

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ZANZIBAR**

**(CORAM: MBAROUK, J.A, MZIRAY, J.A. And NDIKA, J.A.)**

**CIVIL APPEAL NO. 177 OF 2017**

**AMINA KARIM JETHA ..... APPELLANT**

**VERSUS**

**WAKF AND TRUST PROPERTY COMMISSION**

**(As Administrator of the Estate of the**

**late ALI SALIM ALI ) .....RESPONDENT**

**(Appeal from the decision of the High Court of Zanzibar**

**at Vuga, Zanzibar)**

**(Issa, J.)**

**dated 7<sup>th</sup> day of March, 2017**

**in**

**Civil Case No. 65 of 2016**

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**RULING OF THE COURT**

6<sup>th</sup> & 8<sup>th</sup> December, 2017

**MBAROUK, J.A.:.**

When the appeal was called on for hearing, it transpired that the learned advocate for the respondent had earlier on 4-7-2017 filed his notice of preliminary

objection made under Rule 107 (1) of the Court of Appeal Rules, 2009 (the Rules) to the following effect:-

1. The appeal is defective and incompetent in law for want of notice of appeal.
2. The appeal is incompetent for want of record of appeal.

In this appeal, Mr. Salim Hassan Bakari Mnkonje, learned advocate represented the appellant, whereas Mr. Haji Suleiman Tetere assisted by Mr. Salim Bushiri, learned advocates represented the respondent.

As per the practice of the Court, when there is a notice of preliminary objection in an appeal, we deal with it first, hence we decided to hear the preliminary objection before hearing the appeal.

Arguing in support of the 1<sup>st</sup> point of preliminary objection, Mr. Tetere submitted that, the notice of appeal

and the memorandum of appeal have indicated that the appellant is appealing against the judgment and decree in the matter which arose from an originating summons. He said, this is contrary to the requirements under Rule 83 (3) and (6) of the Rules, because the decision sought to be appealed against did not arise from **judgment** and **decree**, but rather from the **ruling** and **extracted order**.

For that anomaly, Mr. Teterere urged us to find the notice of appeal and memorandum of appeal incompetent and the appeal should be struck out with costs. He then opted to abandon the 2<sup>nd</sup> point of preliminary objection.

On his part, Mr. Mnkonje, strongly opposed the preliminary objection for the reason that, the matter before the High Court originated from the plaint and not an application. He said after a case is fully heard in a suit where a plaint has been filed, what follows is a **judgment** and **decree** and not a **ruling** and **extracted order**.

Mr. Mnkonje was of the view that the requirements under Rule 83 (3) and (6) of the Rules were fully complied with. He then urged us to find that the word **judgment** and **ruling** can be used interchangeably and the defect has not occasioned any injustice or prejudice on the part of the respondent, because the respondent later filed his notice of address.

For those reasons, Mr. Mnkonje prayed for the preliminary objection to be overruled as the anomaly has not gone to the root of the matter. He further prayed for the appeal to be allowed to proceed for hearing.

In his rejoinder, Mr. Tetere submitted that, it is always the practice that, when a person is aggrieved with the decision of the lower court, he specifies whether he appeals against a **judgment** and **decree** or **ruling** and **extracted order** made by the lower court. He therefore urged us to find that as far as the High Court's decision

was a ruling, the appellant should have appealed against the said ruling and not judgment. The anomaly renders the appeal incompetent for contravention of Rule 83 (3) and (6) of the Rules. For that reason, he reiterated his earlier prayer that the appeal be struck out with costs.

Having heard the rival submissions, we researched and set upon ourselves to determine whether the High Court's decision, on an action instituted by an action instituted by an originating summons gives rise to **judgment** and **decree** or **ruling** and **extracted order**. This is because neither Mr. Tetere nor Mr. Mnkonge provided us with an authority to help us as to what follows after the High Court heard an originating summons.

In our research, we found assistance in a case of the erstwhile East African Court of Appeal in **Bhag Bhani v. Mehdi Khan** [1965]: E.A. 94 (CAN) where therein the

case of **Gurdial Singh Dhillon v. Sham Kaur** [1960]

E.A. 795 at p. 796 was quoted and stated as follows:

*"It may be noted that the description of the grounds for the learned judge's decision as a "judgment" is incorrect. **It is common ground that the formal adjudication upon an originating summons under O. 36 if the Civil Procedure Rules is an "order" and not a "decree" (Violet O' Dell v. A.W. Thompson (1955) 22 E.A.C.A. at p. 179). Owing to the structure of the legislation in Kenya relating to appeals on civil matters a judgment can only be delivered if it will result in a decree. The grounds for making an order cannot be treated as a judgment and are normally referred to as a ruling. (Bhagat Singh v. Ramanlal P.***

***Chauhan* (1956). 23 E. A. C. A at p. 185)**".

*[Emphasis added]*.

In essence, from the above cited authority, we are of the considered opinion that where there is an originating summons filed before the High Court and heard, what follows is a **ruling** and **drawn order** and not a **judgment** and **decree**.

We are further of the view, unlike what has been submitted by Mr. Mnkonje that the term "judgment" and "ruling" can be used interchangeably, we are of the considered opinion that is not the case, because the consequences of judgment are different from those of a "ruling".

For that reason, we find merit in the 1<sup>st</sup> point of preliminary objection and hereby sustain it. For that reason, we find the appeal incompetent for being instituted as stated in the notice of appeal and memorandum of

appeal, against **judgment** and **decree** of the High Court, which are legally non-existent, instead of the **ruling** and **extracted order** of the High Court which comprise the actual decision of the High Court sought to be appealed against. For being incompetent, the appeal is struck out with costs.

It is so ordered.

**DATED** at **ZANZIBAR** this 7<sup>th</sup> day of December, 2017.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSITCE OF APPEAL**

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

  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**