

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL CASE NO. 112 OF 2020

*(Originating from the District Land and Housing Tribunal of Temeke District in
Land Case No. 12 of 2015)*

**FATUMA SALUM HAMISI.....APPELLANT
VERSUS**

**SALUM ABDALLAH JOGAYA.....1ST RESPONDENT
ATHUMAN ABDALLAH JOGAYA.....2ND RESPONDENT
RAJAB ABDALAH JOGAYA.....3RD RESPONDENT**

RULING

Date of Last Order 11/8/2021
Date of Ruling 31/8/2021

T.N. MWENEGOHA, J:

The appellant herein filed a Memorandum of Appeal contesting the decision of the District Land and Housing Tribunal for Temeke at Temeke which was delivered on 26th March, 2020 by Hon. A. Rashid, Chairperson in Land Application No. 12 of 2015. He gave the following eight grounds of appeal and prayed that the appellant be declared the rightful and lawful owner of the suit land.

On 20th August, 2020 the 2nd and 3rd respondents notified this Court of the Preliminary Objections to be raised on the first day of hearing this case. The objections were on point of law to the effect that;

1. This appeal is incompetent or bad in law for contravening Order XXXIX Rule 1 of the Civil Procedure Code, R.E 2019.
2. This appeal is hopeless time barred.

Hearing was set for the Preliminary Objection to be made by way of written submissions. The 2nd and 3rd respondents' submission were drawn and filed by Mr Lutufyo Mvumbagu, learned advocate, while Mr Balthazar Kitundu, learned advocate, filed reply to the 2nd and 3rd preliminary objection on behalf of the appellant.

2nd and 3rd respondents abandoned the second Preliminary Objection and, on their behalf, Mr Mvumbagu submitted on the 1st Preliminary Objection only. He stated as follows; That, the Memorandum of appeal filed by the appellant is not accompanied by a copy of decree as required by Order XXXIX Rule 1(1) of the Civil Procedure Code, R.E 2019, herein after referred to as the CPC.

He reproduced the provision and submitted further that the law under that provision requires an appeal which is to be filed to this Honourable Court to be accompanied by a copy of decree or order appealed from and judgment.

The wording "*shall*" as provided under the said provision, he said is a mandatory requirement and failure to attach the same renders the appeal incompetent, hence the same should be struck out with costs. He cited three cases including the case of **ALEX SENKORO & 3 ORS VS ELIAMBUYA LYIMO, CIVIL APPEAL NO. 16 OF 2017, CAT (Unreported)**, where it was held that:

"... In term of Order XXXIX, Rule 1(1) of the CPC, such copy of judgment on which the decree appealed from is founded, along with a copy of the decree, is required to be attached to the memorandum of appeal when instituting an appeal."

He prayed this appeal be struck out with costs. In reply, the appellant's counsel submitted opposing that the requirement of law to file memorandum of appeal to this Court to be accompanied by decree extracted from judgment, as is not applicable where the decree is from the Tribunal. That there is no competent decree worth attaching to the Memorandum of Appeal since decree from Tribunal is not recognized in law and this is because, as a matter of fact, reality and practice a decree can only be extracted from judgement only on the date or after the date of judgment.

However, in the current case he submitted the decree was given on 26th March, 2020 while judgment was delivered on 7th May, 2020 and hence in no way they could attach or rely on such illegally procured decree. For that reason and as a matter of necessity, they attached the whole judgment instead of such decree. He prays the Preliminary Objection as pointed by the respondents' counsel be rejected.

In rejoinder, counsel for the 2nd and 3rd respondents rejoined that by submission of the appellant's counsel, he has admitted that it is true that copy of decree was not attached to the Memorandum of Appeal and also concurred with the requirement of provision of Order XXXIX Rule 1(1) of CPC.

He reiterated the position that the requirement of attaching a copy of decree is mandatory and that the excuse submitted by the appellant has no merit since before filling this appeal, appellant was at liberty to consult trial tribunal about the anomalies which tribunal could amend and thereafter insert proper date which is found on the judgment.

He revisited the case of **DONATA KAKWIRA & ANOTHER VS FULGENCE KAKWIRA FULGENCE, LAND APPEAL NO. 23 OF 2019 (HC) at Kigoma** which he cited in submission in chief that failure to attach copy of decree in appeal renders the appeal incompetent to the extent that it cannot be amended in any way. Thus, remedy available in this appeal is to be struck out in its entirety with costs.

After going through the arguments from both sides, I will go straight to discuss whether the preliminary objection raised by the 2nd and 3rd respondents' counsel has merit.

Looking at the provisions of Order XXXIX Rule 1(1) of the CPC and as correctly stipulated by the respondents' counsel the word "shall" is a mandatory requirement.

*"Order XXXIX Rule 1.-(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)

The law is put in place so as to be adhered to and not otherwise. Appellant's counsel has submitted that the date on the decree and the date of judgment are not in sync and that is the reason they could not rely on an illegally procured decree. I find this to be a weak excuse since as put well by the respondents' counsel, there are legal avenues to amend the anomalies seen in the dates of judgment and decree.

Appellant enjoyed the services of a learned advocate and it is without doubt he is aware of the laws and requirement of how to file documents in court. And as he himself has stated in the reply submission to preliminary objection at paragraph 3 and I quote;

"...it is true that it is the requirement of the law that a memorandum of appeal to this court shall be accompanied by the decree extracted from the judgment of the respective case."

Simply put appellant's counsel had knowledge of the procedure to file the memorandum of appeal and if there were mistakes in dates between judgment and decree of the Tribunal he ought to address the Tribunal to cure that mistake before filling to this Court the Memorandum of Appeal with no decree.

I therefore find this Preliminary Objection has merits and It is hereby upheld it. This appeal is struck out with costs.



T. N. MWENEGOHA
JUDGE
31/8/2021

