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IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAM

TSKS 31,001
(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And ORIYO, J.A.)

CIVIL APPEAL NO. 33 OF 2007

ELIAS RAYMOND 1ST APPELLANT

CASSAGRANDE GARAGE LIMITED 2ND APPELLANT

VERSUS

TANGAMANO TRANSPORT SERVICE LIMITED 1ST RESPONDENT

NATIONAL INSURANCE OF TANZANIA LTD 2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of
Tanzania Commercial Division at Dar Es Salaam)

(Massati, J.)

dated 12th day of May, 2006
in

Commercial Case No. 50 of 2004

RULING OF THE COURT

21 February, & 5 March 2012

RUTAKANGWA, J.A.:

The 1st Respondent herein was the Plaintiff in Civil Case No. 50 of 2004 in the High Court of Tanzania (Commercial Division) at Dar es Salaam (the suit). The two appellants were the defendants, while the 2nd respondent was impleaded on a third party basis.

The High Court delivered its judgment in the suit and issued its decree in favour of the two respondents and against the two appellants on **12th May, 2006**. The appellants were aggrieved by the said "judgment and decree", and by notice of appeal dated and lodged 25th May, 2006, they showed their desire to appeal to this Court. This desire was apparently manifested on **10th April, 2007** when through M/s Kisarika and Malimi Advocates, they purported to lodge a memorandum of appeal in this Court together with the record of appeal.

The memorandum and record of appeal were lodged in accordance with the requirements of Rule 83 (1) of the Tanzania Court of Appeal Rules, 1979 (the old Rules), after obtaining a certificate of delay. The said certificate excluded the period up to **13th February, 2007** from the computation of sixty days within which the appellants were required to institute the appeal. So the appellants had up to **14th April, 2007** to lodge their appeal against the earlier referred to judgment and decree.

Under Rule 89 (1) of the old Rules, one of the core documents to be incorporated in the record of appeal was a valid copy of the decree appealed from. To be a valid decree, as the High Court had issued the

challenged decree in the exercise of its original jurisdiction, the incorporated copy had to comply with the mandatory requirements of Order XX, Rule 7 of the Civil Procedure Code, 1966, Cap 33 R.E. 2002 (the C.P.C.).

Rule 7 of the O.XX of the C.P.C. provides as follows:-

"The decree shall bear the date of 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 C.P.C. became operative in Tanganyika/Tanzania Mainland on 1st January, 1967, when the Indian Code of Civil Procedure, 1908, heretofore in force in Tanganyika ceased to apply. Order XX Rule 7 of the Indian Code is identical with our Rule 7 of O.XX. Commenting on this Rule, MULLA in his treatise **MULLA ON THE CODE OF CIVIL PROCEDURE ACT V 1908**, 15th ed. at p. 1524 says:-

"Under this rule, the decree comes into existence on the date of the judgment, though it is signed

later. Decree comes into existence as soon as the judgment is pronounced and not on the day when it is signed and sealed later...."

The law in this country, and indeed in East Africa, is to the same effect. See, for instance, **ABDALLAH RASHID ABDALLAH V. SULUBU KIDOGO AMOUR & SAID ISSA SAID**, Civil Appeal No. 94 of 2006, **JOVIN MTAGWABA & 85 OTHERS V. GEITA GOLD MINING LTD**, Civil Appeal No. 109 of 2005, **UNIAFRICO LTD & 2 OTHERS V. EXIM BANK (T) LTD**, Civil Appeal No 30 of 2006, **ROBERT EDWARD HAWKINS AND ANOTHER V. PARTICE MWAIGOMOLE**, Civil Application No. 109 of 2007, **HARUNA MPANGAOS & 902 OTHERS V. TANZANIA PORTLAND CEMENT CO. LTD.**, Civil Appeal No. 10 of 2007, **GOBANYA F. HEZWA V. THE COMMISSIONER GENERAL, T.R.A.**, Civil Appeal No. 83 of 2008 (dated 21/7/2010), **ELIZABETH STEPHEN & ANOTHER V. THE ATTORNEY GENERAL**, Civil Appeal No. 4 of 2007, a decision of the full bench of this Court dated 22/12/2010, **ZANZIBAR INSURANCE CORPORATION V. PAUL M. CHACHA**, Civil Appeal No. 83 of 2006, **KIRIGITI SASI & 362 OTHERS V. GENKURU VILLAGE MANAGER**, Civil Appeal No. 51 of 208 (dated 11/02/2011) (all unreported), among many others.

In all these cases, the Court has consistently held that a decree which does not comply fully with the mandatory requirements of O.XX, Rule 7 of the C.P.C is incurably defective and an appeal predicated on it is incompetent and ought to be struck out. The same approach was taken by the former East African Court of Appeal and the Kenya Court of Appeal.

The East African Court of Appeal had this to say in the case of **NGONI-MATENGO CO-OPERATIVE MARKETING UNION LTD v. ALI MOHAMED OSMAN** [1959] E.A. 577:

"It is common ground, and as has been held by this Court on a number of occasions, that a failure to extract and lodge with memorandum of appeal to this Court, **a copy of the relevant formal order or decree is not a mere procedural defect, but goes to jurisdiction and renders the appeal incompetent...**" [Emphasis is ours].

