

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

LAND APPEAL NO. 28 OF 2018

*(From the Decision of District Land and Housing Tribunal of Tabora
District at Tabora in Land Application No. 16 of 2017)*

ABDULKHAKIM ABDUL MAKBEL.....APPELLANT

VERSUS

1. ZUBEDA JAN MOHAMED

2. ZUHEIR F. DOSSAJI



.....RESPONDENT

JUDGMENT

11/3/2021-21 /5/2021

BAHATI, J.:

This is an appeal against the judgment and decree of the District Land and Housing Tribunal for Tabora at Tabora by Hon.M.H.Waziri (Chairman) which was entered in favour of the respondents delivered on 16/2/2018.

Dissatisfied the appellant registered his grounds of appeal in this court canvassed with 4 grounds of appeal. Before the appeal could be heard on merit the respondent raised a preliminary point of objection with one ground to the effect that;

- i. The appeal is incompetent before the court for being accompanied by a defective decree.*

As a matter of practice when the objection is raised it must be disposed of first before going into the merits of the case.

When the matter was called upon for hearing, the appellant was represented by Sycone Justine, learned counsel whereas the respondent has the services of Musa Khasim, learned counsel. Parties agreed to dispose of by way of written submissions and complied with the filling schedules.

In support of the preliminary Objection, the respondent submitted that the appellant's appeal is against the judgment and decree of the tribunal decision in Land Application No. 16/2017 Tabora District Land and Housing Tribunal. The subject matter which moved the respondents to file the said Land Application was to seek for the tribunal redress against the appellant was inter alia for recovery of their landed property by way of vacant possession from the appellant, plot identified as House No. 14 at Gongoni

street in Gongoni Ward, Tabora municipality for that matter (see paragraph 3 read together with paragraph 7 (1) both of the Land Application before the trial Tribunal).

He further submitted that contrary to Order XX Rule 9 of the Civil Procedure Code, Cap. 33 [R.E 2019], the purported decree of the trial tribunal accompanying the appellant's memorandum of appeal does not indicate anywhere the said landed property, plot identified as House No. 14 at Gongoni street in Gongoni ward, Tabora Municipality, which is the subject matter of their dispute before the trial tribunal. The said contravened provision of the law, Order XX Rule reads thus:-

“Where the subject matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by a tittle number under the Land Registration Act, the decree shall specify such tittle number.”

He then submitted that the appellant's memorandum of appeal is accompanied by the Decree and Judgment of the trial tribunal of which is the mandatory requirement of Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap. 33 [R.E 2019] which provides thus:-

“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”.

The said decree accompanying this appeal which is the vital document and indispensable one in support of the appeal before this court falls short of the qualification above stated of none identifying the landed property which is the subject matter of the dispute. This means the decree accompanying the appeal at hand is incurably defective for non-inclusion of the description of the suit land in the decree of such need being a mandatory requirement as set by law.

Due to the above defects of the decree supporting this appeal then the whole Appeal before the court is incompetent for being supported by incurably defective decree and the only remedy available is to have it struck out with costs, which is the prayer made before this court.

To buttress his ground, in the case of **Mantrac Tanzania Limited Vs. Raymond Costa, Civil Appeal No. 74 of 2014, Court of Appeal of Tanzania at Mwanza (unreported)** stated that,

"We are not shaded unsure on the naked fact that the above-extracted decree which formed the basis of Civil Appeal No. 39 of 2008, is not in conformity with the mandatory requirements of Order. XX, rules 6 and 7 read together with form 9 of Appendix D reproduced above. This is because, firstly, it does not agree with the judgment."

The Court of Appeal went further to state at the last paragraph of page 21 up to 22 thus:-

"In the circumstances, as the law on the issues raised by this purported Appeal is well settled, we have found ourselves constrained to agree with both counsels. Since the decree of the trial court which was the substratum of the appeal the High Court was incurably defective, the said appeal was incompetent. The High Court was enjoined by the law to strike it out as correctly submitted by both counsels in this appeal."

Based on what has been submitted being supported by the provisions of the law and the case law to that effect, he prayed the objection to be upheld and the appellant's appeal be struck out with costs for being supported by incurably defective decree.

Responding to the preliminary objection, the appellant's counsel submitted that the respondent's preliminary point of

objection is misconceived and has been instigated with the myopic interpretation of the law. He submitted that the general provision governing the contents of the decree is Order XX Rule 6 (1) of the Civil Procedure Code Cap 33 [R.E. 2019] which provides that:

"The Decree shall agree with the judgment, it shall contain the number of the suit, the names and description of parties and particulars of the claim and shall specify the relief granted or other determination of the suit".

He submitted that the attaches' decree has met this requirement of law. The requirement of Order XX Rule 9 of the Civil Procedure Code, Cap 33 [R.E. 2019] of the decree is that the decree includes the description of the property that is sufficient to describe it. The disputed property is well known and it has well been described in the judgment. The judgment and the decree cannot be separated they go together. Thus the allegation that the property is not described is nothing but a technique that does not serve any purpose in an administration of justice.

He further submitted that the raised preliminary objection by the respondents is nothing but a technicality, which aims at defeating substantive justice. It is the current law of the land that courts should uphold the overriding objective principle and disregard

minor irregularities and unnecessary technicalities to abide by the need to achieve substantive justice as per section 3A (1) (2), 3 B (1) (a) and (e) of the Civil Procedure Code, Cap. 33 [R.E 2019] as amended by section 6 of the Written Laws (Miscellaneous Amendment) Act No. 8 of 2018 which requires courts of law to apply the civil procedure code to facilitate the just, expeditious, proportionate, and affordable resolutions of all matters governed by the Act. The rationale behind the introduction of the principle is to promote substantive justice and give statutory effects to Article 107A (2) (e) of the Constitution. Therefore this court is enjoined to promote substantive justice and not procedural technicalities.

He further submitted that the application of the overriding objective was well articulated by the Court of Appeal of Tanzania in the case of **Jeremiah. L. Kunsindah vs. Leila John Kunsindah Civil Appeal No. 260 of 2017. Court of Appeal of Tanzania of Mwanza (Unreported)**. In this case, admittedly the facts are distinguishable with the current disputes however the principle laid down can be applied to demonstrate the application of the overriding objective principle. When the appeal was lodged in court it was confronted with the following preliminary point of objections, that the appeal before the court is incurably defective for being lodged without a proper notice of appeal, that the appeal is incompetent on the

reason that the record of appeal is incurably defective for failure to properly specify the impugned judgment, and the record of appeal is incurably defective for omission to include the judgment of the High Court, the Court of Appeal in determining this preliminary point of objection shade light to the overriding objective principle by allowing the appellant to file the supplementary records of appeal within sixty days to cure the three discussed preliminary of objection. Thus the overriding objective principle was applied to promote substantive justice.

He further stated that even if the contended decree is defective which is not as it has been submitted, the proper remedy is not to strike out the appeal, rather stay the appeal and give an appellant time to apply for rectification of decree in the trial tribunal to facilitate substantive justice which is the core objective of this court.

Further to that, he submitted that the respondent has prayed that the appeal be struck out with cost for alleged defective which it does not exist; he submitted that the appellant cannot be punished by an error which has been committed by the trial tribunal. The appellant does not draw a decree but this is a duty of the court.

In terms of Order XX Rule 7 of the Civil Procedure Code, Cap 33

[R.E 2019] which provides that the decree shall bear the date of the day in judgment was pronounced and when the judge or the magistrate has satisfied himself the decree has been drawn in accordance with the judgment, he shall sign the decree.

Basing on this provision of law the court has to satisfy itself that the decree has been drawn as required. Thus the appellant cannot be condemned to pay costs for any error if any for the mistake committed by the trial tribunal. He prayed that the respondent's preliminary objection be dismissed with costs for being misconceived.

In his rejoinder, the respondents submitted that, it is obvious that the appellant is not disputing the decree accompanying the appellant's memorandum of appeal is defective its non-inclusion of the specification of the suit land, *plot identified as House No. 14 at Gongoni street in Gongoni Ward, Tabora municipality*, which is the subject matter of their dispute before the trial tribunal in terms of **Order XX Rule 9 of the Civil Procedure Code, Cap. 33 [R. E 2019]**. They are only seeking the mercy of this court on two things, **one**, the stay and they be given time to apply for **rectification of the decree**, and **two**, the mercy

of the court be given to them not to pay costs on the ground the defect of the decree was not occasioned by the appellant rather the trial tribunal.

He submitted that recently this court had an opportunity to address these issues in the case of ***Alexander Mundebe versus Tanzania Brush Products Limited, Civil Appeal No. 245 of 2018 High Court at Dar es Salaam (Unreported) on page 6-8*** where quoting the decision of the Court of Appeal of Tanzania stated:-

"What is gleaned from the above provision is that this court when interpreting any provision of the law should seek to embrace the overriding objective of the CPC which is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. However, it is settled that the advent of this provision was not designed to blindly disregard the rules of procedure that are couched in mandatory terms." This position of the law was spelt in the case of ***Njake Enterprises Ltd. Vs Blue Ltd and Rock Venture Company Ltd, Civil Appeal No. 69 of 2017 (CAT- Unreported)*** where the court had this to say;

"Also, the overriding principle cannot be applied blindly on the mandatory provisions of the procedural

law which goes to the very foundation of the case. This can be gleaned from the objects and reasons introducing the principal Act. According to the Bill, it was said thus:

“The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms.

This court went further to state thus:-

“As alluded above the decree is defective. Order XXIX Rule 1 of the CPC makes it mandatory that the memorandum of appeal must be accompanied by a copy of the decree. A decree must be a valid one to have a competent appeal. In this matter the appeal was filed by the advocate who is learned in law, thus it was expected of him to note the defect and have it amended by the trial court before the petition or memorandum of appeal is filed in court. It is from those reasons this court refutes the appellant's invitation and makes a finding that this is not a fit case to apply oxygen principle.”

Also, he referred this court to the court of appeal decision in **Juma Ibrahim Mtale Vs. K.G. Karmali [1983] TLR 50 (CAT).**

A decree is the foundation of any appeal before the court in terms of Order XXXIX Rule (1) for the CPC and it is settled law of this country that the decree must not be an invalid one. He further submitted that the invalidity of the decree is not limited to non-compliance of order XX Rule 6 (1) of the CPC as suggested by the appellant in their reply submission instead there are many others as are provided for under Order XX of the CPC the objection we raised here caters for what are the decree contents in land disputes being among.

The stance which was taken by this court in the cited (supra) which was to strike out the appeal on the ground of being accompanied by the invalid decree, the same be applied in the appeal at hand by striking it out with costs. The appellant and his advocate have shown gross negligence in procuring proper decree to support their appeal, as this bringing an appeal against the trial tribunal in being committed here the second time, the first being in Land Appeal No. 5/2018 before Hon. Mallaba, J which was struck out on 25/5/2018.

They reiterated by submitting that this appeal is incompetent for want of valid decree and be struck out with costs.

Having heard from both parties, the issue for determination in this ruling is whether or not the decree is defective for failure to reflect what is contained in the judgment. The question as to what should be contained in the decree is governed under Order XX Rule 6 (1) (2) and (3) of the Civil Procedure Code, Cap 33 [R.E 2019].

“The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.”

Also, Order XX Rule reads thus:-

“Where the subject matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by a tittle number under the Land Registration Act, the decree shall specify such tittle number.”

As rightly submitted by the respondents, it is not in dispute that the decree which is before me is defective. As noted in this court that the appeal which does not contain a correct drawn decree in accordance with the judgment will not have complied with the requirements of Order XX Rule 7. In my opinion, in to far as it

departs from the judgment, the decree of the trial court is defective.

In the present appeal, there is no dispute that the decree in the record of appeal filed is defective and therefore invalid. In the case of **Fortunatus Masha Vs William Shija and Another [1997] TLR 41**, the 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.

As rightly submitted, the appellant has 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.

This court is of the view that the defect in the decree and judgment cannot be taken lightly. It goes to the root of this appeal. The law is

settled that an appeal accompanied by 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. Hence this objection has merit.

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, for the interest of justice, the appellant is granted leave to re-file a fresh appeal, if he is still interested to pursue this matter.

In my considered opinion since this error was committed by the court, it sounds unfair and inequitable for a party to civil litigation to be punished for an error committed by the court and more specifically where the error is within the domestic affairs of the court. In the circumstances, I make no orders as to costs.

Order accordingly.




A.A BAHATI

JUDGE

21/5/2012

Date: 21/05/2021

Coram: Hon. J. Mdoe, Ag. DR.

Appellant: absent

Respondent: present

B/C: Grace Mkemwa, RMA

Mussa Kassim for the Respondent.

I am with Abdulkhakim Abdul on behalf.

Elizabeth Kijumbe holding brief for Saikoni on behalf of the Appellant

Court: Judgment is delivered in chamber.

A handwritten signature in blue ink, appearing to read "J. MDOE", is written over a circular stamp that contains the same emblem as the High Court seal.

J. MDOE

AG. DEPUTY REGISTRAR

21/05/2021