

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

CORAM: KILEO, J. A, ORIYO, J.A., And MMILLA, J.A.

CIVIL APPEAL NO. 49 OF 2014

**IBRAHIM SELEMAN SINDILAAPPELLANT
VERSUS
AHMED JUMARESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Moshi, J.)

dated 28th February, 2014

in

Misc. Land Case Application No. 97 of 2013

.....

RULING OF THE COURT

3rd & 5th September, 2014

MMILLA, J.A.:

The genesis of the case giving rise to the present ruling dates back to 2008. In that year, Ibrahim Seleman Sindila (the appellant) instituted Land Application No 37 of 2008 in the District Land and Housing Tribunal for Babati against Ahmed Juma (the respondent), in which he contested ownership of a house in Plot No. 57 Block "M" in Babati township alleging to have purchased it from one Juma Nada on 25.1.2008. On the basis of the weight of evidence before it, the trial tribunal decided in favour of the

respondent whom it declared as the lawful purchaser. The appellant was aggrieved and filed Land Appeal No. 30 of 2012 in the High Court at Arusha. Unfortunately, that appeal was on 12.7.2013 dismissed for want of prosecution after he had failed to appear in court, thus prompting him to file Misc Land Application No. 97 of 2013 in which he sought that court's indulgence to restore Land Appeal No. 30 of 2013. Misc Land Application No. 97 of 2013 was again dismissed for lack of merit, the result of which he instituted the present appeal from which this ruling arises.

Before us, the appellant appeared in person and was unrepresented, while Mr. John Lundu, learned advocate, represented the respondent.

At the commencement of the hearing of the appeal, the Court ***suo motu*** raised the point that the record was not complete on the ground that the proceedings which are the basis of the ruling of the High Court which the appellant seeks to impugn were omitted from the record of appeal and asked the parties to react on the point.

On his part, Mr. Lundu submitted that he also noted that irregularity, but that he did not file a notice of preliminary objection on the ground that he discovered it too late when the hearing was about to commence. He

contended that failure to incorporate the said proceedings contravened the provisions of Rule 96 (1) (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules) making the appeal incompetent, thus entitling the Court to strike it out.

Mr. Lundu added one more point that after the appellant had filed the notice of appeal on 2.3.2014, he did not serve it to the respondent within a period of 14 days from that date as envisaged by Rule 84 (1) of the Rules. He submitted that this ground too makes the appeal incompetent and liable to be struck out. In view of the above, Mr. Lundu pressed the Court to strike out the appeal with costs.

The appellant, a layman as is the case, had no substantial contribution on the points raised, save for his lamentation that he did not serve the notice of appeal in time because of ignorance. He also said that he was unaware that he omitted to include in the court record the proceedings in Misc. Land Case Application No. 97 of 2013. He however, left the fate of his appeal in the hands of the Court.

We wish to begin with the ground touching on appellant's failure to serve a copy of the notice of appeal to the respondent.

On perusing the record, it is certain that after lodging the notice of appeal on 2.3.2014, the appellant was expected to have served it to the respondent by 16.4. 2014, but he botched. The appellant said that he did not serve it in time because of ignorance. We need to restate here that ignorance to perform a duty imposed by law does not afford one an excuse. This is particularly so where the provision imposing such duty is couched in mandatory terms as is the case under Rule 84 (1) of the Rules. That Rule provides that:-

“(1) An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court..” [Emphasis is provided].

The purpose of a notice of appeal is to inform the respondent that an appeal is intended to be lodged. See **Rawland Faini Sawaya t/a Sawaya Bus v. The National Insurance Corporation Ltd**, Civil Appeal No. 53 of 2007, CAT (unreported). Surely, failure to serve such notice is a fundamental

irregularity which makes the appeal incompetent. As to the attending consequences, we resort to the case of **Justine Nyari v. Guardian Ltd and another**, Civil Application No. 3 of 2009, CAT (unreported) in which relying on the case of **Akbar Hassanali and 2 others v. Edward A. Mweisumo** (unreported), the court said:-

“... it is a mandatory requirement under the rule (in our case Rule 84 (1) of the Rules) for the ... applicant in this case, to serve a copy of the notice of appeal on the respondent before, or within seven days after lodging the notice of appeal. It is an essential pre-requisite step to be taken in the process of instituting the appeal. Failure to do so, as happened in this case, rendered the notice of appeal incompetent. Such failure on the part of the appellant, in our view, entitled the respondent to invoke the provisions of rule 82 in applying for the notice of appeal to be struck out.”

With respect, we subscribe to this view. We find and hold that since the said notice was not served on the respondent in the present case, the irregularity makes the appeal incompetent and liable to be struck out.

This ground alone could be sufficient to dispose of this appeal. However, we think it is necessary to consider the ground we raised ***suo***

motu regarding the omission to include in the court record the proceedings on the basis of which the ruling intended to be impugned by the responded was made.

It is incontrovertible that the proceedings giving rise to the ruling intended to be impugned in this appeal are lacking in the court record. This fact is confirmed by both Mr. Lundu and the appellant himself. The omission contravened the provisions of Rule 96 (1) (d) of the Rules which provide that:-

“(1) For the purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, **the record of appeal shall, subject to the provisions of sub-rule (3), contain copies of the following documents –**

- (a)
- (b)
- (c)
- (d) **The record of proceedings.**” [Emphasis provided].
- (e) up to (k);

Admittedly, there is a proviso under the above quoted Rule which allows the exclusion of copies of any documents or any of their parts that are not relevant to the matters in controversy on the appeal. However, as this Court restated in **Mariam Idd (As Administrator of the Estate of the late Mbaraka Omari) v. Abdulrazack Omari Laizer (As Administrator of the Estate of the late Abubakar Omari) and another**, Civil Appeal No. 20 of 2013, CAT (unreported), in the light of the provisions of Rule 96 (3) of the Rules, the decision to choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal. We stress that the proviso to that Rule cannot be invoked without there being an application for directions under sub - rule (3) thereof – See also **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd, Civil Appeal No. 77 of 2011, CAT** (unreported). Sub –rule (3) of Rule 96 of the Rules provides that:-

“(3) A Justice or Registrar of the High Court or tribunal, may, on the application of any party, direct which documents or parts of documents should be excluded from the record, application for which direction may be made informally.”

In that the record of appeal is incomplete as clearly shown above, we find that the appeal is incompetent, in consequence of which we strike it out.

Costs to be borne by the appellant.

DATED at ARUSHA this 4th day of September, 2014.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL