

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: OTHMAN, C.J., KIMARO, J.A., And KAIJAGE, J.A.)

CIVIL APPEAL NO. 11 OF 2016

RICHARD EMILLIAN NJOVU T/A

NJOVU INTERPRISES APPELLANT

VERSUS

BENEDICTINE FATHERS NDANDA ABBEY..... RESPONDENT

(Appeal from the judgement of the High Court of Tanzania

at Mtwara)

(Twaib, J.)

dated the 17th day of June, 2015

in

Civil Case No. 4 of 2008

RULING OF THE COURT

2nd & 4th August, 2016

KAIJAGE, J.A.:

The respondents were plaintiffs and successful litigants in Civil Case No. 4 of 2008 instituted in the High Court of Tanzania at Mtwara. As against the appellant who was a defendant and a losing party, the High Court decreed as follows:-

"(a) The defendant is ordered to pay the plaintiff the sum of Tsh. 300,000,000/= being the principal sum and interest up to 27th May, 2008.

(b) The sum in (a) above shall attract 15% commercial rate interest from 27th May, 2008 to the date of this judgement and at 12% court interest rate from the date of judgement to the date of payment in full.

(c) The plaintiff shall also have their costs."

Dissatisfied with the judgement and decree of the trial High Court, the appellant has now appealed to this Court.

Before us, the appellant and the respondents had, respectively, the services of Mr. Steven Tonya and Mr. Hussein Mtembwa, both learned advocates.

When the appeal was called on for hearing, we raised, *suo motu*, a legal issue upon which we tasked the learned counsel representing the parties

herein to give their respective comments. Our main concern was the competence or otherwise of the present appeal, a discovery of a patent discrepancy between the date of the decree and the date of the judgement having been made. Whereas the record of appeal depicts the judgment of the trial High Court as having been delivered on **17/6/2015**, a decree extracted therefrom is dated **18/6/2015**.

Addressing the issues we raised, both learned counsel readily and concurrently conceded the shortcoming, stating categorically that the decree in the record of appeal bears a different date from that on which the judgement was delivered. On account of this anomaly, the decree is rendered invalid and the record of appeal defective, they said. It was further their contention that a defective record of appeal renders the appeal incompetent. Finally, Mr. Mtembwa urged us to strike out the appeal for being incompetent. Realizing, at this stage, that the appeal as instituted was inarguably incompetent, Mr. Tonya, on the other hand, prayed that it be marked as withdrawn.

On our part, we propose to commence our brief discussion by examining Order XX Rule 7 of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC) which provides:-

*"The decree shall bear the date of the day on which
the judgment was pronounced ..."*

Under Rule 96(1) (h) of the Tanzania Court of Appeal Rules, 2009 (the Rules), a copy of the decree or order sought to be appealed against is an essential document in the record of appeal. Law is settled that lack of such document renders the record of appeal defective, and the appeal itself incompetent (see; for instance, **ROBERT EDWARD HAWKINS AND ANOTHER Vs PATRICE MWAIGOMOLE, Civil Appeal No. 48 of 2006** (unreported). Indeed, for such a copy of the decree to be valid, it must in form and substance comply with Order XX Rule 7 of the CPC. If it does not, the decree is defective. (See, **TANZANIA MOTOR SERVICES LTD V's TANTRACK AGENCIES LTD;** Civil Appeal No. 61 of 2007 (unreported).

Since on the authority of the decision in **TANZANIA MOTORS SERVICES'** (supra) a defective decree is as good as no decree, it follows

that a record of appeal to this Court which contains an invalid decree extracted in violation of Order XX Rule 7 of the CPC will not have complied with the requirements of Rule 96(1) (h) of the Rules which reads:-

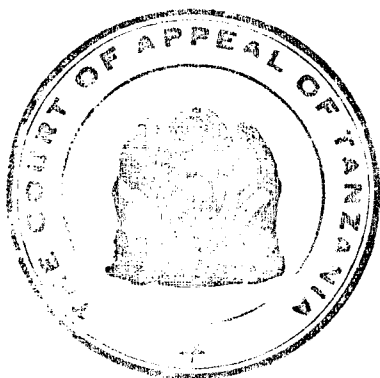
*" 96(1) for purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3), **contain copies** of the following documents:-*

- (a) - (g) (not relevant)
 - (h) **The decree or order;**
 - (i) - (k) (not relevant)..."
- [Emphasis is ours].

We agree, as conceded by the learned counsel, that the appellant in the present purported appeal had sought to appeal against the decree of the High Court dated **17/6/2015**, but the decree which is incorporated in the record of appeal is dated **18/6/2015**. It is as good as no decree. On account of this glaring discrepancy, we are constrained to find the record of appeal defective and the present appeal incompetent. A finding that an appeal is incompetent has constantly resulted in striking out such appeal.

Having made a finding that the present appeal is incompetent, there is, certainly, no appeal which can be withdrawn. We thus decline Mr. Tonya's belated invitation for marking the appeal as withdrawn. Accordingly, we uphold Mr. Mtembwa's prayer and proceed to strike out the appeal, as we hereby do. Since the issue leading to the disposal of this matter was raised by the Court, *suo motu*, we shall make no order as to costs.

DATED at **MTWARA** this 3rd day of August, 2016.



M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL