IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MASSATI, J.A., And ORIYO, J.A.)

CIVIL APPEAL NO. 89 OF 2009

MWANANCHI ENGINEERING AND
CONTRACTING CORPORATION ..... APPELLANT
VERSUS
KHALIFA t/a
MSANGI ENTERPRISES ..... RESPONDENT

(Appeal from the Judgment and Decree of
the High Court of Tanzania at Dodoma)

(Shangali, J.)

dated the 3rd day of October, 2008
in
Civil Case No. 19 of 2000

ORDER OF THE COURT

22 & 23 March 2010

MASSATI, J.A.:

When the appeal was called on for hearing, Mr. Kalolo Bundala, learned counsel for the Appellant rose to seek the Court's directions as to what should be done regarding compliance with Rules 34 and 106 of the Court of Appeal Rules. He said that since the Court of Appeal Rules, 2009 came into effect on 1/2/2010, while he had filed his appeal on 28/9/2009 and although Rule 130, requires that the

new rules be complied with, even to cases that were pending where the new rules became operational, (unless there are circumstances that make it impractical to invoke those rules) he was of the view that to invoke the new rules in the present appeal would delay the hearing of the appeal and thus make it impracticable. He prayed that he be allowed to proceed under the old ones under the proviso of Rule 130 of the Rules.

Mr. Alute Mugwahi, learned counsel for the Respondent was of the view that the Appellant should, at least, have complied with Rule 34, which he, had himself done by filing his own submission on the grounds of appeal. But, since Rule 106 involves an exchange of submissions, it would not be practicable to invoke it in the present appeal. He submitted that rule 130 could only be called in aid, if Rule 106 was applied by the Appellant.

After hearing the learned counsel on the question whether or not to invoke the new 2009 Court of Appeal Rules, the Court **suo motu** asked the counsel to address us on their views on the decree

that is now part of the record of appeal. Both conceded that the decree was defective for non compliance with Order XX r 6 of the Civil Procedure Act but said that the defect was curable. The only point of departure between the learned counsel, was that while Mr. Kalolo Bundala sought for an adjournment in order to file a supplementary record containing a proper decree; Mr. Mugwahi, thought that since this was an old matter it was only proper for the Court to invoke its powers under Rule 2 to proceed with the hearing of the appeal regard being had to the need to achieve substantive justice. He was of the view that even if the decree is defective and the appeal succeeds the Appellant will go back to the High Court to apply to correct the decree before execution. We think there are practical implications in Mr. Mugwahi's suggestion. Once we hold that the decree is defective and we hear the appeal and allow it, we would have endorsed the defective decree. Once the Court endorses it it would not be open for the High Court to rectify it before execution. We think that if it is defective, the decree should be amended before hearing the appeal.

Rule 96 (1) (h) of the Court of Appeal Rules, 2009 (the Rules) requires among others that a record of appeal contain:-

"(h) the decree or order"

from which the appeal is preferred. This rule governs appeals from the High Court in its original jurisdiction, whose proceedings are governed by the Civil Procedure Act 1966 (Cap 33 – RE 2002) Order XX r 6 (1) of the Civil Procedure Act stipulates that:-

> "6 (1) The decree shall agree with the judgment; it shall contain the number of the suit the names and description of the parties, and the particulars of the claim, and shall specify clearly the relief granted or other determination of the suit."

It has been held that if a decree does not agree with the judgment, it is defective, although it may be amended and refiled (See **LACHANI & ANOTHER v LAKHANI** (1978) LRT 26). This decision was approved and followed by this Court in **TANZANIA PORTS**

AUTHORITY v PEMBE FLOUR MILLS LTD. (Civil Appeal No. 97 of 2007 (CAT – Dar es salaam (Unreported).

In the present appeal, the judgment of the High Court, is summarised on page 255 of the record:-

> "Apart from these two claims under paragraphs 11 and 12 of the plaint, the plaintiff has totally and completely proved the rest of his claims to the satisfaction of this Court as stated above.
>
> To sum up, and for the avoidance of doubt, the plaintiff is entitled to the following prayers and reliefs:-
>
> 1. The defendants are ordered to release and hand over to the plaintiff the Registration Cards of the above said motor vehicles immediately.

2. The defendants are ordered to pay to the plaintiff a total of TShs. 502,050,000 as shown under paragraphs 10, 13, 14, 17 and 18 of the plaint.

3. The defendants are ordered to pay to the plaintiff interest at the court rate on the decretal sum of TShs. 502,050,000 from the date of this judgment to the date of full payment.

4. The defendants are ordered to pay to the plaintiff interest on the decretal amount at the commercial rate from the date the cause of action arose till the date of this judgment.

5. The defendants are ordered to pay to the plaintiff the costs of this suit.

On the other hand, the coercive part of the decree that is to be found on page 258 of the record, reads:-

> "Apart from the two claims under paragraph 11 and 12 of the plaint which are dismissed the plaintiff has proved the rest of his claims to the satisfaction of this Court. The suit is allowed with costs to that extent."

We think that the decree as it is reflects only part of the judgment. The other part which clearly specifies the reliefs granted is omitted. This is contrary to Order XX rule 6 (1) of the Civil Procedure Act. That renders it defective. The appeal cannot be determined without amending the decree.

For the above reasons we agree with Mr. Kalolo Bundala that in the circumstances the decree must be amended. For it was held in **LACHANI's** case that where there is such a defect the decree must be amended and refiled.

That leaves us with the issue whether or not the Rules should be applied in this appeal. Given that the appeal before us was filed before and pending in this Court at the time the Rules came into force, Rule 130 is to be resorted to for guidance. The Rule is set out below:-

> "130. In all proceedings pending whether in the Court or High Court, preparatory or incidental to, or consequential upon any proceeding in court at the time of the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done:
>
> Provided that:
>
> (a) if and so far as it is impracticable in any such proceedings to apply the provisions of these rules the practice and procedure previously obtaining shall be followed;
> or

(b) in any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted.

We think that there is no ambiguity in this Rule. It simply state that unless the Court finds that it is impracticable to proceed under these rules (in which case it may apply the old rules) the Rules shall apply to all proceedings pending at the time the Rules came into force. Whether or not it is "impracticable to apply the provisions of the Rules, is a question of fact, that will have to be determined from the facts of each case. Whenever a party intends to invoke this proviso he also assumes the burden of satisfying the Court of "the impracticability" of applying the present Rules.

In the present case, counsel were at cross roads. Mr. Bundala, had tried to show the Court that it would be totally impracticable for him to comply with Rules 34 and 106 at this stage because he had already filed the appeal and might involve further delay. But Mr.

Mugwahi, was prepared to accept if the Court would grant the Appellant time only to comply with Rule 34, but not Rule 106.

Since we have already held above that in the circumstances, the Appellant has to file a supplementary record anyway, containing an amended decree before the appeal is fixed for hearing, we do not see why the Appellant should not comply with Rules 34 which requires a list of authorities and submissions therein to be filed within 48 hours to the date of hearing; and Rule 106, which requires submissions to be filed within 60 days after lodging the record of appeal, and after requesting for additional time to do so under Rule 106 (13). So we do not agree with both learned counsel that this is not a proper case in which to invoke Rule 130.

For the foregoing reasons, the hearing of this appeal is adjourned to a date to be fixed by the Registrar; to enable the Appellant to file an amended decree and comply with Rules 34 and 106 of the Rules. The amended decree must however be filed within 30 days from the date of this Order.

It is so ordered.

DATED at DODOMA this 23rd day of March, 2010.

E.A. KILEO
JUSTICE OF APPEAL

S.A.L. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

(E.Y. MKWIZU)
DEPUTY REGISTRAR