

Citation	Parties	Legal Principles Discussed
CIVIL APPEAL No.55/2003 - Munuo J.A - Msoffe, J.A - Kileo, J.A	LEILA JALALUDIN HAJI JAMAL Vs. SHAFKIN JALALUDIN HAJI JAMALI Appeal from a ruling of the High Court of Tanzania at Dar es Salaam by Kyando J.	1) Compliance with Rule 89(1) (c) of the Court of Appeal Rules, 1979 – Requirement for the Record of Appeal to contain copies of the pleadings from the lower Court. 2) Wrong citation of the case renders the appeal incompetent.

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

(CORAM: MUNUO, J.A. MSOFFE, J.A. AND KILEO, J.A.)

CIVIL APPEAL NO. 55 OF 2003

**LEILA JALALUDIN HAJI JAMAL.....APPELLANT
VERSUS
SHAFFIN JALALUDIN HAJI JAMAL.....RESPONDENT**

**(Appeal from a Ruling of the High Court of Tanzania at
Dar es Salaam)**

(Kyando, J.)

**dated 28th June, 2002
in
Civil Case No. 373 of 2001**

RULING OF THE COURT:

9 March & 3 May, 2007:

MUNUO, J.A.:

The appellant, Leila Jalaludin Haji Jamal, through the services of co-advocates, Mr. Mfalila and Ms Hamida Sheikh, instituted Civil Appeal No. 55 of 2003 to challenge the Ruling of Kyando, J. dated the 28th June, 2002 in Civil Case No. 373/2001 in which the learned judge issued an order for security for costs in favour of the respondent in the following terms:

I order the plaintiff to give security in the sum of Sh. 2,216, 250,000/= which is to be paid into court. Alternatively she can provide a bank guarantee from the kind of bank described by the applicant for this amount in favour of the applicant/defendant. Considering the amount of the security ordered, I give the plaintiff twenty one (21) days within which to pay the sum or provide the bank guarantee.

Dissatisfied with the above Order, the appellant lodged the present appeal.

Before the hearing of the appeal commenced, Mr. Kesaria, learned advocate for the respondent, Shaffin Jalaludin Haji Jamal, filed a preliminary objection contending that the appeal is incompetent so it ought to be struck out with costs on two grounds namely that –

- (a) the Notice of Appeal, Memorandum of Appeal and the record of appeal are all defective because of the incorrect citation of the case number of the lower court; and
- (b) the record of appeal lodged by the appellant is defective as it does not comply with Rule 89 (1) (c) of the Tanzanian Court of Appeal Rules, 1979, for the said record does not contain copies of the pleadings in the lower Court.

Submitting on the above grounds of preliminary objection, counsel for the respondent cited the case of **Citibank Tanzania Ltd. versus Tanzania Telecommunications Co. Ltd. and Others, Civil Application No. 64/2003; D. P. Valambhia versus Transport Equipment Ltd. (1992) TLR 246** wherein the Court ruled that non-compliance with the mandatory provisions of the Court Rules renders the appeal incompetent. He pointed out that the appellant erroneously cited Civil Case No. 373 of 2001 by calling the same Civil Case No. 373 of 2002. The error, counsel for respondent contended, is a fundamental defect which renders the appeal incompetent especially because the error recurs in the memo of appeal and in the record of appeal. It is the contention of counsel for the respondent that the wrong citation contravenes the provisions of Rule 76 of the Court Rules which in turn renders the appeal incompetent so the appeal should be struck out with costs.

Mr. Kesaria cited the case of **Mansoor Daya versus Jenus Ltd. Civil Appeal No. 13 of 2001** (unreported) in which the Court of Appeal struck out the appeal because leave to appeal had not

been obtained. He contended that the decision of the Court in **Mansoor Daya** departed from the decision of a single judge in the case of **Engen Petroleum versus Kobil (T) Ltd. Civil Application No. 110 of 2003** wherein the Court held that wrongly citing a case is a minor and, therefore, a curable irregularity. Like in the present appeal, the appellant had wrongly cited Civil Case No. 250 of 2003 instead of correctly citing Civil Case No. 250 of 2002. In this case, the appellant cited Civil Case No. 373/2002 instead of Civil Case No. 373 of 2001 from which this appeal arises.

