**Kafunga v Sambila**

**Division:** Court of Appeal of Tanzania at Mbeya

**Date of judgment:** 2 June 2004

**Case Number:** 39/04

**Before:** Ramadhani, Nsekela and Msoffe JJA

**Sourced by:** LawAfrica

*[1] Civil procedure – Court of Appeal Rules – Effect of failure to include a copy of the decree or order*

*in the record of appeal.*

**JUDGMENT**

**Nsekela JA:** When this appeal came on for hearing, Mr *Mkumbe*, learned advocate for the respondent, raised the following preliminary objection in terms of rule 100 of the Court Rules, namely that: “Since the record of appeal does not contain the decree or drawn order of the High Court contrary to rule 89(1)(*h*) and 2(v) of the Tanzania Court of Appeal Rules, the appeal is incompetent and should be struck out with costs.” The essence of Mr *Mkumbe*’s argument is that the record of appeal does not contain a decree and consequently the appeal is incompetent. Mr *Mushokorwa*, learned advocate for the appellant, readily conceded the omission of the decree in the record of appeal. However, he submitted that he should be allowed to file a supplementary record under rule 92(3) or amend the record of appeal under rule 104 of the Court Rules. The crucial issue, in these preliminary proceedings, is whether or not there is an appeal before us. Mr *Mkumbe* has submitted to the effect that the omission by the appellant to include in the record of appeal a copy of the decree or order as required by rule 89(1)(*h*) and (2)(*v*) of the Court Rules, renders the appeal incompetent (*sic*). There is considerable merit in this submission. Rule 89(1)(*h*) and (2)(v) sets out a list of documents which are to be included in the record of appeal including “the decree or order”. Documents involved in the prosecution of an appeal are alot more than a notice of appeal and memorandum of appeal. It is clear from this provision that a decree or order is required to be part of the record of appeal in an appeal from the High Court either in the exercise of its original or appellate jurisdiction. Failure to extract the decree or order in terms of rule 89(1)(*h*) and (2)(*v*) of the Court Rules renders the appeal incompetent and has resulted in striking out such an appeal. See *National Bank of Commerce v Magongo* [1996] TLR 394, *Lamwai v Ngula and another* Civil appeal number 43 of 1996 (UR), *Masha v Shija and another* (UR). In result, we sustain the preliminary objection. The appeal is incompetent for non-extraction of the decree or order in terms of rule 89(1)(*h*) and (2)(*v*) of the Court Rules 1979. It is, accordingly, struck out with costs. Of course, the appellant, if he so wishes, can institute the appeal afresh by making the appropriate application before the High Court. For the appellant:

*Mr Mushokorwa*

For the respondent:

*Mr Mkumbe*