IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: ORIYO, J.A., KAIJAGE,J.A. And MUSSA,J.A.)

CIVIL APPEAL NO. 20 OF 2013

MARIAM IDD (As Administratrix
of the Estate of the late
MBARAKA OMARI).....APPELLANT

VERSUS

ABDULRAZACK OMARY LAIZER (As Administrator of
the Estate of the late **ABUBAKAR OMARI).....1ST RESPONDENT**
RODRICK HUMPREY JONAS.....2ND RESPONDENT

(Appeal From the Judgment of the High Court of Tanzania)
At Arusha)

(Nyerere, J.)

Dated the 12th day of July, 2012
in
Civil Appeal No 1(B) of 1992

JUDGEMENT OF THE COURT

5th & 17th June, 2013

KAIJAGE, J. A.:

At the centre of controversy between the parties herein are premises on Plot No. 5, Block 'E', Area 'F' registered under L.O No. 23952 situated within Arusha City. It is common ground that the said property was initially owned and registered in the name of the late OMARI BAKARI who died sometimes in 1991. Following his death, one of his sons, ABUBAKAR OMARI, was appointed an administrator of the deceased estate. After his appointment, he was issued with a long term Certificate of Title No. 12546

over the said property and registered an administrator thereof. In that capacity, he initiated processes of disposing of, by way of sale, the disputed premises to RODRICK HUMPHREY JONAS, the second respondent. Abubakar Omari died on 23rd day of May, 2008 before the intended sale transaction and transfer formalities of the disputed property to the second respondent were completed.

The death of Abubakar Omari brought into picture the first respondent, ABDULRAZACK OMARY LAIZER, who was appointed an administrator of the former's estate. On 12/8/2009, the first respondent was registered a legal personal representative of Abubakar Omari in Certificate of Title No. 12546 of the disputed premises. On the same day, he effected the transfer of the said premises to the second respondent who was henceforth registered its owner, at a consideration of Tshs. 25,000,000/=.

Consequent upon the completion of the sale transaction between the respondents, MARIAM IDD, the appellant, flatly refused to give vacant possession on the ground that the disputed premises were sold by the late Omari Bakari to her late husband, MBARAKA OMARI and that having been appointed an administratrix of the latter's estate, she was its beneficiary owner. Apparently, the late Abubakar Omari, the late Mbaraka Omari and

the first respondent are siblings sharing the same father, the late Omari Bakari.

Going by the record, it appears that the dispute over ownership over the property culminated in the filing, by the respondents, of High Court Civil Case No. 1(B) of 1992.

In its judgment handed down on the 12th day of July, 2012, the High Court decreed and ordered the appellant to give vacant possession of the suit property and was condemned to pay costs of the suit. Aggrieved by that decision, the appellant has now come to us armed with a four points memorandum grounded on the following:-

1. *THAT the High Court clearly erred in law in failing to hold that the suit property; which never comprised part of the estate of the late ABUBAKAR OMARI was illegally sold by the administrator of his estate, the 1st respondent to the 2nd respondent.*

2. *THAT, the High Court clearly erred in law in failing to hold that the disposition of the suit property was unlawful as it was not evidenced in writing or by a written memorandum of its terms as mandatorily required by law.*

3. *THAT, the High Court clearly erred in law in failing to hold that the declared consideration of Tshs.*

25,000,000/= instead of the proper and actual one of Tshs. 200,000,000/= was intended to deceive the Treasury on the tax liable to be paid.

4. *THAT, on the balance of probabilities the High Court ought to have declared the appellant to be the beneficiary owner of the suit property.*

Before us, the appellant had the services of Mr. Kelvin Kwagilwa, learned advocate, while Mr. Abduel Kitururu, leaned advocate, represented the respondents.

When the appeal was called on for hearing, both learned counsel representing the parties rose to state that they were adopting what is contained in their respective written submissions filed in court pursuant to the dictates of Rule 106 (1) and (8) of the Court of Appeal Rules, 2009 (the Rules). At this juncture, the Court, *suo motu,* drew the attention of the learned counsel to the patent defect discovered in the record of appeal as lodged. It was our considered view that the defect which we discovered affected the competence of the present appeal.

Responding to the defect pointed out to them, both learned counsel conceded that the record of appeal as lodged on 6/12/2012 is incomplete. It does not comprise of copies of trial court's proceedings conducted

between 21/01/1992 and 5/04/2011. Of particular significance is the non inclusion, in the record of appeal, of the relevant proceedings and an ex parte judgment delivered by the trial Court on 10/10/1995 referred to in the proceedings of the trial Court appearing at page 61 of the record as lodged. Of further significance, is the fact that the said ex parte judgment does not appear to have ever been set aside.

Despite conceding that copies of the said documents are not incorporated in the record of appeal, both learned counsel were of the view that same are irrelevant to the matters in controversy and are unnecessary for the proper determination of the present appeal. Their view was premised under the *proviso* to rule 96 (1) of the Rules. This brings us to a close examination of the relevant provisions under rule 96 of the Rules which provides:

> *"96(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)……..(c);*
>
> ***(d) The record of proceedings;***

e……(k);

Save that the copies referred to in paragraph (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.

(2)……

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

(4)……(5);

(6) 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.

Admittedly, the proviso to rule 96(1) permits the exclusion of copies of any document or any of their parts that are not relevant to the matters in controversy on the appeal. However, in the light of the provisions under rule 96(3) of the Rules, a decision to choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal. (See; **FEDHA FUND AND TWO OTHERS V. GEORGE T. VARGHHESE AND ANOTHER,** Civil Appeal No. 8 of 2008, **JALUMA**

GENERAL SUPPLIES V. STAN BIC BANK (T) LIMITED AND TWO OTHERS.V. HASMUKH BHAGWANJI MASRANI, Civil Appeal No.93 of 2012 and **JAMAL .A. JAMIM. V. FELIX FRANCIS MKOSAMALI AND ANOTHER,** Civil Appeal No. 110 of 2012 (all unreported).

We are settled in our minds that the proviso to rule 96(1) of the Rules cannot be invoked without there being an application for directions under sub-rule (3). Rule 96(1) of the Rules is only subject to the provisions of sub-rule (3). Indeed, the proviso to that rule must be read with sub-rule (3) of the same rule. (See; **JALUMA's** case – supra). It follows, therefore, that if counsel for the appellant had thought that the proceedings and other copies of documents he excluded from the record of appeal were irrelevant for the proper determination of the appeal, he should have filed an application under rule 96(3) of the rules for appropriate directions. Alternatively, he should have resorted to the provisions of rule 96 (6) of the Rules by filing, **without leave,** the omitted documents within a specified period prescribed thereunder. This was not done.

Rule 90(1) of the Rules provides, *inter alia,* that an appeal is instituted by lodging, in the appropriate registry, the record of appeal among other documents. The record of appeal as lodged is certainly

defective and violative of rule 96(1) (d) of the Rules. Since a defective record of appeal cannot validly institute an appeal, we find that the present appeal is incompetent. The appeal is consequently hereby struck out.

The appeal having been struck out on a point raised by the Court, *suo motu*, there will be no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 17th day of June, 2013.

K.K. ORIYO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

MALEWO, M. A.
DEPUTY REGISTRAR
COURT OF APPEAL