

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

**CIVIL APPEAL NO. 65 OF 2021**

*(Originating from decision of the District Court of Nyamagana, Mwanza in Civil Case No. 03 of 2018 dated 25/11/2021 by, M. O Ndyekobora, SRM.)*

**TANZINDIA ASSURANCE CO. LTD..... APPELLANT**

**VERSUS**

**FARID AMOUR KHALFAN..... 1<sup>st</sup> RESPONDENT**

**OMBEN TIMOTHEO GEORGE..... 2<sup>nd</sup> RESPONDENT**

**MANSOUR INDUSTRIES..... 3<sup>rd</sup> RESPONDENT**

**RULING**

*4<sup>th</sup> & 9<sup>th</sup> September, 2022*

**ITEMBA, J.**

This is a ruling on the preliminary objection raised by the learned counsel for the respondent against the appeal filed by the appellant the gist of which is to the effect that;

- i. The appellant's appeal is incompetent for violating Order XXXIX, Rule 1 (1) of the Civil Procedure Code Cap 33 R.E 2019, for want of accompanying a copy of decree appealed from, thence unmaintainable in law, therefore liable to be struck out with cost.*

It appears that the 1<sup>st</sup> respondent herein had instituted a suit against the appellant, the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents before the District Court of Nyamagana via Civil Case No. 03 of 2018 which case was heard and decided in favour of the 1<sup>st</sup> respondent. Upon being Aggrieved by the decision, the appellant lodged an appeal before this Court advancing a total of four grounds of appeal.

When filing his reply to the memorandum of appeal, the 1<sup>st</sup> respondent, raised one point of preliminary objection. It was agreed by both parties that its hearing be commenced by way of written submissions consistent with the schedule drawn by the Court. Mr. Sileo Mazullah learned Counsel, appeared for the 1<sup>st</sup> respondent while the appellant enjoyed professional representation of Ms. Yusta P. Kibuga learned advocate. In his submissions, the learned counsel for the 1<sup>st</sup> respondent submitted that, the appellant filed an appeal without attaching the copy of a decree contrary to the requirement imposed under Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap 33 [RE 2019] (the CPC) which requires the memorandum of appeal to be accompanied by a copy of the decree appealed from. He contented further that, provisions under Section 53 of the Interpretation of Laws Act [CAP. 1 R.E. 2019] entails that where in a written law the word '*shall*' is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

He maintains that, the fact that the word *shall* is used under Order XXXIX Rule 1 (1) of the CPC it means it was a must for the appellant to attach the said decree in his appeal and such failure violated the mandatory procedure of the law.

To strengthen his contention, he referred this Court to the decision in the case of ***Mariam Abdallah Fundl vs Kassim Abdallah Farsi*** [1991] TLR in which it was held that '*Order XXXIX Rule 1 is mandatory in requiring every memorandum of appeal to be accompanied by a copy of the decree appealed from and that where an appeal has failed to comply with this provision the appeal is not properly before the court and must be dismissed*'.

Also, while referring to the authority in ***Mic Tanzania LTD vs Hamis Mwinjuma and 2 Others***, Civil Appeal No. 64 of 2016 (Unreported) the Court stated as to that position of the law, there is no way the appeal is lawful unless the Court dispenses such requirement. For that reason, it was counsel's prayer that the appeal be struck out for failure to comply with the mandatory requirement of the law with costs.

In his reply the learned counsel for the appellant subscribed to the contention by the 1<sup>st</sup> respondent that the memorandum of appeal was not accompanied with the copy of a decree. However, he stated further that,

the 1<sup>st</sup> respondent has failed to explain as to what extent such omission has affected him. He is of the view that striking out of this Appeal will just create another case in which the appellant will pray for enlargement of time to file another appeal something that he doesn't agree with, he suggests that the Court should not to be bound by technicalities but rather it should allow the appellant to attach the decree so that the matter will be heard on merits.

To cement her averments, she cited the decision in the case of ***R.S.A Limited vs Hanspaul Automechs Limited and Another***, Civil Appeal No. 179 of 2016 CAT (Unreported) in which the Court invoked the overriding objective principle and allowed the appellant to seek and file a proper drawn decree.

