In reaching this view we should not be understood as condoning the perfunctory manner in which receipts are sometimes prepared but wish to deprecate it strongly. We think, however, that clerical errors in receipts are an irregularity which has no bearing on the form or substance of an election petition and cannot lead to a miscarriage of justice. It is therefore of little moment. The appeal is dismissed with costs.

AZIM SULEMAN PREMJI *v.* ATTORNEY GENERAL AND DR AMAN WALID KABOUROU (NUMBER 1)

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Mfalila, Lubuva and Samatta, JJ.A.)

CIVIL APPEAL No. 63 OF 1998

(From the Judgment and Decree of the High Court of Tanzania at Tabora,Masanche, J., in Miscellaneous Civil Cause No. 3 of 1995)

Civil Practice and Procedure – Court of Appeal Rules – Rights and duties of parties to appeal relating to service of documents – Failure to comply with the Rules and effect thereof – Rules 76, 77, 79, 82, 89(1) 90, 92(1) and 106(b) of the Court of Appeal Rules.

Civil Practice and Procedure – Right to counsel – Right of a party to dismiss counsel – Duty of judge on an application by a party to dismiss advocate.

Appeal – Record of Appeal – Record of Appeal being incomplete – What steps a party may take.

During the trial in the High Court, the second respondent applied to the court to dismiss an advocate who had acted irresponsibly by abandoning him in midstream and allow him to engage another advocate. The trial court rejected the application. In

the Court of Appeal, before the hearing of the appeal got underway, learned counsel for the second respondent applied for leave under rule 106(b) of the Tanzania Court of Appeal Rules 1979, instead of rule 82 of the Rules, to raise a preliminary objection. Leave was granted. Learned counsel submitted that the appeal was incompetent because first, the appellant failed to serve the Memorandum of Appeal and Record of Appeal within seven days as per rule 90 of the Rules and, secondly, that the appeal was incompetent because of incompleteness of the record in that it did not contain the original petition which was amended, and that its absence deprived the second respondent of the opportunity to find out whether the petition was filed out of time or in time. In support of the preliminary objection, counsel for the first respondent submitted that the appellant had acted unreasonably in sending the Memorandum of Appeal to an advocate who, to the knowledge of the appellant, was no longer acting for the second respondent. Counsel for the appellant countered by saying that the Record of Appeal was complete and that service was done timeously under rule 77(2). The second respondent did not comply with rule 79 of the Rules.

Held: (i) The second respondent was highly prejudiced in his defence by a decision made by the trial judge on his application to dismiss Mr Kwikima and engage another advocate.

(ii) The right to defend one's case and the choice of an advocate to do this is unconditional. These two rights cannot depend on the willingness of an advocate to withdraw from the case. A client has an unfettered right to dismiss an advocate.

(iii) Since the High Court had rejected the second respondent's application to dismiss Mr Kwikima, Mr Kwikima was officially still his advocate and the appellant was perfectly entitled to treat him as such.

(iv) Only a respondent who has complied with rule 79 is entitled to have the Memorandum and Record of Appeal sent to him under rule 90. Since the second respondent did not comply with rule 79 he could not be heard to complain that the Record of Appeal was sent to the wrong party because he was not entitled to one.

(v) If the second respondent felt that the record was defective or insufficient he should have filed a supplementary record under rule 92(1) of the Rules since the situation in this case was different from one where the defect involves the absence of one of the documents listed in rule 89, that is, a decree or Memorandum of Appeal.

Preliminary objection dismissed.

Mr Mbezi, for the Appellant

Mrs Sumari, for the first Respondent

Mr Mwengela, for the second Respondent

RULING

(Dated 10 December 1998)

MFALILA, J.A.: Before the hearing of this appeal got underway, Mr Mwengela, learned counsel for the second respondent, rose and applied for leave to raise a preliminary objection under rule 106(b) which might have been raised under rule 82. We granted him such leave. Thereupon Mr Mwengela submitted in support of his preliminary objection that since the appellant failed to serve the respondent with the Memorandum and Record of Appeal within seven days as required by rule 90, the present appeal is incompetent and should therefore be struck out. He submitted further that this appeal is incompetent for another reason, that is the incompleteness of the record. He said that the Record of Appeal is incomplete because it does not contain the original petition which was amended, and that its absence deprived the respondent the opportunity to find out whether the petition was filed in or out of time.

In further support of the preliminary objection, Mrs Sumari, learned Senior State Attorney who appeared for the first respondent, the Attorney General, argued that the appellant acted unreasonably in sending the Memorandum of Appeal and the Record of Appeal to Mr Kwikima whom he knew was no longer representing the second respondent. Mr Mwengela had gone further and suggested that the appellant had done so deliberately in order to frustrate the defence of the second respondent.

In reply Mr Mbezi, learned counsel for the appellant, said that both the Memorandum and Record of Appeal were timeously served

on the counsel for the second respondent on Mr Kwikima and that he did this under rule 77(2) after having earlier served both the second respondent and Mr Kwikima with the Notice of Appeal. He added that as he received no response from either of them after service of Notice of Appeal, he reverted to rule 77. As to the second ground of the record being incomplete, Mr Mbezi said that the record was complete with all the necessary documents required under rule 89 (1).

Before we proceed to determine the preliminary objection on merits, we wish to state that the second respondent was highly prejudiced in his defence by a decision made by the trial judge on his application to dismiss Mr Kwikima and engage another advocate. We honestly failed to see why the judge rejected the second respondent's application to dismiss an advocate who had acted irresponsibly by abandoning him in midstream, and then refusing to let him engage another advocate. This surprising decision by the judge put the second respondent in a very awkward situation whereby he had to fend for himself in a very difficult legal situation. It should always be borne in mind that the right to defend one's case and the choice of an advocate to do this is unconditional. These two rights cannot depend on the willingness of an advocate to withdraw from the case. A client has an unfettered right to dismiss an irresponsible and/or incompetent advocate.

In determining this preliminary objection we intend to reproduce the relevant provisions of the Court Rules:

Rule 77(1) Where any person requires to be served with a copy of a Notice of Appeal gave any address for service in or in connection with the proceedings in the High Court, and has not subsequently given any other address for service, the copy of the Notice of Appeal may be served on him at that address, notwithstanding that it may be of an advocate who has not been retained for the purpose of an appeal.

Rule 79(1) Every person on whom a Notice of Appeal is served shall:

a. Within fourteen days after service on him of the Notice of Appeal lodge in the appropriate registry and serve on

the intended appellant notice of full and sufficient address for service, and

b. Within fourteen days serve a copy of the notice of address for service on every other person named in the Notice of Appeal as a person intended to be served.

Rule 90 (1) The appellant shall, before or within seven days after lodging the Memorandum of Appeal and the Record of Appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of rule 79.

From these rules, it is clear that an intended appellant has the obligation and duty to lodge in the High Court a written Notice of Appeal within fourteen days of the date of the decision against which it is desired to appeal. Seven days thereafter another obligation and duty arises under rule 77(1) namely to serve copies of such notice on all persons likely to be affected by the intended appeal. After this the obligations and duties shift to the respondent after receiving the Notice of Appeal as required under rule 79, that is within fourteen days thereof to lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address for service. This compliance with rule 79 by the respondent shifts the obligations and duties back to the appellant who is required under rule 90 within seven days after lodging the Memorandum of Appeal and the Record of Appeal to serve copies of them on each respondent who has complied with rule 79.

What then happened in this case, the appellant said that he fully complied with rules 76 and 77 by lodging the Notice of Appeal and serving it on all the relevant parties within the prescribed time limits. The respondents did not dispute this, they acknowledged receipt of the copies of the Notice of Appeal. The second respondent conceded that he did not comply with rule 79 after receiving the copy of the Notice of Appeal, but contended that notwithstanding this lapse on his part, the appellant should not have sent the Record of Appeal to Mr Kwikima whom he knew was no longer acting for him. He should,

A he added, have sent the Record of Appeal to him as he did with the Notice of Appeal.

But rule 90 is quite clear on this. Only a respondent or any other party who has complied with rule 79 is entitled to have the Memorandum
B and Record of Appeal sent to them under rule 90. Since in this case, the second respondent conceded his non-compliance with rule 79 he cannot be heard to complain that the Record of Appeal was sent to the wrong party because he was not entitled to one. But in this
C case the appellant bent over backwards to accommodate him by sending the copy of the record to the advocate who officially was still his advocate. As the court had rejected the second respondent's application to change his legal representation, Mr Kwikima was still his counsel
D and the appellant was perfectly entitled to treat him as such particularly when both the second respondent and Mr Kwikima failed to respond as required by rule 79. We said the appellant bent over backwards to accommodate the second respondent in sending the Record of Appeal
E to the address shown subsisting at the trial under rule 77(2) because the service envisaged under that rule is service of the copy of Notice of Appeal not the Memorandum and Record of Appeal.

The second ground for the preliminary objection namely that
F the Record of Appeal is incomplete for non-inclusion of the original petition, can be disposed of by a simple answer namely that if the second respondent felt that the record was defective or insufficient, he should have filed a supplementary record under rule 92(1). This
G situation is different from one where the defect involves the absence of any one of the documents listed in rule 89 i.e. a decree or Memorandum of Appeal.

For these reasons, we dismiss he preliminary objection and order
H that the appeal should now proceed to hearing on merits.

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