IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., ORIYO, J.A. And MWARIJA, J.A.)

CIVIL APEAL NO. 87 OF 2013

ORYX OIL COMPANY LIMITED.....APPELLANT

VERSUS

COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY.....RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals tribunal at Dar es Salaam.)

(Mataka, Vice Chairman, Prof. Doriye and Mr. W. Ndyetabula,

Tribunal Members)

Dated the 31st day of July, 2013

In

Customs and Excise Appeal No. 3 of 2012

RULING OF THE COURT

17th February & 14th March, 2016

MWARIJA, J.A.:

This appeal arises from the decision of the Tax Revenue Appeals tribunal (the Tribunal) dated 6/12/2011. The appellant had appealed to the Tax Revenue Appeals Board (the Board) against the respondent's decision refusing to refund to the appellant a sum of Tshs. 426,421,184/=. The amount was claimed to be the duty which was paid for fuel supplied by the appellant between 2007 and 2008 to foreign bound ships. The appellant contended that on the respondent's

consent, it supplied the fuel after it had complied with the requisite conditions for duty drawback as stipulated under the East African Community Customs Management Act, 2004. The Board allowed the appeal and ordered each party to bear its own costs.

Aggrieved by the Board's decision, the respondent successfully appealed to the Tribunal. In its decision, the Tribunal found that the appellant did not qualify to the duty drawback scheme and that it was not therefore, entitled to be refunded the claimed amount of Tshs. 426,421,184/=. Dissatisfied with the Tribunal's decision, the appellant preferred this appeal raising one ground of appeal; that:

> *"The Tax Revenue Appeals Tribunal erred in law by holding that the Appellant herein does not and did not meet any of the conditions under the duty drawback scheme or under the open system provided for under section 138 of the East African Community Customs Management Act, 2004 and hence is not entitled to duty drawback under any of the provisions of the law."*

After service upon it of the record of appeal, the respondent filed a notice of preliminary objection under Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 challenging the competence of the appeal. The preliminary objection, the notice of which was filed On 12/2/2016, is to the effect that the

appeal is bad in law for the appellant's failure to comply with Rule 21 of the Tax Revenue Appeal Tribunal Rules, 2001, G.N. No. 56 of 2001 (The Tribunal Rules) which provides for signing and certification of decisions of the Tribunal.

On 17/2/2016 when the appeal was called on the hearing, the appellant was represented by Mr. Martin Matunda, learned counsel while the respondent had the services of Mr. Felix Haule, learned counsel. We decided to dispose the preliminary objection first.

Submitting in support of the preliminary objection, Mr. Haule argued that the appeal is defective because the decree of the Tribunal (the Decree) is only signed by the Vice-Chairman while it ought to have been signed by both the Vice-Chairman and the members of the Tribunal (all members). For that reason, Mr. Haule argued, the decree contravenes the provisions of Rule 21 of the Tribunal Rules. To bolster his argument, he cited the decisions of this Court in which a similar issue was dealt with. The cases include **Midcom Tanzania Limited v. Commissioner General (TRA),** Civil Appeal No. 13 of 2011 and **Mbeya Intertrade Company Limited v. The Commissioner General,** Civil Appeal No. 68 'A' of 2010 (both unreported). Mr. Haule argued that the defects renders the appeal incurably defective. On that submission, he prayed that the preliminary objection be upheld.

In response, Mr. Matunda opposed the preliminary objection. He argued that Rule 21 of the Tribunal Rules applies only to decisions of the Tribunal, not decrees. He contended that, since the decision was signed and certified by all members, Rule 21 was complied with. He added that under Rule 23 of the Tribunal Rules, issuing of a decree is mandatory only for the purpose of execution, otherwise a decree is not part of the Tribunal's decision required by law to be signed and certified by all members.

Emphasizing his argument, Mr. Matunda contended that, unlike a decision of the Tribunal, a decree is not a necessary document which an appellant is required to include in the record of appeal. As to the decisions cited by Mr. Haule, Mr. Matunda submitted that on the basis of his submission, the same were given *per incuriam*. He therefore urged us to disregard them.

In his short rejoinder, Mr. Haule reiterated his submission in-chief stating that, contrary to what was submitted by Mr. Matunda, a decree of the Tribunal is part of the Tribunal's decision. Relying on section 8 of the Tax Revenue Appeals Act [Cap. 408 RE. 2010] which provides for composition of the Tribunal, Mr. Haule argued that since after making a decision, the Tribunal is required to issue a decree, the same cannot be valid unless it is signed by all members who heard and determined the appeal.

From the submissions made by the counsel for the parties, the issue which arises for our consideration is a narrow one; it is whether or not the appeal is incompetent for want of a valid decree. The basis of Mr. Haule's contention is that the decree is not signed by all members. The position as regards the effect of a decree which is not signed by all members has been a subject of decision by this Court in several cases including **Midcom Tanzania Limited** and **Mbeya Intertrade Company Limited** (supra) cited by the learned counsel for the respondent. In all the cases, the Court held that a decree of the Tribunal which is not signed by all members renders the appeal incurably defective.

Although it is true that Rule 21 of the Tribunal Rules refers to a decision, a decree is, under Rule 24(3) of the Tribunal Rules, read together with Rule 96 (2) (e) of the Tanzania Court of Appeal Rules, 2009, a necessary document which a record of appeal must contain. To be valid therefore, like a decision of the Tribunal, a decree must be signed in the same manner as the decision from which it arises. In the case of **Pembe Flour Mills Limited v. Commissioner General, TRA**, Civil Appeal No. 50 of 2015 (unreported), this Court stated as follows:

> *"In terms of Rule 14(1) of the Tax Revenue Appeals Rules, the quorum in the Tribunal shall be three members of whom one shall be the Chairman or Vice-*

Chairman. This means that a decree, just like a decision of Tribunal, must be signed by all members of the Tribunal."

Having so observed, the Court rejected the argument similar to the one made by Mr. Matunda, that only the decision of the Tribunal is required to be included in the record of appeal as one of the necessary documents for the appeal.

The learned counsel for the appellant has endeavoured to show that the decisions of this Court which held to the effect that a decree of the Tribunal does not become valid unless it complies with Rule 21 of the Tribunal Rules, were given *per incuriam*. It is trite law that although under the principle of *stare decisis*, the Court is bound by its own decisions it may decide not to follow a previous decision where it is satisfied that the same was made *per incuriam*. [See for example **Mohamed v. Bakari and Others** (2005) 2 E.A. 213]. As stated above, Mr. Matunda's argument is based on the interpretation of Rule 21 of the Tribunal Rules that the provision does not specifically state that a decree must be signed by all members. As a general rule, a decision is held to have been given *per incuriam* if it is given in ignorance or forgetfulness of some inconsistent statutory provision or a binding authority. In the case of **Kiriri Cotton Co. v. R.K. Dewani** (1958) E.A. 239, the Eat African Court of Appeal quoted a passage in the judgment of Sir Raymond Evershed, M.R. who stated

the principle in **Morelle Ltd v. Wakeling** (1955)1 All E.R. 708 in the following words.

> *"As a general rule, the only cases in which decisions should be held to have been given* ***per incuriam*** *are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provisions or some authority binding on the Court concerned: so that in such case some part of the decision or some step in the reasoning on which it is based is found on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided* ***per incuriam*** *must, in our judgment consistently with the stare decisis rule which is essential features of our law, be ... of the rarest occurrence...."*

Rule 21 of the Tribunal Rules under which the preliminary objection was based states as follows:

> *"21. After conclusion of the hearing of the evidence and submissions of the parties the tribunal shall, as soon as*

practicable make a decision in the presence of the parties or their advocates or representatives and shall cause a copy duly signed and certified by the members of the Tribunal which heard the appeal to be served on each party to the proceedings".

In holding that a decree of the Tribunal must comply with the requirements of Rule 21 of the Tribunal Rules, the Court gave a wide interpretation to that provision after reading it in the context of other provisions thereto and the Court of Appeal Rules, 2009. Rule 24 (3) of the Tribunal Rules governs institution to this Court, of appeals originating from the Tribunal. It states clearly that the Court of Appeal Rules shall be applicable. In the case of **Mbeya Intertrade Company** (*supra*) for example, it was stated *inter alia* as follows:

"...we have no doubt that according to the Tax Revenue Act, Cap 408 [RE 2006], the Procedure governing appeals to this court from decisions of the Tribunal are provided for by Rule 24(3) of the Tribunal Rules. According to this Rule, it is the Tanzania Court of Appeal Rules, 2009 (the Rules) which shall guide the primary documents which appellants are required to include in the record of appeal. According to Rule 96(2) (e) of the Rules, a valid decree of the Tribunal is

primary document that shall have been part of this appeal."

Clearly therefore, Mr. Matunda's argument that the decisions of this Court were given *per incuriam* is without merit. Apart from relying on Rule 21 of the Tribunal Rules, the learned counsel for the appellant did not have any other material to substantiate his argument. We therefore find the argument entirely devoid of merit.

On the basis of the foregoing reasons, we hereby uphold the preliminary objection. The appeal which is incompetent for want of a valid decree is hereby struck out with costs.

DATED at **DAR ES SALAAM** this 11th day of March, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL