

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT MOROGORO

CIVIL APPEAL NO. 306 OF 2020

(Originating from Civil Case No. 26 of 2019, In the Resident Magistrate's Courts of Morogoro, at Morogoro by Hon. Lihamwike, RM)

IDRISS SEIFUDDIN BUILDERS CENTER.....APPELLANT

VERSUS

SENGO 2000 LIMITED.....RESPONDENT

RULING

26.08.2021 & 30.11.2021

CHABA, J.

Before the Resident Magistrate's Court of Morogoro, at Morogoro, the appellant unsuccessfully sued the respondent for specific damages amounting to the sum of Tanzanian shillings 29,863,150/= which allegedly to arise from breach of contract of security service. Among other reliefs, the appellant prayed for general damages to a tune of Tanzanian shillings 50,000,000/=. However, the trial court upon painstaking the whole evidence adduced before it and when considered the clause No.16 of the contract entered by the two parties, it awarded the appellant/plaintiff the sum of Tanzania shillings 5,000,000/= as general damages. However, the appellant was unhappy and presently seeks to impugn the decision of the trial court through a memorandum of appeal which comprises of three (3) points of grievances, namely:

1. *That, the trial court erred in law and in fact by failure to properly evaluate and analyse evidence on record.*
2. *That, the trial court erred in law and in fact by holding that the plaintiff has failed to prove the specific damages.*
3. *That, the trial court erred in law and in fact by awarding only general damages in the tune of TZS. 5,000,000/= (Say Tanzania Shillings Five Million only).*

When this appeal was called on for hearing, consensually it was scheduled to be disposed by way of written submissions and both parties complied with the court's orders accordingly. In this appeal, the appellant was represented by Mr. Jovin Robert Manyama, learned advocate, whereas Ms. Mariam Timothy Kapama, learned advocate entered appearance for the respondent. While composing my decision for the instant appeal, I noted that the appellant filed his appeal by presenting memorandum of appeal without attaching the decree contrary to Order XXXIX, Rule 1 (1) of the Civil Procedure Code [Cap.33 R. E. 2019] (the CPC). Upon noting the above anomaly, the court *suo motu*, prompted the learned counsels for the parties to address this court and comment on the competency of the instant appeal, specifically in view of the fact that the memorandum of appeal lodged by the appellant on 23rd day of July, 2021 was filed without being accompanied by a copy of a decree.

It is a trite principle of law that the court has no liberty to raise new issue without availing the parties with an opportunity to address on the raised issue. This issue has been addressed by the Court of Appeal in a number of cases including **Peoples' Bank of Zanzibar v. Suleman Hajj Suleman** [2000] TLR. 347, **Mussa Chande Jape v. Moza Mohammed**

Salim, Civil Appeal No. 141 of 2018, CAT (ZNZ) (2019), **Abbas Sherally and Another v. Abdul Fazalboy**, Civil Application No.33 of 2002 (All unreported). In the case of **Abbas Sherally and Another v. Abdul Fazalboy**, Civil Application No.33 of 2002 (unreported) the Court of Appeal emphasized the importance of the right to be heard as follows:

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.

The Court went on to state that:

"Without much ado, we find there to be merit in this appeal which we accordingly allow. We find the judgment of the High Court to have been a nullity for violation of the right to be heard. "(emphasis is added).

Having noted the raised infraction as alluded to above, on 26th November, 2021 I invited the learned counsels for the parties to address the court on this additional issue before pronouncing my judgment. Addressing the court on this matter, the learned appellant's counsel conceded that he filed instant appeal without attaching the respective decree. Explaining the circumstance under which he filed the appeal without being accompanied with the copy of a decree, he explicated that he tried to make follow up to obtain the copy thereof, but his effort ended in vain. As only two days had remained to lodge the appeal, then he decided to file it on 23rd December, 2020. Upon being asked by this court why did not make further follow up to obtain the copy of a decree, Mr.

Manyama submitted that his effort ended in vain apart from making his level best to get it.

On the other hand, Ms. Kapama averred on the raised issue to the effect that, as the law requires the memorandum of appeal ought to have been filed hand in hand with the copies of the impugned judgment and decree. She added that the filling of instant appeal had to abide by the law.

In rejoinder, Mr. Manyama reiterated what he submitted earlier and added that he raised this concern before my learned sister Ebrahim, J., but was informed that since the said copy had not been supplied by the trial magistrate/court, then it was not possible to get it before her. However, this contention is not supported by the court record.

