

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND APPEAL NO. 12 OF 2020

(Arising from Land Application No. 07 of 2018 of the District Land and Housing Tribunal for Tunduru District at Tunduru before Hon J. I. LUKEHA, Chairman)

HASSAN HAJI ABDALA APPELLANT

VERSUS

KIKUNDI CHA NEEMA RESPONDENT

Date of Last Order: 29/04/2021

Date of Ruling: 24/06/2021

RULING

I. ARUFANI, J.

The Respondent, Kikundi cha Neema filed Land Application No. 7 of 2018 before Tunduru District and Housing Tribunal for Tunduru, (herein referred as the tribunal) claiming the appellant, Hassan Haji Abdala had trespassed to their premises (the suit farm) in 2015. It was averred the appellant destructed the plants, uprooted plants and is making development therein and he has caused a loss of Tshs 2,000,000/= and disturbed the respondent's future development of the suit farm.

After full hearing of the matter the tribunal decided the matter in favour of the respondent. The appellant was dissatisfied by the decision

of the tribunal and appealed to to this court basing on six grounds of appeal. The respondent filed in the court a reply to the memorandum of appeal accompanied by a notice of preliminary objection on point of law which states that, the appeal is accompanied with a defective decree and prays the court to strike out the appeal with cost.

When the matter came for hearing of the preliminary objection the appellant appeared in court in person fending for himself and the respondent was represented by Mr. Kaizirege Prosper, learned advocate. The counsel for the respondent told the court that, it is a legal requirement that an appeal is required to be accompanied by a copy of judgment and decree.

He argued that, the law requires the decree to tally with the judgment and supported his argument by making reference to Order XXX1X Rule 1 and Order XX Rule 6(1) of the Civil Procedure Code, Cap 33 RE 2019 (herein referred as the CPC). He argued further that, Order XX Rule 9 of the CPC requires where the subject matter is immovable property the decree is required to contain sufficient description of the suit property.

He went on arguing that, if you go through the decree attached to the memorandum of appeal in the appeal at hand you will find there is

no any information or description which will help to identifying the landed property which was the subject matter in the suit. He argued that is contrary to the records of the tribunal as the Land Application No. 7 of 2018 filed in the tribunal shows the location of the property which was subject matter in the application. He stated that, although paragraph 1 of the application describes the land in dispute is located at Masonge Kilimo Area of Masonge Village within Tunduru District but that description is not given in the decree accompanying the appeal.

He stated further that, apart from the application, page 1 of the judgment of the tribunal describes where the land in dispute is located. He submitted it is their expectation and as required by the law that, the decree would have shown the location of the land in dispute so as to comply with the dictates of Order XX Rule 9 of the CPC. He supported his argument by referring the court to the case of **Ernest Maguha V. Dari Hassan & Another**, Land Appeal No. 08 of 2018, HC at Songea (unreported) where the court struck out the appeal for being accompanied with a decree which had the similar defect. In fine he prayed the court to strike out the appeal with costs.

In reply the appellant did not dispute the appeal is accompanied with a defective decree but he prayed the court to refrain from striking

out the appeal. In lieu thereof he prayed the court to given him a chance to rectify the defect stated by the counsel for the respondent so that the appeal can be heard on merit. In his rejoinder the counsel for the respondent insisted that, as the appeal is incompetent for being accompanied with a defective decree it has to be struck out with costs.

This court has carefully considered the submission made by the counsel for the respondent and after going through the memorandum of appeal and the copy of decree attached thereto it has found that, the issue to be determined in this matter is whether the decree accompanying the memorandum of appeal is defective. The court has found that, as rightly argued by the counsel for the respondent it is a requirement of the law as provided under Order XXXIX Rule 1 of the CPC that a memorandum of appeal is required to be accompanied by a copy of decree appealed from and where the court has not dispenses therewith a copy of the judgment on which the decree is found.

The court has also found that, as rightly argued by the counsel for the respondent it is a requirement of the law as provided under XX Rule 6 (1) of the CPC that the decree is required to tally with the judgment in which it was extracted. The court has found it is also provided under Rule 9 of Order XX of the CPC that, where a subject matter of a suit is

an immovable property the decree is required to contain a description of such property sufficient to identify the same. For clarity purpose the cited rule 9 states as follows:

"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 title number under the Land Registration Act, the decree shall specify such title number."

From the wording of the above quoted provision of the law, it is crystal clear that, as the word used therein is the word "shall" then it is mandatory for the decree to give description of the subject matter in the decree where the subject matter is an immovable property. The court has arrived to the above view after seeing section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2019 states that, where the word "shall" is used in a written law to confer a function such word shall be interpreted to mean that the function so conferred must be performed.

While being guided by the above stated position of the law the court has gone through the memorandum of appeal and the copies of documents accompanying it and find that, the judgment of the tribunal gives location of the land in dispute at its first paragraph by stating the land in dispute is located at Masonya Kilimo area of Masonya Village

within Tunduru District. However, the decree extracted from the stated judgment annexed to the memorandum of appeal has no any information or description as to where the suit land is located. To the view of this court that is contrary to what is provided under Order XX Rule 9 of the CPC quoted earlier in this ruling and it renders the decree incurably defective. The above view of this court is getting support from the case of **Ernest Maguha** (supra) cited to the court by the counsel for the respondent.

The court has considered the prayer by the appellant that he be allowed to rectify the defect appearing in the decree so that the appeal can be heard on merit but found that, although a defective decree can be rectified or emended but the said prayer cannot be granted because the stated defect cannot be rectified by the appellant and enabled the hearing of the current appeal on merit. The court has arrived to the finding after seeing that, as the appeal is accompanied by an incurably defective decree then the whole appeal is incompetent. To the view of this court the defect appearing in the decree cannot be rectified by the appellant to allow the appeal to be heard on merit but the defect appearing in the decree can only be rectified or amended by the tribunal after being moved by the appellant to do so.

The position of the law as stated in number of cases decided by our courts which some of them are the cases of **Ernest Maguha** (supra) and **Abdulkhakim Abdul Makbel V. Zubeda Jan Mohamed**, Land Appeal No. 28 of 2018, HC at Tabora (unreported) is that, an appeal accompanied by a decree violating the requirement provided under Order XX Rule 9 of the CPC is incompetent and the available remedy for such an incompetent appeal is to strike out the same and not to order for its amendment or rectification.

Basing on what I have stated hereinabove the court has found the point of law raised in the notice of preliminary objection of the respondent is meritorious and is hereby upheld. Consequently, the appeal is hereby struck out in its entirety for being accompanied by an incurably defective decree. Due to the fact that, the defect found in the decree was caused by the tribunal the court has found proper for the interest of justice to order each party to bear his own costs in this appeal. It is so ordered.

Dated at Songea this 24th day of June, 2021




I. ARUFANI

JUDGE

24/06/2021

Court:

Ruling delivered today 24th day of June, 2021 in the presence of the appellant in person and in the presence of Mr. Augustino Mahenge, Advocate holding brief of Mr. Prosper Kaizirege, Advocate for the respondent. Right of appeal is fully explained.



I. Arufani

I. ARUFANI

JUDGE

24/06/2021