

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ZANZIBAR**

**(CORAM: WAMBALI, J.A., SEHEL, J.A. And GALEBA, J.A.)**

**CIVIL APPEAL NO. 245 OF 2020**

**NASSORO ABUBAKAR KHAMIS..... 1<sup>ST</sup> APPELLANT**

**AZAM MARINE SERVICES.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**WAKF AND TRUST COMMISSION ZANZIBAR,**

**THE ADMINISTRATOR OF THE ESTATE OF FARIDA ALI NASSOR,**

**NAHID KHAMIS ISSA, AKRAM KHAMIS ISSA, NASHRAR KHAMIS ISSA,**

**FATMA NASSIR KHAMIS AND ADAM NASSOR MOHAMED**

**Represented by its agents; Ali Nassor Kombo,**

**Khamis Issa Mohamed, Nassor Khamis Shoka**

**And Nassor Mohamed Nassor.....1<sup>ST</sup> RESPONDENT**

**ALLIANCE INSURANCE CORP. LIMITED.....2<sup>ND</sup> RESPONDENT**

**(Appeal from the decision of the High Court of Zanzibar  
at Vuga)**

**(Issa, J.)**

**Dated the 17<sup>th</sup> day of September, 2019**

**in**

**Civil Case No. 73 of 2016**

**.....**

**RULING OF THE COURT**

*29<sup>th</sup> November, & 3<sup>d</sup> December, 2021*

**WAMBALI, J.A.:**

This appeal has been preferred by the appellants against the judgment and decree of the High Court of Zanzibar in which several reliefs were granted in favour of the respondents.

Hearing of the appeal was scheduled on 29<sup>th</sup> November, 2021 on which parties were duly represented by counsel. It is noted that in the course of hearing the submissions of the counsel for the parties for and against the appeal, having closely scrutinized the judgment, it transpired that the decree of the High Court of Zanzibar in Civil Case No. 73 of 2016 did not seem to be in conformity with the judgment. We thus invited counsel to make submissions on the query.

Mr. Issack Msengi, learned advocate who appeared to represent the appellants conceded that the substance of what is contained in the decree differs with the conclusion of the judgment of the High Court of Zanzibar in Civil Case No. 73 of 2016. He submitted that in terms of Order XXIII Rule 6 (1) of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD), the decree must agree with the judgment. He therefore agreed that the decree is defective for contravening the law. In the circumstances, he prayed that as the defect in the decree was caused by the trial court, the appellants be allowed to approach it to seek amendment in terms of section 130 of the CPD.

Moreover, Mr. Msengi prayed for the adjournment of the hearing of the appeal to a date to be fixed by the Registrar to enable the appellants to obtain an amended decree which will be consistent with the judgment of the trial court as required by law.

On his part, Mr. Iss - Haq Ismail Shariff, learned advocate who appeared for the respondents readily conceded that the decree is defective as it does not agree with the judgment as correctly submitted by Mr. Msengi. He added that as the decree is defective the appeal is rendered incompetent. However, he strongly contested the prayer of the appellants' counsel to be granted leave to approach the High Court of Zanzibar to seek rectification of the errors in the decree. He submitted that it is settled law that an incompetent appeal must be struck out.

He contended further that the appellants are fully to blame for the defect in the decree as they were supposed to ensure that they obtained a proper decree from the trial court before they lodged the appeal to this Court. In the premises, he firmly implored us to strike out the appeal with costs.

We have closely examined the decree of the trial court and we entirely agree with the learned counsel for the parties that it does not agree with the judgment as required by Order XXIII Rule 6(1) of the CPD. For purpose of clarity, the respective provisions provide as follows: -

*"6 (1) The decree shall agree with the judgment or minute of judgment: It shall contain the number of the suit, the names and descriptions*

*of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit”.*

As intimated above, the decree in the record of appeal is defective because it is not in conformity with the judgment of the trial court. There is no doubt that the instant appeal is accompanied by a defective decree. The crucial issue for our determination in this ruling therefore, is what should be the way forward with regard to the fate of the appeal.

Though Mr. Shariff did not cite any authority to support his position that a defective decree renders an appeal incompetent liable to be struck out, we are aware of numerous decisions of the Court on this stance. Interpreting the provisions of Order XX Rule 6 (1) of the Civil Procedure Code Cap 33 R.E. 2002 (now R.E. 2019) which is *parimateria* with Order XXIII Rule 6 (1) of the CPD, the Court in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Appeal No. 74 of 2014 (unreported) quoted its holding in **Uniafrico Limited and Two Others v. Exim Bank (T) Limited**, Civil Appeal No. 30 of 2006 (both unreported in which it was succinctly stated that: -

*"in terms of Order XX Rule 6 of the Code, the decree shall agree with the judgment. **It must correctly state what is really decided and intended by the court...**"*

[Emphasis added]

Indeed, in **Mantrack Tanzania Limited** (supra) the Court observed further that a decree which is not in conformity with the mandatory requirement of Order XX Rules 6 and 7 read together with Form 9 of Appendix D *"cannot be legally enforced by the decree holder against anybody unless the executing court becomes remiss"*.

Other decisions on the consequences of the defective decree include **Kapinga and Co Advocates v. National Bank of Commerce Limited**, Civil Appeal No. 42 of 2007, **Robert Edward Hawkins and Another v. Patrice P. Mwaigomole**, Civil Appeal No. 48 of 2006 and **Tanzania Motors Services Limited v. Tantrack Agencies**, Civil Appeal No. 61 of 2007 (all unreported). Therefore, in most cases where defective decrees were incorporated in the respective records of appeal, the Court held the firm view that the said appeals are incompetent and struck them out.

However, in the wake of the amendment which was made to the Appellate Jurisdiction Act, Cap 141 R.E. 2019 by the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018 which introduced sections 3A and 3B, the Court is enjoined to consider the prevailing circumstances of the respective defect and the extent of prejudice caused to the parties for purpose of rendering substantive justice.

Particularly, the amendment which has introduced the overriding objective principle enjoins the Court to administer justice by facilitating the just, expeditious, proportionate and affordable resolution of all matters before it, more so where the issue is with regard to the procedural mistakes committed by parties and the courts. Thus, where there is a defect on the decree which is essentially caused by the trial court, the respective party is granted leave to approach the maker of it for rectification or amendment. Indeed, we think that this approach is in line with the observation of the Court in case of the **Attorney General v. Ahmad R. Yakuti and 2 Others**, Civil Appeal No. 49 of 2004 (unreported) to the effect that parties should not be punished for the errors committed by the courts.

We are however mindful of the argument of Mr. Shariff that the appellants are equally to blame for not verifying the correctness of the decree before the same was included in the record of appeal. Be it as it may, in the circumstances of the instant appeal, we respectfully hold that the trial court which issued the defective decree has a big share of blame for the mistakes contained in the decree.

Admittedly, in **Mwananchi Engineering and Contracting Corporation v. Khalifa t/a Msangi Enterprises**, Civil Appeal No. 89 of 2009 (unreported) in which parties conceded that the decree was

defective for non-compliance with Order XX Rule 6(1) of the CPC but argued that the defect was curable, the Court stated as follows among others: -

*"... once we hold that the decree is defective and we hear the appeal and allow it, we would have endorsed the defective decree. Once the Court endorses it, it would not be open for the High Court to rectify it before execution. We think that if it is defective, the decree should be amended before hearing the appeal... Rule 96 (1) (h) of the Court Appeal Rules, 2009 (the Rules) requires among others that a record of appeal contain: "(h) the decree or order" from which the appeal is preferred. This Rule governs appeals from the High Court in its original jurisdiction, whose proceedings are governed by the Civil Procedure Act, 1966 (Cap 33 R.E. 2002) ....*

*It has been held that if a decree does not agree with the judgment, it is defective, although it may be amended and refiled (see **Lachani and Another v. Lachani - (1978) L.R.T 26**). This decision was approved by this Court in **Tanzania Ports Authority v. Pembe Flour Mills Limited**, Civil Appeal No. 97 of 2007 (unreported)".*

From the foregoing deliberation, we are settled that cognizant of fostering substantive justice, currently, in fitting circumstances, the Court has been granting the respective appellant an opportunity to approach the court which issued the decree to rectify it and thereafter lodge an amended version through a supplementary record of appeal instead of striking out the appeal. For this stance, see **Anthony Josephat @ Kabula v. Hamis Maganga**, Civil Appeal No. 150 of 2020 and **Daudi Hagha v. Salum Ngezi and Damiani Toyi**, Civil Appeal No. 313 of 2017 (both unreported). Besides, we are of the settled view that this approach is in recognition of the fact that in both the CPC and CPD sections 96 and 130 respectively empower trial courts which issue defective decree to correct clerical mistakes and errors apparent in the decree before execution is done.

In the circumstances, we respectfully decline the respondents' counsel's prayer to strike out the appeal with costs. On the contrary, we grant leave to the appellants to approach the High Court of Zanzibar to obtain an amended decree which will be in conformity with the judgment as required under Order XXIII Rule 6 (1) of the CPD. We further order that the amended decree should be lodged through a supplementary record of appeal within sixty (60) days from the date of this ruling.



Meanwhile, in terms of Rule 38A (1) of the Tanzania Court of Appeal Rules, 2009, we adjourn the hearing of the appeal to a date to be fixed by the Registrar with no order as to costs.

**DATED** at **ZANZIBAR** this 3<sup>rd</sup> day of December, 2021.

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

This Ruling delivered on 3<sup>rd</sup> day of December, 2021 in the presence of Mr. Issack Msengi learned counsel for the appellants, and Mr. Iss- Haq Ismail Shariff learned counsel for the 1<sup>st</sup> respondent who is also holding brief for Dr. Alex Nguluma, learned counsel for the 2<sup>nd</sup> respondent, is hereby certified as a true copy of original.

  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**