

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAM REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 294 OF 2021

(Arising from the decision of the District Court of Ilala in Civil Cause No. 92 Of 2021)

JAMES HUMPHUREY HAULE APPELLANT

VERSUS

RAJESH KUMAR SHIVJI AGGARWAL RESPONDENT

Last order: 31/03/2022
Judgment Date: 08/06/2022

RULING

MANGO, J

The Respondent instituted Civil Case No. 92 of 2019 against the Appellant before the District Court of Ilala at Kinyerezi claiming Tshs. 93.8 Million and interest thereto being outstanding loan amount payable by the Appellant to the Respondent. The Trial Court determined the matter in favour of the Respondent and ordered the Appellant to pay Tshs 8,600,000/- and interest of the decretal amount at the rate of 7% from the date of judgement to the date of final payment. The Respondent was also awarded costs of the suit. Aggrieved by the decision of the trial Court, the Appellant approached this court armed with two grounds of appeal as follows;

1. That the honorable Resident Magistrate erred in facts when he ruled that the money was given to James Humphrey Haule as a loan by Rajesh Kumar Shivji Aggarwal while in fact in fact the money was a payment of the money he owed Edward Gerald Ndilina
2. The honorable Resident magistrate erred in law and facts when he ruled that there was a valid contract and there was a breach of contract as there was no consent, Contrary to the laws of Tanzania

The Respondent raised a preliminary objection with two limbs as follows;

- i. that the appeal is not accompanied by a copy of decree,
- ii. that this court is not properly moved for not having been moved by way of memorandum as required by the law.

On 24th February 2022, this Court ordered the preliminary objection be argued by way of written submissions. According to the schedule of submissions, the Respondent was supposed to file his submission by 9/03/2022, Appellant by 22/03/2022 and rejoinder if any be filed by 28/03/2022. The Respondent filed his submission as ordered by the court but the Appellant did not file any submission. Submission being a substitute of oral hearing, failure to file written submission amounts to waiver of the right to be heard. The Court considered the Appellant to have waived his

right to be heard on the preliminary objection raised by the Respondent and decided to determine the objection raised by considering the submission made by the Respondent and the relevant provisions of the law.

The Respondent submitted that failure to attach a copy of a decree subject of the appeal fatal as it contravenes mandatory requirements of Order XXXIX, Rule 1(1) of the Civil Procedure Code, [Cap.33 R.E-2019]. The cited provision requires the memorandum of appeal be accompanied by a copy of the decree appealed from. To bolster his argument, the Respondent referred us the case of ***Mic Tanzania Ltd v. Hamis MwinyiJuma, Ambwene Yesaya and Cellulant Tanzania Ltd***, Civil Appeal No. 64 of 2016 in which the Court struck out the appeal with costs for not complying with the mandatory provisions of Order XXXIX, Rule 1(1) of the Civil Procedure Code, [Cap 33-R:E-2019].

On the second limb he submitted that, it is a requirement of the law, that, when the matter emanates from the District Court, the appeal to High Court must be preferred in the form of a memorandum and not by way of petition of Appeal as in this appeal. He fortified his claims with Order XXXIX, Rule 1(1) of the Civil Procedure Code, [Cap. 33 RE 2019] which requires that

every appeal be preferred in the form of a memorandum, signed by the Appellant or his Advocate.

I have considered the Respondent's submission and the relevant provision of the law. I agree that attachment of a decree subject of the appeal is a mandatory requirement under Order XXXIX Rule 1(1) which reads;

'1.-(1) 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.'

The provision has been couched in mandatory terms, thus, failure to comply with the requirement makes the appeal incompetent. There are a number of cases that the Court has struck out appeals governed by this provision of the law for failure to attach a decree subject of the appeal such as, the case of **Pieta Songoloka versus Belga Fungameza and Albina Kapandila** Land Appeal No. 4 of 2020 High Court of Tanzania at Sumbawanga and the case of **T.G World International Ltd versus Carrier Options Africa**

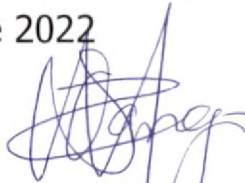
(Tanzania Ltd) Civil Appeal No. 23 of 2021, High Court of Tanzania at Arusha.

The requirement to attach a decree cannot be considered to be a mere irregularity that can be cured by overriding objective principle because, the decree is the order upon which the appeal is based. In absence of the decree the Court cannot easily understand the nature of orders that has been issued against the Appellant. For that reason, I hereby sustain the first limb of objection.

The second limb of objection should not detain much this court. The use of the word Petition instead of Memorandum has been considered to be not fatal. The same is curable under the overriding objective principle, see the case of ***Mary Mwambene v Benard Mwashambwa***, Land Appeal No. 42 of 2016, High Court of Tanzania, at Mbeya. However, given the fact that the Appellant has not attached a copy of a decree sought to be challenged in this appeal, I hereby struck out the appeal with costs for being incompetent before this Court.

Dated today on 8th day of June 2022




Z. D. MANGO
JUDGE