

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

CIVIL APPEAL NO. 53 OF 2018

*(Arising from the decision of the District Court of Kinondoni Hon K.D Mhina, SRM,
in Civil Case No 33 of 1999 dated 11th January 2018)*

SALIM OMARI SALIM and ZUBERI MBWENI

Administrator of the estate of the late

MARIAM SELEMAN..... APPELLANTS

VERSUS

ALLY MOHAMED HANIU

Administrator of the estate of the late

HIDAYA JUMA HANIU.....RESPONDENT

RULING

10 December 2019 & 21st February, 2020

NGWALA . J

This is an appeal arising from a preliminary decree or order of the District Court where the appellant case was not successfully since the judgment was not in his favour. The trial court entered judgment against the appellant on 11th January 2018. Aggrieved, the appellant preferred the appeal using the services of Mr. Thomas Brash, learned advocate.

On 31th October 2019, Mr. JumaMtatiro , learned advocate for the respondent sought the order of the Court to strike out the appeal with costs for incompetency. The ground of objection was as follows:-

- (a) That the Memorandum of Appeal is accompanied with a defective decree.

In the course of addressing the above point of objection Mr. Mtatiro urged that the parties to a Decree are different from the parties to the appeal especially respondent. It was submitted that the name of the defendant in the Decree of Civil Case No 33 of 99 is Ally Mohamed Hamis as the administrator of the estate of the late Ally Juma Haniu. The learned counsel urged that the deceased is not Ally Juma Haniu but Hidaya Haniu.

Mr. Mtatiro thus contended that the Memorandum of Appeal contravenes Order 39 Rule 1 of Civil Procedure Code and therefore he prayed for the appeal to be struck out.

Mr. Brush, learned advocate, easily conceded to the reality that the decree which is in the record of appeal did not comply with the provisions of the law. The learned advocate urged that the defect was caused by typing error which the same is not fatal. Mr.Brush forceful submitted that since the appellant is not challenging the decree but rather the judgment, therefore an error appearing in the decree is not

fatal. He thus prayed for an order of amendment of a decree since his learned friend has taken him by surprise.

Mr. Brush prayed for the objection to be overruled and the matter be allowed to proceed.

On my part, I had no difficulty in dealing with the present objection on the decree as consented to by learned advocates. As stated earlier on, the appeal is sought against the decision pronounced by the trial Court on the 11th January 2018 between Salim Omar Salim and Zuber Mbwani Administrators of the estate of the late Mariam Selaman versus Ally Mohamed Haniu Administrator of the estate of the late Hidaya Juma Haniu, but the decree mentioned the defendant as Ally Mohamed and Haniu Administrator of the estate of the late Ally Juma Haniu instead of Hidaya Juma Haniu. The names of the parties in the decree is couched in the following words:-

*"SALIM OMARI SALIM and ZUBERI MMBWENI
Administrator of the estate of the late MARIAM
SELEMAN.....PLAINTIFF*

VERSUS

*ALLY MOHAMED HANIU Administrator of the estate of the
late ALLY JUMA HANIU.....DEFENDANT"*

The names of the parties in the Memorandum of Appeal is couched in the following words;

*"SALIM OMARI SALIM and ZUBERI MMBWENI
Administrator of the estate of the late MARIAM
SELEMAN.....PLAINTIFF*

VERSUS

*ALLY MOHAMED HANIU Administrator of the estate of the
late HIDAYA JUMA HANIU.....DEFENDANT"*

Obviously the name of the respondent in the decree differs with the name of the respondent in the memorandum of appeal.

Order XX rule 7 reads as follows:-

*" The decree shall bear the date on which the judgment was pronounced and when the Judge or magistrate has satisfied himself that the **decree has been drawn up in accordance with the judgment** he shall sign the decree."*

I wish to observe here that the necessary documents for the purpose of the present appeal are spelt out under **Order XXXIX Rule 1(1) of the Civil Procedure Code Cap 33** . The sub-rule provides as follows:-

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.*

It is evident from **Order XXXIX rule (1) (1)** above that one of the essential documents to be contained in a Memorandum of Appeal is a copy of the decree or order appealed from. It is now settled that non-incorporation of a copy of decree or incorporation of a defective decree renders the appeal incompetent.

For instance, some of the previous decisions of the Court of Appeal of Tanzania on the issue of defective decrees can be found in the cases of:-

Haruna Mpangaos and 902 Others Vs Tanzania Portland Cement Co. Ltd, Civil Appeal No. 10 of 2007; **Kapinga and Company Advocates Vs NBC Ltd**, Civil Appeal No 42 of 2007; **Mkama Pastory Vs T.R.A**, Civil Appeal No. 95 of 2006; **Zanzibar Insurance Corporation Vs**

Paul MwitaChacha, Civil Appeal No 83 of 2006;
(all unreported).

I am therefore, firmly of the view that a decree which has not been drawn up in accordance with the judgment is not valid. It follows that the appeal to this court which does not contain a correctly drawn decree in accordance to the judgment will not have complied with the requirements of **Order XX Rule 7**, (supra). In the present appeal there is no dispute that the decree in the record of appeal filed on 2/3/2018 is defective and therefore invalid.

In the case of **Fortunatus Masha Vs William Shija and Another [1997] TLR 41**, objection was taken that the record of appeal did not contain the drawn or extracted order which is contrary to Rule 89(1) (h) of the Rules. The respondent conceded to the non-compliance with the rule but contended that the omission did not render the appeal incompetent. To this, the Court of Appeal of Tanzania had the following to say:-

“The law as it now stands is that failure to extract the decree or order in terms of Rule 89 (1) (h) and (2) (v) of the Court of Appeal Rules renders the appeal incompetent.”

Apart from that the Court expressed the view that there is no difference between extracting an invalid decree and failure to extract a valid decree as in **Masha's case**. In all such cases the appeal is incompetent and the remedy is to strike it out.

Accordingly I strike out the appeal. Since the defect in the decree which led to the striking out of the appeal was not brought by a notice of preliminary objection, I t is hereby ordered that, the Decree should be rectified by the trial court in order to comply with the requirements of the law. In the circumstances I make no orders as to costs.



A. F. NGWALA

JUDGE

21/02/2020

21/02/2020

Coram: Hon. A. F. Ngwala, J.

For the Appellant - Mr. Thomas Brush (Advocate)

For the Respondent - Absent

CC: Manumbu

Court: Ruling delivered in the presence of Mr. Brush and absence of respondent and counsel.

Court: Right of Appeal to Court of Appeal explained.


A. F. Ngwala

JUDGE

21/02/2020