

**IN THE HIGH COURT OF TANZANIA**  
**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**CIVIL APPEAL NO. 10 OF 2022**

*(Originating from the Ruling of the Resident Magistrate Court of Sumbawanga at  
Sumbawanga in Civil Case No. 4 of 2021)*

**JUMA KUMOGOLA.....APPELLANT**

**VERSUS**

**CRDB BANK PLC.....RESPONDENT**

**RULING**

*20<sup>th</sup> June & 1<sup>st</sup> August, 2023*

**MRISHA, J.**

This Ruling is in respect of a preliminary objection raised by the respondent in order to challenge the competence of the appeal filed by the appellant. The appeal is against the ruling of the Resident Magistrate Court of Sumbawanga at Sumbawanga (the trial court) which was delivered on 22.04.2022 through Civil Case No. 4 of 2021.

In that case the appellant sued the respondent claiming a total of Tshs. 500,000,000/= being general damages for breach of contract. However, before the said suit could be heard on merit, and upon filing of a Written Statement of Defence, the respondent's counsel raised a preliminary

objection that the trial court lacked pecuniary jurisdiction to entertain the matter before it.

The trial court allowed counsel for the parties to argue on the preliminary objection raised by the respondent's counsel and in the end, it sustained the same and proceeded to dismiss the suit with no order as to costs. Believing that the trial court wrongly disposed of the matter, the appellant lodged the present appeal with a view of requesting this court to reverse the impugned decision and grant an order directing the trial court to determine the matter on merit.

As indicated above, the respondent raised a preliminary objection, of which notice was filed on 28<sup>th</sup> September, 2022 with an intention of challenging the competence of the instant appeal. In the said objection, the respondent alleged:

*1. That, the appeal is incompetent before this court for contravening Order XXXIX, Rule 1(1) read together with Order XL, Rule 2 of the Civil Procedure Code, Cap 33 R.E. 2019.*

When this appeal was called on for hearing, both parties enjoyed the legal services of learned counsel. Whereas the appellant was represented by Mr. Sigano M. Antoni, learned advocate the respondent was represented by Mr. Baraka Hiltan Mbwilo, learned advocate.

However, being alive to the rule of thumb that once a preliminary point of law is raised it has to be heard and disposed of first, this court gave the counsel for the parties a chance to argue for and against the preliminary objection raised.

Since it was agreed by both counsel that the said preliminary objection be heard by way of written submissions, the court ordered a submission in chief to be filed on 13.02.2023, a Reply on 20.02.2023 and a Rejoinder, if any, to be filed on 27.02. 2023. Such orders were complied with by each of the learned advocates, as scheduled by the court.

Arguing in support of the preliminary objection, Mr. Mbwilo submitted that in the present appeal, it appears that the appellant filed the appeal challenging the ruling of the trial court, and attached with it a copy of ruling and a *DECREE IN THE ORIGINAL SUIT*.

The learned counsel argued that the position of the law under Order XXXIX, Rule 1(1) of the Civil Procedure Code, CAP 33 R.E. 2019(the CPC) reading together with Order XL, Rule 2 requires that a memorandum of appeal be accompanied by a decree and a copy of judgment.

He also argued that since the present appeal emanates from a ruling which was an order upholding the preliminary objection, then the appellant ought to have attached to the memorandum of appeal a copy

of the RULING and DRAWN ORDER, but to the contrary he attached a copy of a ruling and DECREE IN THE ORIGINAL SUIT instead of a DRAWN ORDER.

The counsel went on to submit that the word "*shall*" as interpreted under the provisions of section 53 of the Interpretation of Laws Act, CAP 1 R.E. 2019(the ILA) denotes that the requirement is mandatory. To bolster his proposition regarding the use of the above word, Mr. Mbwilo referred to this court the case of **Yusuph Mtambo & Others v. Moez Alidin**[1985] TLR 145; **Mariam Abdallah Fundi v. Kassim Abdallah Fars**[1991] TLR 196 and **Paul Charles Mhere v. Felistas James Mwingwa**, Probate Appeal No. 36 of 2020(unreported) which all emphasize that the provisions of Order XXXIX, Rule 1 of the CPC are couched with a mandatory requirement.

