are even remotely similar to those provisions. We do not find those provisions of assistance to us in the determination of Mr Ngalo's preliminary objection. With all the goodwill in the world, we are unable to find any merit in Mr Kapinga's argument.

For the foregoing reasons, we uphold the preliminary objection and strike out the purported appeal with costs.

SALEHE IBRAHIM *v.* DADIRAHIM MOHAMED

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPEAL No. 60 OF 1996

(From the decision of the High Court of Tanzania at Dar es Salaam, Chua J., dated 7 January 1997, in Probate and Administration Cause No. 72 of 1985)

Court of Appeal Rules – Rules 83(1)(a), 89(1)(e) and 90(1) – Effect of non-compliance with.

The appellant's *caveat* to the respondent's petition for grant of probate was dismissed by the High Court. He appealed to the Court of Appeal, but the Record of Appeal did not incorporate a Memorandum of Appeal, and counsel for the respondent informed the court that the respondent had not been served with a copy thereof. Counsel for the appellant virtually admitted there were such omissions. He contended, however, that the omission was not fatal to the appeal. The court noted that the record did not include the pleadings in the probate proceedings.

Held: The document entitled "GROUNDS OF APPEAL" was not a Memorandum of Appeal; thus there has been a non-compliance with the provisions of rule 83(1)(a) of the Court of Appeal Rules. Preliminary objection is upheld.

Appeal struck out

A Cases referred to:

(1) *Mohantal Karamshi Shah v Mohanlal Kala Thacker* (1955) 22 E.A.C.A. 305

(2) *Dr. Fortunatus Lwanyantika Masha v Dr. William Shija and the Hon.*
B *Attorney General*, CA, Civil Appeal Number 43 of 1986 (unreported)

Statutory provision referred to:

(i) Tanzania Court of Appeal Rules 1979, rules 6(a),10(4) and (5), 79, 83(1)(a), 86(3), 89(1)(a), (c) and (h), 90(1), 100 and 122
C

Mr. Mwengela, for the Appellant

Mr. Kinguji, for the Respondent

D

RULING

(Dated 18 December 1998)

E **SAMATTA, J.A.:** This is an appeal from a judgment of the High Court (Chua, J.), dated 15 June 1995, dismissing the caveat which was lodged by the appellant, Saleh Ibrahim, to the respondent's petition for grant of probate of the will of one Hawa Mohamed, who died on
F 5 November 1985, allowing the petition and appointing the respondent as the executor of the said will of the deceased.

When the appeal was called on for hearing, Mr Kinguji, counsel for the respondent, raised, pursuant to the notice he had lodged under
G rule 100 of the Tanzania Court of Appeal Rules 1979 (hereinafter referred to as "the rules"), a preliminary objection. In the Notice of Preliminary Objection two principal grounds were indicated: (1) the appeal is time-barred; and (2) the appellant did not comply with
H rules 10(4) and (5), 83(1)(a) as read together with rules 86(3), 89(1)(a), (c) and (h), and rule 90(1), of the rules. At the commencement of the hearing of the preliminary objection, however, the learned advocate abandoned the first ground. He informed the court that he had decided to do so because, having studied the provisions of rule 6(a) of the
I rules more closely, he was satisfied that no question of the appeal

being time-barred arises. We are therefore left with the second ground, which we proceed to deal with. A

It is not in dispute that the record of the appeal does not contain any document entitled Memorandum of Appeal. The document which forms part of the record and which purports to relate to grounds of appeal partly reads as follows: B

> **Grounds of Appeal**
>
> The appellant above named appeals to the Court of Appeal of Tanzania against the above mentioned decision on the following additional grounds, namely: C
>
> (1) That the learned trial Judge failed to appreciate legal requirements as to proof of a will in law. D
>
> (2) That the learned trial Judge failed to hold that inheritance under Islamic Law is based on consanguinity.
>
> (3) That the learned trial Judge misdirected himself when he granted probate to the respondent against the totality of the evidence which showed that he was not entitled to such grant. E
>
> *It is proposed to ask the court for Orders sought for in the memorandum of appeal.* [emphasis supplied] F

This document is signed by an advocate from the legal firm of Mchora and Company. Originally the words Grounds of Appeal in the document were immediately preceded by the word additional, but this word was later deleted. It is not known when the deletion was effected, G but, as will, we hope, be clear later in this ruling, as far as the determination of the preliminary objection is concerned the point is irrelevant. Mr Mwengela, counsel for the respondent, very fairly conceded that the record of the appeal does not include a Memorandum of Appeal. H He asserted from the Bar, however, that that document was lodged, but he does not know why it was not incorporated into the record. Mr Kinguji submitted that a Memorandum of Appeal having not been made part of the record, the appeal is incompetent in law. The learned I

advocate cited rule 83(1)(a) of the rules and *Mohanlal Karamshi Shah v Mohanlal Kala Thacker* (1) in support of that submission. The sub-rule reads:

> 83(1) Subject to the provisions of rule 122, an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the Notice of Appeal was lodged:
>
> (a) a Memorandum of Appeal, in quintuplicate;
>
> (b) the record of the appeal, in quintuplicate;
>
> (c) the prescribed fee; and
>
> (d) security for the costs of the appeal,
>
> Save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.

In *Shah's case* (1) the Court of Appeal for Eastern Africa, in a very short judgment, dismissed Shah's appeal from a decision of the Supreme Court of Kenya, on the ground, among others, that the appellant had "failed to observe many of the rules of [the] court governing the presentation appeals." Mr Mwengela sought to meet the point raised by Mr Kinguji by contending that the principle laid down in *Dr. Fortunatus Lwanyantika Masha v Dr William Shija and the Hon. Attorney General* (2) that failure to extract the order appealed from is fatal to the appeal is inapplicable to the present case because, as the learned advocate put it, what is missing here is a Memorandum of Appeal, and not an extracted order. The learned advocate further contended that *Shah's case* is distinguishable from the case now before us because the judgment delivered therein does not disclose that the rules of the court which the appellant (Shah) failed to comply with

are similar to the rules which are said not to have been complied with in the instant case. A

We have given careful consideration to the learned advocates' arguments, and in the end we are of the settled opinion that Mr Kinguji's submission has merit. The provisions of rule 83(1)(a) are, in our view, pre-emptory. A Memorandum of Appeal is a very important document in a Record of Appeal, the absence of which has the effect of making the purported appeal incompetent in law. The document which forms part of the record of the appeal in the present case and which, after the deletion of the word additional is entitled Grounds of Appeal, is not, as Mr Mwengela very properly conceded, a Memorandum of Appeal. We hold that opinion mainly for two reasons: (1) the first sentence of the document makes it abundantly clear that the grounds stated in the document are additional grounds; and (2) the last sentence in the document, as will be recalled, states: "It is proposed to ask the court for Orders sought in the Memorandum of Appeal." That sentence leaves no doubt that the advocate who drafted it did not intend it to be a Memorandum of Appeal. But since the Memorandum of Appeal referred to in the sentence does not form part of the record of the appeal, the conclusion that the purported appeal is incompetent in law is in our opinion, inescapable. The appellant's advocates had the duty to ensure that the record was complete for the purposes of challenging the High Court's decision in this court. They are not entitled to lay the blame for the irregularity which Mr Kinguji has complained against on the Registrar. The Record of Appeal is theirs and not the Registrar's. B C D E F G

Mr Kinguji told the court from the Bar that neither he nor his client has been served with a copy of the Memorandum of Appeal allegedly lodged with the Registrar. Mr Mwengela was unable to contradict this assertion; all he was able to do was to blame his firm's clerks for the irregularity. In our opinion, the omission is a serious irregularity as it constitutes a failure to comply with the mandatory provisions of rule 90(1) of the rules, which reads: H I

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

B The respondent in this case complied with the requirements of rule 79. We hope we shall be forgiven for stating the obvious: In this country a party to a proceeding in a court of justice is entitled in law to know the case he is to meet. His opponent cannot be allowed C to hold his cards close to his chest.

In our settled view, the two irregularities we have considered constitute a sufficient warrant for sustaining Mr Kinguji's preliminary objection. We think, however, that it might serve some practical D purpose if we say a word or two on the appellant's failure to comply with the provisions of rule 89(1)(c) of the rules. The record of the appeal lodged in the registry does not include the pleadings in the probate proceedings. Plainly, this was a serious omission. The need E for advocates to take great pains to ensure that their records of appeal are in order cannot be over-emphasized. As far as possible appeals should be determined on their merits rather than on preliminary technical points.

F For the foregoing reasons, we uphold Mr Kinguji's preliminary objection and strike out the appeal. The respondent shall have his costs.

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