

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

CIVIL APPEAL NO. 95 OF 2006

MKAMA PASTORY APPELLANT

VERSUS

TANZANIA REVENUE AUTHORITY RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania
at Mwanza)**

(Mchome, J.)

**dated the 10th day of March, 2005
in**

HC Civil Case No. 10 of 2001

REASONS FOR THE COURT DECISION

MROSO, J.A.:

When we heard this appeal on 12th February, 2007 we sustained a preliminary objection by the respondent and struck it out with costs. We now give our reasons.

In a ruling of the High Court at Mwanza (Mchome, J.) dated 10th March, 2005 the respondent succeeded in a preliminary objection it had raised and, as a result, the appellant's plaint before the High Court was struck out for failure to disclose a cause of action.

The appellant was aggrieved by the ruling and appealed against it to this Court.

Before the appeal could be called on for hearing counsel for the respondent, Mr. Teemba, raised two grounds of preliminary objection against the appeal in a notice which was duly filed nineteen days prior to the hearing date. The notice was followed by a supplementary notice of preliminary objection containing two additional grounds, making a total of four points of preliminary objection.

At the hearing of the points of preliminary objection Mr. Teemba, learned counsel, abandoned the fourth point of objection and also conceded that the first ground of objection was misconceived. As a result, only two grounds of objection were argued by Mr. Teemba. The two grounds read as follows:-

- “(2) That the appellant did not comply with the mandatory provisions of Rule 90 (1) of the Tanzania Court of Appeal Rules, 1979, (G.N. No. 102 of 28th September, 1979).

(3) The Record of Appeal is defective by containing an Extract (sic) Order whose date is different from the date of the Ruling which is appealed against, contrary to the mandatory provisions of order XX Rule 7 of the Civil Procedure Act, Cap. 33 R.E.V. 2002.”

Mr. Teemba submitted that on the basis of either of those two grounds the appeal was incompetent and should be struck out with costs.

After putting up some resistance to the third ground of objection Mr. Magongo, learned advocate for the appellant, yielded. He conceded that the extracted order which was filed did not comply with Order 20 rule 7 of the Civil Procedure Code, 1966 and that the defect rendered the appeal incompetent and liable to be struck out. He did not proceed to argue against the second ground of objection.

We intend to dispose of ground (2) of the grounds of preliminary objection. Rule 90 (1) of the Court of Appeal Rules, 1979 (the Rules) provides as under:-

“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.”

It is apparent that the appellant lodged his memorandum of appeal in the Court registry on 22nd March, 2006 and the record of appeal on 13th July, 2006. He was, therefore, required to serve on the respondent both the copy of the memorandum of appeal and of the record of appeal within seven days of the lodging of those documents if the respondent had complied with Rule 79 of the Rules. It will be recalled that Mr. Teemba informed the Court that the respondent was not so served within the stipulated period. It was served on 13th July, 2006 which was some 113 days after the memorandum of appeal was lodged in the Registry, which would appear to be well beyond seven days. The question, however, is whether the respondent had complied with Rule 79 of the Rules to be entitled to be served the memorandum of appeal and the record of appeal within the stipulated period. Rule 79 (1) which is the relevant part reads:-

"79 (1) Every person on whom a notice of appeal is served shall –

- (a) within fourteen days of service on him of the notice of appeal lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address for service; ..."

Mr. Teemba said to Court that the respondent complied with Rule 79 of the Rules. But he did not point to any particular document in the record as proof of such compliance and Mr. Magongo for the appellant did not address the Court on this ground of objection. The Court, on its part, has gone through the whole of the record of appeal and could not find trace of a notice under Rule 79 (1) (a) lodged by the respondent. We take it, therefore, that no such notice was filed in fact.

It appears to us that since the obligation on the appellant under Rule 90 (1) of the Rules is contingent upon the respondent complying with the requirement under Rule 79 (1) (a) of the Rules, and since the respondent does not appear to have complied with that rule, the obligation on the appellant to serve both the memorandum

of appeal and the record of appeal on the respondent within the period stipulated under Rule 90 (1) of the Rules does not arise. We, therefore, dismiss that ground of objection. We now wish to consider ground (3) in the Supplementary Notice of Preliminary Objection.