Having considered oral submissions by the counsels for parties in respect of the raised anomaly, the question that needs consideration, determination and decision thereon is whether this appeal is competent before this court.


To answer the question, I find it apposite to revert to the relevant provision of the law governing a form of memorandum of appeal. As hinted above, the pertinent provision of the law is Order XXXIX, Rule 1 (1) of the CPC. It provides that:

*"Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and **the memorandum shall be accompanied by a copy of the decree appealed from and (unless***

the Court dispenses therewith) of the judgment on which it is founded. (Emphasize is mine).

The expression "**Shall**" have been used in the wording of the said provision of which from its contextual viewpoint it confers a mandatory function which is to be performed as far as the interpretation enshrined under **section 53 (2) of the Interpretation of Laws Act [Cap. 1 R.E. 2019]** is concerned. The said provision expressly requires a memorandum of appeal to be accompanied by a copy of a decree appealed from and if the court has not dispensed with the copy of judgement on which it was extracted. Back to the instant appeal, there is no dispute that the memorandum of appeal filed by the appellant has not been accompanied by the decree from which this appeal ascends.

Alike situation has been dealt by our Apex Court and there is a chain of authorities to the effect that where an appeal lacks a decree or contains a defective decree, it renders the appeal incompetent, and such appeal is liable to be struck out. (See: **Bahadnarali E. Shamji & Another v. The Treasury Registrar, Ministry of Finance & 4 Others**, Civil Appeal No. 4 of 2003; **Uniafrico Limited & 2 Others v. Exim Bank (T) Limited**, Civil Appeal No. 30 of 2006; **Mkama Pastory v. TRA**, Civil Appeal No. 95 of 2006; **Ami (TZ) Limited v. OTTU on behalf of P. L. Assenga & 106 Others**, Civil Application No. 72 of 2002; **Haruna Mpangaos & 902 Others v. Tanzania Portland Cement Co. Limited**, Civil Appeal No. 10 of 2007 and **Kashemeza Phares Kabuye v. Choya Anatory Kasazi**, Civil Appeal No. 110 of 2007 (All unreported).



Having so observed and taking into account on how vital importance the copy of a decree is as expressed under the provisions of the Civil

Procedure Code, and the consequence for non-attachment where one prefers an appeal, such an appeal becomes incompetent before the court. On the violation by the appellant's failure to append the same, I have found it apposite to preface this issue with this illuminating quotation from the judgment of the Court of Appeal of Tanzania in the case of **VIP Engineering Limited v. Said Salim Bakhressa Limited**, Civil Application No. 47 of 1996 (CA), the Court had lucidly observed thus:

"...It is not all rules of procedure whose compliance should be regarded as mere technicalities. This is because, procedural rules are not enacted for purpose of fanciful satisfaction of the legislator or promulgators but for compliance. Whereas some rules are vital and go to the root of the matter that they cannot be sidestepped; others are not of such nature and may be ignored but only if there is substantial compliance as a whole..."
[Emphases added].

Order XXXIX, Rule 1 (1) of the CPC being purely couched in mandatory nature and an ardent into the competency of the appeal itself, in the surrounding circumstance, this court cannot even invoke the overriding objective principle enshrined under Sections 3A and 3B of the CPC since determination of this appeal is dreadful in law as competence of the appeal itself largely depended on the existence of a copy of a decree extracted from a Civil Case No. 26 of 2019. For that reason, it is my finding that the defect is incurable one and it goes to the root of the appeal itself.

In the final analysis, to the extent of my finding and taking into account that a copy of decree appealed from the judgment on which it is founded has not been appended thereon, I find that the same is

incompetent for want of a decree and accordingly, I strike it out with no order as to costs as the irregularity was raised by the Court, ***suo motu***.

It is so ordered.

DATED at MOROGORO this 30th day of November, 2021.


M. J. CHABA

JUDGE

30.11.2021

Ruling delivered at my hand and Seal of this Court in Chamber's this 30th day of November, 2021 in the presence of Ms. Levina Mtweve, learned counsel for the respondent, also holding brief for Mr. Jovin Robert Manyama, learned counsel for the appellant.

M. J. CHABA

JUDGE

30.11.2021

Rights of the parties have been explained.



M. J. Chaba

JUDGE

30.11.2021

