

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MUSOMA**

**AT MUSOMA**

**LAND APPEAL NO. 3 OF 2021**

**CHACHA ISARARA BHOKE ..... 1<sup>ST</sup> APPELLANT  
MWITA ISARARA BHOKE ..... 2<sup>ND</sup> APPELLANT  
MACK ISARARA BHOKE ..... 3<sup>RD</sup> APPELLANT**

***VERSUS***

**MAGWAIGWA MTUNDI ..... RESPONDENT**

***(Appeal against the judgment of the District Land and Housing  
Tribunal for Tarime at Tarime in Application No. 25 of 2017)***

**RULING**

13<sup>th</sup> September and 8<sup>th</sup> November, 2021

**KISANYA, J.:**

The above named appellants and one, JULIUS ISARARA BHOKE whose appeal was dismissed for want of prosecution sued the respondent herein, on a claim of trespassing into their land located at Kamugutu Hamlet, Matongo Village in Tarime District. Both parties were heard on merit. At the end, the trial tribunal held the view that the respondent was the lawful owner of the disputed land. Further to that, the appellants were ordered to vacate the disputed land.

In a bid to challenge the judgment of the trial tribunal, the appellants appealed to this Court, raising four grounds of appeal.

When the appeal was called on for hearing on 13<sup>th</sup> September 2021, the appellants were present in person, unrepresented, while the respondent had the service of Mr. Emmanuel Werema, learned advocate.

At the very outset, I probed the parties to address the Court on the competence of the appeal in view of the variance between the judgment and the decree appended to the petition of appeal.

Mr. Werema took the floor first. He conceded that the judgment and the decree were at variance. He therefore asked the appellants to withdraw the appeal with leave to refile. The learned counsel urged the Court to strike the appeal if the same is not withdrawn by the appellants. He prayed for no orders as to costs.

On the other hand, the 1<sup>st</sup> appellant moved the Court to hear and determine the appeal on merit. He submitted that they did not attribute to the defect in the decree. On his part, the 2<sup>nd</sup> appellant was of the view that the appeal was competent, while the 3<sup>rd</sup> appellant asked this Court to quash the judgment.

On my part, the issue under consideration has its basis on Order XX, Rule 6(1) of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC). The said provision provides, *inter alia*, that the decree must agree with

the judgment. It reads: -

*"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."*

The above provision is couched in mandatory terms. It follows that, a decree which is at variance with the judgment is defective. Pursuant to Order XXXIX, Rule 1(1) of the CPC, a memorandum of appeal has to be accompanied by the copy of decree appeal from. It follows that an appeal accompanied by a defective decree is incompetent. There is a plethora of authorities on this position. Some of such decision include, **Puma Energy Tanzania Limited vs Ruby Rodway Market (T) Limited**, Civil Appeal No. 3 of 2018, (unreported), **Tanzania Motor Service Ltd vs Tantrack Agencies**, Civil Appeal No. 61 of 2009 (both unreported):

In the present case, both parties do not dispute that the decree and the judgment are at variance. Indeed, while the judgment shows that the respondent was declared as the lawful owner of the disputed land and the appellants were ordered to vacate the disputed land, the decree displays that the application was dismissed. Further to this, an order as to costs was not awarded in the judgment, while the decree

suggests that the appellants were condemned to pay costs. Therefore, the decree is defective for contravening Order XX, Rule 6 of the CPC. And guided by the position in the above cited authorities, I agree with Mr. Werema that the appeal is incompetent.

It is trite law as held in the case of **Ghati Methusela vs Matiko w/o Marwa Mariba**, CAT, Civil Application No. 6 of 2006 (unreported) that an incompetent matter cannot be withdrawn, amended or adjourned. Therefore, the Court of Appeal had this say in respect of an incompetent matter:

*"It is now established that an incompetent proceeding, be it an appeal, application, etc., is incapable of adjournment, for the court cannot adjourn or allow to withdraw what is incompetently before it."*

In the event, I am inclined to strike out this appeal for being incompetent. On the way forward, I have considered that the variance between the judgment and the decree was not caused by the appellants but the trial chairman. In my considered view, that it will serve the interest of justice if the appellants are allowed to lodge a fresh appeal after obtaining the rectified decree. That being the case, the case file is remitted to the trial tribunal for purposes of correcting the decree within

30 days from the date hereof. If the appellants are still interested to pursue the matter, a fresh appeal should be filed within 20 days after obtaining the rectified decree. Further to this, it is ordered that the appellants be exempted from paying court fees in respect of the fresh appeal. Lastly, I order each party to bear its own costs due to the circumstances of this case.

It is so ordered.

DATED this 8<sup>th</sup> November 2021.



  
E. S. Kisanya  
JUDGE