly dated decree. The letter was copied to Law Associates (Advocates) - the firm of advocates representing the respondent Company. On 4/12/2007 the High Court extracted a properly dated decree. Two days later, i.e. On 6/12/2007, Mr. Marando lodged a supplementary record of appeal containing the properly dated decree.

When the appeal was called on for hearing the Court had to deal with a preliminary objection notice of which was given earlier in terms of Rule 100 of the Court of Appeal Rules, 1979. The objection is that the appeal is incompetent because the decree, the subject of the appeal, is invalid.

In arguing the objection, Mr.Rosan Mbwambo, learned advocate for the respondent Company, was of the general view that a decree is a vital document under Rule 89 (1) (h) of the Court of Appeal Rules, 1979. Since this vital document was not present at the time of filing the record of appeal the appeal is incompetent notwithstanding the effort made by the appellants in filing the supplementary record of appeal. Furthermore, Mr.Mbwambo went on to submit, under sub - rule I of Rule 92 only a respondent can file a supplementary record of appeal if the record of appeal is defective or insufficient. Under sub-rule (3) thereof, an appellant does not enjoy the same right. Under this sub-rule an appellant can only file a supplementary record of appeal containing "such other documents" as may be necessary for the further determination of the appeal as provided for under **item (k)** of **sub-rule (1) of Rule 89**. A supplementary record of appeal containing a properly dated decree is not among the sort of "such other documents" envisaged under the **item**, Mr. Mbwambo concluded.

We wish to observe from the outset that the contents of a record of appeal are spelt out under Rule 89 (1) and (2) of the Court Rules. For our purpose sub- rule (1) is the most relevant. The sub-rule provides as follows:-

> *89 - (1) For the purposes of an appeal from the High Court in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3),contain copies of the following documents:-*
>
> *(a) an index of all the documents in the record with the numbers of the pages at which they appear:*
>
> *(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service on him of the notice of appeal;*
>
> *(c) the pleadings;*
>
> *(d) the trial judge's notes of the hearing;*
>
> *(e) the transcript of any shorthand notes taken at the trial;*

(f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, their certified translations;

(g) the judgment or order;

(h) the decree or order;

(i) the order, if any, giving leave to appeal;

(j) the notice of appeal;

(k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant.

save that the copies referred to in paragraphs (d),(e) and (f) shall exclude copies of any documents or any of their parts that are not relevant to the matters in controversy on the appeal.

Under Rule 83 (1) the record of appeal must be lodged in the appropriate registry within a period of sixty days from the date of the

lodging of the notice of appeal, subject to the exception therein. If the record of appeal containing the essential documents mentioned under Rule 89 (1) is not so lodged the appeal will be held to be incompetent.

Under Rule 89 (1) one of the essential documents to be contained in a record of appeal is a copy of decree or order appealed from. From the authorities of this Court it is now settled that non- incorporation of a copy of decree or incorporation of a defective decree renders the appeal incompetent. In the case of **Fortunatus Masha v William Shija and Another** (1997) TLR 41 this Court stated:-

> *However, we are of the view that where by reason of non-extraction of the decree or order, as in this case, the appeal is rendered incompetent, the issue of insufficiency or incompleteness does not really arise. The position that arises is simply one of non-existence of the appeal. Because insufficiency or incompleteness connotes something which is in*

existence and which can be improved upon, say by adding to it. ***An incompetent appeal is one in which in law did not come into existence although efforts were made to bring it into existence. In such circumstances, therefore, one cannot properly talk of there being an insufficient or incomplete appeal which one can improve upon by filing a supplementary record, because in law no appeal came into existence in the first instance, there was only a purported appeal if you wish.***

(Emphasis supplied)

It is settled law that a decree which bears a date different from the date of the impugned decision is defective and invalid. See, for instance, **Abdallah Rashid Abdallah**, Civil Appeal No. 94 of 2006 (unreported), **Ami (Tanzania) Limited v Ottu on behalf of P.L. Assenga and 106 Others**, Civil Application No. 76 of 2002

(unreported), and **Uniafrico Limited and two Others v Exim Bank (T) Limited**, Civil Appeal No. 30 of 2006 (unreported).

There is no dispute that the decree in the record of appeal filed on 1/2/2007 is defective. In essence Mr. Marando concedes that much hence the effort to file the supplementary record of appeal containing a properly dated decree. The crucial question in this appeal is whether or not the supplementary record of appeal validated the already defective record of appeal.

In answering the above question it occurs to us that the starting point is a close examination of Rule 92, particularly sub- rule (3) thereof. Rule 92 reads:-

> *92 - (1) If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any*

additional parts of documents which are in his opinion, required for the proper determination of the appeal.

(2) The respondent shall as soon as practicable after lodging a supplementary record of appeal, serve copies of it on the appellant and on each other respondent who has complied with the requirements of Rule 79.

(3) An appellant may at any time lodge in the appropriate registry four copies of a supplementary record of appeal and shall as soon as practicable after doing so serve copies of it on every respondent who has complied with the requirements of Rule 79.

(4) A supplementary record of appeal shall be prepared as nearly as may be in the same manner as a record of appeal.

We wish to observe that the above rule is similar to Rule 89 of the defunct Court of Appeal for East Africa Rules, 1972 which used to read as follows:-

89 - (1) If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal.

(2) The respondent shall as soon as practicable after lodging a supplementary record of appeal, serve copies of it on the appellant and on each other respondent who has complied with the requirements of rule 78.

(3) An appellant may at any time lodge in the appropriate registry four copies of a supplementary record of appeal and shall as soon as practicable thereafter serve copies of it on every respondent who has complied with the requirements of rule 78.

(4) A supplementary record of appeal shall be prepared as nearly as may be in the same manner as a record of appeal.

It seems to us that the catch - word in Rule 92 of the Court Rules, and Rule 89 of the defunct Court of Appeal for East Africa Rules for that

matter, is **"supplementary"**. In the Oxford Advanced Learners Dictionary of Current English, 6th Edition, the word "supplementary" is defined as:-

> *"Provided in addition to something else in order to improve or complete it"*

So, a supplementary record of appeal presupposes the existence of a complete record of appeal lodged by an appellant. Complete in the sense that it contains all the essential documents itemized under Rule 89 (1). Under Rule 92 (1) the use of the words "containing copies of any further documents or additional parts of documents which are, in his opinion required for the proper determination of the appeal" mean in effect that the supplementary record of appeal may be lodged for the purpose of making good deficiencies in the record of appeal not affecting the competence of the appeal. A supplementary record of appeal should, therefore, add something to the otherwise complete record of appeal.

In the case of **Kiboro v Posts and Telecommunications Corporation**, (1974) EA 155, the defunct Court of Appeal for East

Africa had occasion to discuss the import and sense of a supplementary record under Rule 89 (*supra*). In that case the appellant had filed a supplementary record which did not contain a copy of the decree appealed against. Before the appeal was heard, the appellant filed another record of appeal containing a proper decree arguing that he was entitled to file it under Rule 89 (3) (*supra*). The Court held that a supplementary record of appeal cannot contain one of the essential documents required by the Rules. Law, Ag. V. P. stated:-

> *"The meaning of a supplementary record of appeal is made clear in r. 89 (1). It means a record containing copies of "further documents or any additional parts of documents which are... required for the proper determination of the appeal". The word "further" must, in my opinion, mean further to the documents required by r. 85 (1) to be contained in the record of appeal. Any other construction would mean that any appellant, who has filed a record omitting one or more of the basic documents required by r. 85 (1) could, at any time before the hearing, file a fresh record containing those documents, without having to apply*

to the court for an extension of time under r. 4. If Mr. Muite is right, a record of appeal could be filed in complete disregard of r. 85 (1), and the matter put to right by filing a new record complying with that rule at any time before the hearing. I cannot accept such a submission. I have no doubt that the record filed just before the hearing of this appeal was not a supplementary record, but a re- filing out of time of the original record containing one of the basic documents omitted from the original record, and that the appeal is incompetent unless this court extends time either for filing the copy of the decree as part of the original record, or for filing the fresh record as the record of appeal in place of the original defective record, as prayed in (a) of Mr. Muite's amended application. Before the court can do this, it must be satisfied that there is "sufficient reason" for granting indulgence....."

