

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 254 OF 2021

GABRIEL JOHN MUSSA APPELLANT

VERSUS

GEORGE FRANCIS MSAMI

(AS ATTORNEY OF TWAHIR ABDALLAH MOHAMED) RESPONDENT

**(Appeal from the judgment and decree of the Resident Magistrate's
Court of Dar es Salaam at Kisutu dated 15th day of April, 2021
in Civil Case No. 7 of 2020)**

RULING

9th and 16th September, 2022

KISANYA, J.:

At the Resident Magistrate's Court of Dar es Salaam at Kisutu, the above named respondent sued the appellant claiming for Tshs. 47,850,000/= being the outstanding amount paid by the guarantor, USD 1,700/= being travelling expenses from Atlanta to Dar es Salaam, Exemplary damages to the tune of Tshs. 10,000,000/=, general damages and costs of the case. The appellant disputed the respondent's claim.

At the end of the trial, the trial court entered a judgment and decree in favour of the respondent. The appellant was ordered to pay the plaintiff, Tshs. 47,850,000/= being the amount paid to rescue the house from being sold by the

Bank, exemplary damages to the tune of Tshs. 10,000,000/=, general damages of Tshs. 8,000,000 and costs of the suit.

That decision aggrieved the appellant who lodged the present appeal on seven grounds of appeal. I find no need of reproducing the grounds of complaints due to the reasons to be noticed later.

With leave of the Court, the appeal was argued by way of written submissions. In the course of composing the judgment, I noticed that the judgment and decree were at variance on the name of the respondent (the then plaintiff). The judgment and petition of appeal shows that the respondent is George Francis Msami (As Attorney of Twahir Abdallah Mohamed) while the decree displays that the plaintiff (respondent) is George Francis Msami.

In view of the foregoing, I found it appropriate to recall the learned counsel for the parties and prob them to address me on the said anomaly. While Mr. Ambrose Nkwera, learned advocate appeared for the appellant, Ms. Pendo Charles, also learned advocate appeared for the respondent.

In their respective submissions on the issue raised by the court, both counsel were at one that the decree is defective. Mr. Nkwera went on to argue that the decree contravenes Order XX, Rule 6(1) of the Civil Procedure Code, Cap. 6, R.E. 2019 (the CPC). However, the learned counsel were not at one on the way forward.

Mr. Nkwera argued that the proper recourse is to halt the proceedings of the appeal and grant leave to the parties to approach the trial court for correction of the decree. He relied on the case of **Nassoro Abubakar Khamis and Another vs Wakf and Trust Commission Zanzibar, the Administrator of the Estate of Farida Ali Nassor, Nahid Khamis Issa, Akarma Khamis Issa, Nashrar Khamis Issa, Fatma Nassir and Adam Nassoro Mohamed and Another**, Civil Appeal No. 245 of 2020 (unreported).

On the other hand, Ms. Charles was of the view that the appeal is incompetent for being accompanied by a decree which is defective. Therefore, she was of the view that the only remedy is to strike out the appeal in order to enable the appellant to file a fresh appeal. Her argument was based, among other, on the reason that the appellant was duty bound to ensure that the decree is correct. To cement her argument, Ms Pendo cited the cases of **Kapinga and Company Advocates vs NBC Company Ltd**, Civil Appeal No. 43 of 2007, **Robert Edward and Another vs Patrick P. Igmote**, Civil Appeal No. 48 of 2006, **Tanzania Motors Services Ltd and Tantruck Agencies**, Civil Appeal No. 5 of 2006 (all unreported).

Rejoining, Mr. Nkwera argued that the position stated in the cases relied upon by the counsel for the respondent was made before introduction of section

3A and 3B of the CPC and the recent decision of the Court of Appeal. He further urged that the law is settled that the courts follow the recent decision.

From the very outset, I agree with the parties that the decree is defective for contravening Order XX, Rule 6(1) of the CPC. This is because the decree is at variance with the judgment in respect of the name of the plaintiff. Going by record, the plaintiff's name is George Francis Msami (As Attorney of Twahir Abdallah Mohamed) and not George Francis Msami as indicated in the decree.

With regard to the way forward, I agree with Ms. Charles that it has been a position that an appeal that is accompanied by a defective decree is incompetent. However, after introduction of the principle of overriding objective which requires court to uphold substantive justice, defect in the decree does render the appeal incompetent. As rightly argued by Mr. Nkwera, this stance was taken in the case of **Nassoro Abubakar Khamis and Another** (supra), in which the Court of Appeal underscored that: -

"Therefore, in most cases where defective decrees were incorporated in the respective records of appeal, the Court held the firm view that the said appeals are incompetent and struck them out.

However, in the wake of the amendment, which was made to the Appellate Jurisdiction Act, Cap 141 R.E. 2019 by the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018

which introduced sections 3A and 3B, the Court is enjoined to consider the prevailing circumstances of the respective defect and the extent of prejudice caused to the parties for purpose of rendering substantiate justice. Particularly, the amendment which has introduced the overriding objective principle enjoins the Court to administer justice by facilitating the just, expeditious, proportionate and affordable resolution of all matters before it, more so where the issue is with regard to the procedural mistakes committed by parties and the courts.

Thus, where there is a defect on the decree which is essentially caused by the trial court, the respective party is granted leave to approach the maker of it for rectification or amendment. (Emphasis supplied).

Being guided by the above cited decision, I hold the view that the appeal is not incompetent. This is when it is considered that the decree was prepared by the trial court. Although the appellant was duty bound to ensure that the decree tallies with the judgment, it is vivid that the trial court contributed to the defect on the decree. In the result, it will be unfair to punish the appellant.

In the event, this appeal cannot be struck out as prayed by counsel for the respondent. In view of the decision of the Court of Appeal in the case of **Nassoro Abubakar Khamis and Another** (supra), I hereby direct the appellant to approach to trial court and have the decree amended in accordance with the law. It is further ordered that the amended decree be filed on or before 25th October,

2022. In the meantime, this appeal is scheduled for orders on 30th October, 2022 at 9.30 am. No order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 16th day of September, 2022.



A handwritten signature in black ink, appearing to read "S.E. Kisanya".

S.E. Kisanya
JUDGE