IN THE HICH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CIVIL APPEAL NO. 1 OF 2015

(Appeal from the judgment and decree of Lindi District Court at Lindi dated 5th September 2014 in Civil Case No. 1 of 2012)

THE EXECUTIVE OFFICER NMB, HEAD OFFICE, DSM ..... APPELLANT

VERSUS

AIZACK AMOSI MWAMPULULE ..... RESPONDENT

02/08/2016 & 22/09/2016

R U L I N G

F. Twaib, J:

The appeal before me, Civil Appeal No. 1 of 2015, was filed presumably to challenge the judgment and decree of the Lindi District Court in Civil Case No. 1 of 2012 dated 5th September 2014. However, the Memorandum of Appeal cites, in its stead, Civil Case No. 1 of 2012. That was an error on the part of counsel who prepared the Memorandum of Appeal. The respondent did not discover this error. If he did, he saw no need for bringing it to the Court's attention.

There is yet a second error in the Memorandum of Appeal: After setting out the grounds of appeal, the same did not say what reliefs the appellant wants the Court to grant her. The respondent discovered this shortcoming, and raised it in his prayer contained in a document he titled "Reply of Memorandum of Appeal". On 25th July 2015, Ms Teye, DR, ordered the parties to file written submissions to dispose of the appeal. However, considering that the DR had no jurisdiction

to make such orders, I reversed the orders. When the matter was called on for hearing before me on 5th May 2016, the respondent renewed his point of objection and I set a date for oral hearing of the objection.

At the hearing, the respondent fended for himself, while the appellant was represented by Ms. Masame, learned advocate. Ms. Masame was quick to concede that the Memorandum of Appeal did not conform to the requirements of Order XXXIX rule 1 (2) of the Civil Procedure Code, which renders it in contravention of rule 3 of that Order. She however prayed to the court to allow the appellant to amend the Memorandum of Appeal, in terms of order 39 (3) (1) (2) and (3) of the CPC.

On the strength of this concession on behalf of the appellant, and considering the requirements set down by law, the parties agree that the Memorandum of Appeal is not drawn up in the manner prescribed by law. The respondent backed up his submission with the decisions in the cases of *Zacharia Milalo v Onesmo Mboma* (1983) TLR 240 and *James Funke Gwagilo v AG* (2004) TLR 161, and prayed for dismissal of the appeal.

However, despite the consensus among the parties, the Court must be satisfied that the law actually does contain such requirement. Subrules (1) and (2) of Rule 1 of Order XXXIX of the CPC provide as follows:

> *(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….*
>
> *(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from*

without any argument or narrative, and such grounds shall be numbered consecutively.

The respondent's complaint is that the memorandum does not contain prayers. Clearly, the relevant law quoted above does not impose any such requirement. In addition, as Ms. Matemu submitted, the cases the respondent has cited are distinguishable. They do not strictly support the contention that for a memorandum of appeal to this court to comply with legal requirements under rule 1 (1) of the CPC, it must set out the prayers sought by the appellant. Admittedly such requirement exists with regard to plaints, in terms of Order VII rule 1 (g). There is no such express requirement in Order XXXIX rule (1) of the CPC, which deals with Memorandum of Appeal.

That said, however, I think it is fair to say that it is now established practice in this court that the memorandum of appeal has to contain the reliefs that the appellant wants the court to grant upon a successful prosecution of the appeal. The omission of prayers would not be in conformity with this practice, which is good practice. It assists the Court and the parties by making clear what outcome the appellant wants to secure at the end of the appeal. Hence, even though the law does not specifically require it, I would hold that such a requirement can now be read into the law due to established practice. Perhaps it is for this reason that counsel for the appellant graciously conceded to the objection.

The question that remains is: What should be the appropriate remedy in the circumstances? Ms. Matemu has asked for an order of amendment. The respondent vehemently opposed that prayer, arguing that even though the law allows an amendment, the case has reached a stage that would render such a course untenable. He thus insisted that the appeal should be dismissed. Ms.

Matemu rejoined by pointing out that the relevant law (Order XXXIX rule 3) only provides that where the memorandum of appeal is not drawn up in accordance with the prescribed format, it may be rejected, or returned to the appellant for purposes of being amended. With respect, she is right. The law does not call for an order dismissing the appeal.

However, I also agree with the respondent that it would not be proper, at this stage, to pre-empt the preliminary objection raised. I think the better course to take in the circumstances is to reject the Memorandum of Appeal. The appellant would be at liberty, subject to the law of limitation, to reinstitute her appeal, if he is still so minded.

In the upshot, I reject the memorandum of appeal. Without it, the appeal cannot survive. It is struck out with costs.

DATED and DELIVERED at MTWARA this 22nd day of September, 2016.

F.A. TWAIB

JUDGE