

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CIVIL APPEAL NO. 126 OF 2008

SIMON NCHAGWA.....APPELLANT

VERSUS

MAJALIWA BANDE.....RESPONDENT

**(Appeal from the ruling and order of the High Court of
Tanzania, Land Division)**

(Longway, J.)

dated 10th August, 2007

in

Land Case No.212 of 2006

.....

RULING OF THE COURT

22nd October, 2010 & 4th November, 2010

KIMARO, J.A.:

When the appeal was called on for the hearing, Professor Mgongo Fimbo learned advocate appearing for the respondent raised a preliminary objection on the competency of the appeal, notice having been filed earlier on, under Rule 100 of the then Court of Appeal Rules, 1979. The objection is that the drawn order appealed against offends the provisions of Order XX of Rule 7 of the Civil Procedure Code, Act Cap 33 R.E. 2002.

Submitting in support of the preliminary objection, Professor Fimbo said the drawn order forming part of the record of appeal at pages 102 to 103 is defective. Whereas Order XX Rule 7 requires the date of the decree or order appealed against to bear the date of the delivery of the ruling, argued Professor Fimbo, the date of the decree in this appeal does not tally with the date of the delivery of the ruling. In support of his submission he cited to us the cases of **Kapinga & Co Advocates Vs National Bank of Commerce Limited**, Civil Appeal No. 42 of 2007(CAT) (unreported), **Haruna Mpangaos Vs Tanzania Portland Cement Co Ltd** Civil Appeal No. 10 of 2007(CAT) (Unreported) and **Kalunga and Company Advocates Vs National Bank of Commerce** Civil Appeal No. 46 of 2006(CAT) (Unreported). He prayed that the preliminary objection be upheld and the appeal be struck be with costs.

Responding to the submission made by Professor Fimbo, Mr. Abduel Kitururu, learned advocate for the appellant conceded that the position of the law prior to amendment by Government Notice No. 223 of 2010 was as explained by Professor Fimbo and the decisions he cited. However, the learned advocate contended that, the position of the law has now changed.

He said Government Notice No. 223 of 2010 which became effective on 18th June, 2010 amended order XX Rule 7 and now the decree shall no longer bare the date when the judgment was pronounced ,but the date when it was extracted. He said the amendments apply retrospectively.

In brief reply Professor Fimbo insisted that the amendment to Order XX Rule 7 is not applicable in this appeal because the ruling has already been delivered. In his considered opinion, this amendment will only apply in a situation where a ruling is reserved for delivery. But when the ruling in this case was delivered, the law required the decree to bear the date when the judgment was pronounced. He said the Government Notice No. 223 of 2010 cannot cure what was a nullity. He reiterated his prayer for upholding the preliminary objection and striking out the appeal.

On our part we agree that the position of the law prior to the amendments by Government Notice No. 223 of 2010 is as explained by the learned advocates that the decree should bear the date of the delivery of the judgment. The issue before us is whether with the amendments by Government Notice No.223 of 2010 the law has now changed.

Government Notice No. 223 of 2010 was published on 18th June 2010. It shows that it was made under **Rule 81**. This must have been the slip of the pen. It is section 81 of the Civil Procedure Code Act which empowers the Chief Justice with the consent of the Minister responsible for legal affairs to amend the Civil Procedure Rules contained in the first schedule.

Government Notice No. 223 of 2010 is titled The Civil Procedure Code (Amendment to the First Schedule) Order 2010. Sub rule 1 gives the citation of the order as follows: This order may be cited as the Civil Procedure Code (Amendment of the schedule) order, 2010 and shall be read as one with the Civil Procedure Code Act , hereinafter referred to as the "principal order". The relevant part of the amendment concerned with this ruling is sub rule 2 of the Amendment order which reads: "The Principal Order is amended in Order XX by:-

- (a) re-designating Rule 7 as 7(1);
- (b) inserting a new sub-rule (2)as follows:

“2. The decree shall bear the date on which the decree was extracted from the decision” and...”

Going by the amendments the provisions of Order XX Rule 7(1) now reads as follows:

“The decree shall bear the date of the day on which 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.”

The added sub rule 2 of rule 7 now reads:

“The decree shall bear the date on which the decree was extracted from the decision”

Rule 5 says that the amendments shall apply retrospectively.

