

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

LAND APPEAL NO. 46 OF 2021

(Arising from the District Land and Housing Tribunal of Kagera at Bukoba in Land Application No. 100 of 2012)

MOHAMED BANTURA.....APPELLANT

VERSUS

HEMED MUSSA.....RESPONDENT

RULING

Date of Ruling: 15.09.2021

Mwenda, J.

This appeal arises from the judgment and decree of the District Land and Housing Tribunal of Kagera at Bukoba in **Land Application No. 100 of 2012** which was entered in favour of the respondent, dated 13th July 2016.

Aggrieved the appellant preferred this appeal which carries three grounds of appeal. Before hearing of this appeal on merits commenced, the respondent raised two preliminary points of objections to wit;

- i. This purported appeal is misconceived and bad in law for being attached and accompanied by a defective decree which does not reflect the judgment

- ii. The purported appeal is misconceived and bad in law for being an abuse of court process and against the order of the court dated 27/05/2021 in **Land Appeal No. 33 of 2016.**

It is trite practice that when preliminary objection is raised it must be disposed of first before going into merits of the case.

When this matter was called for hearing on preliminary points of objections the appellant was represented by Mr. Kabunga, learned advocate whereas the respondent enjoyed the services of Ms. Pilly Hussein, learned advocate.

In support to the first preliminary point of objection the learned advocate for the respondent submitted that it is trite law that a Decree must agree with the judgment as the Decree is a summary of judgment and the said Decree must contain a number of suit, names and description of parties and particulars of claim. She said, the Decree must also show reliefs granted or other determination of the suit and this is provided under order ***XX r.VI (I) of CPC, Cap 33 R.E 2019.***

The learned advocate stated that from the record the Decree does not reflect what is contained in the judgment in **Land Application No. 100/2012** of District Land and Housing Tribunal of Bukoba. She said while in the Decree there are particulars of claim, in the judgment those claims do not appear. For that matter, it means that the decree does not agree with the judgment. In the said judgment, the Hon.

Chairman stated that issue No. 1 is answered negatively in that the suit premises was no longer the Estate of the Late Leocadia Mugula. But in the Decree this issue is not reflected.

She stated that these discrepancy make the Decree defective and therefore it become defective and that being the case the appeal becomes incompetent. In support to her argument the learned advocate cited the case of ***AMI (TANZANIA) LTD V. OTTU ON BEHALF OF PL ASSENGA AND 106 OTHERS, CIVIL APPLICATION NO. 76 OF 2002, at page 7 (unreported)***. On that basis she concluded that this appeal is incompetent and she prayed the same to be struck out with costs.

With regard to the second preliminary point of objection the learned advocate submitted that this appeal is incompetent as is filed against the order of this court dated 27/5/2021. The appellant had at one time filed **Land Appeal No. 33/2016** and the same had anomalies on the names of the parties. During hearing the respondent raised objections against the said anomalies and the appellant's advocate conceded.

The learned advocate submitted that the applicant's advocate did not comply with the order of the court as he has now repeated the same errors which is the appellant's discrepancy in names. She said while the names appearing in the Decree are Mohamed Bantula, in the memorandum of appeal he is referred to as

Mohamed Bantura. She thus concluded in that this appeal is bad in law for non-compliance of the court's order and prayed this appeal to be struck out with costs.

Responding to submission in respect of the preliminary objections, the appellant's advocate submitted that the preliminary objections are misconceived and misplaced.

He submitted that a Decree and judgment impugned in this court emanate from **Land Application No. 100/2012**, District Land and Housing Tribunal of Bukoba. The said Decree mentioned the parties and it is properly dated. This Decree is what the appellant received from District Land and Housing Tribunal for appeal process and variance of the contents between the judgment and decree are the Tribunal's fault which are subjected to the present appeal. He stated further that if the District Land and Housing Tribunal, issued the judgment and decree, it cannot amend them on its own as it will become *functus officio* and according to him by virtue of **Section 95 of the Civil procedure Code, [Cap 33 R.E 2019]** matters which can be corrected are not the content of the judgment or decree. He said what the learned Advocate for the respondent has stated is the decision which is different to judgment and it is not incidental omission or slip that can be rectified. According to him this is the purpose of this appeal as the chairman delivered orders contrary to judgment.

The learned advocate submitted further that the court's errors should not affect the innocent party that is why in the **Civil Procedure Code, [Cap 33 RE.2019] Sections 3A and 3B** were invented to introduce the principle of overriding objectives (oxygen principle). He said, if this court is of the view that the District Land and Housing Tribunal is capable of correcting the said anomalies, then the appellant should be given leave to go and bring a correct decree because striking out this appeal will lead to backlog of cases.

On the second limb of the preliminary objection the learned advocate said this objection has no substance that is why the learned advocate for the respondent did not cite any authority or any provision of the **Civil Procedure Code [Cap 33 R.E 2019]** to support her argument. He stressed that there is no discrepancy in names of the appellant as the names of the appellant is Mohamed Bantura and if there is any discrepancy then it is just a spelling mistake which cannot defeat the case as it can be rectified by a slip rule and under the principle of overriding objective the said omission cannot defect justice. He then prayed the preliminary objections to be overruled as they are intended to defeat justice.

In her rejoinder, advocate for the respondent submitted by insisting that the Decree does not reflect the substance of the judgment and on the argument that the decree and the judgment are the ones he received from the tribunal she said that argument is farfetched as the advocate for the appellant had a room to pray

for corrections of the anomalies just for the sake of ensuring similarities and not to amend the judgment as he contended. She also submitted that this memorandum of appeal was prepared and filed by the advocate who is learned in law of the land and therefore he cannot hide on the reason that those documents are the ones they received from the tribunal.

On the argument by learned advocate for the appellant that the tribunal would be *functus officio* by amending the judgment the learned advocate for respondent stated that the intention is not to amend the judgment but to make the judgment go with the decree. Also on the argument by the appellant's advocate seeking leave to amend and bring a proper appeal she said this entails the advocate for the appellant concedes to their objections and that the principle of overriding objectives cannot be applied blindly and used as a cover for violation of laid down procedures. On arguments by the advocate for the appellant that the spelling error is minor as if "R" and "L" is the same thing she said that it is not true and this court dealt with it in **Land Appeal No. 33/2016** when leave to correct the said anomaly and refile was granted. She concluded with her previous prayer that this appeal be struck out for being incompetent.

Having heard 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.

Order XX Rule 6 (1) of the Civil Procedure Code, Cap 33 R.E 2019 provide for the contents of the decree in that;

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

As was rightly submitted by the advocate for the respondent, the contents of the decree is not in alignment with the judgment as it contains particulars of claims which do not feature in the judgment. This anomaly renders the said decree defective.

Order XX Rule 7 of the Civil Procedure Code [Cap 33 R.E 2019] (supra) mandatorily as stated above state that the judge or magistrate shall sign the decree upon satisfaction that the decree has been drawn in accordance with the judgment. This order reads as follows:

*"The decree shall bear the date of the day in 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**".*

The learned advocate for the appellant submitted that the decree in question was supplied to them by the tribunal and since they were prepared by the tribunal then amending it would make the tribunal *functus officio*. With respect to the learned advocate's submission this court disagree to that contention as the principle is clear that the correction of this nature ought to effected upon application before the court. In the case of **Abdulkhakim Abdul Makbel vs. Zubeda Jan Mohamed and another, Land Appeal no. 28 of 2018** (unreported) it was held inter alia they:

"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..." [Emphasis added].

Also, the learned advocate for the appellant was of the view that if this court is of the view that the decree does not agree with the judgment, then the principle of overriding objective be applied to allow them to go bring the corrected decree as striking out this appeal will lead to backlog. This court has considered this submission but since the defect goes to the root of this matter it therefore cannot

be cured by the principle of overriding objective. In the case of **Abdulkhakim Abdul Makbel V. Zubeda Jan Mohamed & Another, Land Appeal No. 28 of 2018** (supra) this court citing the case of **Puma Energy Tanzania Limited vs Rubi Rodway Market (T) Limited** held inter alia that;

"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 a defective judgment or decree is incompetent".

Since the first preliminary objection concluded this matter, this court find no reason to discuss the second preliminary point of objection.

In view of the foregoing this court find merit in preliminary objection and therefore this appeal is struck out with costs.

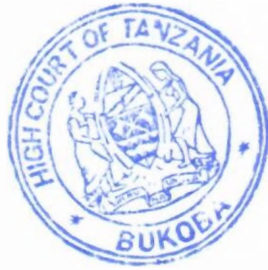
It is so ordered.


A.Y. Mwenda

Judge

15.09.2021

This Ruling is delivered in chamber under the seal of this court in presence of Zedy Ally for the Respondent and absence of the Appellant.




A.Y. Mwenda

Judge

15.09.2021