

TANZANIA / JUDGMENT

daima ally vs hawa mengele msalangi

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVIL APPEAL NO. 107 OF 2016
(CORAM: MKUYE. J.A.. SEHEL. J.A. And KITUSI. J.A.)
DAIMA ALLY..... APPELLANT VERSUS HAWA MENGELE MSALANGI.....RESPONDENT (Appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam) (Khadav, J. dated the 5th day of August, 2016 in Misc. Land Application No. 94B of 2013 RULING OF THE COURT 17th November, & 3rd December, 2020
KITUSI. J.A.: Our determination of this matter is going to be on a narrow scope, so that ordinarily we would not cast our eyes beyond the necessary horizon. However, the twists and turns of the matter, especially at the High Court from where this appeal arises, have inclined us to set out the full

background.

The appellant lost in both Land Application No. 56 of 2009 before the District Land and Housing Tribunal of Kinondoni, and in Land Appeal No. 13B of 2011 before the High Court, Land Division, (Sambo, J.). Thereafter, there followed a wild-goose-chase. First, the applicant lodged an application for leave to appeal to the Court, but later withdrew it. Then subsequently, the urge to pursue again the matter got the better of her, so she applied for extension of time within which to apply for leave. This application was placed before Mansoor, J who granted it ex parte on 7/2/2014. On 26/2/2014 the respondent lodged an application to set aside that order, and that application was granted by Sambo, J on 10/8/2014. This meant that the application had to be determined on merit upon hearing both parties. We must pause here to point out a unique feature of this matter in the registration and numbering of the appeal as well as the applications arising from it. The appeal was registered as Land Appeal No. 13B of 2011, which may have been a correct style of numbering the case. We find it unique that the application for extension of time before Mansoor, J was also registered as Land Appeal No. 13B of 2011 and so was the application before Sambo, J for an order to set aside the order of Mansoor, J. 2 After the order of Mansoor, J had been set aside, the matter was placed before Khaday, J but not as Land Appeal No. 13B of 2011 as had been the trend, it was registered as Miscellaneous Land Application No. 94B of 2013. On 5th August, 2015 the application was dismissed. Aggrieved by that decision, the appellant instituted the present appeal. However, when the appeal was called on for hearing on 5th

September, 2019 the Court raised, on its own motion, the issue whether the record before it was complete. The Court noted that two sets of important documents were not part of the record before it, these are; one, the outcome of the application to set aside the decision of Mansoor, J, two, the Chamber Summons and the attendant affidavits relevant in Miscellaneous Land Application No. 94B of 2013 before Khaday, J, for extension of time. The Court concluded that the record offended Rule 96 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), but proceeded to order filing of a supplementary record of appeal in terms of Rule 96 (7) of the Rules, giving the appellant 30 days within which to file the same, to include the missing documents. 3 When the appeal was subsequently placed before us for hearing, there was indeed a supplementary record of appeal that had been lodged on 30th September, 2019 well within the 30 days earlier granted by the Court. This supplementary record included the ruling of Sambo, J dated 12th August, 2014 setting aside the ruling of Mansoor, J. We noted however that this is but only one of the two sets of documents that were missing in the original record. The other set was the Chamber Summons, the affidavit and counter affidavit relevant in Miscellaneous Land Application No. 94B of 2013. These were not included in the said supplementary record of appeal. We drew the attention of the unrepresented parties to this persistent omission of those vital documents, and the appellant pleaded with us to be given another chance so as to lodge another supplementary record. She submitted that she is a lay person and has brought to court what she could get, unaware that there is still more. She undertook to get the omitted documents if we could grant her another time. The respondent on the other hand, was strongly opposed to that, so she insisted that we strike out the appeal to bring to an end this old matter. 4 It is necessary, we think, to observe that the Rules have in recent years, been amended so much to accommodate certain situations with the view of removing stumbling blocks to swift justice. Specifically, part of sub rule (6) and the whole of sub rule (7) of Rule 96 are a recent development. Originally sub rule (6) provided as follows: "(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". The law as it stood then was that if an appellant did not file a supplementary record within 14 days of lodging the appeal, he had completely missed the boat. But with the amendment of the Rules brought about by Government Notice No. 344 of 2019 which introduced sub rule

- (7) and expanded the scope of sub rule (6), the said sub rules now read as follows: - "(6) Where a document referred to in rule 96(1) and (2) is omitted from the record of appeal the appellant may within fourteen days of lodging the record of appeal, without prior permission and thereafter, informally, with the permission of the Registrar, include the document in 5 the record of appeal by lodging an additional record of appeal.
- (7) Where the case is called on for hearing, the Court is of opinion that document referred to in rule 96(1) and
- (2) is omitted from the record of appeal, it may on its own motion or upon an informal application grant leave to the appellant to lodge a supplementary record of appeal". We are settled in our minds that the above sub rules (6) and (7) have generously accommodated

possible inadvertences on the part of the appellant. Back to the appeal at hand, the chamber summons, the supporting affidavit and the counter affidavit have not been included in the supplementary record of appeal lodged by the appellant. We had toyed with the possibility that after Sambo, J set aside the order of Mansoor, J then all Khaday, J did was to proceed with the hearing of that application that had originally been before Mansoor, J. However, we concluded that there could not have been any such possibility for two reasons. One, while the matter before Mansoor, J was Civil Appeal No. 13B of 2011 that before Khaday, J was Misc. Land Application No. 94B of 2013, meaning that it was a distinct matter with its own pleadings. Two, since the order that set aside the order of Mansoor, J is dated 12th August, 2014, Misc. Land Application No. 94B of 2013 must have been instituted before the setting aside of the said ex parte order of Mansoor, J. The above demonstrates how those documents are key in the determination of this appeal, but the question is whether the Rules permit our further indulgence after we had earlier ordered filing of the supplementary record under Rule 96 (7). Rule 96 (8) ties the hands of the Court subsequent to ordering of filing of supplementary record. It reads: "(8) Where leave to file a supplementary record under sub rule (7), has been granted, the Court shall not entertain any similar application on the same matter". (Emphasis ours) The Rule is clear that we cannot entertain what the appellant has just asked us to do. There have been similar applications by desperate appellants before, such as in the case of Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited, Civil Appeal No. 3 of 2018 (unreported). In that case, counsel for the appellant had invited the Court to apply the Rules with the overriding objective principle in mind as provided by section 3A (1) (c) of the Appellate Jurisdiction Act Cap 141 (the AJA). The Court declined and stated: - 7 "Concomitant with the above, it is to be noted that section 3B (2) (b) of AJA enjoins the Court to ensure efficient use of the available judicial and administrative resources. It is for this reason, rule 96 (8) was added to preclude the Court from entertaining further applications meant to cure like defects in the record of appeal. The bottom line in our view is that defects in the record of appeal attributed to the omission of essential documents required under rule 96 (1) or (2) of the Rules can only be cured once in terms of rule 96 (8) of the Rules". We take a similar position in this case because the appellant has exhausted the opportunity to rectify the defects in the record of appeal which she lodged in court. Before we conclude, we wish to make a brief observation on the registration and numbering of the present appeal as well as the applications that arose from it. With respect, we think it was a bit haphazard, to say the least. The procedure for admission and registration of civil appeals before the High Court is provided under Order XXXIX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC), to be as follows: "9. Where a memorandum of appeal is admitted, the court or the proper officer of the court shall endorse thereon the date of presentation and shall register the appeal in a book, to be known as the Register of Appeals, and kept for that purpose Applications to the High Court are governed by Order XLIII Rule 2 of the CPC which provides; "Every application to the court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit". In view of those provisions, we are unable to comprehend how the registration and numbering of the instant appeal and the applications was as

demonstrated earlier. As the applications could not have been instituted otherwise than by way of chamber summons, they must have had their distinct numbers of registration. Miscellaneous Land Application No.94B of 2013 which was correctly given a distinct number must have been instituted by a chamber summons supported by an affidavit. We therefore wonder how were the application for extension of time (Mansoor, J) and that of setting aside the ex parte order (Sambo, J) both numbered Civil Appeal No. 13B of 2011. However, that is just by way of digression. In fine, since the record of appeal is incomplete for not including the chamber summons in Misc. Land Application No. 94B of 2013 and since we had earlier given the appellant leave to cure the omission in terms of sub 9 rule (7) of Rule 96, this appeal is struck out with costs. The prayer by the appellant to be given another opportunity to bring another supplementary record is not granted because sub rule (8) of Rule 96 of the Rules, bars us from entertaining it. Order accordingly. DATED at DAR ES SALAAM this 1st day of December, 2020. R. K. MKUYE JUSTICE OF APPEAL B. M. A. SEHEL JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL The Ruling delivered this 3rd day of December, 2020 in the presence of appellant and respondent in personal is hereby certified as a true copy of the original. D.R DEPUTY REGISTRAR COURT OF APPEAL 10

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