IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MFALILA, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 68 OF 1998

BETWEEN

NDWATY PHILEMON OLE SAIBULL ..... APPELLANT

AND

SOLOMON OLE SAIBULL ..... RESPONDENT

(Appeal from part of the judgement of
the High Court of Tanzania at Arusha)

(Mapigano, J.)

dated 5th July, 1996

in

(PC) Civil Appeal No. 32 of 1990

RULING OF THE COURT

MFALILA, J.A.:

When this appeal was called for hearing, Mr. Mwaluko learned counsel for the respondent, rose to argue a preliminary objection against the appeal, an objection he had earlier filed under the provisions of Rule 100 of the Rules of this Court. Mr. Mwaluko submitted that this appeal is incompetent on two grounds. First, he said that the appeal is incompetent for failure to extract the decree and annex it to the record of appeal as required by Rule 89 (2). He added that the document at pages 163-164 of the record of appeal cannot be regarded as a decree because it was not signed by the judge who decided the appeal as required by Order 39 Rule 35 (4) of the Civil Procedure Code. The document which was filed purporting to be a decree was not a decree because it was signed by the District Registrar who had no competence to sign the same. Filing an incompetent decree, is the same as failing to extract and file a decree and this Mr. Mwaluko submitted rendered the appeal incompetent. Secondly, Mr. Mwaluko submitted that this appeal was lodged in contravention of Section 5 (1) (c) of the Appellate Jurisdiction Act 1979 as no leave to appeal was sought and obtained.

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Therefore he concluded the purported appeal is incompetent and should be struck out.

In reply, Mr. D'Souza learned counsel for the appellant, said that the provisions of O. 39 would not apply to third appeals such as the present because that order applies only to appeals from original decrees. He added that since no decrees are issued by Primary Courts and District Courts on appeal from Primary Courts, similarly no decree is required to be issued by the High Court after hearing an appeal originating from a Primary Court. The only thing which is required is a certificate under section 32 (2) of the Magistrates Courts Act 1984.

On ground 2, Mr. D'Souza submitted that there is no need to apply for leave where as in this case there is a requirement to apply for a certificate on a point of law and the same has been issued. This certificate in Mr. D'Souza's view includes leave.

We shall first deal with the second ground of the preliminary objection. In this connection, we wish to reiterate what this Court stated in a similar case, Sambeke Notira v. Ngitiri Meng'oru Civil Appeal No. 9 of 1989. In that case, somewhat a reverse of the present one, counsel for the respondent had taken a preliminary objection and sought to have the appeal struck out as being incompetent because no point of law had been certified for consideration by this Court in terms of section 5 (2) (c) of the Appellate Jurisdiction Act. The record showed that the High Court acting under section 11 had granted leave to appeal to this Court. Counsel for the respondent submitted that such leave was not sufficient to confer jurisdiction on this Court on such a matter. He referred to Rule 89 (2) which specifically provides that in the case of a third appeal, the record of appeal shall contain inter alia, the certificate of the High Court that a point of law is involved.

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In reply, counsel for the appellant submitted in effect that the leave to appeal as granted by the High Court was sufficient to confer jurisdiction on this Court, and that it was not necessary to apply specifically for a certificate that a point of law was involved and further that when in this case the High Court granted leave to appeal, it also amounted to granting the certificate because, he added, there is no special format for such certificate. This court held as follows:

> The present proceedings arise under Head (c) of Part III of the Magistrates Courts Act 1984. The provision makes it clear that despite the general permission granted under sub-section (1) (c) to appeal with leave, in this particular type of cases leave granted under that sub-section would not do, appeal shall lie only upon a certificate that a point of law is involved.
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> It is our firm view that a party seeking a certificate that a point of law is involved must apply specifically for it under section 5 (2) (c) of the Act. We do not think that it is necessary for such a party to make two applications, one for leave to appeal and then another one for a certificate. Only one application under section 5 (2) (c) suffices, and if the High Court certifies a point of law for consideration by the Court of Appeal, that in itself necessarily means that the High Court agrees that the matter should be tested on appeal to the Court of Appeal. It hardly needs emphasizing that when an application is brought under section (2) (c), the High Court should set out clearly that a point or points of law which it certifies for the opinion of the Court of Appeal, and the Court of Appeal should

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not be made to guess what that point or points are.

