

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

**(CORAM: MUNUO, J,A. KAJI, J,A. AND KIMARO, J,A)
CIVIL APPEAL NO. 31 OF 2006**

- 1. MIRE ARTAN ISMAIL.....1ST APPELLANT**
- 2. ZAINABU MZEE.....2ND APPELLANT**

AND

SOFIA NJATI.....RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania,
at Dar es Salaam District Registry)**

(Hon. Mandia, J.)

**Dated 3/2/2006 and for which leave to appeal was
granted the same day**

In

Civil Revision No. 82 of 2003

RULING OF THE COURT

29TH Aug. & 20TH October, 2006

MUNUO J, A.:

In Civil Revision No. 82 of 2003 in the High Court of Tanzania, Mandia J., nullified the proceedings and grant of letters of administration in Probate and Administration Cause No. 112 of 1998 in the Court of Resident Magistrate at Kisutu, Dar es Salaam for lack

of jurisdiction under the provisions of section 19(1)(c) of the Magistrates' Courts Act, 1984 read together with the Fifth Schedule thereto, which vests in the primary court, jurisdiction to administer customary and Islamic Law estates. The learned judge also invalidated the sale of the house on Plot No. 29 Livingstone/Udowe Street and the property on Plot No. 4 Block 61 at the same location, sold by one Zainabu Mzee to one Mire Artan Ismail.

Dissatisfied with the Ruling and Orders of the High Court, the vendor and purchaser of the property on the material plots, now the co-appellants, through the services of Mr. Marando, learned advocate, instituted Civil Appeal No. 31 of 2006 to challenge the decision of the High Court.

At the hearing, the Court suo motu, asked counsel for the appellant whether the Drawn Order was signed by the learned judge who passed the decision appealed from, as is mandatory under the provisions of Order XXXIX Rule 35(4) of the Civil Procedure Act, Cap 33 R.E.2002 which states, inter-alia;

"Rule 35 (4) The decree shall be signed and dated by the judge or judges who passed it: Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any judge dissenting from the judgment of the Court to sign the decree."

Counsel for the appellant conceded that the Drawn Order was not signed by the learned judge. He, however, doubted whether a decree is synonymous with an order, implying that the Drawn Order appealed against was rightly signed by the District Registrar of Dar es Salaam Zone instead of being signed by the judge who decided the matter.

Mr. Galikano, learned advocate for the respondent, contended that the appeal is incompetent in view of the defective Drawn Order

which was not signed by the judge who decided the case. He therefore urged the Court to strike out the appeal with costs.

We found Mr. Marando's distinction of decree and order novel so we considered the same. Such distinction was considered by the Court in the case of Cleoplace M. Motiba and 6 others versus The Permanent Secretary Ministry of Finance and 2 others Civil Appeal No. 17 of 2003, Court of Appeal of Tanzania (unreported). In that case the Court affirmed its decision in the case of NBC Holding Corporation versus Mazige Mauya and another, Civil Appeal No. 36 of 2004 wherein it held that a decree which was not signed and dated by the judge who gave the decision was invalid for non-compliance with the provisions of Order XXXIX Rule 35(4) of the Civil Procedure Act, Cap 33 R.E 2002. However, the Court distinguished an order from a decree by observing that:

"The order in the record of appeal in the present matter was signed by an acting District Registrar who was "Registrar" under

the High Court Registries Rules, 1985 (Government Notice No. 335 of 1991). To invalidate it on the mere argument that an "order" should be treated as a "decree" will result in the appeal being declared incompetent. We think, with respect, that such a drastic consequence should come about only from a clear and unambiguous legal requirement in the Civil Procedure provisions or in decided cases. There is at present no such requirement and we are not inclined to create one in this case. We dismiss the preliminary objection with costs."

In the case of Cleophance M. Motiba cited supra, the Court referred to the cases of Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) versus Adam Mollel, Civil Appeal No. 2 of 1990, Court of Appeal of Tanzania (unreported); Ndwaty

Philemon Ole Saibul versus Solomon Ole Saibul, Civil Appeal No. 68 of 1998, Court of Appeal of Tanzania (unreported), and Tanganyika Cheap Store versus National Insurance Corporation Ltd., Civil Appeal No. 37 of 2001, Court of Appeal of Tanzania (unreported) in which decrees in appeals had not been signed by the trial judge whereupon the Court affirmed the decision in Ndwaty Philemon Ole Saibul's case cited *supra* to the effect that:

"The requirement that a decree must be signed by the judge who made the decision is rooted in sound reason, namely, that the judge who decided the case or appeal is in the best position to ensure that the decree has been drawn in accordance with the judgment."

The Court further distinguished a decree from an order by categorizing orders in appeal which: -

".....apparently will need to be signed by the judge who passed it..... That implied that Rule 35(4) of Order 39 would apply to "orders" in appeal as they apply to decrees in appeal. However, the "order" which was appealed to this Court arose from original proceedings in the High Court so that the decision of this Court in the Mazige Mauya case and Order 39 Rule 35(4) as well as Order 40 Rule 2 are not relevant in the present case....."

The position is different in this appeal in that the drawn order which was signed by the District Registrar arose not from the decision of the High Court in its original jurisdiction but from revisional proceedings arising from the Court of Resident Magistrate. Like a decree in appeal, therefore, the Drawn Order in the present case, ought to be signed by the judge who determined the matter in compliance with the mandatory provisions of Order XXXIX Rule 35.

(4) of the Civil Procedure Act, Cap 33 R.E. 2002. Under the circumstances, the Drawn Order in this case is defective for it was not signed by the judge who decided the revision. We accordingly strike out the appeal. There shall be no order for costs because the Court brought up the matter suo motu.

Dated at Dar es Salaam this 25th day of September, 2006.

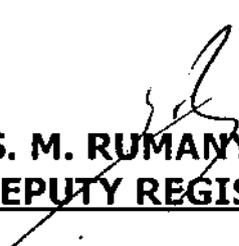


E. N. MUNUO,
JUSTICE OF APPEAL

S. N. KAJI,
JUSTICE OF APPEAL

N. P. KIMARO,
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


S. M. RUMANYIKA
DEPUTY REGISTRAR