

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CIVIL APPEAL NO. 78 OF 2006

**1ST ADILI BANCORP LIMITED.....APPELLANT
VERSUS
ISSA HUSSEIN SAMMA.....RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of
Tanzania at Dar es Salaam)**

(Ihema, J.)

**delivered on 23rd day of March, 2006
in
HC. Civil Case No. 178 of 2000**

RULING OF THE COURT

6 May & 2 June, 2008

MUNUO, J.A.:

Mr. Maira, learned advocate for the respondent, filed a Notice of Preliminary Objection under Rule 100 of the Tanzania Court of Appeal Rules, 1979, Cap 141 Subsidiary Legislation R.E. 2002, on the ground that –

"The appeal is incurably defective for non compliance with the mandatory provisions and established principles of law".

At the hearing, Mr. Marando, learned advocate, held brief for Mr. Maira with instructions to proceed. Contending that the record of appeal is incurably defective, Mr. Marando pointed out that the decree bears two different dates. Thence, he further contended, the appeal is incompetent and ought to be struck out with costs for non-compliance with the provisions of Rule 89 (1) (h) of the Court Rules.

Furthermore, counsel for the respondent submitted, the supplementary record filed on the 11th April, 2008 purporting to rectify the defective decree in the record of appeal, is not part of the said record. On this, counsel for the respondent cited the case of ***Haruna Mpangaos and 902 Others versus Tanzania Portland Cement Co. Ltd. Civil Appeal No. 10 of 2007***, Court of Appeal of Tanzania (unreported) at Pages 13-14 of the typed ruling, wherein the Court held that a supplementary record does not cure a defective decree in the record of appeal. Mr. Marando argued, furthermore,

that a full bench of the Court should harmonize conflicting decisions on the issue of defective decrees and drawn orders for in the case of ***Kapinga and Co. Advocates versus NBC Civil Appeal No. 42 of 2007 (unreported)*** the Court ordered the appellant to rectify a defective Drawn Order in an otherwise incompetent appeal. All in all, Mr. Marando urged us to strike out the incompetent appeal with costs.

Ms Kirethi, learned advocate for the appellant, conceded that the appeal is incompetent for lack of a properly dated decree in the record of appeal. She also conceded that the supplementary record she filed before the hearing cannot correct the defective decree in the record of appeal. She, nonetheless, requested us to grant her leave to refile the appeal after striking out the incompetent appeal.

We are of the settled view that a defective decree renders an appeal incompetent. Both counsel concede the same. The Court has, as we shall see later, held the same in a chain of cases.

The question before us is whether there is ground for granting the appellant leave to refile the appeal. On this, we wish to refer to Orders XX Rule 7 and XXXIX Rule 35 (4) of the Civil Procedure Act, Cap 33 R.E. 2002.

Order XX Rule 7 states, *inter-alia*:

"The decree shall bear the date of the day 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".

In this case, the decree is wrongly dated so it renders the appeal incompetent. Furthermore, Order XXXIX Rule 35 (4) also underscores the requirement of a proper decree by stating:

Order XXXIX 35. "(1) The decree of the Court shall bear the date of the day on which the judgment was pronounced.

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4. *The decree shall be signed by the judge who passed it:*

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any judge dissenting from the judgment of the Court to sign the decree”.

The Court has, in numerous cases, struck out incompetent appeals for the reason that the decree was defective. To mention but a few of such decisions, the cases of ***Tanganyika, Cheap Store versus National Insurance Corporation (T) Ltd. Civil Appeal No. 37 of 2001 (unreported)***; ***Permanent Secretary Ministry of Natural Resources and Tourism versus Hotel Travertine Ltd. Civil Appeal No. 138 of 2004 (unreported)***; and ***Olam Uganda Ltd.*** suing through its Attorney ***United Youth Shipping Co. Ltd. versus Tanzania Harbours Authority, Civil Appeal No. 57 of 2002 (unreported)***.

In another case, ***Fortunatus Masha versus William Shija and Another (1997) TLR 41*** the Court had this to say on defective decrees:

".....we are of the view that where by reason of non-extraction of the decree or orders, as in this case, the appeal is rendered incompetent, the issue of insufficiency or incompleteness does not really arise. The position that arises is simply one of non-existence of the appeal. Because insufficiency or incompleteness connotes something which can be improved upon, say by adding to it. An incompetent appeal is one which in law did not come into existence although efforts were made to bring it into existence. In such circumstances therefore, one cannot properly talk of there being an insufficient or incomplete appeal which one can improve upon by filing a supplementary record, because in law no appeal came into existence in the first instance, there was only a purported appeal if you wish....."

We are also mindful of the decision in the case of ***Kiboro versus Posts and Telecommunications Corporation (1974) E.A. 155***

in which the then Court of Appeal of Eastern Africa, observed that –

".....The meaning of supplementary record of appeal is made clear in r.89(1). It means a record containing copies of "further" documents or any additional parts of documents which are required for a proper determination of appeal. The word 'further' must.....mean further to the documents required under r.85 (1) to be contained in the record of appeal. Any other construction would mean that any appellant, who has filed a record omitting one or more of the basic documents required by r.85 (1) could, at any time before the hearing, file a fresh record containing those documents, without having to apply to the Court for an extension of time under r.4".

We are satisfied, therefore, and as reflected in the above decisions, that a defective decree renders an appeal incompetent. In this

regard, an incompetent appeal should be struck out with costs. However, in some situations, the Court has allowed defective decrees to be rectified.

In 1990, in the case of ***Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) versus Adam Mollel, Civil Appeal No. 2 of 1990***, Court of Appeal of Tanzania (unreported) the Court granted leave to the appellant to reinstitute the appeal observing that –

".....bearing in mind the fact that practically all judges of the High Court have consistently omitted to comply with the requirements of Order 39 Rule 35(4) and the Court of Appeal has also consistently until now failed to notice the omission since it was established over ten years ago, thereby encouraging members of the legal profession to believe that all was in order with the decree in appeal, we think justice demands that the appellant be put in a position to reinstitute his appeal to this Court should he wish....."

In the Olam Uganda Ltd. case cited supra, the Court noted that in the past –

"the Court had struck out the appeals and proceeded to direct the appellants to reinstitute their appeals within a given time. But we can now safely say that it is all history....."

There could indeed be special and peculiar circumstances which would make the Court grant leave to refile an appeal as it did in Haruna Mpangaos case, *supra*. We are satisfied, however, that there is no justification for doing so in this case.

We accordingly strike out the incompetent appeal with costs.

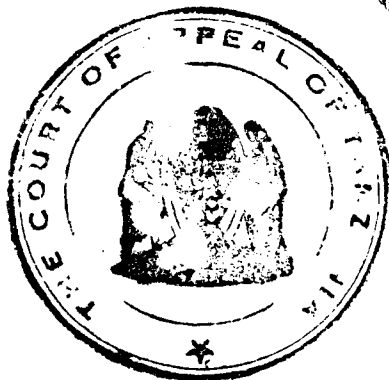
DATED at DAR ES SALAAM this 23rd day of May, 2008.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

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



(S. A. N. WAMBURA)
REGISTRAR