IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., NSEKELA, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 17 OF 2003

CLEOPHACE M. MOTIBA AND 6 OTHERS..... APPELLANTS
VERSUS
1. THE PERMANENT SECRETARY MINISTRY
OF FINANCE..... 1ST **RESPONDENT**
2. THE ATTORNEY GENERAL..... 2ND RESPONDENT
3. TANZANIA REVENUE AUTHORITY..... 3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Bubeshi, J.)

dated the 28th day of September, 2001
in
Civil Case No. 361 of 1999

R U L I N G

MROSO, J.A.:

The appellants who had been employees of the Ministry of Finance, working in different departments to wit, the Income Tax Department, the Customs Department, Sales Tax and Inland Revenue Department, were on 30th June, 1996 retired in the public interest. On 1st July, 1996 the Tanzania Revenue Authority which had taken over the functions, duties and liabilities of the above mentioned departments of the Ministry of Finance became operational.

The appellants disputed the validity of the decision of the Government to retire them in the public interest. They believed that the Tanzania Revenue Authority had taken them over as its employees. Since both the Government and the Tanzania Revenue Authority did not agree with the appellants, the latter brought court action against the Permanent Secretary of the Ministry of Finance, the Attorney General and the Tanzania Revenue Authority seeking among other reliefs a declaration that their retirement in the public interest was unlawful and that they were still in service, now working for The Tanzania Revenue Authority, the third defendant in the suit.

The third defendant, now third respondent, filed in the trial High Court a notice of preliminary objection to the effect that the plaintiffs' plaint did not disclose a cause of action against it and the suit was therefore bad for misjoinder of parties.

The High Court, Bubeshi, J., in a ruling dated 28 September, 2001, upheld the preliminary objection. It struck out from the plaint the third defendant and ordered that the suit would proceed against the Principal Secretary, Ministry of Finance and the Attorney General only. The appellants did not accept that ruling and filed an appeal to this Court. At the hearing of the appeal the learned

Principal State Attorney, Mr. Kamba, who appeared for the first and second respondents, raised and argued a preliminary objection that the appeal was incompetent because the extracted order in the record was not signed by the judge who gave the ruling against which the appellants are appealing. He cited the decision of this Court in **NBC Holding Corporation v. Mazige Mauya and Another,** Civil Appeal No. 36 of 2004 as authority. In that decision this Court 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 39 R. 35 (4) of the Civil Procedure Code, 1966. Mr. Beleko, learned advocate for the third respondent, supported Mr. Kamba in that submission.

The appellants, who were lay people and unrepresented by counsel, fended for themselves. The first appellant, Mr. Cleophace M. Motiba, spoke on behalf of the other six appellants. He argued that the **Mazige Mauya** case which Mr. Kamba cited related to a decree which was not signed by the judge who gave the decision whereas in the matter under appeal there was no extracted decree but merely an order. Secondly, he argued that the respondents did not comply with Rule 106 (b) in raising and arguing the preliminary objection. He submitted that the respondents should have applied under Rule 82 of the Court Rules to have

the appeal struck out. Thirdly, he argued that the extracted order was signed by the acting District Registrar of the High Court under Order 43 rule 1 (d) of the CPC, 1966 and was therefore valid in law. In the fourth place he prayed that if this Court found that Order 43 rule 1 (d) was not to be relied upon, then the appellants should be allowed time to have the order signed by the judge who made it. Finally, he prayed that the preliminary objection should be dismissed so that they could get justice, which was what brought them to court.

Order 20 rule 7 of the Civil Procedure Code, 1966 reads as follows –

> 7. The decree shall bear (the) date the day on which the judgment was pronounced, and, when the Judge or magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

The issue before us therefore is whether an “order” is a decree for the purposes of Order 20 rule 7 of the Civil Procedure Code, 1966 in which there is a requirement that the judge who passed the decision should sign it.

It is helpful, we think, to look at the definition of the term ‘order’ as used in the Civil Procedure Code, 1966. Under section 3 of the Code the term “Order” is defined as “the formal expression of any decision of a civil court which is not a decree”. It is clear, therefore, that an “order” is not a decree. It would follow that the condition in Order 20 Rule 7 that a decree shall be signed by the judge does not necessarily apply to an “order”. The **Mazige Mauya** decision which Mr. Kamba cited did not say that an “order” was a decree. The decision in that case followed from an appeal from a subordinate court to the High Court. Order 39 rule 35 (4) of the Civil Procedure Code, 1966 stipulates that a decree (in appeal) “shall be signed and dated by the judge or judges who passed it”. But an “order” in appeal apparently will need to be signed by the judge who passed it. See Rule 2 of Order 40 relating to appeals from Orders where it is provided that the rules of Order 39 shall apply “so far as may be”, to appeals from orders. That implies 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 matter. So, the position remains that the “order” which was

appealed to this Court is not a decree for purposes of Order 20 rule 7 of the Civil Procedure Code, 1966.

Mr. Kamba contended that the fact that it was an "order" rather than a decree which is in the record of appeal made it all the more necessary that it should have been signed by the judge who made the order. He did not however refer the Court to any authority, statutory or from case law, which made such a requirement. The cases of **Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) v. Adam Mollel,** Civil Appeal No. 2 of 1990 (unreported); **Ndwaty Philemon Ole Saibul v. Solomon Ole Saibul,** Civil Appeal No. 68 of 1998 (unreported) and **Tanganyika Cheap Store v. National Insurance Corporation Ltd.,** Civil Appeal No. 37 of 2001 (also unreported) all related to appeals in which the decrees had not been signed by the judge who gave the decision.

The rationale for the requirement that a decree should be signed by the judge or magistrate who passed it was explained in the **Ndwaty Philemon Ole Saibul** case (supra). It was said:-

> 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.

It may be argued that the same reasoning applies to "orders", that they should be signed by the judge or magistrate who gave the decision from which the order is extracted.

The order in the record of appeal in the present matter was signed by a acting District Registrar who was "Registrar" under the High Court Registries Rules, 1985 (GN. 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.

Before we end this ruling we wish to observe that, indeed, Mr. Kamba had not filed a prior notice of preliminary objection and that the appellants might have been taken by

surprise. Rule 106 (b) of the Court Rules, 1979 provides that “a respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under Rule 82.”

When Mr. Kamba raised the objection informally we gave him a hearing, thereby signifying our leave to him to argue the objection. When Mr. Motiba complained against Mr. Kamba raising the preliminary objection he did not indicate that he or his co-appellants needed time to marshal arguments and, at any rate, he made the complaint belatedly when he was responding to the preliminary objection. All in all, no injustice has been done to the appellants.

DATED at DAR ES SALAAM this 17th day of November, 2005.

JUSTICE OF APPEAL

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