

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

AT BUKOBA

LAND CASE APPEAL NO. 71 OF 2021

(Arising from the District Land and Housing Tribunal for Bukoba at Kagera in Application No. 70 of 2012)

**ROGERS B. RWOTO (THE ADMINISTRATOR OF THE
ESTATE OF THE LATE ALPHONCE RWOTO) ----- APPELLANT**

VERSUS

**PROSPER KABERWA (THE ADMINISTRATOR OF THE ESTATE OF THE
LATE KEZIA K. JOEL)-----RESPONDENT**

RULING

Date of Ruling: 18.03.2022

Mwenda, J.

This appeal arises from the judgment and decree of the District Land and Housing Tribunal of Bukoba at Kagera in Land Application No. 70 of 2012 which was entered in favour of the respondent.

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

- i. This purported appeal is incurably defective for being accompanied with a defective Decree.

- ii. This appeal is improperly filed before the court which has ceased its jurisdiction over the matter.
- iii. The appeal is irredeemable defective for being an abuse of court process.

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. Lameck John, learned advocate whereas the respondent enjoyed the services of Ms. Gisela Maruka, learned advocate.

The learned counsel for the respondent submitted that, after they have received a memorandum of appeal, they filed a reply to memorandum of appeal accompanied with three (3) preliminary points of objections. She informed the court that she abandons the second and third points of objection thereby remaining with the first point of objection which reads as follows;

***"That the purported appeal is incurably defective
for being accompanied with a defective decree".***

She further submitted that by looking at the memorandum of appeal, it is accompanied with a judgment and decree of District Land and Housing Tribunal in Application No. 70 of 2012. She stated that the decree which accompanied the judgment, reads as follows;

"It is hereby DECREED that;

1. The Applicant sued claiming the estate of the late Kezia K. Joel.

2. The applicant planted trees on the suit land and that the trees are of the same age size and uniform with the one at the applicant's land.

3. The foot path and trunks are not boundaries of the applicant's land, and that the foot path and trunks are within the applicants land.

4. The application is allowed with costs".

She further submitted that, in the judgment, what surfaces is "***the application is allowed with cost***" only and the rest reliefs do not feature at all (in the judgment).

The learned counsel for the respondent also submitted that, the decree has to reflect what is contained in the judgment and if not, then the appeal become incompetent. To bolster her argument, she cited the case of **AMI (Tanzania) LTD V. OTTU on behalf of PL ASSENGA and 106 others, Civil Application No. 76 OF 2002, Mohamed Swibon and another vs. Hashimu Hassan Kamugunda, Land Appeal No. 63 of 2016**, and the case of **Mohamed Bantura vs. Hemed Mussa, Land Appeal No. 46 of 2021** (unreported).

She therefore concluded by praying for this appeal to be struck out for being incompetent.

In reply to the submission by the counsel for the respondent, the learned counsel for the applicant submitted that, this is the second time the same preliminary point

of objection with regard to the same issue is raised. He said that at first they knocked at the door of this court in Land Case Appeal No. 09 of 2019 before the Resident Magistrate with extended jurisdiction and the respondent raised the same preliminary point of objection and at the end of the day the appeal was struck out. They then went back to the Hon. Chairman to rectify the anomaly in the said documents.

He further submitted that, the same decree which the respondents allege to be defective, is used by them in execution process but when they attempt to use the same in filling the present appeal the respondent raises preliminary objection.

The learned counsel for the Appellant submitted that, the present decree was rectified by Hon. Mogasa to cover all the reliefs as reflected in the copy of judgment.

He submitted further that, the case laws cited by the respondent's advocate are in support of his appeal as the memorandum of appeal is accompanied with the decree and judgment. To him the decree is proper and it was prepared by Hon, Chairman of the District Land and Housing Tribunal. To him, the respondent is only basing on legal technicality so as to bury justice against the appellant. He concluded by submitting that, the decree is proper and it reflect the judgment and he prayed the preliminary objection to be overruled.

In brief rejoinder the learned counsel for the respondent submitted that it is true that they raised preliminary objection on point of law before the Resident Magistrate with extended jurisdiction. According to her bringing this appeal with similar defect is negligence on his part. And the relief which is available in the copy of judgment is only one which is **"this application is allowed with costs"** and the rest as appearing in the decree are not reflected (in the judgment). She also submitted that, the learned counsel for the Appellant submitted that according to Order XXXIX Rule.1 of Civil Procedure Code [CAP 33 R.E 2019] the learned advocate said that attachment of copy of judgment is not mandatory. She submitted that, that position is for fetched because if there is lacuna in Land Dispute Court Act [CAP 216 R.E 2019], then Civil Procedure Code applies and therefore he was required to annex a copy of judgment and decree. She concluded by praying this preliminary objection to be sustained with costs.

Having gone through the submission by both parties, the issue for determination is whether or not the decree is defective for failure to reflect what is contained in the judgment.

It is trite law that a memorandum of appeal must be accompanied by a copy of decree and judgment appealed against see Order XXXIX Rule 1(1) of the Civil Procedure Code [CAP 33 R.E 2019]

It is also trite law that a decree shall agree with judgment. Order XX Rule 6 (1) of the Civil Procedure Code, [Cap 33 R.E 2019] provide 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."

In our present appeal, as was rightly submitted by the advocate for the respondent, the contents of the decree are not in alignment with the judgment as it contains orders 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]*** state that the judge or magistrate shall sign the decree upon satisfaction that the decree has been drawn in accordance with the judgment "in accordance with the judgment entail alignment to it" emphasis here is that decree shall be 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 features all the reliefs as it was prayed before the trial tribunal but he did not show this court where exactly those orders are reflected. The learned Advocate was also

of the view that what the counsel for the respondent is contesting is just technical delay intended to bury his client's rights. He possibly wanted this court to forego the anomaly and invoke the principle of overriding objectives. This court has considered the submission by the counsel for the appellant but since this defect goes to the root of this matter it cannot be technical delay as he suggested. 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*** where 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".

In addressing a similar concern this court however in the case of ***Mohamed Bantura vs Hemed Mussa Land Appeal No. 46 of 2021*** while citing 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].

From the foregoing analysis this court therefore finds merits in preliminary objection and this appeal is hereby struck out with costs.


It is so ordered.




A.Y. Mwenda
Judge
18.03.2022

This ruling is delivered in chamber under the seal of this court in the presence of Erieth Barnabas learned counsel for appellant and in the presence of Gisera Maruka learned counsel for the respondent.




A.Y. Mwenda
Judge
18.03.2022

