

IN THE HIGH COURT OF TANZANIA

AT MASASI

[MTWARA REGISTRY]

DC.CIVIL APPEAL NO. 4 OF 2011

[Appeal from the order of the Masasi District Court

Civil Case No.4 of 2009]

MASASI DISTRICT COUNCIL APPELLANT

VERSUS

MOSES AMBROS CHIWINGA

HAMISI SAIDI NAMPWITA & 38 OTHERS 1ST RESPONDENT

MASASI – MTWARA COOPERATIVE } 2ND RESPONDENT
UNION LTD

Date of last order – 19/6/2013

Date of Ruling – 21/6/2013

RULING

KIBELLA, J.

When the appeal came for hearing on 19/6/2013, Mr. Mtembwa learned Advocate for the 1st Respondent raised a Preliminary objection on point of law stating that:-

“The order appealed from is not subject of appeal or not appealable”

However, in my further perusal of the record of appeal with a view of determining the above point of objection, I have discovered that, the present appeal was not accompanied by a drawn order Contrary to Order XXXIX rule 1(1) of the Civil Procedure Code [Cap.33 R.E 2002] read

together with Order XL rule 2 of that code. For easy reference Order XXXIX rule 1(1) provides that:-

"1(1) Every appeal shall be preferred in the form of 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 above order, should also apply to appeals from orders, and it reads:-

"2. The rules of Order XXXIX shall apply, so far as may be, to appeals from orders."

There are numerous authorities which some of them are persuasive which insist on the requirement to attach a decree or drawn order when an appeal is preferred before the court. See for instance the case of ***Munshiram & Co. Vs. Star Soda Water Factory [1934], 16 K.L.R 50*** which states:-

"That O.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 provision, the appeal is not properly before the court and must be dismissed."

Similarly in the case of ***Kotak Ltd Vs. Kooverji [1967] 1 EA 348 [HC] at Dar es Salaam***, the court found that though a ruling was attached in the memorandum of appeal the same could not assist the appellant because a ruling is not an order and therefore it was mandatory for such

order to be drawn up and attached in a memorandum of appeal. In that case the court held:-

“a ruling is not an “order” and the appeal had not been legally preferred...”


In our case the appellant has attached a proceeding of the District Court. As rightly held above, just like a ruling, a proceeding is not an order to be appealed against, the appellant, ought to have an extracted order and attached in his memorandum of appeal. The appeal therefore had not been legally preferred. This point alone which this court raised *suo motu*, is sufficient to dispose this appeal. However, I wish to state briefly with regard to the point of objection raised by Mr. Mtembwa, learned Advocate for the 1st Respondent, who submitted that the order of the District Court which is the subject matter of the appeal, is an interlocutory order which had no effect of disposing the case. He cited section 74(2) of the Civil Procedure Code [Cap.33 R.E 2002] as amended by Act No.25 of 2002 which bars appeals in respect of interlocutory orders. To cement his argument he referred the court to the decision in the case of ***The Director Ilala Municipal Council and 2 others Vs. Sincon Environment Limited Tanzania Environment and Another, Civil Revision No.30 of 2009, HCT at Dar es Salaam [unreported]***. He concluded by requesting this court to dismiss the appeal.

On his part, Mr. Kulanga, Solicitor who appeared for the appellant told this court that he lodged this appeal relying on the provision of section 75 and 76 of the Civil Procedure Code [Cap.33 R.E 2002]. He viewed that section 75 of the Code, allows appeals from such order, and this court, is allowed under section 76, to give the reliefs sought in his appeal.

In his rejoinder Mr. Mtembwa, viewed that the provision of section 75 and 76 of the Civil Procedure Code, do not allow appeals from interlocutory orders which have no effect of disposing the suit instead section 75, allows the appellant, after the disposal of suit, to set, his complaint as one of the grounds of appeal.


This point should not detain me much, the appellant does not object the fact that, the order sought to be appealed did not finally determine the suit, and therefore under section 74(2) of the Civil Procedure Code as amended by Act No.25 of 2002 such order is not subject to appeal. Also as rightly submitted by Mr. Mtembwa, section 75 of the Code [supra] does not allow appeals from orders which do not finally dispose the case to be challenged by way of appeal. Except section 75, of the Code, provide for a room in case a decree from the main decision is appealed against. That in that appeal the appellant will be allowed to set as one of the grounds any irregularity which resulted to that, decree. For that reason the 1st respondent's point of objection is equally sustained.

The totality of all discussed above, left this court with no other option but to dismiss the appellant's appeal with costs. It is ordered that the case file be returned to the trial District Resident Magistrate for her to compose a judgment on the main suit. It is so ordered.


R.M. Kibella,
Judge
21/6/2013

Order: Ruling delivered in chambers today, 21st June, 2013 in the presence Mr. Kulanga, learned District Council solicitor for the appellant as well as holding the brief for Mr. Mtembwa, learned Advocate for the 1st Respondent and in absence of the 2nd Respondent.




R.M. Kibella,
Judge
21/6/2013

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