

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

LAND CASE APPEAL No. 32 OF 2021

(Arising from District Land and housing Tribunal for Kagera at Bukoba in Application No. 73 of 2018)

MARYODELISA CHRISTIAN.....1ST APPELLANT

ESTHER CADIS2ND APPELLANT

JASPER JOSEPHAT.....3RD APPELLANT

VERSUS

BURUTE SACCOS LIMITED.....RESPONDENT

RULING

Date of last Order: 22/9/2020

Date of Ruling: 30/9/2020

This appeal originates from Land Application No. 73 of 2018 at District Land and Housing Tribunal for Kagera at Bukoba where the respondent sued the appellants in respect of a suit land located at Mafumbo Street, Kahororo Ward, Bukoba Municipality. At the end of the judicial day the judgment was delivered in favour of the respondent. Aggrieved by the said decision the appellant have preferred this appeal. When a copy of memorandum of appeal was served the respondent replied by filing a counter affidavit.

When the hearing of this appeal was set in motion the appellant were represented by Mr. Assey, learned counsel and the respondent enjoyed the services of Mr. Zed Ally, learned counsel. Before hearing of appeal commenced Mr. Zed Ally, learned Counsel for the respondent informed this court that they have noted an anomaly which automatically vitiates the whole proceedings. This court therefore invited the parties to submit in that respect as it is trite law that whenever a preliminary point of objection is raised the court has to determine it first before resorting to the hearing of the main case.

When invited by the court to submit in support of the preliminary objection Mr. Zedy Ally, learned counsel for the respondent submitted that a decree and judgment accompanying this appeal do not reflect each other. He said it is trite law under order **XX Rule 7 of CPC Cap 33 and XX Rule 6 (1) of CPC Cap 33 RE 2019** that a decree and judgment must reflect each other. In our case, the decree and judgment do not agree/reflect each other. He said the Decree at page 2 is written as follows:

"AND WHEAS, the application is coming for final disposal before E. Mogasa, Chairman in the absence of the tribunal(sic) assessors, Mr. Henry Muyaga and L.D. Mpanju as their tenure expired before the case was due for judgment".

He said this clause however is reflected in the judgment.

He submitted further that in the last order (the third order) the applicant is ordered to pay cost of the suit but the applicant won the case and there is no need to order him pay cost. He said in the judgment, it was the respondent who was ordered to pay costs.

He said, another area is in the 2nd order of damages of Tshs. 2 million where the decree refers to respondents while the judgment speak of the *respondent (sic)*.

The learned counsel for the respondent submitted further that with regards to prayers in the **first relief in a decree he has not put the figure while it 15 million** and therefore these inconsistency make this appeal incompetent and therefore the appeal is improper. In support of his argument he cited a case of **Mohamed Bantura vs. Hemed Mussa Land Application No. 46 of 2021** which was in which a judgment and a decree did not agree each other and the appeal was struck out with costs.

Mr. Zedy conclude his submission with a prayer for this court to strike out this appeal with costs as this is the second time the appellants are making similar mistakes to the ones in Land Case No. 53 of 2020 and now they have repeated the same mistake.

Responding to the submission by the learned Counsel for the respondent, Mr. Assey, learned counsel for the appellants started by stating that it is true that this defect goes the root of the matter but he tried to distinguish the said cases with

the present the appeal. He said the cited case and the present appeal are different as in the present appeal they see that the Tribunal's judgment is defective and therefore even the decree is like it does not exist. He said, before District Land and Housing Tribunal there was a problem on a set of assessors and the Tribunal did not observe the Coram contrary to S. 23 (3) of Cap. 216.

The learned counsel for the appellant's submitted further that with the discrepancy between the decree and judgment the decree is not executable, prayers are defective and the prayers are also different and he prayed for necessary orders as this anomaly is caused by the tribunal and the duty to prepare the decree is that of the court and the appellants did not prepare the said judgment and therefore they should not be condemned to pay costs.

He concluded by stating that striking out this appeal will delay justice and prayed this preliminary objection to be disregarded so that the hearing of this appeal proceeds.

In rejoinder, Mr. Zeddy, learned counsel for the respondent submitted that the advocate conceded that the documents are defective and goes to the root of the case and if that is the case, then the remedy is to strike out the appeal. He said, the argument that the mistake is not caused by the appellant is unfounded as they ought to satisfy themselves that the document are in order and this is negligence on their part.

On the argument that striking out this appeal will delay the hearing process, he said they were afforded that opportunity to correct the anomaly in Land Case No. 53 of 2020 but they have not complied. He thus concluded by maintaining that this appeal be struck out with costs.

Having heard submissions by both parties, the issue for determination is whether or not there is discrepancies between the judgment and decree.

This court went through a copy of judgment and decree and noted that the two do not agree each other. As was rightly pointed out by Mr. Zed Ally, the learned counsel for the respondent, and conceded by Mr. Assey, learned counsel for the appellants, there following are discrepancies discovered. One, while the Decree state on the date of disposal of the application two assessors namely Mr. Henry Muyaga and L.D. Mpanju were absent as their tenure expired before the case was due for judgment, the said clause is not reflected in the judgment. Two, the last order (3rd order) of a decree shows that the applicant is ordered to pay costs of the suit while he (the applicant) won the case. This defies logic as there is no need to order the winner to pay costs. But going through a copy of judgment, it is the respondent (sic) who were ordered to pay costs. Three, the 2nd order in the decree state that general damages of Tshs. 2 million shall be paid by the respondents while the judgment refers the said damages to the respondent (sic). Four, while the first relief claimed by the respondent was Tshs. 15 million as seen in a copy of

judgment, the said figure is not stated in a list of reliefs claimed as appearing in a decree.

It is trite law that decree must agree with the judgment and this position is stated under ***Order XX Rule 6 (1) of the Civil Procedure Code, Cap 33 R.E 2019*** in the following words:

“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.”

It is also trite law that a decree which does not agree with the judgment is defective and since it is a legal requirement that appeal must be accompanied by a decree, then a defective decree make appeal also defective. It was Mr. Zedy Ally's submission that following the said discrepancies this appeal is incompetent and should be struck out but Mr. Assey submitted that despite the said discrepancies this court should invoke Section 96 of Civil Procedure Code, [CAP 33 R.E 2019] by amending the decree but this court having sighted the said provision of S. 996 of Civil Procedure Code is of the view that the court which is capable of correcting a decree and judgment is the trial court/tribunal itself and the applicants were required to move the Trial Tribunal to correct the anomaly before filing this appeal. **Rule 7 of Order XX** states 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"

Also this court in the case of **Mohamed Bantura vs. Hemed Mussa Land Application No. 46 of 2021** this Court while citing the case of **Abdulkhakim Abdul Makbel Vs. Zubeda Jan Mohamed and Another, Land Appeal No. 28 of 2018 (ureported)** held inter alia that :

"Since the defect goes to the root of the 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 a 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]

Since the defects in the decree goes the root of the case then this appeal is incompetent. In the case of Mohamed Bantura (supra) this court held 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."

From the foregoing analysis, this court is satisfied that this appeal is incompetent for being accompanied with a defective decree and it is therefore struck out with costs.

It is so ordered.



A.Y. Mwenda

Judge

30.09.2021

Ruling delivered in chamber under the seal of this court in the presence of Ms. Pilly Hussein for the respondent holding brief of Mr. Gerazi Reuben for the appellants.



A.Y. Mwenda

Judge

30.09.2021