It was his view that there is a need to draw a distinction between a DECREE and DRAWN ORDER as the same are separate documents which originate from decisions that a DECREE is extracted from a judgment and a DRAWN ORDER from a ruling. He thus, submitted that the counsel for the appellant ought to have checked the law properly and file proper documents and he can not be excused for his failure to do so.

In winding up, the counsel for the respondent submitted that the defect committed by the appellant's counsel renders the present appeal incompetent. Hence, he implored this court to struck out the instant appeal with costs.

On the adversary side, Mr. Antoni submitted that he read the respondent's written submission in chief and found it to be devoid of merits. Replying against the said submission, the appellant's counsel submitted that the appeal before this court is properly filed and no provision of the law has been offended.

While referring the provisions of Order XXXIX, Rule 1 of the CPC, Mr. - Antoni argued that the said provision of the law is very clear about requirement of instituting an appeal whereby the appellant's memorandum of appeal has been accompanied by a copy of a decree appealed from and a judgment, hence he was of the view that the present appeal is competent before this court.

Arguing about the provisions of Order XL, Rule 1 in line with the provisions of Order XXXIX, Rule 1 of the CPC, Mr. Antoni contended that both provisions of the law have not described which documents must be attached with the memorandum of appeal other that those stated under Order XXXIX, Rule 1 of the CPC which provision has vested the High

Court with power to dispense with that requirement of the law for the interest of justice.

The learned counsel also submitted that the respondent's counsel has not stated how the attachment of a decree instead of a drawn order has occasioned injustice and how that omission has prejudiced the respondent.

In cementing the above point, Mr. Antoni cited the case of **Harbour Microfinance Company Limited vs Chrisant Kitime and Another**, Labour Revision No. 319 of 2021, TZ HC (available in Tanzlii), in which this court had the following to say: -

*"...The applicant asserted some defects in the proceedings, I have gone through the submission, in my view all what is identified as defect in the proceeding did not occasion any injustice. The applicant's failure to show injustice occasioned by the alleged defects make the said errors to have no effect"*

Having cited the above authority, Mr. Antoni submitted that since the learned counsel for the respondent has not stated how his client will be affected by attachment of a decree instead of a drawn order, then he does not see any reason whatsoever, to have the respondent's preliminary objection stand. He was of the view that the said objection is a wastage of the precious time of the court and costs to the appellant.

He further submitted that the alleged ruling and decree are documents prepared and issued by the trial court and the appellant has nothing to be blamed for the errors and mistakes committed beyond his control. He also said it is a trite law that a party cannot be penalized by the mistake committed by the trial court as it was stated by the Court of Appeal in the case of **Indo-African Estate Ltd vs District Commissioner for Lindi District and 3 Others**, Civil Application No. 12/7 of 2022(while citing the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd**, Civil Application No. 5 of 2006) thus:

*"In my considered view if the Court denies this application it will amount to penalising the applicant for a mistake done by the court itself, this will cause grave injustice on the part of the applicant..."*

The appellant's counsel then argued that penalising the appellant who is not the drawer of the document will cause grave injustice and will be a breach of a fundamental right to be heard which is provided under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 which provides for a right to be heard as well as a right to appeal.

In the alternative, Mr. Antoni submitted that if the present appeal will be found to have offended the provisions of the law and since the error was committed by the trial court, then the remedy is not to struck out the

the appeal but to grant a leave to re-file the same with consideration of time limitation after the appellant to have been granted leave to apply for ratification of documents by the trial court.

He concluded his reply by submitting that basing on their submission and authorities cited, he is of the view that the appeal before this court is competent and therefore, the preliminary objection raised by the respondent's counsel is devoid of merit and deserves to be dismissed with costs.