As we stated earlier, the present case is the reverse of the Sambeke case in that in the present case a certificate that a point of law was involved was issued but not leave to appeal. In the above case, this Court stated that it is not necessary to make two applications in a situation where a certificate of law is required, because once a certificate has been issued, leave to appeal is not necessary as it is deemed to be included in the certificate. The reverse of course is not true, namely, that leave to appeal does not include a certificate that a point of law is involved for consideration by this Court. Accordingly, we agree with Mr. D'Souza and dismiss ground 2 of the preliminary objection.

We now turn to ground 1 of the preliminary objection. Fortunately, there is also a decision of this Court on the point. This was in the case of Robert John Mugo v. Adam Mollel Civil Appeal No. 2/90. In that case, a preliminary objection was raised at the first hearing of the appeal, on the ground that the appeal was incompetent as it lacked the decree against which the appeal was instituted as required under Rule 89 (2). In support of this point, counsel for the respondent, drew the attention of the Court to the record of appeal which contained a document which according to him could not be construed to be a decree as it was not signed as required by O. 39 r. 35 (4) by the judge who adjudicated the case in the High Court where it came as a first appeal from a subordinate court. Counsel contended further that since the decree on appeal was signed by the District Registrar and not by the judge concerned, and since the District Registrar has no power to sign such decree on appeal, either under O. 43 or any other law, the purported decree was invalid and consequently the appeal must be struck out under Rule 82 on the ground that some essential step in the proceedings

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had not been taken. In support of this proposition, he cited the case of Arusha International Conference Centre v. Damas Augustine Kavishe Civil Appeal No. 34 of 1988. This Court held:

> Although the case cited by Mr. Lobulu concerned failure to extract a decree of the court below, we agree that in essence there is no difference between extracting an invalid decree and failure to extract a valid decree. We also agree that a decree on appeal which is not signed by a judge as required by O. 39 r. 35 (4) invalidates the purported decree. This is because such signature by a judge is mandatorily required and it authenticates the decree. We do not however think that every omission or irregularity would necessarily invalidate the decree. Therefore for the reasons stated above we are bound to sustain the preliminary objection made by counsel for the respondent.

One can therefore apply the above rule and say with Mr. Mwaluko that since also the decree in the present case was not signed by the judge who heard the appeal, the decree lodged with the record of appeal is invalid and therefore the appeal should be struck out. Such a result would have been inevitable but for one difficulty, that the present appeal is not from an original decree as O. 39 states. It was a second appeal in the High Court, it having originated from the Primary Court. O. 39 is clearly headed "Appeals from original decrees". We therefore agree with Mr. D'Souza that the order and decision in the Kavishe case quoted above would not be applicable to a case such as the present. There is also another objection to the use of O. 39 and this is that apart from the limited exception created by section 35 of the Magistrates Courts Act, which allows the use of the Civil Procedure Code to strike out appeals from Primary Courts, that Code is otherwise not applicable when the High Court is dealing with appeals

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from Primary Courts. In Julius Petro v. Cosmas Raphael /1983/ TLR 346, the High Court of Tanzania stated:

> The Civil Procedure Code 1966 does not apply to the High Court when hearing appeals originating from Primary Courts. It applies in the High Court, Resident Magistrate's Court and District Courts when they exercise original civil jurisdiction and also applies when the High Court hears appeals originating from District Courts or Resident Magistrates Courts.