In conclusion, he prayed the Court not to be bound by the decisions cited by the 1<sup>st</sup> respondent as they all of the same Court instead it should follow the findings in the decision of the Court of Appeal that she has cited and order the decree to be brought in Court instead of striking out the appeal.

Having completed the arguments both for and against the preliminary objection raised by the 1<sup>st</sup> respondent, this Court is invited to rule out whether or not the said point of objection has merit.

As it appears in the submission for the objection, the 1<sup>st</sup> respondent has questioned competence of the instant appeal. The view taken by him is that the appeal is incompetent for not being accompanied by a copy of the decree appealed against. The 1<sup>st</sup> respondent further argued that the alleged omission is in violation of Order XXXIX Rule 1 (1) of the Civil Procedure Code (supra) asserting that conformity to this requirement is of imperative nature, he urged the Court to hold that the appeal is incompetent and have it struck out.

Responding to the submission, as mentioned, the appellant conceded that the decree from which the appeal arises did not accompany the memorandum of appeal. She submitted further that although this requirement was omitted, the 1<sup>st</sup> respondent has failed to show how he is affected with such omission. She prayed for this court to dispense with the said requirement as the law allows the court to do so and further to that; since the anomaly can be cured by the overriding objective principle, it should allow the appellant to attach the decree so that the matter will be heard on merits.

In respect of modality of filing appeals Order XXXIX Rule (1)(1) of the Civil Procedure Code is relevant. It provides as hereunder:

*'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 founded.'*

It is clear that the above quoted provision puts a mandatory requirement to the effect that every memorandum of appeal must be accompanied by a copy of a decree or order appealed from, and, unless the Court dispenses therewith, the impugned judgment. This requirement was emphasized in **Mariam Abdallah Fundi v. Kassim Abdallah Farsi** [1991] TLR 196, as rightly cited by the learned counsel for the 1<sup>st</sup> respondent, in which the Court of Appeal of Tanzania held that:

*"Order XXXIX Rule 1 is mandatory in requiring every memorandum of appeal to be accompanied by a copy of the decree or order appealed from and that where an appellant has failed to comply with this provision the appeal is not properly before the court and must be dismissed; the learned Judge ought to have dismissed the appeal which must be treated as having been null and void."*

In the matter at hand, as conceded by the appellant, while the memorandum of appeal had the impugned judgment accompanying it, it did not, have the decree from which the appeal arises. This means that the imperative requirement set under the above cited law was not met by the appellant.

The appellant has pleaded this Court to dispense with the requirement in the above cited provision for the reason that the provision empowers the Court to do so. Moreover, he has asked this Court to invoke the overriding objective principle to cure the anomaly and cited the decision in the case of **R.S.A Limited**. With due respect to the counsel for the appellant, the circumstances in the case of **R.S.A Limited** are totally different from the instant appeal. In the said decision the appellant had attached the decree in which the date differs from that of the judgment while in this matter the decree is not attached at all. The provision in question does not empower this Court to dispense with the requirement to attach a copy of the decree appealed from. The attachment is mandatory. What this Court is empowered to dispense with is the attachment of a judgment on which the decree is founded. Failure to attach the decree therefore is a violation of a mandatory requirement thus affects the competence of the appeal. The said violation can neither be saved by the



'oxygen principle' as the same cannot be applied blindly against the mandatory provisions of the law.

Before I draw the conclusion, I wish to clarify the averments by the counsel for the appellant that all authorities which were cited by the 1<sup>st</sup> respondent are High Court decisions and therefore not binding. This is untrue because the decision in the case of **Mariam Abdallah Fundi** (Supra) of the Court of Appeal and not of the High Court.

In consequence, the preliminary objection is sustained. I embrace the view that the present appeal is incompetent. It is accordingly struck out with costs. It is so ordered.

DATED at **MWANZA** this 9<sup>th</sup> day of September, 2022.

**L. J. ITEMBA**

**JUDGE**

Judgement delivered under my hand and seal of the court in chambers in presence of Mr. Deogratias Maya, advocate for the respondent, Mr. Ignas RMA and in the absence of the appellant.

