

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**MISCELLANEOUS LAND APPEAL No. 110 OF 2021**

*(Arising from the Decision of District Land & Housing Tribunal for Mara at Musoma in  
Land Application No. 92 of 2021)*

**BETWEEN**

**ZAWADI MUSTAPHA..... APPELLANT**

**AND**

**PATRICK AMANI MBARIKA**

(Administrator of estate of

**ANASTAZIA KIBHO WAKARA) ..... 1<sup>st</sup> RESPONDENT**

**PASCHAL MAGANGA ..... 2<sup>nd</sup> RESPONDENT**

**JOEL MARWA KICHELE ..... 3<sup>rd</sup> RESPONDENT**

**RULING**

**A.A. MBAGWA, J.**

This ruling is in respect of preliminary objection on points of law raised by the respondent's counsel one Mr. Baraka Makowe to the effect that;

*'The appeal is incompetent for originating from a defective drawn order'*

However, before going into the merits of the preliminary objection, I find it apposite to recount the facts obtaining in this matter albeit in brief.

The dispute originates from the estates of the late Anastazia Kibho Wakara in particular a house situated in Plot No. 49 Block 'J' Rutigingi Street within Musoma Municipality. The 1<sup>st</sup> respondent, Patrick Mbarika is the appointed administrator of the estates of the late Anastazia Kibho Wakara. Upon his appointment, he distributed the house in dispute to himself. Later on, the said house was sold to the 2<sup>nd</sup> respondent who subsequently sold it to the 3<sup>rd</sup> respondent. When the probate proceedings were complete and closed, the appellant claimed to be a beneficiary of the late Anastazia Wakara and for that reason claimed interest in the house in dispute. Aware of the fact that she had no locus stand to sue, the applicant successfully petitioned to be appointed administratrix of the estates of the late **Anastazia Kibho Wakara** before Musoma Urban Primary Court via Probate Cause No. 73 of 2008. However, her appointment was set aside by this Court (Hon. Kahyoza J.) in PC Civil Appeal No. 42 of 2020. In its decision delivered on 12<sup>th</sup> May, 2021, this Court held that the appellant's right as a beneficiary was to claim for her share from the administrator of the deceased's estates but not to petition for appointment of an administrator.

Owing the above decision in PC Civil Appeal No. 42 of 2020 the appellant resorted to institute the suit namely, Land Application No. 92 of 2021 in the District Land Housing Tribunal for Mara at Musoma (DLHT) against the respondents claiming that they have trespassed into the estates of the late Anastazia Kibho Wakara. In reply, the respondents filed a joint written statement of defence along with a notice of preliminary objection. The notice contained two preliminary points of objection namely;

1. The Tribunal lacks jurisdiction to entertain the matter filed by the applicant
2. The applicant has no cause of action against the 2<sup>nd</sup> respondent in view of the transaction between the 2<sup>nd</sup> respondent and his co-respondents relating to the land which is subject to these proceedings.

After hearing the parties, on 1<sup>st</sup> October, 2021 the trial Chairman delivered ruling in which he upheld the preliminary points of objection and consequently struck out the application with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Aggrieved with the ruling of the trial Tribunal, the appellant preferred the present appeal. For the reasons which are obvious, I will not reproduce the grounds of appeal raised by the appellant.

When the appeal was called on for hearing, the appellant was represented by Emmanuel Gervas, learned advocate whilst Mr. Baraka Makowe, learned advocate appeared for the respondents. As alluded to, the respondents' counsel raised a preliminary objection on point of law to the effect that "The appeal is incompetent for originating from a defective drawn order'.

This court, for interest of time, ordered the parties to argue both preliminary objection and the appeal on merits. However, as the rule of the thumb requires, the court was enjoined to dispose of the preliminary objection first before determining the appeal on merits hence this ruling.

Submitting in support of the preliminary objection, Mr. Baraka Makowe argued that the annexed drawn order does not match with the decision of the trial DLHT as it misses the particulars of the claims. He elaborated that the drawn order contravenes the provisions of Order XX Rule 6 (1) of the Civil Procedure Code (CPC).

According to Mr. Makowe, the contents of the drawn order must tally with the ruling from which it arises. While referring to Orders XXXIX and XV Rule 2 of the CPC, he insisted that an appeal from a drawn order would apply *mutatis mutandis* with a decree hence the contents of a drawn order as the same as those of a decree. In view of the learned advocate, the appeal is incompetent and deserves to be struck out with costs.

In rebuttal, Mr. Emmanuel Gervas learned advocate for the respondent submitted that, the provisions cited by the respondents' learned advocate are about the decree which emanates from the judgement. He expounded that what has been attached to the appeal is an order emanating from ruling. It was Mr. Gervas' submission that there is no clear provision as to what should be contained in the drawn order unlike the decree as such, the preliminary objection is devoid of merits. He thus urged the Court to dismiss the objection.

In rejoinder, the learned counsel for the respondent insisted that the ruling which struck out the case resulted from the defendant's prayers which ought to be contained in the drawn order.

Having heard the rival submissions, the pivotal issue for determination is whether the appeal filed before this court is incompetent for emanating from a defective drawn order. I carefully read the ruling and drawn order of the Trial Tribunal. It is without doubt that the learned advocate for the appellant does not deny that drawn order misses the particulars of the claim as plainly shown on record of the appeal. The argument by the appellant's counsel is that, despite the omission of the said particulars of the claim, the law is silent as to the contents of a drawn order emanating from the preliminary objection.

On the other side, respondents' counsel submitted that although there is no clear provision on the contents of a drawn order, through case law, it has been settled that the drawn order carries similar contents to those of the decree.

On my part, I entirely agree with the learned counsel for the respondents that a drawn order should contain similar contents to those of a decree. The only difference is that a decree results from judgment whereas a drawn order arises from the ruling. See the case of **Citibank Tanzania Limited vs Tanzania Telecommunications Company Limited and 4 Others**, Civil

Appeal No. 23 of 2008, CAT at Dar Es Salaam and **Mire Artan Ismail and Another vs Sofia Njati**, Civil Appeal No.31 of 2006, CAT at Dar es Salaam.

Applying the position of law as settled in the above cases, let me examine the contents of a decree as provided under Order XX rule 6(1) of the Civil Procedure Code.

*6.-(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.*

From the above provision, there is no gainsaying that the drawn order ought to contain what the defendants claimed/prayed to the court to grant. Since the drawn order does not contain the particulars of claim, it goes without saying that it is defective. It is the law that an appeal emanating from a defective drawn order is incompetent. See **Sonora Gold and Corporation & Another versus Minister for Energy and Minerals**, Civil Appeal No. 112 of 2018 CAT at Dar Es Salaam.

Since the drawn order in this appeal has been found to be defective, it naturally follows that the appeal is incompetent. In results, I sustain the

preliminary objection and consequently, strike out the appeal. I order each part to bear its own costs.



  
**A. A MBAGWA**

**JUDGE**

**21/06/2023**