What is immediately noted from the amendments is that the content of the provision of order XX Rule 7 in existence before the amendment did not change. It remained intact. It has now been re-designated as order

XX Rule 7(1) instead of the previous order XX Rule 7. So in terms of content nothing has changed. Instead, the amendment has brought in confusion, because a provision which contradicts what was in existence has been brought in. As shown from the decisions cited by Professor Fimbo, experience will show that a lot of cases were not determined on merit because of non compliance with the provisions of Order XX Rule 7. A lot of decrees were issued which did not bear the date when the judgment was pronounced. Consequently a lot of cases were struck out because of non compliance with Order XX Rule 7. Parties had to start afresh in filing their appeals after obtaining a properly dated decree or order. This caused delays in determining the cases; parties incurred a lot of expenses and inconveniences and suffered from being denied prompt substantive justice.

What was intended to be cured by the amendments was to have in place a provision of law that would be easily complied with by the courts in order to avoid delays, denial of prompt justice to the parties, save expenses and time of the courts and the parties as well as avoid inconveniences to the parties. Unfortunately, that does not appear to be forthcoming from the amendment effected by Government Notice NO. 223 of 2010. Instead, there will now confusion.

Coming back to the order appealed from, the ruling was written by Longway, J. as she then was, and is dated 10th August 2007. The drawn order shows that the ruling was delivered by G. K. Mwakipesile, Deputy Registrar as she then was, on 24th August, 2007 but the order is dated 10th August 2007 and signed by Mziray J, Successor in office. According to the learned advocate for the appellant, the preliminary objection by Professor Fimbo has no merit because the amendment effected by G.N. 223 of 2010 would apply because it is applies retrospectively.

On the other hand Professor Fimbo argued that the amendment cannot run retrospective in this case.

The question of whether legislation operates retrospective of not was discussed in the case of **Patel V Ben Bros Motors Tanganyika Ltd** Civil Appeal No. 5 of 1968. In the said case Sir Charles Newbold P, had an occasion to discuss the issue of retrospective law. He cited with approval the case of **Municipal of Mombasa V Nyali Limited** 1963 E.A. 371 at page 373 where he said:-

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as

manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

The Civil Procedure Code Act regulates the procedure for conducting civil proceedings. It is a procedural law. The drafting of a decree and dating is a procedural requirement. It does not affect the substantive rights of the parties. Moreover, the intention of the amendment was to solve the predicament of having the decree be signed only by the judges and magistrates while they could as well be signed by

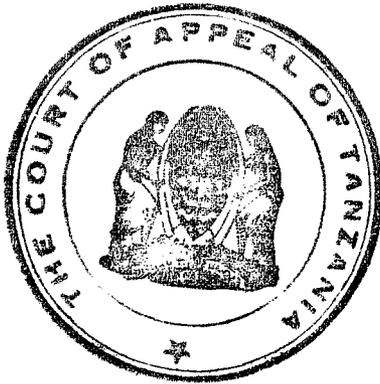
other judicial officers without occasioning any harm to any of the parties in the proceedings. From the above observation and the case of **Patel V Ben Bros Motors Tanganyika Ltd** (supra) the amendment applies retrospectively because they will only affect the procedure and not substantive rights of the parties.

However, as we have pointed out, in the case at hand, the amendments have not solved the problem of the order appealed from. One, we have pointed out the confusion brought out by amendments. The provisions of Order XX Rule 7 have remained intact. A decree has to be dated and signed by the Judge on the date the judgment is pronounced. Two, the new sub section 2 of Order XX Rule 7 added to the Rules by the amendment requiring the decree to be signed on the date it is extracted cannot apply because it conflicts with sub Rule 1 of Order XX Rule 7 . Three, the order in this case is peculiar in nature. The date when the decree was extracted is not indicated. As stated the ruling is dated 10th August, 2007. It was delivered on 24th August, 2007. The order tends to show that it was signed on 10th August 2007. Obviously, the 10th of August, 2007 cannot be the date when the decree was extracted because on that day it had not even been delivered to the parties. So in this case

we have no properly dated order which is appealed from. Under Rule 89(1) (h) of the then Court of Appeal Rules 1979, one of the essential documents to be contained in a record of appeal is a copy of the decree or order appealed from. Since the order forming part of the record of appeal is improperly dated, it is good as having no order appealed from. The cases cited by Professor Fimbo and all others decided on the same issue are still valid and have not been affected by G.N .223 of 2010.

In the event, we find the preliminary objection having merit. It is upheld and the appeal is struck out with costs. It is ordered.

DATED at DAR ES SALAAM this 28th day of October, 2010.

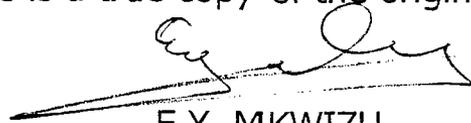


J.H. MSOFFE
JUSTICE OF APPEAL

N.P.KIMARO
JUSTICE OF APPEAL

M.S.MBAROUK
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL