

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB - REGISTRY)

AT MOROGORO

CIVIL APPEAL NO 25 OF 2022

(Originating from Misc. Civil Application No. 25 of 2021; in the Resident Magistrates Court of Morogoro, at Morogoro)

CHAMA CHA USHIRIKA CHA MSINGI CHA WAKULIMA

WA MIWA NA MAZAO MENGINE (TUCOCPRCOS)

& ANOTHER 1ST APPELLANT

MTIBWA SUGAR ESTATES LIMITED 2ND APPELLANT

VERSUS

SALUMU RAJABU KIDULI RESPONDENT

RULING

30th June, 2023

CHABA, J.

Before the Resident Magistrates' Courts of Morogoro, at Morogoro (the RM's Court) vide Misc. Civil Cause No. 25 of 2021, the appellants herein lodged an application for setting aside the *ex-parte* judgment and decree delivered by the same Court (Hon. B. Lihamwike, RM) on the 23rd April, 2021 which ended in favour of the respondent.

Upon heard the application on merit, the learned trial magistrate dismissed the application for want of sufficient reasons to justify the non-



appearance on the part of the appellants. Discontented with the dismissal of the application, the appellants preferred this appeal wherein they are faulting the said dismissal order on the following grounds: -

1. That, the Honourable Magistrate erred in fact and law by failing to consider appropriately the grounds relied on by the applicants (now appellants) in the application.
2. That, the Honourable Magistrate erred in fact and law by delivering an illogical and baseless ruling.
3. That, the Honourable Magistrate erred in law by failing to consider appropriately legal provisions governing the matter.

When the memorandum of appeal was duly served to the respondent, he immediately filed a notice of preliminary objection on points of law to the effect that, the Civil Appeal No. 25 of 2022 which is before this Court is incompetent for being filed contrary to Order XXXIX, Rule 1 (1) of the Civil Procedure Code [CAP. 33 R. E, 2019] (the CPC).

As a matter of court's practice, whenever there is a preliminary objection raised by either party, the same is to be determined first before going into substance of the case, thus this Court ordered the parties to submit on the said preliminary objection by way of written submissions. Both parties' submissions were prepared by trained legal minds and filed in line with the Court's scheduled orders. Whilst those for the respondent were drawn and filed by Mr. Abdul



Kunambi and Mr. Salumu Mkila, both learned advocates, the appellants' submission was prepared and filed by Mr. Niragira T. E, also learned advocate.

Arguing in support of the raised preliminary objection, learned advocates for the respondent reproduced the provision of Order XXXIX, Rule 1 (1) of the CPC and submitted that, the provision requires the memorandum of appeal to be accompanied with a copy of decree appealed from and a judgment on which it is founded. They submitted further that, the memorandum of appeal filed by the appellants was not accompanied with the ruling and drawn order of the Miscellaneous Civil Application No. 25 of 2021. In their view, failure by the appellants to attach the said documents rendered the appeal incompetent.

To fortify their proposition, the learned advocates referred this Court to the cases of **T.G. World International Ltd vs. Carrier Options Africa (Tanzania) Ltd**, Civil Appeal No. 23 of 2021, HCT at Arusha (unreported) and **Stanley Kalawa Maliki vs. Chichiyo Kwisiye W/O Nderingpo Ngumuo (1997) TLR 288** in which in the later it was held: -

"The combined effect of these provisions, in so far as is applicable to the present case is that, on appeal from order of the court, the memorandum of appeal shall be accompanied by a copy of the order appealed from. But the memorandum of appeal in the instant case was not so accompanied. The established practice of our courts has been that, where the memorandum of appeal is not accompanied by a copy of the Order appealed from, this renders the appeal incompetent. On

that ground the purported appeal in the present case ought to have been dismissed accordingly."

The learned advocates went on challenging the memorandum of appeal filed by the appellants contending that, the same contravenes Order XXXIX, Rule 1 (2) of the CPC for bearing a cited enabling provision on it and consequently prayed for the appeal to be struck out with cost.


In reply, the learned advocate for the appellants readily conceded to the objection raised by his counterparts, but vehemently resisted that the instant appeal should not be struck out for lacking a copy of the drawn order in the memorandum of appeal. To reinforce and strengthen his argument, he relied upon the holding of the CAT in the case of **Yusuf Nyabunya Nyatururya vs. Mega Speed Liners Ltd & Another (Civil Appeal No. 85 of 2019) [2019] TZCA 444 (29 November 2019)** which was quoted in the case of **Erasto Kamala Mwambusye vs. Jubilee Insurance Co. Tanzania Ltd and Another**, Civil Appeal No. 13 of 2020, (unreported) and invited the Court to invoke an overriding objective principle and Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1997 (as amended from time to time) and allow the appellants to make amendment.

More-over, the learned advocate being fortified by the observation of the Court of Appeal of Tanzania in the case of **Yusufu Same and Another vs. Hadija Yusufu**, Civil Appeal No. 1 of 2002, (Dar Es Salaam Registry)

(Unreported), which was quoted with approval by Hon. NDIKA, JA., in the case of **Kambona Charles vs. Elizabeth Charles (Civil Application No. 529 of 2019) [2020] TZCA 214 (12 May 2020)**, prayed for the Court to put into consideration that, the appellants who are laypersons should not be punished by the wrong done by the advocate and consequently beckoned upon this Court to overrule the preliminary objection with costs.

In rejoinder, the respondents' advocates essentially reiterated what they submitted in chief and insisted that there is no other remedy for the memorandum of appeal in which the order appealed from was not accompanied with the same than for the appeal to be struck out. He also attacked the case of **Kambona Charles vs. Elizabeth Charles** (supra) cited by the appellants that, it is irrelevant to the matter at hand as it dealt with extension of time.

Having dispassionately considered rival submissions by the trained legal minds persons, the main issue for deliberation is whether or not the raised preliminary objection is meritorious. However, I will not labour much discussing on the merit of the preliminary objection since through his reply to the respondent's written submission in support of the point of preliminary objection, the learned counsel for the applicants, Mr. Niragila T. E, has impliedly conceded to the P.O., whilst praying for the room for amendment through invocation of overriding objective principle.



At the outset, I must say that, I do not embrace the appellants' contention that the legal fault in this appeal can be cured under the overriding objective principle. Indeed, it is the mandatory requirement of the law specifically, Order XXXIX, Rule (1) of the CPC (supra) that, every appeal shall be preferred by Memorandum which shall be accompanied with a copy of decree appealed from and of the judgment on which it is founded.

My understanding of the provision of section 53 (2) of the Interpretation of Laws Act [CAP. 1 R. E, 2019] is that, where the word "**shall**" is used in a written law conferring a function, then the same must be performed. That is to say, as Order XXXIX, Rule 1 (1) of the CPC on which the preliminary objection is based, makes it mandatory for a memorandum of appeal to be accompanied by a copy of the decree. Thus, this Court has no discretionary powers to depart from the requirements of the law. Not even the overriding objective principle can cure the violation as the same cannot be applied blindly against the mandatory provisions of the law. In this regard, it therefore goes without saying that, as non-compliance with the provision of Order XXXIX, Rule 1 (1) of the CPC goes to the validity and / or root of the appeal itself, the only remedy available is to strike it out from the registry of this Court.

The above stand of the law has been enunciated in a chain of authorities including the cases of **Donata Kakwira & Another vs. Fulgence Kakwira**, Land Appeal NO. 23 OF 2019 (HC) at Kigoma (unreported), **Mic Tanzania LTD vs. Hamis Mwinjuma and 2 Others**, Civil Appeal No. 64 of 2016

(unreported), **H. J. Stanley Ltd vs. A. Ramadhani [1988] TLR 250**, at page 252, **Haruna Mpangaos & 902 Others vs. Tanzania Portland Cement Co. Limited**, Civil Appeal No. 10 of 2007 (unreported) and **Mariam Abdallah Fundi vs. Kassim Abdallah Farsi [1991] TLR**, just to mention a few. For instance, in the case of **H. J. Stanly & Sons LTD** (supra), the Court had this to say: -

"(i) It is mandatory that a memorandum of appeal be accompanied by a copy of the decree - Order 39, Rule (1) of the C.P.C.

(ii) Where a memorandum of appeal is not accompanied by a copy of the decree, there is no legal presentation of the appeal at all".

Similarly in **Mariam Abdallah Fundi vs. Kassim Abdallah Farsi** (supra), it was held: -

"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; the learned Judge ought to have dismissed the appeal which must be treated as having been null and void".

For the above reasons and to the extent of my finding, that being the settled position of the law, I sustain the preliminary objection on a point of law raised by the respondent. Accordingly, I proceed to struck out the instant appeal for

want of competence. However, for the interest of justice, I grant the appellants leave to refile the same within fourteen days from the date of this order with no orders as to costs. Order accordingly.

DATED at **MOROGORO** this 30th day of June, 2023.


M. J. CHABA

JUDGE

30/06/2023