I have carefully gone through the contentions by the learned counsel in regards to the preliminary objection raised against the filed memorandum of appeal lodged by the appellant, and I have also in the same manner, gone through all the authorities cited in the filed written submissions.

What I have observed therein is that both learned advocates are in agreement that the documents attached by the appellant in the course of filing the instant appeal, are a copy of RULING and A DECREE IN ORIGINAL SUIT. It is the latter document which is the subject of this ruling due to the fact that in submitting for and against the preliminary objection, each of the learned counsel has taken his own way just to convince this court agree with his proposition.



In the circumstance, I find that the issue for my determination is whether the present appeal is competent before this court for failure by the appellant to attach a drawn order with the memorandum of appeal.

In order to have a good starting point, I find it pertinent to reproduce the provisions of the law which have been referred by both learned advocates.

Order XXXIX, Rule 1 of the CPC provides that:

*"Every appeal shall be preferred in the form of memorandum signed by the appellant or his advocate and presented to the High 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** (unless the court dispense with) of the judgment on which it is founded."* [Emphasis added]

Order XL, Rule 2 of the CPC provides thus:

*"The rules of Order XXXIX **shall apply, so far as may be, to appeals from orders**"* [Emphasis added]

From the above provisions of the law, it is apparent that there is the use of the word "*shall*" as opposed to the word "*may*". By virtue of section 53(2) of the Interpretation of laws Act, CAP 1 R.E. 2019, it is provided that:

*"Where in a written law the word "shall" is used in conferring a function, **such word shall be interpreted to mean that the function so conferred must be performed**" [Emphasis added]*

Again, there is a number of cases in which the courts of records in this jurisdiction have interpreted the provisions of law as cited above. To mention a few, are the cases of **Muca Trading Company vs Jacqueline Michael Baruti and 4 Others**, Civil Appeal No. 158 of 2022, TZ HC, **Paul Charles Mhere vs Felister James Mwingwa**, Probate Appeal No. 36 of 2020, TZ HC, **Alexander Mundebe vs Tanzania Brush Products Limited**, Civil Appeal No. 245 of 2018, TZ HC and **Mondorosi Village Council and 2 Others vs Tanzania Breweries Limited**, Civil Appeal No. 66 of 2017, CAT.

In **Alexander Mundemba's case**(supra), this court through Hon. Kakolaki, J. stated thus:

*"The law under Order XXXIX, Rule 1(1) of the CPC makes it mandatory that the memorandum of appeal must be accompanied by a copy of decree appealed from."*

Also, the Court of Appeal in **Mondorosi Village Council's case** (supra) had the following to say on rules of procedures: -

*"Regarding the overriding objective principle, we are of the considered view that, **the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case.**" [emphasis added]*

From the above authorities, it is obvious that the provisions of Order XXXIX, Rule 1 are couched in mandatory terms in the sense that in appealing against a decree, or against an order as per Order XL, Rule 1 of the CPC, the appellant must attach with the memorandum of appeal a decree and a copy of judgment, if the appeal is against a decree, and a drawn order together with a copy of ruling, if the appeal is against a drawn order, as provided under Order XL, Rule 1 of the CPC.

Reverting back to the case at hand, the counsel for the respondent has requested this court to struck out the present appeal with cost alleging that the present appeal is incompetent before the court for contravening the provisions of Order XXXIX, Rule 1(1) of the CPC read together with Order XL, Rule 1 of the CPC.

He has further submitted that since the present appeal emanates from a ruling, then the appellant's counsel ought to have attached with the memorandum of appeal a copy of the Ruling and a Drawn Order. He has also referred the provisions of section 53 of the ILA which provides the

meaning of the word "*shall*", and finally the learned counsel has referred to this court to a number of cases which emphasize about the mandatory requirement of Order XXXIX, Rule 1 of the CPC.

On his side, the appellant's counsel, while seemingly conceding that there is an omission to attach a drawn order with the memorandum of appeal, has attempted to invite this court to take a view that the instant appeal is competent.

