

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

SUMBAWANGA SUB-REGISTRY

AT SUMBAWANGA

CIVIL APPEAL CASE NO. 4286 OF 2024

(Originating from Civil Case No.04 of 2022 in the Resident Magistrates
Court of Sumbawanga, at Sumbawanga)

EMMACULATA CHAPANGAAPPELLANT

VERSUS

CHARLES KATEPA (TICHA)RESPONDENT

Last order: MAY 08, 2024

Judgment: MAY 13, 2024

RULING

NANGELA, J.:

This ruling addresses the question whether failure to attach a decree to the memorandum of appeal makes an appeal filed in this court incompetent.

By way of background to this appeal, the appellant and the respondent had a civil matter, to wit, **Civil Case No.04 of 2022**, before the Resident Magistrates Court of Sumbawanga. In that matter, the appellant was a Defendant while the respondent was the plaintiff. The case was heard and determined by Hon. K.M Saguda, Senior Resident Magistrate who decided it in favour of the Plaintiff (respondent).

Aggrieved by the decision of the trial court, the appellant appealed to this court raising three grounds in her memorandum of appeal and sought for the following orders: -

1. That, the judgement, and order of the Resident Magistrate Court be quashed.
2. That costs of this appeal be provide for.
3. Any other relief(s) as this Honourable Court may deem fir and just to grant.

On the 8th of April 2024 the parties appeared before this court. Whereas the appellant enjoyed the services of Ms. Neema Charles, learned advocate, the respondent appeared unrepresented. However, he informed this court that he was intending to engage an advocate to represent him. Since a right to be represented is a paramount one, I granted him time to do so, and this case was scheduled for hearing on the 8th of May 2024.

On the material date, the appellant and her advocate, Ms. Charles, appeared in court. The respondent appeared as well, and he enjoyed the services of Mr. Peter Kamyalile, learned advocate. When this court set the appeal for hearing on motion, Mr. Kamyalile informed it that having been engaged and having examined the record of appeal, he has noted a legal concern which he intends to raise as a preliminary point of law. Since he had not filed such a notice, he prayed that he be allowed to do so, or else raise the matter orally.

Having given opportunity to the parties to consider whether it would be appropriate to allow the matter to be raised orally, it was agreed that the same could be raised and be disposed of first before taking any further action. It was on

the juncture that Mr. Kamyalile seized the moments and raised the preliminary objection orally to the effect that the current appeal is incompetent for failure to attach a copy of the decree appealed from to the Memorandum of Appeal as per Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap. 33 R.E 2019. He submitted that such a failure is fatal as it is a mandatory requirement under the respective provision. For that reason, he urged this court to strike out the appeal with costs.

For her part, Ms. Neema Charles, appearing for the appellant, refuted the argument made by Mr. Kamyalile. She submitted that the appeal at hand is competently laid before this court as it is accompanied by the judgement of the trial court. It was Ms. Neema's contention that Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap.33 R.E 2019 requires two documents to accompany the memorandum of appeal, namely: (i) the Judgement of the trial court and (2) the decree.

She argued, however, that, looking at sub-rule 1 of Order XXXIX Rule 1 of the CPC, the court is granted discretion to dispense with the requirement of the decree provided that the judgement of the trial court is attached to the memorandum of appeal. Since the appellant had attached the judgement to the memorandum of appeal, then the appeal was competently laid before this court, she so argued.

By way of rejoinder submission, Mr. Kamyalile held a different view. He contended that the interpretation given by his learned colleague was incorrect since the reading of Order

XXXIX Rule 1 of the Civil Procedure Code, Cap. 33 R.E 2019 does indicate that attachment of a decree to a memorandum of appeal is mandatory. He submitted that; the court may only dispense with the requirement to attach a copy of the judgement sought to be appealed against but not the decree of the trial court. He relied on the case of **Mariam Abdallah Fundi v. Kassim Abdallah Farsi** [1991] TLR 196 to support his submission and urged this court to strike out the appeal for being incompetent.

I have observed the rival submissions made by the parties, the record of this appeal and the law as relied upon. Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap.33 R.E 2019, provides that:

'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 founded.'

The above provision is very clear. It requires an appellant **to ensure that** his or her memorandum of appeal is **"accompanied by a copy of the decree appealed from"**. It is couched in mandatory terms meaning that any deviation from it will render an appeal incompetent. The mandatory

nature of the above cited provision of Order XXXIX Rule 1 (1) of the Civil Procedure Code has been emphasized in several decisions of this Court and the Court of Appeal. For instance, in the case of **Mariam Abdallah Fundi v. Kassim Abdallah Farsi** (supra) which was rightly relied upon by the learned counsel for the respondent, the Court of Appeal of Tanzania held that:

"Order XXXIX Rule 1 is mandatory in requiring every memorandum of appeal to be accompanied by a copy of the decree or order appealed from and that where an appellant has failed to comply with this provision the appeal is not properly before the court"

Other cases which have considered such provision and, hence, worth citing include **T.G. World International Ltd vs. Carrier Options Africa (Tanzania) Ltd** [2022] TZHC 785; [2023] TZHC 23233 (8 December 2023); **Chasa Yahya Mongela and 6Others vs. Registered Trustees of Baraza Kuu la Waislam Tanzania & 11 Others**, [2022] TZHC 14478; **Gerald Mbagha and Others vs. Alexander Rwechungura Ngalinda**, Civil Appeal No. 17 of 2016 HC at Bukoba (unreported); **Mkama Pastory vs. Tanzania Revenue Authority** [2007] TZCA 170, and **TanzIndia Assurance Co. Ltd vs. Farid Amour Khalfan & 2Others**, [2022] TZHC 12807.

In essence, the purpose of attaching decree or drawn order to an appeal is, among other things, to determine if the appeal is within time. If such a requirement is not

adhered to, the consequences, as the Court of Appeal of Tanzania emphasized in the case of **Mkama Pastory vs. Tanzania Revenue Authority** (supra), are drastic but inevitable. The appeal will be rendered incompetent and, hence, open to being struck out by the court. In the circumstances, this court makes such findings, upholds the objection, and settles for the following orders:

1. That the appeal being found incompetent is hereby struck out.
2. That, in the circumstances of the matter, the appellant is at liberty to refile the same subject, of course, to the laws of limitation.
3. I make no orders as to costs.

It is so ordered.

DATED AT SUMBAWANGA THIS 13TH DAY OF MAY 2024



A handwritten signature in black ink, appearing to read "Nangela", with a long, sweeping flourish extending to the right.

Dr. Deo John Nangela,
JUDGE.