

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL APPEAL NO. 5 OF 2018

(Arising from Civil Case No. 8/2017 of Muleba District Court)

JOSIA MAKABILANE APPELLANT

VERSUS

NGEMELA SEBASTIAN RESPONDENT

RULING

25/2/2020-13/3/2020

BAHATI, J.

This ruling is for preliminary objection (PO) on point of law raised by the learned counsel respondent, Dustan Mutagahywa against the appeal to challenge the ruling and decree of the Muleba District Court in Civil Case No.8/2017.

In objecting the appeal, the respondent has lodged two grounds of PO that;

1. The appeal has not been accompanied by a decree
2. The appeal has not been properly drawn.

At the hearing of the above PO, the respondent was represented by Dustan Mutagahywa, learned counsel while the appellant appeared in person.

Mr. Dustan submitted that the appeal has not been accompanied by a decree which is a compulsory requirement under Order XXXIX R. 1 (1) of the Civil Procedure Code, Cap 33. He stresses that it is very important for the appeal to be attached with the appropriate decree.

Having pointed out that, Mr. Dustan further submitted that the Interpretation of Laws Act, Cap. 1 under section 53(2) has defined the word "Shall" to mean that the function so conferred must be performed and not optional.

On the second ground of PO, the counsel submitted that, the appeal has not been properly drawn under Order XXXIX R. 1 (1) of Cap. 33 which provides that,

“Every appeal shall be prepared in a form of memorandum signed by the appellant or his advocate and the memorandum shall be accompanied by a copy of a decree appealed from...”

Since this appeal is cropping from Civil Case No. 8/2017 Muleba District Court on the original jurisdiction, the appeal ought to come as Memorandum of Appeal instead of Petition of Appeal. Hence, the counsel submits further that the remedy for this defect is to strike out the appeal with costs.

In reply, the appellant strongly objected the PO raised by the respondent that this court has different administrative sections, before the case is filed. He submitted that this appeal was seen and approved by the Registrar thus it was filed according to the laws. Therefore, he asserts that those objections are not fair because he filed to the Registrar of the High Court and it was admitted. He argued further that if there could be any anomalies, the Registry would have instantly rejected the intended appeal. Hence, he prayed the PO to be found devoid of merits worth overruling with costs.

Rejoining, Mr. Dustan Mutagahywa argued that the court is not part of the suit. This has been clearly provided under the law. The Court is not supposed to be the champion for this. The content of decree shows that, this is the essential matter. Therefore, requirement of attaching

the decree to the memorandum forms the basis for an appeal. According to the learned counsel, attaching the decree makes the court to have an opportunity to see the decree that is being challenged. He reiterated his client's prayer for the appeal to be struck out with costs.

After considering the submission from both parties the court has found it proper to start by looking into the provisions of the law in this connection. The said provision which is order XXXIX Rule 1(1) of the Civil Procedure Code. It states as follows;-

"...the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgement on which it is founded".


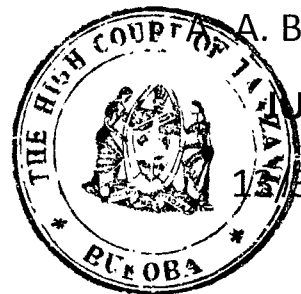
The above provision shows that it is mandatory that the memorandum of appeal must be accompanied by a copy of a decree appealed from. The court is of the further view that this appeal ought to come vide a Memorandum of Appeal instead of Petition of Appeal.

Therefore, under those circumstances, it is the view of this court that the defects appearing in the present appeal are not minor. In the premises, I find the PO raised by the counsel has merit and hence is hereby upheld.

From the foregoing reasons, therefore, the appeal is struck out. I make no order as to costs, since the applicant is a lay person.

It is so ordered.

Right of Appeal explained.


A. BAHATI
JUDGE
15/3/2020


Date: 13.03.2020

Coram: Hon. A. A. Bahati – J

Appellant: Josia Makabilane

Respondent: Ngemela Sebastian (Dunstan Mutagahywa – Advocate)

B/Clerk: A. Kithama

Respondent: I am ready.

Appellant: I am ready.

Court: Ruling delivered in the presence of both Appellant and Respondent.



A.A BAHATI

