

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

AT BUKOBA

LAND APPEAL NO. 14 OF 2021

(Arising from the District Land and Housing Tribunal for Kagera at Bukoba in Application No. 135 of 2016)

**KAGERA FARMERS COOPERATIVE
BANK LTD UNDER LIQUIDATION
OF DEPOSIT INSURANCE BOARD.....APPELLANT
VERSUS
ALISTIDES MARTIN.....RESPONDENT**

RULING

Date of Ruling: 06/09/2021.

Mwenda, J

Before this Court is an appeal filed by the appellant against the judgment and Decree of the District Land and Housing Tribunal for Kagera vide Application No. 135/2016 dated 17/02/2021.

When the respondent was served with the memorandum of appeal he registered his reply and accompanied a preliminary point of objection which reads, and I quote:

"That, the filed Appeal is incompetent for being annexed to the defective Decree".

It is trite practise that when preliminary point of objection is raised the court is duty bound to consider it first before resorting into a substantive matter.

When the Preliminary Objection was set for hearing, the Appellant was represented by Mr. Lameck Butuntu, Learned State Attorney and the respondent enjoyed the service of Ms. Erieth Barnabas, Learned Advocate.

When invited to address the court in respect to the preliminary point of objection, Ms. Erieth submitted that the respondent was an applicant in Land Application No. 135 of 2016 before District Land and Housing Tribunal for Kagera at Bukoba. She said that the said application ended in favour of the respondent and the present appellant lodged this appeal and a copy of it was served to the respondent. Ms. Erieth submitted that after a perusal to the said the memorandum of appeal they discovered some material irregularities in the Decree annexed thereto. She submitted further that at page 2 of the Decree it appeared it was signed on 16th of February 2021 but in the copy of impugned judgment especially at page 7 it is indicated that it was delivered on 17.12.2021 and at page 8 it indicates it was delivered on 16.02.2021.

According to Ms. Erieth, this error is clerical or arithmetical mistake and in support to her submission she cited ***Section 96 of Civil Procedure Code [Cap 33 RE 2019]***. On top of that she referred this court to ***Order XX Rule 7 of the Civil Procedure Code [Cap 33 R.E 2019]*** which states the contents of the Decree

include 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.

Ms. Erieth submitted that, since the memorandum of appeal is required to be accompanied by a Decree, then a defective Decree renders the whole appeal incompetent. She concluded by praying this appeal to be dismissed with costs.

In reply to the submission by the learned Advocate for the respondent, Mr. Butuntu, learned State Attorney for the Appellant submitted that the errors raised by the respondent are curable under ***Section 96 of the Civil Procedure Code [Cap 33 R.E 2019]*** which allow Courts to rectify the clerical errors. According to the learned State Attorney the gist of Section 96 of the Civil Procedure Code is to ensure that the court exercise justice to the parties. In support to his argument, Mr. Butuntu, learned State Attorney cited the case of ***Yakobo Magoiga Gichere v. Penina Yusuph, Civil Application No. 55 of 2019 (unreported)*** where emphasis on courts to deal with cases justly and with due regards to substantive justice was emphasized. On top of that he also cited **Article 107 of the Constitution of the United Republic of Tanzania and** stated further that the said defects are curable as long as they arise from clerical errors and as long as the court itself can rectify. When asked by the court as to which court can rectify the said anomaly and at what stage, the learned State Attorney was of view that this High Court may do so or direct the subordinate court to rectify the anomaly.

Upon further reflection on the applicability of his views the learned State Attorney changed his position and stated that the proper court capable of rectifying the anomaly is the trial court upon prayers by the parties and not this court. He then prayed this court to issue necessary orders but not for dismissal and costs.

In a brief rejoinder Ms. Erieth, learned advocate for the respondent stated that the learned State Attorney was negligent in filing a memorandum of appeal accompanied with a defective Decree as he ought to have exercised due diligence before filing this appeal. She prayed this appeal to be struck with costs.

In this appeal, the issue is whether the Preliminary Objection is meritorious.

It is trite law that the essential documents to accompany a memorandum of appeal are the decree or order appealed from. ***Order XXXIX rule (1)(1) of the Civil Procedure Code [Cap 33 R.E 2019]*** state as follows:

"Every appeal shall be preferred in the form of memorandum signed by the appellant or his advocate and presented to the High court ...or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed (unless the court dispenses therewith) of the judgment on which it is founded"

In the present matter, this court went through the Decree accompanying the memorandum of appeal and noted that it was signed on 16th of February 2021. However, going through the judgment accompanying the Decree, this court noted two different dates which appear therein. These are 17th December, 2021 which is reflected 7 of the typed judgment and 16th February 2021 at page 8 of the typed judgment. These dates clearly show that matter the decree does not agree a with the judgment. ***Order XX Rule 6(1) of the Civil Procedure Code [Cap 33 R.E 2019]*** state as follows:

“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 reliefs granted or other determinations of the suit.” [emphasis added].

The two dates as they appear in the typed judgment create confusion as to when exactly the said judgment was pronounced. The learned state attorney for the appellant was of the view that the said defects are curable as long as they arise from clerical errors and as long as the court itself can rectify. Having considered the defects in this matter this court is of the firm view that the appellant ought to have applied before the District Land and Housing Tribunal to correct the Clerical or arithmetic mistakes in the judgment before filing this appeal.

The appellant ought to have moved the District Land and Housing Tribunal to correct the defects relying on **Section 96 of the Civil Procedure Code [Cap 33 R.E 2019]**, which reads as follows and I quote:

“Clerical or arithmetical mistakes in a judgment, decree, or orders or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion on the application of any of the parties”

In the case of *Mohamed Bantura V. Hemed Mussa, Land Appeal No. 46 of 2021 (unreported)* this court citing with approval the case of *Abdulkhakim Abdul Makbel vs. Zubeda Jan Mohamed and another, Land Appeal No. 28 Of 2018* (unreported) held inter alia that:

"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].

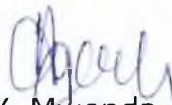
Failure by the appellant to ensure the defects are corrected thereby filing an appeal accompanied by defective decree render this appeal incompetent. In the case of ***Mohamed Bantura V. Hemed Mussa (supra)*** citing the case of ***Abdulkhakim Abdul Makbel V. Zubeda Jan Mohamed & Another*** it was held 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."

That being said this court join hands with the Advocate for the respondent that this appeal is incompetent and it is hereby struck out.

As the said anomaly was caused by the District Land and Housing Tribunal it will be unfair to condemn the Appellant to pay costs. I thus order each party to bear their own costs.

It is so ordered.


A.Y. Mwenda

Judge

06.09.2021

Ruling delivered in chamber under the seal of this court in the presence of the learned state Attorney Mr. Lameck Buntuntu for the appellant and in the presence of Miss. Erieth Barbanabas for the respondent.




A.Y. Mwenda

Judge

06.09.2021