In similar vein, Mustafa, J. A. stated:-

" I am satisfied that a supplementary record, in terms of r. 89 of the Rules, can only include

additional or further documents, which are, in the opinion of an appellant or respondent, required for a proper determination of an appeal. It supplements the original record of appeal, which has to be filed within the prescribed time, and which has to contain the basic documents as provided in rule 85 of the Rules. If a basic document, like a copy of the decree, is omitted from the original record of appeal that cannot be introduced into the record by filing a supplementary record of appeal, when the prescribed time has expired. In this case the appellant could only file the omitted decree out of time with leave..... To succeed he must show "sufficient reason".

Applying **Masha** and **Kiboro**, and also the interpretation of **Rule 92,** to this case it is evident that the defect in the record of appeal filed on 1/2/ 2007 was not cured under Rule 92 (3) by the supplementary

record of appeal filed on 6/12/2007. The copy of a valid decree ought to have been filed with the record of appeal within the time prescribed under Rule 83 (1) of the Court Rules. If such time had expired the appellants ought to have resorted to Rule 8 for extension of time either for filing the copy of the decree as part of the record filed on 1/2/2007 or for filing the fresh record as the record of appeal in place of the original defective record.

All said and done, we uphold the respondent on the preliminary objection. The appeal, being incompetent, is accordingly struck out with costs.

In the justice of this matter however, we think we should not end up there. We realize that for quite some time appellants have always resorted to Rule 92 (3) as a remedy in filing supplementary records of appeal containing valid decrees where the already filed records of appeal had no valid decrees. Part of the reason for doing so was a result of this Court's decisions in a number of cases advising appellants to do so. For instance, in **NBC Holding Corporation v (1) Mazige Mauya**

(2) Mwanahamisi M. Bilali, Civil Appeal No. 36 of 2004 (unreported) in a situation where the copy of the decree in the record was invalid for being signed by the District Registrar the Court had this to say:-

> *"With regard to pending appeals not yet scheduled for hearing, parties would be well advised to resort to Rule 92 (3) of the Court of Appeal Rules, 1979, to rectify defects and regularize the same in conformity with the law".*

We are of the view that if the attention of the Court in **Mauya**, and in other cases of similar nature, had been brought to **Kiboro**, the advice would have been to the effect that appellants should resort to Rule 8. It is for this reason that we think it is fair to adopt the wisdom in **Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) v Adam Mollel,** Civil Appeal No.2 of 1990 (unreported) where, in an issue revolving around a defective decree, the Court stated:-

> *"But bearing in mind the fact that practically all the judges of the High Court have consistently*

> *the legal profession to believe that all was in order with the decree in appeal, we think justice demands that the appellant be put in a position to re-institute his appeal to this court should he so wish".*

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> *"But bearing in mind the fact that practically all the judges of the High Court have consistently*

omitted to comply with the requirements of Order 39 Rule 35 (4), and that the Court of Appeal has also consistently until now failed to notice the omission since it was established over ten years ago, thereby encouraging members of the legal profession to believe that all was in order with the decree in appeal, we think justice demands that the appellant be put in a position to re-institute his appeal to this court should he so wish".

Therefore, adopting the wisdom in **Mugo**, the appellants are accordingly directed to re- institute the appeal if they so wish without further payment of Court fees. We will hasten to add, however, that re-instituting the appeal will be subject to compliance with Court Rules – See **Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) v Adam Mollel,** Civil Appeal No. 15 of 1991(unreported). We order accordingly.

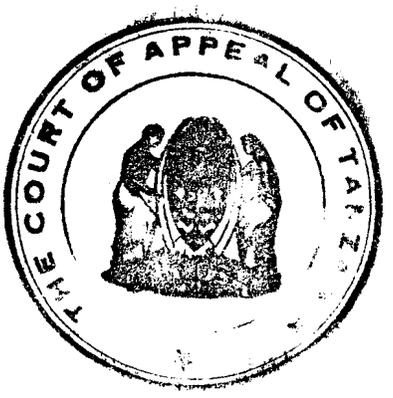
DATED at DAR ES SALAAM this 10th day March, 2008.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

L. B. KALEGEYA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



S. M. RUMANYIKA
DEPUTY REGISTRAR