

**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. 383 OF 2021

HIGO INVESTMENT LIMITED PLAINTIFF

VERSUS

WATUMISHI HOUSING COMPANY LIMITED..... RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court of Dar es
Salaam at Kisutu in Civil Case No. 298 of 2017)**

RULING

4th and 28th April, 2023

KISANYA, J.:

This ruling is in respect of a preliminary objection raised by the respondent against the appeal lodged in this Court by the appellant against the judgment and decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 298 of 2017.

In objecting the appeal, the respondent has raised a preliminary objection on the point of law to the effect that the appeal contravenes Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC).

At the hearing of the appeal, the respondent had the services of Mr. Urso Luoga, learned State Attorney, whereas the appellant defaulted to

appear. Thus, the preliminary objection was heard in the absence of the appellant.

In his brief submission, Mr. Luoga argued that the appeal is incompetent. His argument was based on the ground that the decree was not appended to the memorandum of appeal as mandatorily required under Order XXXIX Rule 2(1) of the CPC. He thus, prayed that the appeal be struck out with costs for being incompetent.

Having considered the record of appeal and the submission advanced in support of the preliminary objection, the issue for determination is whether the appeal is incompetent for want of decree.

Pursuant to Order XXXIX, rule 1(1) of the CPC referred to this Court by the learned State Attorney, an appeal to this Court must be preferred in form of a memorandum of appeal and shall be accompanied by the copies of decree and judgment on which it is founded. The said provisions read:

*"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.”(Emphasis supplied)

It is clear that the above provision is couched in mandatory terms. Thus, parties are duty bound to comply with the same by presenting a memorandum of appeal accompanied by the copies of impugned decree and judgment. See also the case of **Mic Tanzania Limited vs Hamisi Mwinyijuma and 2 Others**, Civil Appeal No. 64 of 2016, HCT at DSM in which this Court (Arufani J,) had this to say on the said provisions:

“...the above provision shows it is mandatory that the memorandum of appeal must be accompanied by a copy of decree appealed from and if the court has not dispensed with the copy of judgment on which it was extracted.”

Now, as rightly submitted by Mr. Luoga, a copy of decree was not appended to the memorandum of appeal presented to this Court by the appellant. Thus, the appeal contravenes Order XXXIX Rule 1(1) of the CPC. I am alive to the principle of overriding objective, enshrined under section 3A of the CPC, which requires the courts to uphold substantive justice. It is my considered view that the requirement to append copy of decree goes to the foundation of the appeal. In that regard, the defect cannot be salvaged

by applying the principle of overriding objective. I am fortified, among other, by the case of **Morondosi Village Council & Others vs Tanzania Breweries Ltd. & Others**, Civil appeal No. 66 of 2017 (Unreported) in which the Court of Appeal underscored that the oxygen principle should not be applied blindly against the mandatory procedural law which goes to the foundation of the case.

The upshot of the above is that the preliminary objection is found meritorious. Thus, the appeal incompetent for want of decree. In consequence, the appeal is hereby struck out with costs.

DATED at DAR ES SALAAM this 28th day of April, 2023.



S.E. KISANYA
JUDGE