The decision against which the appeal is sought was pronounced by the High Court on 10th March, 2005 but the extracted order was signed by the judge who gave the ruling on 19th December, 2005. The dating and signing of the extracted order appears under the following words –

“Given under my hand and the Seal of the Court this 19th day of December, 2005.”

Obviously, the date differs from the date the ruling of the court was given.

Order 20 Rule 7 of the Civil Procedure Act, Cap. 33 of the Laws of Tanzania, Revised Edition of 2002 reads:-

“The decree shall bear the date on which the judgment was pronounced and, when the judge or magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree.”

At first Mr. Magongo attempted to argue that Order 20 rule 7 of the Civil Procedure Act, Cap. 33 (the Act) relates to decrees only and that the Act is silent as regards orders like the one under consideration. Therefore, according to him, Order 20 rule 7 is inapplicable. When the Court called his attention to the provisions of Order 40 rule 2 of the Act, he conceded that orders, too, have to be signed and dated bearing the date the ruling was pronounced.

Order 40 of the Act is on appeals from Orders. Sub-rule 2 thereof reads:-

“2. The rules of Order XXXIX shall apply, so far as may be, to appeals from orders.”

Now, Order 39 which is referred to in Order 40 (2) relates to appeals in original decrees. That would include a decree under Order 20 rule 7 of the Act which is required to be dated as of the date when the judgment was pronounced. We think, therefore, that on the same parity of reasoning an extracted order of the High Court in original jurisdiction is required, under the authority of Order 40 (2) of the Act, to bear the date when the ruling from which the order was extracted was pronounced. We are of the view that that should be the case

because it could not have been the intention of the legislature to require a decree to bear the date when the judgment was pronounced but leave it open for an extracted order to bear any date regardless of when the ruling appealed against was pronounced. The question now is, what would be the legal status of an appeal which is accompanied by an extracted order which does not bear the date when the ruling was pronounced?

We have not been able to find from the available resources judicial pronouncements specifically on orders. However, in a recent decision of this Court in **Jovin Mtagwaba and 85 Others v. Geita Gold Mining Limited**, Civil Appeal No. 109 of 2005 (unreported) this Court held that an appeal which was accompanied by a decree which did not bear the date when the judgment was pronounced was incompetent and the appeal was struck out.

Mulla on The Code of Civil Procedure, Fifteenth Edition at page 1524 commenting on rule 7 of Order 20 which is rendered substantially like rule 7 of Order 20 of the Act underscored the importance of the date of a decree. He said:-

“Under this rule, the decree comes into existence on the date of the judgment, though it is signed later. Decree comes into existence as soon as the judgment is pronounced and not on the day it is signed and sealed later. For the purpose of appeal, time runs from the date of pronouncement of the judgment.”

We think that is the correct position in law. We also think that, again, on a parity of reasoning, the same should be the case with extracted orders *mutatis mutandis*.

The date of a decree, and by extension of an order, is important not only in reckoning time for appeal but also for purposes of period of limitation in the case of an application to set aside an *ex parte* decree or order. Furthermore, the right to execute a decree or order accrues from the date it is pronounced, not on the day it is signed. We are, therefore, firmly of the view that an order which does not bear the date when the judgment or ruling was pronounced is not valid. It follows that an appeal to this Court which does not contain a correctly dated decree or order will not have complied with the requirements of Rule 89 (1) (h) of the Court Rules, 1979. The

Rule requires that for purposes of an appeal from the High Court in its original jurisdiction, the record of appeal shall contain among other documents a copy of the decree or order.

The appeal before the Court does not contain a copy of a valid extracted order. We do not consider that the omission is a mere irregularity but it goes to the root of the appeal. Mr. Magongo appears to concede this legal position.

The consequence of the appeal record lacking a valid order is drastic but inevitable. Although strictly speaking Order 20 rule 7 of the Civil Procedure Act refers to a decree and not to an order, for the reasons which we have attempted to give, creating a parity between a decree and an order for the purpose of dating an order we sustained the third ground of Preliminary Objection and struck out the appeal with costs.

DATED AT MWANZA this 23rd day of February, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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



(S. M. RUMANYIKA)
DEPUTY REGISTRAR