To him, the appellant's act of attaching with a memorandum of appeal a decree in the original suit in lieu of a drawn order, does not make the appeal incompetent before this court because the provisions of Order XXXIX, Rule 1(1) and Order XL, Rule 1 of the CPC do not describe which documents other than those stated under Order XXXIX of the CPC must be attached with the memorandum of appeal.

It is also his proposition that the same provision of the law vests this court with power to dispense the requirement of law for the purpose of interest of justice. Additionally, the said counsel has challenged his fellow learned counsel for not stating how such omission has occasioned failure of justice and prejudiced the respondent.

In furtherance of his arguments, the counsel for the appellant has thrown a ball to the trial court as source of such defect alleging that instead of issuing a drawn order to the appellant, it issued a decree in

the original suit. Hence, according to him, the appellant cannot be blamed and/or penalised for such error.

However, while concluding his submission, the appellant's counsel has proposed that the remedy available is not to struck out the present appeal, but to grant the appellant leave to re-file the same after applying to the trial court for rectification of the said anomaly and obtain a proper document which is a drawn order.

In my view, it is quite clear that the counsel for the appellant is not at issue on the mandatory requirement of the law that given the circumstances of this case, the appellant ought to have attached a drawn order and a copy of ruling with the memorandum of appeal, and not a decree in the original suit as he did.

It is also important, at this point, to draw a distinction between a decree and a drawn order, as rightly pointed out by the respondent's counsel. The former is normally extracted from a judgment, whereas the latter is normally extracted from a ruling. In drawing such a distinction, one has to look on statutory provisions as well as the caselaw. Starting with statutory provisions, section 3 of the CPC provides that:

***"decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with***

*regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 89, but shall not include—*

*(a) an adjudication from which an appeal lies as an appeal from an order; or (b) ...N/A” [Emphasis added]*

Also, Order XX, Rule 6(1) of the CPC provides that:

*"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"*

Again, in the case of **Frolentina Philbert vs Verdiana Protace Mujwahuzi**, Land Case Appeal No. 59 of 2021, TZ HC at Bukoba(unreported), it was stated that:

*"a decree is a summary of the judgment, equally a drawn order is a summary of the ruling, thus **the decree must agree with the judgment likewise the drawn order, must agree with the ruling.**"*

What can be ascertained from the above authorities of the law is that a decree and a drawn order are different documents and they serve

different purposes. While a decree is extracted from a judgement and must agree with the judgement it is extracted from, a drawn order which is normally extracted from a court ruling, must agree with the ruling it is extracted from. Hence, the same applies even when one wants to prefer an appeal before the High Court as provided under Order XXXIX, Rule 1(1) of the CPC, read together with Order XL, Rule 1 of the same law. In other words, there is no mixture of documents to be attached with the memorandum of appeal for that purpose.

It is my considered view that if that was the case, then the law would have specifically provided that an aggrieved party may attach either a decree or a drawn order while lodging a memorandum of appeal, but that is not what the legislature intended while enacting the provisions of Order XXXIX, Rule 1(1) of the CPC and Order XL, Rule 1 of CPC which makes an internal reference to the former provision of the law.

In the present appeal, I have observed that apart from the fact that there is an omission by the appellant to attach a drawn order with the memorandum of appeal, even if it could be a slip of the pen by the drafter of the alleged document the subject of this ruling to use the words, *"A DECREE IN THE ORIGINAL SUIT"* to mean a *"DRAWN ORDER"*, still the same could be bad in law because its contents reveals pretty well that the prayers sought by respondent (who then was the

defendant) are quite different with the ones granted by the trial court in its ruling. I find it necessary to quote the said document just to make my point clear: -