On the question of wrong citation, Mr. Mfalila readily conceded that the appellant erroneously cited Civil Case No. 373 of 2002 instead of Civil Case No. 373 of 2001, from which the appellants are appealing against the decision of Kyando, J. It is the view of counsel for the appellant that the wrong citation is not a material irregularity for it does not go to the root of the appeal so it is a curable defect. Counsel for the appellant contended that mis-citing the year 2002 instead of year 2001 was a typographical error which is not substantive because it does not occasion miscarriage of justice.

We note that the Mansoor Daya case cited supra was struck out with costs because mandatory leave was not obtained before the appeal was filed. In that regard, the Mansoor Daya case is, in our considered view, distinguishable because leave to appeal is not an issue in the present appeal. We are, furthermore, of the settled mind that the error of citing year 2002 instead of 2001 is a minor curable defect. We, therefore, overrule ground one of the preliminary objection.

As for ground two of the preliminary objection, Mr. Kesaria urged that the appeal is incompetent for non-compliance with Rule 89 (1) (c) of the Tanzania Court of Appeal Rules, 1979 in that the appellant omitted to file the pleadings of the main suit, namely the plaint and the written statement of defence. Counsel for the respondent asserted that these pleadings should have been included in the record of appeal. The omission, counsel for the respondent argued, rendered the record of appeal incomplete and the appeal incompetent. Counsel for the respondent cited several cases in

which the Court struck out incompetent appeals with costs and urged us to do the same in this appeal. In the case of **Fortunatus Masha versus Wilson Shija and another (1997) TLR 41** the Court struck out the appeal upon the failure of the appellant to file a copy of the decree or order appealed from. In the case of **National Bank of Commerce versus Methusela Magongo (1996) TLR 394** the Court struck out the appeal for want of a copy of the Order appealed against. In another case, **D.P. Valambhia versus Transport Equipment Ltd. (1992) TLR 246** an application for extension of time was struck out because neither a copy of the Notice of Appeal nor a copy of the letter to the Registrar was served on the other party so the appeal was incompetent. On these and other authorities, Mr. Kesaria urged us to strike out the appeal upon the appellant's failure to comply with Rule 89 (1) (c) of the Court Rules.

Responding to ground 2 of the preliminary objection, Mr. Mfalila contended that the present appeal arose from the chamber application on security for costs which matter was determined against the appellant giving rise to this appeal. The chamber

summons, counsel for the appellant observed, was supported by the affidavit and reply of the applicant as well as the counter-affidavit of the respondent. The affidavit, counter-affidavit and reply thereto, counsel for the appellant contended, constituted the pleadings for the chamber application which was determined against the appellant necessitating the lodging of this appeal. Counsel for the appellant pointed out that the pleadings for the chamber application on security for costs are on Pages 35 to 39, and Pages 51 to 52 of the record of appeal. In that respect, counsel for the appellant asserted, the appellant complied with Rule 89 (1) (c) of the Court Rules. The plaint and written statement of defence relate to the main suit which has not yet been heard so they are not relevant to the issue of security for costs which should have been determined from the pleadings of the chamber application. Mr. Mfalila prayed that the second preliminary objection be overruled as well.

The issue before us is whether the appellant failed to comply with Rule 89 (1) (c) by omitting to include the plaint and written statement of defence of the substantive suit in the record of appeal.

We are of the settled view that the Ruling and Order appealed against arose from the interlocutory proceedings on security for costs whose pleadings comprised of the affidavit, counter-affidavit and reply filed by the parties. The pleadings for the chamber application on security for costs, we note, are on Pages 35 to 39, 51 to 52 of the record of appeal. These pleadings, we agree with Mr. Mfalila, are relevant for the determination of the appeal. We are satisfied, therefore, that the appellant complied with the provisions of Rule 89 (1) (c) of the Court Rules. We are of the considered opinion that the pleadings for the substantive suit would be relevant for the determination of an appeal of the main suit which is yet to be heard.

All in all, we find no merit in the preliminary objection. We accordingly overrule the preliminary objection with costs.

DATED at DAR ES SALAAM this 19th day of April, 2007.

E. N. MUNUO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR