IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CIVIL APPEAL NO. 48 OF 2010

BETTY MBAPA ..... APPELLANT

VERSUS

1. **DIPAK VASSA**
2. **JOSEPH MUSHI** } **.....RESPONDENTS**

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Mwipopo, J.)

Dated the 19th day of November, 1998
in
Misc. Civil Appeals No. 6 of 1996 and 7 of 1997

RULING OF THE COURT

4 & 8 July, 2011
RUTAKANGWA, J.A.:

The proceedings which gave rise to this purported appeal have had a chequered history. Because of the order we propose to make, we have found the narration of the historical background to bear us out on this assertion of little account. It will suffice, in our considered view, if we briefly state that, way back in 1989, the 2nd Respondent herein had sued the appellant in the District Court of Mbeya at Mbeya (**vide** Civil Case No. 54 of 1989). He was claiming to be reinstated to his business premises, which the appellant had allegedly unlawfully closed, and general damages. The suit was resisted by the appellant.

In a judgment delivered on 31st March, 1992 the trial District Court allowed the 2nd Respondent's claim. It decreed that the appellant pay the 2nd respondent "TShs. 1000/= per day from 28/8/1989 up to when the shop" would have been opened. The 2nd respondent was also awarded interest at the rate of 7% per centum, and costs, among other claimed ancillary reliefs.

The appellant was aggrieved. She preferred an appeal to the High Court, **vide,** Civil Appeal No. 9 of 1992. The High Court (Mkude, J.) sitting at Mbeya, allowed the appeal and set aside the decree and orders of the trial District Court. This was on 15th June, 1994. However, before the said appeal was finally determined by the High Court, the 2nd respondent had managed to secure the execution of the decree in his favour. The execution involved the selling of a house by public auction. The eventual successful bidder happened to be the 1st respondent herein. The successes on both sides triggered off numerous applications in both the trial District Court and the High Court, and also a few appeals in the High Court. Of particular importance for this appeal are Misc. Civil Appeals No. 6 of 1996 and 7 of 1997. These two appeals which were predicated upon the outcome in Civil Appeal No. 9 of 1998 were consolidated, heard together and determined by Mwipopo, J. on 19th November,1998. It is this decision which prompted this purported

appeal. The merits of the decision are not relevant for the purposes of this ruling, however.

Both the appellant and 1st respondent were aggrieved by the said decision of Mwipopo, J. The appellant was the first to appeal and the 1st respondent subsequently cross-appealed. This purported appeal was instituted by the appellant after being granted an order, by Lukelelwa, J., on 6th August, 2008, extending the time within which to lodge a notice of appeal. Pursuant to this order of extension of time, the appellant lodged the notice of appeal on 22nd October, 2008. This was exactly seventy seven (77) days following the grant of the order. Thereafter this "appeal" was instituted on 25th February, 2010.

When the "appeal" was called on for hearing, the appellant was represented by Mr. Justinian Mushokorwa and the 1st respondent was represented by Mr. Mika Mbise, learned advocates. The 2nd respondent appeared in person and was unrepresented.

At the outset, we wanted first to satisfy ourselves as to whether or not there was a competent appeal before us worth considering and determining on merit. We had to take this course at the earliest opportunity because of two very glaring defects we noted in the record of appeal. The first and obvious one was the notice of appeal. Was it

lodged in time? The second one related to the incorporated copy of the trial court's decree upon which civil appeal No. 9 of 1992 which was decided by Mkude, J., was based. It is this latter decision which, admittedly, prompted most of the applications in the High Court and eventually led to the institution of this "appeal." Although, as we have already shown above, the trial District Court issued its decree on 31st March, 1992, the incorporated copy is dated "April, 2007". Could Betty Mbapa have appealed to the High Court in 1992 and yet have her memorandum of appeal accompanied by a copy of the decree dated "April 2007"? What is the position of the law regarding these two defects?

Under Rule 7 of Order XX of the Civil Procedure Code, Cap. 33, (the Code) every decree of the trial District Court (and the High Court too) shall be signed by the presiding magistrate (or judge) or his/her successor in office, as of the date when the judgment is pronounced in open court. Ever since the decision of this Court in the case of **ABDALLA RASHID ABDALLAH v. SULUBU KIDOGO AMOUR & SAID ISSA SAID,** Civil Appeal No. 94 of 2006 (unreported), it is now settled law that, if a first appeal from an original decree under the Code, is accompanied by a wrongly dated or undated decree, contrary to the

mandatory requirements of the said Rule 7, that appeal is rendered incompetent and ought to be struck out.

Furthermore, it is a mandatory requirement under Order 39 Rule 1(i) of the Code for a memorandum of appeal to the High Court to be accompanied by a copy of the decree appealed from. Omission to attach the said copy to the memorandum of appeal, renders the appeal incompetent also.

Also, under Rule 76 (2) of the then Tanzania Court of Appeal Rules, 1979 (the Rules), any person who desired to appeal to this Court had to lodge a notice of appeal within fourteen days of the date of the decision against which it was desired to appeal. This was a mandatory requirement. Failure to do so, unless an extension of time had been sought from and granted by either the High Court or this Court, rendered the instituted appeal incompetent. Fortunately, both Mr. Mushokorwa and Mr. Mbise did not dispute this long established legal position. We, accordingly, need not cite any authority to bear us out on this. What then were the positions taken by the two learned advocates on these patent defects in the record of appeal.

On the issue of non compliance with the mandatory provisions of Order XX Rule 7 of the Code, both counsel were in agreement that the

copy of the trial court's decree incorporated in the record of appeal, was incurably defective. They only parted company when it came to the issue of the legal consequences thereof. While Mr. Mbise contended that the defect rendered the appeal incompetent, Mr. Mushokorwa prayed for an adjournment so as to be enabled to amend the defects.

On the second defect (on the notice of appeal), Mr. Mbise urged us to hold that the notice was lodged out of time and as such it was not valid. On his part, Mr. Mushokorwa, strenuously argued that since the High Court did not set a time limit, in the extension order, within which to lodge the notice of appeal, he thought and believed that they had a "right to lodge the notice of appeal, any time" after the grant of the extension order. To him, therefore, it was lodged in time.

We shall begin within the notice of appeal. It is our firm holding that Mr. Mushokorwa's contention is misconceived in law. The High Court, in our considered judgment, in granting an order extending the time within which to lodge the notice of appeal, was bound by the express provisions of Rule 76 (2) of the Rules. Although the order did not expressly set the time limit for doing so, the same was subject to the time limit prescribed in sub rule (2). Neither the High Court nor this Court, for that matter, had jurisdiction to set a limit for the lodging of the notice of appeal beyond the prescribed period or in violation of the

express provisions of the law. We believe that the learned judge was aware of this. See, **JOHN MUGO** (Administrator of the Late John Mugo Maina) **v ADAM MOLLEL,** Civil Appeal No. 2 of 1990 (unreported), for inspiration. On this legal premise, we find ourselves constrained to hold that this notice of appeal was lodged out of time. We accordingly strike it out. This purported appeal is therefore, rendered incompetent and ought to be struck out.

All things being equal, we would have rested our decision at this stage. Due to the second irregularity pointed out already, we shall not do so. We have , we think, a duty to make this brief observation. It is trite law that a wrongly signed and/or dated decree renders an appeal based on it totally incompetent. Indeed this Court in a number of cases has categorically ruled that a defective decree cannot even be cured by invoking the provisions of Article 107A(2)(e) of the Constitution. See, for example, **AMI (TANZANIA) LIMITED v. OTTU on BEHALF OF P.L. ASSENGA & 106 OTHERS,** Civil Appeal No. 76 of 2006, **THE ATTORNEY GENERAL v. Rev. CHRISTOPHER MTIKILA,** Civil Appeal No. 20 of 2007, and **ABBDALLA R. ABDALLA v. SULUBU AMOUR** (supra) (all unreported).

In the **AMI v. OTTU** (supra) case, the Court succinctly held that:

"...such non compliance is fundamental and goes to the root of the matter and in our humble view, Article 107A(2) (e) cannot resurrect a non-existent appeal."

In our endeavours to solve the riddle posed by the incorporated patently incurably defective copy of the trial court's decree, we spared no efforts in perusing most of the relevant court records. These included the original trial District Court record. It is unfourtunate that our endeavours were not successful. We failed to trace a copy of the decree dated 31st March, 1992. All we found, in all these records, were copies of the "April, 2007" decree. Does this, then, lead to an inference that Civil Appeal No. 9 of 1992 which led to the institution of this incompetent appeal was lodged by a memorandum of appeal which was not accompanied by any copy or a proper copy of the decree appealed from? This crucial question, in our considered opinion, will be answered at the appropriate stage. For the moment, we cannot even hazard an answer. We were only making a simple but pertinent observation on account of having on record, a copy of the decree dated "April, 2007" in respect of an appeal lodged in 1992.

All said and done, for the reasons already stated when dealing with the issue of the notice of appeal, we find this appeal to be incompetent.

It is accordingly struck out as urged by Mr. Mbise. However, as neither party pressed for costs and we would not have been inclined to grant them in the circumstances, we make no orders on costs.

DATED at **MBEYA** this 8th day of July, 2011.

E.M.K RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL