

IN THE HIGH COURT OF TANZANIA

**AT DAR ES SALAAM
CIVIL APPEAL NO 2 of 2010**

**(Originating from Resident Magistrate's Court of Dar es Salaam at Kisutu-RM
Miscellaneous Civil Application No. 31 of 2008-Nkya-RM of 7th December
2009)**

INTERTEK TESTING SERVICES EA PTY LTD.....

APPLICANT

VS

WALTER A. KAWA.....

RESPONDENT

Ruling

Date of last Order: 02-12-2010

Date of Ruling: 15-02-2011

JUMA, J.:

On 5th January 2010 the appellant (INTERTEK TESTING SERVICES EA PTY LTD) filed its memorandum of appeal to manifest its grievance over the Ruling and extracted Order of the Resident Magistrate's Court of Dar es Salaam at Kisutu (E.R.M. Nkya-RM) which had dismissed this appellant's Objection Proceedings. The respondent WALTER A. KAWA opposed the memorandum of appeal, and filed a Notice of Preliminary Objection on 8th June 2010 containing four grounds of objection. The fourth ground was later conceded by the appellant leaving this Court to determine the remaining three grounds of objection contending,

1. appellant's Civil Appeal No 2 of 2010 is fatally defective as it is preferred against a non-existent decision;
2. High Court has no jurisdiction to hear appeal on matters arising from objection proceedings; and
3. decision of the Resident Magistrate's Court of Dar es Salaam dated 7th December 2009 is not appealable.

The background leading up to the appellant's Civil Appeal No 2 of 2010 and respondent's three points of objection traces back to an Objection Proceedings which the appellant (as judgment debtor) filed in the Resident Magistrate's Court under Order XXI Rule 57 (1) and section 95 of the **Civil Procedure Code, Cap. 33**. The Objection Proceedings were aimed at preventing the respondent (as Decree Holder) from executing the orders of the Minister of Labour dated 5th April 2007. At the subordinate court, the respondent (Decree-Holder) responded by filing his own preliminary objection to the effect that the appellant had cited wrong provisions of the law.

The trial magistrate (E. Nkya-RM) was of the considered view that the provision which the appellant (as judgment debtor) had employed only applied to a person who was not a party to the suit. The learned magistrate decided that since the two parties to the suit that resulted in the Decree were parties to that suit, the appellant (judgment debtor) could not in law file an Objection Proceedings the way he did. The RM's Court dismissed this appellant's objection proceedings. Aggrieved appellant (judgment debtor) filed Civil Appeal No 2 of 2010 which is opposed by respondent's three points of preliminary objection.

On the first point of Objection, the respondent submitted that although the appellant is challenging the Ruling and Drawn Order that was delivered by the trial magistrate on 7th December 2009, the certified copy of the Ruling accompanying the Memorandum of Appeal shows that it was delivered 18th November 2009. According to the respondent, the date of Ruling (18-11-2009) and date of drawn Order (delivery date, 07-12-2009, signed and sealed on 06-01-2010) suggests two different decisions accompany the appellant's memorandum of appeal.

Further, respondent contended that in terms of Order XXIX Rule 1 (i) of the **Civil Procedure Code** and the decision of **Kotak Ltd. vs. Kooverji [1967] EA 348**, a Ruling and a drawn Order appealed which accompany the Memorandum of Appeal must be dated and signed by presiding magistrate and both must bear the date on which they were delivered. The appellant premised its reply to the respondent's first point of objection by contending that the preliminary objection does not qualify to be regarded as preliminary objection because it does not raise any clear point of law. According to the appellant, the preliminary point of objection is wholly based on speculative provisions of law which were not even cited in the Notice of Preliminary Objection. In so far as the appellant is concerned the first point of objection should be dismissed because his appeal (i.e. Civil Appeal NO. 2 of 2010) is accompanied by a valid Ruling and a properly drawn Order thereof.

After hearing the arguments by the counsel for the parties on the first point of objection, I should perhaps first deal with the contention by the appellants that the Notice of Preliminary Objection which the respondent filed on 8th June 2010 was uncalled for because it falls outside the settled principle of law on disposal of applications by preliminary objections. Courts in Tanzania have accepted the principle laid down in **Mukisa Biscuit Manufacturing Company Ltd Vs. West End Distributors Ltd (1969) EA 696** that preliminary objection consists of a point of law which have been pleaded or which arise by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit or applications without the need of hearing further evidence.

As I will show below, the first point of objection arises out of the appellant's alleged failure to comply with mandatory provisions of Order XXXIX Rule 1 read together with Order XL Rule 2 of the **Civil Procedure Code, Cap 33**. My reading of these provisions clearly show that the first point of objection contending appellant's appeal is defective for failing to include a valid Order extracted from the Ruling, raises pure point of law within the principle laid down in **Mukisa Biscuit Manufacturing Company Ltd Vs. West End Distributors Ltd (supra)**. In my view the submission by the appellant that the first point of objection does not raise pure question of law has no merit and is hereby rejected. It is unfortunate that the appellant did not in his submissions address himself to the respondent's thrust that the drawn Order accompanying his HC

Civil Appeal No. 2 of 2010 has not complied with the mandatory provisions of Order XXXIX read together with ORDER XL Rule 2 of CPC governing appeals from Orders.

Upon my perusal of the memorandum of appeal together with the accompanying copy of the Ruling and drawn Order, I was able to discern several matters which are important for my determination of the first point of objection. The Ruling of E. Nkya is clearly dated 18th November 2009. The drawn Order shows that it came for Ruling on 7th day of December 2009 and the hand-written records of the trial court shows that it was W. Lema-PRM who delivered that Ruling on 7th day of December 2009. The drawn Order indicates also that it was signed and sealed on 6th January 2010 but the name of the magistrate under whose hand the seal of the court was embossed is not indicated. It is therefore clear that the drawn Order and its Ruling which accompanied the Memorandum of Appeal do not bear same date the Ruling was delivered. I am therefore satisfied that a copy of the Ruling which accompanied the appellant's memorandum of appeal was not accompanied by a copy of the Order drawn from that Ruling as imperatively required by Order XL Rule 2 read together with Order XXXIX of CPC.

ORDER XXXIX of CPC read together with ORDER XL governs Appeals from Original Decrees and appeals from Orders in the following way,

ORDER XXXIX Rule 1:

- (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and 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.

Order XL Rule 2 provides that the conditions governing appeals under above-mentioned Order XXXIX also apply to appeals from Orders. This means that memorandum of appeal against a Ruling must be accompanied by a copy of a drawn Order appealed from and the Ruling on which it is founded. This legal requirement was restated by this Court in the case of **Yusufu Mntambo And Others V Moez Alidina 1985 TLR 145 (HC)** where Mapigano, J. (as he then was) emphasized that **Order XL Rule 2** read together with **Order XXXIX Rule 1** of the **Civil Procedure Code** provide that in order for a memorandum of appeal to be competent it must be accompanied by a copy of the Order appealed against. Mapigano, J. went further and stated that,

Order 39 r.1 is framed in imperative terms. It imposes a mandatory and not a directory requirement that every memorandum of appeal must be accompanied by a copy of the decree appealed from. Order 40 r. 2 assimilates the provision of Order 39 r.1 and read *mutatis mutandis* it says that in the case of an appeal from an order the memorandum of appeal must be accompanied by a copy of the order appealed against.

Court of Appeal (Ramadhani JJA and Mnzavas JJA and Mapigano Ag JA) has also reiterated the mandatory language employed by Order XXXIX Rule 1 (and by implication Order XL Rule 2) in the case of **Mariam Abdallah Fundi V Kassim Abdallah Farsi 1991 TLR 196** where on page 197 the Court of Appeal stated that,

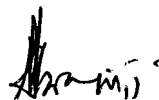
..... It has been held a number of times:

That Order 39 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 provisions, the appeal is not properly before the court and must be dismissed: **Munshiran & Co. v Star Soda Water Factory [1934], 16 K.L.R. 50 which was followed in Kotak Ltd. v Kooverji (1967) E.A. 348.**

The learned judge in this appeal overlooked that fact and went ahead to determine the appeal which was not properly before him instead of dismissing it. So what is now the position? We must treat as done that which ought to have been done. The learned judge ought to have dismissed the appeal but did not. We must treat the appeal to have been null and void.

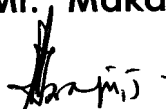
From the foregoing there is no need to address myself to the remaining two points of objection. It is clear that the appellant has failed to comply with the imperative provisions of ORDER XXXIX Rule 1 read together with ORDER XL Rule 2 governing appeals from Orders. The first point of objection is sustained because Civil Appeal Number 2 of 2010 is not properly before this court and is therefore dismissed. The respondent is awarded the costs.

Orders accordingly.



I.H. Juma
JUDGE
15-02-2011

Delivered in presence of: Mr. Makaki Masatu (Adv) for the Respondent.



I.H. Juma
JUDGE
15-02-2011

