

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 158 OF 2022

(Originating from Kinondoni District Court in Civil Case No.30 of 2022)

MUCA TRADING COMPANY.....APPELLANT

VERSUS

JACQUELINE MICHAEL BARUTI..... 1ST RESPONDENT

SOPHIA SUDI RWANGA2ND RESPONDENT

BELINDA NOEL MOLLEL.....3RD RESPONDENT

HELEN WILSON MTETI.....4TH RESPONDENT

CLEOPHAS KASEZA RUHUMBIKA.....5TH RESPONDENT

RULING

23rd March & 25th April, 2023

BWEGOGGE, J.

The appellant herein above named commenced civil proceedings against the respondents for breach of contract in the Kinondoni District Court. Allegedly, the respondent entered sale of land agreement with the appellant whereas

upon receiving purchase money, the same failed to discharge their contractual obligation. Upon being served with summons for order, the respondents filed a notice of preliminary objection in that the trial court had no jurisdiction to entertain land dispute. The trial court, upon hearing the argument of both parties, reached the conclusion that it had no jurisdiction to preside over the case. Consequently, the case was struck out. Being aggrieved with the decision of the trial court, the appellant lodged an appeal herein praying this court to vary and, or vacate the impugned decision and orders entered thereon.

Upon being served with the summons and a copy of the pleading filed in this court, the respondents raised the preliminary objection that the appeal before this court is incompetent and moved this court to strike out the petition of appeal with cost.

The appellant was represented by Mr. Switbert Rwegasira, learned advocate whereas the respondents enjoyed the services of Messrs Tumaini Mfinanga and Derick Rogers.

In substantiating the advanced preliminary objection, Mr. Derick Rodgers, submitted that, the appeal herein is incompetent on the ground that, the

memorandum of appeal filed in this court is only accompanied by the ruling delivered on 20th of September, 2022, without the drawn order entered thereon. Therefore, the counsel argued, the appellant herein has not complied with Order XXXIX, rule 1(1) of the Civil Procedure Code (Cap 33 R:E of 2019). The advocate directed the mind of this court to the cases of **Paul Charles Mhere vs Felistas James Mwingwa** (Probate Appeal 36 of 2020) [2021] TZHC 3063, and **TG World International Ltd Vs Carrier Options Africa (T) Ltd** (Civil Appeal No 23 of 2021) [2022TZHC 785 to bolster his point. On the above premise the counsel prayed that the appeal lodged herein be struck out with costs.

On the other hand, Mr. Rwegasira, counsel for the appellant submitted in reply that, the cases cited by the counsel of the respondents to support his argument are from the High Court, which this court is not bound to follow. The counsel contended that the lack of drawn order doesn't make the respondents fail to understand the gist of the appeal filed herein. That the defect can be cured by invoking the overriding objective principle and Article 107(A)(2) of the Constitution of the United Republic of Tanzania which require the court to dispense substantial justice without being tied with procedural technicalities, and allow the amendment to be made.

Further, the counsel submitted that the wanting drawn order doesn't prejudice the respondents herein because the same are in possession of the ruling and apprehend that the lower records will be brought with necessary records, the drawn order inclusive. The counsel asserted that the omission occasioned herein doesn't cause a miscarriage of justice. On the above premises, the counsel prayed for the advanced preliminary objection to be overruled.

In his rejoinder, the counsel for the respondents reiterated his previous stance and contended that in the case of **TG Worldwide International Ltd (*supra*)** the court found that the overriding principles cannot pre-empt mandatory procedural rules. The counsel concluded by reiterating his previous prayer in that the appeal herein be struck out for being incompetent.

The issue for determination is whether the failure by the appellant to attach the drawn order appealed against renders the appeal lodged herein incompetent.

From the outset, I find it pertinent to put it clear that it has been conceded by the counsel for the appellant in that the appeal lodged herein is not

supported by the drawn order appealed against. The provision of Order XXXIX, Rule 1(1) of the Civil Procedure Code [Cap 33 R.E 2019] provides *viz*:

*"(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.**"*Emphasis mine.

In the same vein, the provision of Order XL, rule 1 (2) of the Code, provides as thus:

" 2: The rules of Order XXXIX shall apply, so as far as may be, to appeals from order."

The legal requirement to attach the decree and, or order appealed against is denoted by the word "**shall**" which is imperative. Previously, when this court was faced with the issue of like nature in the cases of **Paul Charles Mhere vs Felistas James Mwingwa** (supra); **TG World International Ltd vs Carrier Options Africa(T) Ltd** and **H.J. Stanley Ltd vs. Ramadhani** [1988] TLR 250, in no uncertain terms, held that the provisions aforementioned are mandatory requiring compliance to the effect that the

appeal should be accompanied by the decree and, or order appealed against lest the purported appeal is rendered incompetent. I find myself constrained to borrow a leaf from the case of TG **World International Ltd vs Carrier Options Africa(T) Ltd** (supra) as thus:

"This court is of the view that, the requirements in the cited provision are made in mandatory terms for the purpose of establishing orderly procedures for the conduct of appeals filed at the court and promoting efficient determination of appeals. Thus, this provision needs to be interpreted and applied knowing it is couched in mandatory terms and with the above purpose in view."

I fully subscribe to the above-settled view of the court. Reverting to the matter at hand, it is clear as daylight that the appeal lodged herein is incompetent for omission to attach the order appealed against.

The appellant's counsel while conceding the omission to the drawn order to the memorandum of appeal filed hereto, he prayed this court to invoke the overriding objective principle and Article 107(A)(2) of the Constitution of the United Republic of Tanzania of 1977, as amended, so that the appellant will be allowed to amend the appeal records. In responding to the like prayer in

the case of **Paul Charles Mhere vs Felistas James Mwingwa** (supra), the court stated:

"Such failure cannot be cured by the overriding objectives because it goes to the validity of the appeal itself. It is therefore, no valid appeal before this court capable of being determined by a competent court of law."

In the same vein, in **TG World International Ltd vs Carrier Options Africa(T) Ltd** (supra), the court said:

"This court finds that the overriding objective principle invoked by the appellant is not intended to disregard the rules of procedure made in mandatory terms..."

I equally purchase wholesale the considered opinions above in that the overriding principle cannot pre-empt mandatory procedural rules. Likewise, it was aptly stated by the superior court in the case **Njake Enterprises Ltd vs Bluerock Ltd & Another** (Civil Appeal 69 of 2017) [2018] TZCA 304:

".... the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons for introducing the principle in the Act. According to the Bill, it was said thus;

"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...."

As I aforestated, the appeal lodged herein is incompetent for omission to attach the order appealed against. Therefore, there is no appeal before this court in strict legal sense. Hence, there is nothing for the appellant to amend. It follows that the prayer for amendment by virtue of the overriding objective principle is misconceived in the circumstances of this court.

In fine, I find the preliminary objection advanced by the respondents with substance. I hereby sustain the same. The appeal is hereby struck out with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th day of April, 2023.



O. F. BWEGOGGE

JUDGE