Although we hasten to add with respect that the above formulation is too wide in view of the exception referred to above. Where then do we go from here? In this connection Mr. D'Souza suggested that since under the Primary Courts Civil Procedure Rules GN 312/64 there is no requirement for drawing up decrees, similarly there is no requirement for District and High Courts to issue decrees in appeals from Primary Courts. We agree that there is no provision in the Primary Court Civil Procedure Rules for drawing up decrees nor is there one in the Magistrates Courts Act 1984 dealing with appeals from Primary Courts. The nearest provision to the notion of a decree is section 32 of the Magistrates Courts Act which provides:

> 32. (2) Where the High Court determines any appeal or revises any proceedings under this part /Part III of the Act/ it shall certify its decision or order to the Primary Court in which the proceedings originated through the District Court, and the Primary Court shall thereafter make such orders as are conformable to the decision or order of the High Court, and, if necessary, the records shall be amended in accordance therewith.

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Mr. D'Souza submitted that all that is required in appeals from Primary Courts, is a certificate of the decision to the Primary Court concerned. Mr. D'Souza is right but only if no appeal is preferred to the Court of Appeal against the decision of the High Court. Where however an appeal is lodged, the provisions of Rule 89 (2) of the Court of Appeal Rules come into play. This Rule provides:

> (2) For the purposes of any appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-paragraph (1) and shall contain also the following documents relating to the appeal to the first appellate Court:-
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> (i) The order if any giving leave to appeal;
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> (ii) the memorandum of appeal;
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> (iii) the record of proceedings;
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> (iv) the judgement or order;
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> (v) the decree or order;
>
> (vi) the notice of appeal
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> and in the case of a third appeal, shall contain also the corresponding documents in relation to the second appeal and the certificate of the High Court that a point of law is involved.

It is clear from these provisions that a decree is required to be part of the record of appeal in an appeal originating from Primary Courts, in other words the High Court must extract a decree

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from its decision in an appeal from Primary Courts. The next question is who signs this decree? Part III of the Magistrate's Courts Act 1984 does not have such a provision nor the Primary Court Civil Procedure Rules. In the absence of any provision in the relevant statutes or the Rules we have to fall back on Rule 3 to enable us to formulate a procedure in this regard, since the requirement to draw up decrees in appeals originating from Primary Courts is in the Rules themselves.

The requirement that a decree must be signed by the judge who made the decision is rooted in sound reason, namely, that the judge who decided the case or appeal is in the best position to ensure that the decree has been drawn in accordance with the judgement. We think this advantage becomes even more pronounced in a second appeal originating from Primary Courts. Consequently we think that even in second appeals in cases originating from Primary Courts the decree should be signed by the judge. Accordingly in the present case the decree should have been signed by the judge who decided the appeal and not the Registrar and that therefore the decree which is in the record is invalid for that reason.

For these reasons we uphold the first ground of the preliminary objection and say that since the decree which was annexed to the record of appeal is invalid, this appeal is incompetent and we order that it be struck out.

For the same reason that this Court gave in Civil Appeal No. 2/90, we think that justice demands that the appellant be put in a position whereby he can easily re-institute his appeal in this Court should he so wish. With that and in view, we hereby direct that the appellant be at liberty to apply to the High Court within twenty one days of receiving this decision for a decree in

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appeal properly signed by the judge concerned or in case the judge concerned has vacated office for any reason, then such decree shall be signed by his successor. We further direct that the appellant be at liberty to re-institute the appeal in this Court within fourteen days from the date of obtaining the decree from the High Court without further payment of court fees. As the appellant is not in any way to blame for this lapse, we make no order as to costs.

DATED AT ARUSHA THIS 18th DAY OF May, 1999.

L. M. MFALILA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(A.G. MWARIJA)
DEPUTY REGISTRAR

Judgement delivered today 9th day of June 1999 in the presence of Mr. D'Souza for Appellant, Mr. Mwaluko for the Respondent.

AG. DISTRICT REGISTRAR
ARUSHA