

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 141 OF 2018

MUSSA CHANDE JAPE APPELLANT

VERSUS

MOZA MOHAMMED SALIM RESPONDENT

**(Appeal from the judgment and decree of the High Court of Zanzibar
at Vuga)**

(Mahmoud, J.)

dated the 11th day of December , 2017

in

Civil Case No. 47 of 2012

.....

RULING OF THE COURT

2nd & 5th December, 2019

MWARIJA, J.A.:

The appellant was the plaintiff in the High Court of Zanzibar. He filed a suit, Civil Case No. 47 of 2012 against the respondent, Moza Mohamed Salim. In that suit, the appellant claimed that he is the lawful owner of a house situated on plot No. 198 at Mombasa area, within the Zanzibar Municipality (the suit premises) having purchased it on 15/10/1992 from one Hamid Ramadhani Mgongo. It was his

contention further that in July 2003, the respondent trespassed into the suit premises and resided therein with her family without the appellant's consent. He therefore sought, among other reliefs, an order evicting the respondent from the suit premises.

The respondent disputed the appellant's claim that she trespassed into the suit premises. It was her defence that at the time of filing the suit, the appellant was not a lawful owner of the suit premises as the same had been purchased by one Yahaya Ahmed Salim in 1995. She contended therefore, that she was wrongly sued by the appellant.

Having heard the evidence of the witnesses for both parties, the trial court (Mahmoud, J.) found that the appellant had failed to prove his case. She thus dismissed the suit with costs hence this appeal.

When the respondent was served with the record of appeal, she responded by filing a notice of preliminary objection consisting of two grounds that:-

"1. That the record of appeal is incompetent for want of exhibits X1 and Y1 tendered as per Order XV

Rules 4 (1) (a), (b), (c) and (d) and Rules 7 (1) of Civil Procedure Decree (Cap.8) of laws of Zanzibar contrary to Rules 96 (1) (k) of the Court of Appeal Rules of 2009 as amended by the Court of Appeal (Amendment) Rules, 2017.

2. That the Drawn Order of the Ruling delivered on 23rd day of July, 2013 is not incorporated in the record of Appeal contrary to Rule 96 (1) (h) and (k) of the Court of Appeal Rules of 2009 as amended by the Court of Appeal (Amendment) Rules, 2017.

On 2/12/2019 when the appeal was called on for hearing, the appellant was represented by Mr. Masoud H. Rukazibwa assisted by Mr. Jambia Said Jambia, learned advocates while the respondent had the services of Mr. Said M.H. Mayugwa assisted by Mr. Suleiman Salum Abdalla, also learned Advocates. As the rule of practice dictates, we proceeded to hear first, the preliminary objection raised by the respondent. In support of the 1st ground, Mr. Mayugwa, argued that the record of appeal is incomplete because the appellant did not include the exhibits which were tendered at the trial and admitted in evidence

as exhibits X1 and Y1. Citing *inter alia*, the case of **Ray Champion v. Marek Antoni Kloryga & Another**, ZNZ Civil Application No. 1 of 2013 (unreported), the learned counsel argued that the omission renders the appeal incompetent.

With regard to the 2nd ground of the preliminary objection, Mr. Mayugwa submitted that the appellant has omitted to include in the record of appeal, a drawn order which arose from the ruling dated 25/7/2013 given in respect of the preliminary objection raised by the respondent challenging competence of the suit. According to the learned counsel, the drawn order is necessary for the determination of the appeal and thus the appellant's failure to include it in the record of appeal contravenes the provisions of Rule 96 (1) (h) and (k) of the Rules. Relying on the case of **Anastazia Lucian Kibela and Another v. Abdalla Amour Mohamed & 5 Others**, Civil Appeal No. 121 of 2015 (unreported), the respondent's counsel argued that the omission renders the appeal incompetent and thus urged us to strike it out.

In response to the submission made by the respondent's counsel, Mr. Jambia opposed the preliminary objection. He argued that the documents which are the subject of Mr. Mayugwa's 1st ground of the

objection have been included in the record of appeal. He pointed out that, the documents which were admitted in evidence as exhibit X1 and Y1 at pages 45 and 77 of the record of appeal respectively, are contained in the record of appeal.

As for the drawn order, it was Mr. Jambia's argument that the same is not necessary for the determination of the appeal. He submitted that since the ruling dated 25/7/2013 is not the subject matter of this appeal, the drawn order complained of by the respondent's counsel is not a necessary document. On that submission, the appellants counsel urged us to overrule the preliminary objection.

To begin with the 1st ground of the preliminary objection, it is a correct position as argued by the respondent's counsel, that the exhibits which were admitted at the trial in the High Court are some of the essential documents which, in terms of Rule 96 (1) (k) of the Rules, must be included in the record of appeal. In the case of **Amran Mohamed Talib & 2 Others v. Jamal Abdallah Suleiman**, Civil Appeal No. 18 of 2015 (unreported), the Court stated as follows:-

"... all the documents listed in Rule 96 (1) (a) – (k) are primary or core documents and, unless expressly excluded under sub-rule (3), they must be in the record of appeal, if there is to be a competent appeal."

In the present case, the issue is whether the exhibits referred to as "X1" and "Y1" are not included in the record of appeal. Having perused the record, we agree with the counsel for the appellant that indeed, although they were not so marked, the two exhibits appear at pages 80 – 81 and 82 – 83 of the record of appeal respectively. The document which was admitted at page 45 of the record as "X1" was tendered by the appellant as evidence of his purchase in 1992, of the disputed house from one Hamid Ramadhan Mgongo. That is what the contents of the sale deed appearing at pages 80 – 81 of the record of appeal reflect. Similarly, the document which was admitted at page 77 of the record of appeal as exhibit "Y1" was intended to establish that there was a sale agreement in respect of the said house. The document was tendered by Ussi Khamis Haji (DW6) who testified that he endorsed it in his capacity as the Registrar General of the

Government of Zanzibar. The document which was an annexure 'A' to the plaint, appears at pages 82 and 83 of the record of appeal.

What is clear from the record is that, the two exhibits were properly tendered, admitted and signed by the trial Judge. They were admitted as exhibits "X1" and "Y1". However, the High Court inadvertently omitted to endorse them as required under the provisions of O. XV r. 4(1) (a) (b), (c) and 7 (1) of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar. In our considered view, since the admitted documents are those which have been included in the record of appeal, the omission to endorse them does not render the appeal incompetent. We are supported in that view by the case of **Standard Chartered Bank Tanzania Limited v. National Oil Tanzania & Another**, Civil Appeal No. 98 of 2008 (unreported).

In that case, the Court considered the effect of the omission to endorse exhibits as required by the corresponding provision of the Civil Procedure Code [Cap. 33 R.E 2002] [O. XIII r.4(1)] and observed as follows:-

"... the documentary evidence in the instant case was annexed to the plaint and the written statement of defence, it was properly tendered by the relevant witness who spoke on the exhibits; it was duly admitted by the Court, no party raised any objection or challenged the authenticity or genuineness Considering the exceptional circumstances of this case, we are of the respectful view that the High Court's omission to endorse the exhibits was inadvertent and does not efface them as evidence or render the record of the suit, defective."

On the basis of the above stated position, we do not find merit in the 1st ground of the preliminary objection.

With regard to the 2nd ground, we need not be detain much in disposing it. In this case, as stated above, the appeal is against the decree arising from Civil Case No. 47 of 2012. It is not against any of the interlocutory decisions made in the course of hearing, including the ruling on the preliminary objection dated 25/7/2013 appearing at page 37 of the record of appeal. The drawn order extracted from that ruling

would have been necessary if there had been an appeal against that decision.

It is a decree or order for which an appeal has been preferred that, under Rule 96 (1) (h) of the Rules, should be included in the record of appeal - See for example the case of **Mwananchi Engineering and Contracting Corporation v. Khalifa t/a Msangi Enterprises**, Civil Appeal No. 89 of 2009 (unreported). In that case, the Court stated that:

"Rule 96 (1) (h) of the Court of Appeal Rules, 2009 (the Rules) required among others that a record of appeal contain:

'(h) the decree or order'

from which the appeal is preferred."

That being the position therefore, the 2nd ground of appeal is equally devoid of merit.

On the basis of the foregoing reasons, we find that the preliminary objection has been raised without sufficient grounds. The

same is thus hereby overruled. We consequently order hearing of the appeal to proceed on 6/12/2019 at 9:00 a.m.

Order accordingly.

DATED at **ZANZIBAR** this 5th day of December, 2019

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 5th day of December, 2019 in the presence of Mr. Masoud H. Rukazibwa assisted by Mr. Jambia S. Jambia, counsel for the Appellant and Mr. Said M. H. Mayugwa, counsel for the Respondent is hereby certified as a true copy of the original.




A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL