in the Notice of Motion, we are not persuaded by Mr Mselem's forceful submission to have the application struck out. Rather, having regard to the peculiar circumstances of the case, the nature of the matter, the subject of the intended revision, we think that the ends of justice of the case would be met by granting leave to the applicant to amend the Notice of Motion so as to comply with the requirement of rule 45(1) of the Court's Rules 1979.

In the event, and for the foregoing reasons, the preliminary objection is overruled. The application for leave to amend the Notice of Motion by stating the grounds of the application is granted within two weeks from the date of this ruling. Each party to bear its costs.

SEBASTIAN RUKIZA KINYONDO *v.* DR MEDARD MUTALEMWA MUTUNGI

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

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

CIVIL APPEAL No. 83 OF 1998

(From the Judgment and Decree of the High Court of Tanzania at Bukoba, Lugakingira, J., dated 27 May 1998 in Miscellaneous Civil Cause No. 12 of 1995)

Civil Practice and Procedure – Appeals – Notice of Appeal – Respondent alleges Notice of Appeal was not served in time – Rule 77(1) of the Court of Appeal Rules 1979 – Who carries the evidential burden to prove service of the copy of the Notice of Appeal.

Civil Practice and Procedure – Limitation – Question of limitation and jurisdiction of the High Court not raised at the trial and the court of first instance did

(4) *Leonsi Ngalai v. Hon. Justine Afred Salakana and Attorney General,* Civil Appeal Number 38 of 1996 (unreported)

Messrs Rweyongeza and *Galati,* for the Appellant

Messrs Magafu and *Swai,* for the Respondent

Mr Kabonde, Amicus curiae

RULING

(Dated 16 December 1998)

LUBUVA, J.A.: This appeal arises from an election petition filed in the High Court at Mwanza, Miscellaneous Civil Cause Number 12 of 1995. During the 1995 General Elections, the appellant Sebastian Rukiza Kinyondo, one among other candidates for the Bukoba Rural Constituency was declared to be the elected Member of Parliament. Dr Medard Mutungi being dissatisfied with the results filed the petition. As a result, the High Court (Lugakingira, J.) declared the Parliamentary Election of 1995 in Bukoba Rural Constituency null and void. Hence this appeal.

At the commencement of the hearing of this appeal Mr Magafu, who together with Mr Swai, learned counsel, appeared in this appeal for the respondent raising a preliminary objection. Earlier, before the Appeal was called on for hearing, Mr Magafu had filed a notice of preliminary objection in terms of the provisions of rule 100 of the Court's Rules 1979, hereinafter referred to as the rules. The preliminary objection was based on the following two grounds:

(5) The appeal is incompetent for the appellant *(sic)* failure to serve the Notice of Appeal to the respondent within the prescribed period.

(6) This Honourable Court has no jurisdiction to entertain ground number 1 of the appeal as that ground was not raised and considered by the High Court during the trial.

Dealing with ground one of the preliminary objection Mr Magafu submitted that the appeal was incompetent because the appellant did not serve the respondent with the copy of the Notice of Appeal within seven days after the Notice of Appeal was lodged. This, he contended, was in contravention of rule 77(1) of the Rules. Elaborating on this Mr Magafu set out the sequence of events as follows: That judgment in the High Court (sitting at Bukoba) Miscellaneous Civil Cause Number 12 of 1995 was delivered on 27 May 1998. The Notice of Appeal was filed on the same day i.e. 27 May 1998 and that the respondent was not served with the copy of the Notice of Appeal until 15 June 1998. According to Mr Magafu the only available evidence in support of the claim that the respondent was served on 15 June 1998 was his (Magafu) diary in which the name "Magafu" is entered against the date 15 June 1998. That after the respondent had been served with the copy of the Notice of Appeal, the respondent signed the diary of the appellant's advocate.

On this ground of preliminary objection, the issue is simple, namely, whether the Notice of Appeal was served within seven (7) days as prescribed under rule 77(1) which, in part, provides:

> 77(1) An intended appellant shall before or within seven days after lodging a Notice of Appeal, serve copies of it on all persons who seem to him directly affected by the appeal ... [emphasis supplied]

It is apparent therefore that it is a mandatory requirement for the appellant to serve the respondent with a copy of the Notice of Appeal within seven days of the Notice of Appeal. The court, however, has the discretion to extend the time in which to serve the notice where sufficient reason is shown. In this case, Mr Magafu for the respondent strenuously contends that the respondent was served with the Notice of Appeal on 15 June 1998. On the other hand, Mr Galati, learned counsel who, together with the lead counsel, Mr Rweyongeza, appeared for the appellant, vehemently opposed the preliminary objection. With regard to the Notice of Appeal, Mr Galati maintained that the Notice of Appeal which was lodged at the High Court sub-registry at Bukoba on 27 May 1998 was also served on the same day i.e.

27 May 1998 personally on the respondent, Dr Medard Mutungi. A
He submitted further that Dr Mutungi, the respondent signed the dispatch book of Galati and Co. Advocates after he was served the copy of the Notice of Appeal. The signature by Dr Mutungi, Mr Galati urged, was sufficient evidence on the respondent. B

Upon close scrutiny of the dispatch book and prompting by the court, Mr Galati concedes that no date was shown against Dr Mutungi's name. This, Mr Galati went on in his submission, was due to inadvertence on the part of his office. In these circumstances it seems to us that C
even if it is accepted that Dr Mutungi appended his signature to the name "Dr Mutungi" there is no cogent evidence to show that the respondent was served on 27 May 1998. In the absence of the date being shown, we do not think that the alleged signature of Dr Mutungi D
is by itself conclusive evidence of service being effected on the respondent on 27 May1998 and not 15 June 1998. What is more, upon being shown the dispatch book in court, it appeared to us that the words indicating subject matter of the dispatch in question, namely, E
"Notice of Appeal" are written in different handwriting. In these circumstances, the appellants claim that the respondent was served with the copy of the notice on 27 May 1998 is, to our minds, highly suspicious. F

In the upshot therefore, with regard to ground one of the preliminary objection, the issue concerning the service of the copy of the Notice of Appeal turns on the word of one person against the other. The respondent says service was effected on 15 June 1998 while the G
appellant claims it was on 27 May 1998. Neither of them as already indicated, has adduced plausible evidence is support of the date claimed. Consequently both the respondent, the objector, and the appellant have in our view, failed to discharge the evidential burden to prove H
service of the copy of the Notice of Appeal on the respondent. It must however be pointed out at once that in holding this view, we are quite alive to the settled principle that he who alleges must prove. In the case before us, it is the respondent who alleges that he was I
not served with the copy of the notice of appeal within seven days

of the Notice of Appeal. On this aspect, the respondent, the objector in the preliminary objection, has a greater burden to discharge than the appellant. That burden in our estimation, the respondent, the objector, has failed to discharge to the required standard, i.e., on a balance of probabilities. That disposes of ground one of the preliminary objection.

We now turn to ground two. Mr Magafu forcefully submitted that the question of limitation and jurisdiction of the High Court cannot be entertained at this stage on appeal because it was not raised at the trial and the court of first instance did not address or make a decision on it. He went on in his submission, on 27 March 1998, at the trial the parties were given the opportunity to prepare written submissions. In the written submissions, he said, this issue was not raised at all. Instead, Mr Magafu stated, objection was raised in respect of verification and not jurisdiction and limitation. To entertain this issue at this stage, Mr Magafu insisted, is a violation of rule 86(1) of the Court's Rules. In that rule, Mr Magafu further elaborated, it is a mandatory requirement that a Memorandum of Appeal should set out the grounds of objection to the decision appealed against, specify the points which are alleged to have been wrongly decided. In this case, he said, the question of jurisdiction and limitation not having been raised, was therefore not decided by the High Court thus does not fall within the scope of rule 86(1). Mr Magafu was quick to point out that the case of *Hon. Wilbroad Slaa v. Arusha Kalwa and others* (1) is distinguishable from this case. In his submission, while in the case of *Dr Slaa* (1) the issue of jurisdiction and limitation was raised and decided at the trial, in this case the issue was neither raised nor decided on. He urged the court to sustain the preliminary objection on this ground with the result that ground one of the memorandum be struck out.

Vigorously opposing the preliminary objection on this ground, Mr Rweyongeza, learned counsel for the appellant, urged that the objection was misconceived. He said, this court has powers which enables it to step into the shoes of the High Court so as to deal even with issues which were not dealt with by the High Court. In support

of this proposition, he cited the case of *Azim Premji v. Aman Walid Kabourou* (2). In the instant case, it was Mr Rweyongeza's contention that the High Court assumed wrong jurisdiction in dealing with the election petition case when the time prescribed under section 115(2) as amended by Act Number 3 of 1997 had expired. He further submitted that the question of jurisdiction is so fundamental that any error pertaining to jurisdiction should be corrected by the Court of Appeal irrespective of whether or not the matter was decided by the High Court. Finally, Mr Rweyongeza urged that court to exercise its revisional jurisdiction to correct the error if this submission this ground is not sustained.

Mr Kabonde, learned Senior State Attorney appeared at the hearing of the appeal as a friend of the court – *amicus curiae*. In his brief submission he more or less made a repeat of what had been submitted by Mr Rweyongeza. He was firmly of the view that if the High Court had as summed wrong jurisdiction in determining the election petition, the court has wide powers to deal with the matter either on appeal or revision. With such wide powers he added, it does not matter whether the point of law involved was raised at the trial court, the Court of Appeal can competently deal with it. For this proposition Mr Kabonde made a vain effort to cite a case which he promised to avail to the court later after consulting his office in Mwanza. Eventually, he furnished the case of *Anwar Z. Mohamed v. Said Selemani Masuka* (3).

The issue for determination in this matter is whether ground one of the Memorandum of Appeal in this appeal can be entertained. In addressing this issue, it is imperative to make it clear from the outset that this court is an appellate court which deals essentially with appeals. The court is therefore a creature of statute in which its jurisdiction and powers are prescribed and the procedure for the processing of appeals is as well provided for under the Rules of the Court. As against this factual situation, the question is whether in this appeal, the issue of jurisdiction and limitation, the subject matter of ground one of the Memorandum of Appeal can be raised in this appeal. As pointed out earlier, Mr Magafu has forcefully argued that it cannot

because it was not addressed and decided by the High Court as the court of first instance. With respect, we think there is merit in Mr Magafu's submission. The filing of a Memorandum of Appeal is one of the essential steps to be taken towards the institution of an appeal. Rule 86(1) of the Court's Rules provides for the format and scope of the Memorandum of Appeal. In part, rule 86(1) provides:

> A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make (emphasis supplied).

From this provision of rule 86(1) it is clear that in order for a subject matter to qualify for appeal purposes, it should comply with the requirement of the Rule. That is, in the first place, the matter should pertain to the decision of the court against which the appeal is preferred. Secondly, the Memorandum of Appeal should also specify the points which are alleged to have been wrongly decided. In the instant case, we agree with Mr Magafu that the question of jurisdiction and limitation was not raised and as a result, it was not decided by the High Court. On this, if we understood Mr Rweyongeza properly, he also conceded that the issue was not raised at the trial. As he put it himself, the issue somehow featured at the trial when dealing with the amendment to the pleadings. Otherwise, the issue did not arise. In the circumstances, as there was no decision of the High Court made on the issue of jurisdiction and limitation, it follows that there is no foundation upon which points which are alleged to have been wrongly decided could be specified in the Memorandum of Appeal. Consequently, in the absence of a decision by the High Court on this aspect, we are settled in our minds that the issue of jurisdiction is not, in the circumstances, subject to the Memorandum of Appeal in terms of rule 86(1) of the Court's Rules.

If the subject matter in ground one of the Memorandum of Appeal does not fall within the scope and preview of rule 86(1) on what basis can it be dealt with in this appeal. Mr Rweyongeza valiantly

submitted that because the issue of jurisdiction is so fundamental, the court has powers to deal with it. We agree that the question of jurisdiction is fundamental but as already observed, the court carries out its work in terms of laid down rules governing appeals. It is common ground that all appeals including those touching on constitutional issues have to comply with the requirements of the Rules. In the case of *Leonsi Silayo Ngalai v. Hon. Justine Alfred Salakana and Attorney General* (4), this court emphasized the importance of adhering to the rules governing appeals even where a constitutional right is involved. That case involved an election petition in which, among others, the question of jurisdiction and Leave to Appeal was raised. The court held to the effect that in an appeal against the decision of the High Court in an election petition case a party may appeal as a matter of right to the Court of Appeal. However, as regards the need for complying with the rules governing appeals the court *inter alia*, stated:

> For the avoidance of doubts, we must emphasize, that this right of appeal, like all other rights of appeac to this court, has to be exercised in accordance with the procedural rules regulating appeals to this court.

The rationale behind the need for complying with the Court's Rules in regulating appeals is not far to seek. If appeals are not dealt with strictly in accordance with the rules, we apprehend the danger of turning the appeal court into a court of first instance where issues are to be tried subject to the rigour of cross examination by affected parties before a decision is arrived at. Furthermore, non-compliance with the rules would, in our view, tempt some of the parties to raise issues at the appeal stage which for some reason were not raised at the trial. We think for an effective appeal system geared towards a proper system of administering justice tendencies of this nature should be deprecated.

As regards the cases cited to us in support of the proposition that issue touching on jurisdiction can be raised on appeal even if they were not raised at the trial, we intend to briefly make observation on two of them. We agree with Mr Magafu, learned counsel that the

A case of *Dr Wilbroad Slaa* (1) is distinguishable from this. In that case, the question of jurisdiction was in issue from the commencement of the trial, it was a subject of decision by the High Court against which the matter came on appeal to this court. Likewise, the case
B of *Azim Premji v. Aman Walid Kabourou* (2), does not in our view, advance the appellant's case any further. In that case which also involved an election petition, unlike the situation in this case, the contended issues on appeal were, among others, the question of citizenship
C which was an issue at the trial and was decided upon. However the question of citizenship was not one of the grounds of appeal but the court raised it *suo motu*, invited arguments on it and made a decision. In this case, the situation is different, the issue did not arise at the
D trial and so, there is no legal basis upon which it can be specified in the Memorandum of Appeal as a point which is alleged to have been wrongly decided by the High Court. And so, these two cases are not, in our opinion, on all fours with the instant case.

E Finally, we turn to Mr Rweyongeza's invitation to the court to invoke its powers of revision. On this, and with respect to the great industry on the part of the learned counsel, we hardly need to dwell for long. For the reasons we have endeavoured to give, namely that
F in a case such as this where the appellant was ably represented by counsel at the trial the issue was not raised at all despite the prompting by the trial judge, we are not inclined to exercise the court's powers of revision.

G In the event, we dismiss ground one of the preliminary objection. Ground two of the preliminary objection is allowed with consequential result that ground one of the Memorandum of Appeal is struck out. Costs in the cause.

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