**"IN THE RESIDENT MAGISTRATE COURT OF SUMBAWANGA**

**AT SUMBAWANGA**

**CIVIL CASE NO. 04 OF 2021**

**JUMA KUMOGOLA.....PLAINTIFF**

**VERSUS**

**CRDB BANK PLC.....DEFENDANT**

**DECREE IN ORIGINAL SUIT**

**WHEREAS:** *The Plaintiff prays for Judgment and decree against the defendant as follows: -*

- i. A declaration that the defendant has breached the contract.*
- ii. This Honourable court be pleased to order the defendant to pay the Plaintiff general damage at the Tune of...say Tzs. 500,000,000/= being compensation for the breach of the contract.*
- iii. An order of interest of 12% for item (ii) from the date of Judgment to the date of payment in full.*
- iv. Costs of this suit to be borne by the defendant.*



- iv. *Costs of this suit to be borne by the defendant.*
- v. *Any other order(s) and relief(s) this honourable court deem fit and just to grant.*

**AND WHEREAS:** *This suit is coming for judgment delivered by Hon. K.M. Saguda, RM on 22<sup>nd</sup> day of April, 2022 in the absence of all parties.*

*The court doth hereby order that:*

- 1.The preliminary objection is hereby uphold, hence the prayer made by the defendant's counsel is hereby granted.*
- 2.The whole main suit is hereby dismissed for lack of legs to stand.*
- 3.Each party to bear their own costs.*

***IT IS SO ORDERED***

*Given under my HAND and SEAL of the court this 22<sup>nd</sup> day of April, 2022.*

...

*Sdg*

**K.M. SAGUDA**

**RESIDENT MAGISTRATE**

**SUMBAWANGA"**

The above quoted excerpts clearly demonstrate how the said purported decree is not compatible with the ruling, leave alone the fact that being a decree, it was not supposed to be attached with a memorandum of appeal, as I have elaborated in details above.

In the circumstance, I am of the view that the consequence thereof is nothing but to hold, as I will hereinafter do, that the present appeal is not competent before this court. Hence, due to the reasons which I have given above, I agree with the counsel for the respondent who rightly and briefly submitted that the appellant ought to have attached a drawn order instead of a decree because the present appeal emanates from a ruling, not a judgment.

That alone would have entitled this court to dispose of this matter as proposed by the respondent's counsel. However, I am inclined to go further and deal with the rest of the appellant's counsel propositions. In my careful scrutiny regarding his submissions, it appears that the appellant's counsel has invited this court to apply the principle of overriding objective in order to cure the defect that has been observed in the memorandum of appeal.

With all due respect to the learned counsel, I am not persuaded by such invitation. As I have said before, the provisions of the law which directs how an appeal against an order should be preferred to this court by an

aggrieved party, are mandatory; hence the overriding objective principle which, by necessary implications, seems to have been proposed by the appellant's counsel, cannot be applied blindly in this case, as was stated in **Mondorosi's case**(supra).

As a well-trained mind, the said counsel ought to have checked the relevant law and perused the documents availed to him by the trial court before lodging an appeal to this court. Had he done so, the respondent would have nothing, but to dwell on encountering the merits of the present appeal, if he would so wish.

Besides, I have noted that beyond wanting the present appeal to be struck out for not been competent, the counsel for the respondent has pressed for an order of costs; same applies to the appellant's counsel who has implored me to make an order for costs should I grant his prayers.

However, I have noted despite the fact that the counsel for the appellant had a legal duty of satisfying himself on the correctness of the documents he could use in filing a memorandum of appeal, the trial court also had a hand on the defect observed in one of the attached documents.

In the circumstances, and for the foregoing reasons, I am constrained to sustain the respondent's preliminary objection, as I hereby do.

Consequently, I struck out the present appeal for being incompetent. Owing to the reasons which I have given above, I make no orders as to costs. For the interest of justice, the appellant is given 14 days from the date of delivery of this ruling, within which to refile his appeal after obtaining a proper drawn order from the trial court.

It is so ordered.



  
**A.A. MRISHA**  
**JUDGE**  
**01.08.2023**

**DATED at SUMBAWANGA** this 1<sup>st</sup> Day of August, 2023.



  
**A.A. MRISHA**  
**JUDGE**  
**01.08.2023**