

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

CIVIL APPEAL NO. 22 OF 2020

*(Arising from the Judgment of the Resident Magistrate's Court of Musoma
at Musoma in Civil Case No. 7 of 2017)*

RORYA DISTRICT COUNCIL APPELLANT

VERSUS

1. SAMSON ALIWA

(As Guardian of Debora Samson) 1ST RESPONDENT

2. NESTORY KANDO (As Administrator of

the Estate of the late Owese Olando) 2ND RESPONDENT

3. STEPHENE O. KAGOSE

(As the Guardian of Bilishan Kagose) 3RD RESPONDENT

4. INSAYANSI A. WAMBOGO

(As the Guardian of Rose Wambogo) 4TH RESPONDENT

RULING

1st & 3^d December, 2020

KISANYA, J.:

This appeal has been preferred against the persons whose names do not feature in the copy of the judgment and decree appended to the memorandum of appeal. Upon considering that Order XXXIX, Rule (1) (1) of the Civil Procedure Code [Cap. 33, R.E 2019] (the CPC), requires every appeal to be accompanied by a copy of the decree appealed from and judgment which it is founded, I found it pertinent to invite the parties to address the Court on whether the appeal is competent.

At the hearing of the issue raised by the Court, *suo motu*, Mr. Paxton Marwa, learned State Attorney appeared for the appellant while Mr. Masudi Hamisi, learned advocate appeared for the respondent.

Mr. Marwa conceded that the respondents' names in the memorandum of appeal were different from the names stated in the copy of the judgment and decree. However, he contended that the fault was caused by the trial court which signed the copies of judgment and decree without taking into account the respondents' names as stated in the amended plaint. In that regard, the learned State Attorney urged the Court to strike out the appeal with leave to refile after obtaining the correct copies of the judgment and decree. In support of his prayer, he referred the Court to the case of **Domitian Magombe vs Esso Tanzania Limited**, Civil Appeal No. 60 of 2001, CAT at Dar es Salaam (unreported).

Responding, Mr. Masudi Hamis was of the firm position that, this appeal is incompetent for being accompanied by the defective decree and judgment. He fortified his argument by citing the case of **Puma Energy Tanzania Limited vs Rubi Rodway Market (T) Limited**, Civil Appeal No. 3 of 2016, CAT at Dar es Salaam (unreported). The learned counsel went on to contend that, the copy of the decree and judgment appended to memorandum of appeal are not correct for failure to name the respondents as per amended plaint filed in the trial court. He substantiated that the 1, 3rd and 4th plaintiffs instituted the suit in the capacity of guardians while the 2nd plaintiff was an administrator of the estates of the deceased. However, the decree and

judgment show that the suit was instituted by all plaintiffs in their personal capacities. Therefore, Mr. Masudi argued that, the decree contravened O. XX, R. (6) of the CPC which requires the names and description of parties to be stated in the decree. He went on to submit that such defect cannot be cured as a clerical error under section 96 of the CPC, but on review before the trial court under O. XX, R. 3 of the CPC.

As earlier on stated, the issue raised by the Court, *suo motu*, is premised on the provision of Order XXXIX, Rule 1(1) of the CPC which 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."

In the light of the above, a memorandum of appeal in respect of the decision of the Resident Magistrate's Court as in the case at hand is required to be accompanied by the copy of the decree and judgment on which the appeal is founded. It follows that the copy of judgment or decree which is at variance with the memorandum of appeal cannot be considered to form the basis of the said appeal.

The memorandum of appeal in this appeal names the respondents as

SAMSON ALIWA (as Guardian of Debora Samson), NESTORY KANDO (as Administrator of the Estate of the late Owese Olando), STEPHENE O. KAGOSE (As the Guardian of Bilishan Kagose) INSAYANSI A. WAMBOGO (As the Guardian of Rose Wambogo). However, the copy of the decree and judgment show that the plaintiffs (now respondents) in the case before the trial court were **Samson Aliwa, Nestory Kando, Stephen O. Karoge and Isanya A. Wambogo.** Thus, the decree and judgment suggest that all plaintiffs instituted the suit on their own capacities and not as guardians and administrators of estates of the deceased. This implies that the present appeal has been preferred against the persons who were not parties to the judgment and decree subject to the appeal.

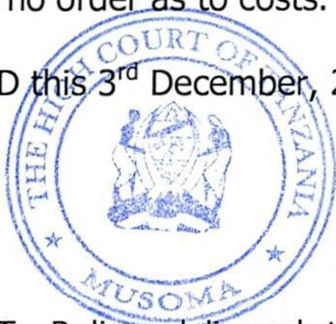
Upon perusing the file, I have noted that the plaint was amended during trial. The plaintiffs' names in the amended plaint are similar to those appearing in the respondents' memorandum of appeal. As rightly submitted by the learned counsel for both parties, the trial court erred in signing the copy of decree and judgment with plaintiffs' names different from the names stated in pleadings. I also agree with Mr. Masudi that the decree at hand contravened the provision of O. XX, R. 6(1) of the CPC for the failure to state properly the names and description of the plaintiffs.

The defect in the copies of the decree and judgment cannot be taken lightly. It goes to the root of this appeal. The law is settled that an appeal accompanied defective judgment or decree is incompetent. See **Puma Energy Tanzania Limited vs Rubi Rodway Market (T) Limited** (supra). Since the defect goes to the root of this matter, it

cannot be cured by the principle of overriding objective. This is so when it is considered that the mandate to correct the judgment and decree is vested in the trial court on review. The appellant was required to move the trial court to correct the decree and judgment before lodging the memorandum of appeal.

In view thereof, this appeal is hereby struck out for being incompetent. As stated herein, the defect in the decree and judgment was caused by the trial court. Hence, in the interest of justice, the appellant is granted leave to refile a fresh appeal, if she is still interested to pursue this matter. The fresh appeal, if any, should be filled within 20 days from the date of receiving the proper or correct decree and judgment but not later than 60 days from the date of this ruling. Since this appeal has been disposed of basing on the issue raised by the Court, *suo motu*, I make no order as to costs. Order accordingly.


DATED this 3rd December, 2020.




E. S. Kisanya
JUDGE

COURT: Ruling delivered through 3rd day of December, 2020 in the absence of the parties but with leave of the Court. B/C Mariam- RMA present.

Parties be notified to collect the copy of ruling.


E. S. Kisanya
JUDGE
3/12/2020