

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPEAL NO. 161 OF 2004

VESTINA BULLU.....APPELLANT

VERSUS

ABEL PEA RESPONDENT

R U L I N G

A.Shangwa,J.

The Respondent Abel Pea has filed a preliminary objection in which he states that the memorandum of appeal filed by the Appellant Vestina Bullu is incompetent and bad in law for the reason that it contravenes the provision of O.XXXIX, r.1(1) of the Civil Procedure Code 1966.

MS Nyangarika and Co; Advocates appeared on behalf of the Respondent and submitted that under O.XXXIX,r.1(1) of the Civil Procedure Code 1966, it is required that the memorandum of appeal should be accompanied by a copy of the order appealed from. They contended that as the Appellant's memorandum of appeal was not accompanied by the said order, her appeal is incompetent and should be dismissed. In support of their contention, they cited the case of **Stanley Kalawa Mariki w/o Nderingo Ngomuo (1981) TLR 143.**

Learned counsel for the Appellant MS Rweyongeza and Company, Advocates submitted that a copy of the ruling which was appended to the memorandum of appeal does comply with the provisions of O.XXXIX, r.1(1) of the Civil Procedure Code, 1966. They submitted that the word 'order' and 'ruling' are used interchangeably in law.

Order XXXIX, r.1(1) of the Civil Procedure Code, 1966 which is said to have been contravened by the Appellant provides inter alia as follows :

" r.1 (1) Every appeal shall be preferred in the form of memorandum signed by the Appellant or his Advocate ...The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded ".

It appears from this provision of law that the memorandum of appeal of necessity, has to be accompanied by a copy of the decree appealed from and the judgment on which it is founded.

It is trite law that where an appeal has been filed against the Court 's Judgment or Ruling, the memorandum of appeal has to be accompanied by a copy of the decree or order appealed from together with the Judgment or Ruling on which the Decree or Order is founded. I agree with learned counsel for the Respondent that a failure to do so makes the appeal incompetent.

In this case, as the Appellant's memorandum of appeal was only accompanied by a copy of the ruling without a copy of the order of the District Court of Kinondoni in Civil case No. 279 of 2002 which is appealed from, I hold that her appeal is improperly before this Court and it must be dismissed.

This holding is supported by two authorities of the Court of Appeal of Tanzania . One is the case of **Stanley**

Kalawa Mariki Vs Chihiyo Kwisia w/o Nderingo Ngomuo (1981) T L R 143. Another one is the case of **Mariam Abdallah Fundi Vs Kassim Abdallah Farsi (1991) TLR at Page 197** in which it was held that O.XXXIX, R. 1 is mandatory in requiring every memorandum of appeal to be accompanied by a copy of the Decree or Order appealed from and that where an Appellant has failed to comply with this provision the appeal is not properly before the Court and must be dismissed.

In my view, the word '**Order**' and '**Ruling**' are not interchangeable in law. Under S.3 of the Civil Procedure Code, 1966, the word '**Order**' is interpreted to mean the formal expression of any decision of a Civil Court which is not a Decree. The words '**any decision of a Civil Court**' which is not a Decree have some connotations of a Civil Court's ruling

such as the one which was made by the District Court of Kinondoni in original Civil case No.279 of 2002 where the said Court refused the Appellant's application for leave to file an application to set aside its ex-parte judgment out of time.

As the word '**Order**' in the Civil procedure code is interpreted to mean the formal expression of any decision of a Civil Court and as the words '**any decision of a Civil Court**' have connotations of a Civil Court's ruling, then the word 'Order' and 'Ruling' cannot be used interchangeably in law.

As I have already mentioned earlier, this appeal is improperly before this Court and it has to be dismissed. Thus, I uphold the Respondent's preliminary objection and dismiss it. I order that each party should bear its own costs.

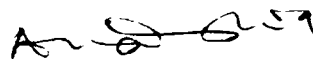

A. Shangwa

JUDGE

12/10/2005.

Delivered in Court this 12th day of October, 2005.





A. Shangwa

JUDGE

12/10/2005

ADVOCATES.

1. R.K. Rweyongeza & Co. Advocates for the Appellant.
2. K.M. Nyangarika & Co. Advocates for the Respondent.