In an apparent amplification on this point this Court having drawn inspiration from its earlier decision in **DR. FORTUNATUS MASHA v. DR.**

WILLIAM S. SHIJA & ANOTHER [1997] T.L.R. 41, firmly stated thus in **ABDALLA v. SULUBU** (supra).

"...there is no difference between extracting an invalid decree, as was the case in the present appeal, and failure to extract a valid decree. In all such cases the appeal is incompetent and is struck out".

We of the course find no overriding need here to overstress the obvious that a wrongly dated decree is an invalid decree.

Dealing with an appeal in which the drawn order incorporated in the record of appeal was almost similarly defective, the Court of Appeal of Kenya had no qualms about its incompetence. It succinctly held in the case of **REPUBLIC v. KENYA POSTS AND TELECOMMUNICATIONS** [1999] 1 E.A. 250 that an order and/or decree "*is a primary document in the appeal which must comply with certain requirements*" of the Civil Procedure Act. It went on to state unequivocally at p. 252, thus:-

"This admitted mistake in the order ... is not a minor clerical error or one that, as suggested by

leading counsel for the Appellant, could be cured by this Court under section 100 of the Civil Procedure Act or section 3(2) of the Appellate Jurisdiction Act (Chapter 9). **This defect is a serious and fundamental one in a primary document like the order,** which certified or otherwise or accidental or otherwise deprives the order of any validity for the purposes of the present appeal as an order which is mandatorily required by rule 85(1) (h) of our Rules to be included in the record of appeal. This alone makes the present appeal incurably incompetent and should be struck out".
[Emphasis is ours].

The said Rule 85(1) (h) is identical with Rule 89(1) (h) of the old Rules and Rule 96(1) (h) of the Rules.

Alive to these legal realities, the appellants' counsel subsequently realized that they had on 10th April, 2007, lodged a record of appeal containing an invalid copy of the decree appealed from. This is because, although the judgment in the suit was delivered on 12th May, 2006, the

incorporated copy of the decree found at pages 225-6 is dated 11th July, 2006. On 8th January, 2008, therefore, they "attempted", as Mr. Semi Malimi learned advocate for the appellants correctly put it, to file a supplementary record of appeal in order to regularize the defect in the original record of appeal.

All the same, on 10th February, 2012, Mr. Samson Mbamba, learned advocate for the 2nd respondent, lodged a notice of preliminary objection, challenging the competence of this appeal. In his brief, concise and focused oral submission before us, Mr. Mbamba urged us to rule that this appeal supported as it is by an incurably defective copy of decree, is incompetent and should be struck out with costs. He relied on the case of the **EDITOR, THE GUARDIAN NEWSPAPER v MR. HARUN MGUDE**, Civil Appeal No. 83 of 2001 (unreported).

Also relying on **MPANGAOS'** case (supra), Mr. Mbamba pressed us to discount totally the supplementary record of appeal lodged on 8/1/2008, as it was lodged out of time without leave.

On his part, Mr. Malimi, vehemently argued that the preliminary objection should be dismissed. Although he conceded that the copy of the

decree found on pages 225-6 was incurably defective, he was of the settled mind that the defect was cured by the valid copy incorporated in the supplementary record of appeal. He was of this view because, the supplementary record of appeal was lodged three (3) clear months before MPANGAOS' case was decided. To be fair to him, we wish to have it on record that he did not question the soundness of MPANGAOS' decision. He further argued that since MPANGAOS' case was decided under the old Rules, the patent defect in the present record of appeal was not fatal. It was curable under Rules 2 and 96 (6) of the Rules, he contended, although he was quick to point out that the supplementary record of appeal was not lodged within the stipulated 14 days. In support of his stance, he referred us to the cases of **SAMSON NG'WALIDA v THE COMMISSIONER GENERAL, T.R.A.**, Civil Appeal No. 86 of 2008 and **OTTU** on Behalf of **P. L. ASSENGA & OTHERS v AMI TANZANIA LTD**, Civil Application No. 35 of 2011 (both unreported).

Mr. Mbamba urged us to disregard the two authorities referred to us, by Mr. Malimi. We have read the two cases and we have found them unhelpful to the appellants' cause. In the OTTU case, the competence of the application was challenged on account of the Court being wrongly moved to exercise its revisional powers by citing Rule 65 of the Court of

Appeal Rules, "1999" instead of the Court of Appeal Rules, 2009. The Court found this to be "a mere mistake in the name" which "misdescription was harmless; and curable." In the SAMSON case, the issue was whether a decision of the Tax Revenue Appeals Tribunal which had otherwise been signed by all three members of the Tribunal but certified by Tribunal's Registrar was defective as claimed by the respondent or not. The Court held that the act of the Registrar certifying the copy to be a true copy of the original "*did not occasion a failure of justice.*" It proceeded to invoke Rule 2 of the Rules and Article 107A (2) (e) of the Constitution to overrule the objection challenging the competence of the appeal. As rightly contended by Mr. Mbamba, the defect, if any, on the certified copy of the decision did not go to the root of the matter before the Court.

We have already sufficiently demonstrated that failure to incorporate a copy of the decree appealed from and/or incorporating in the record of appeal an invalid copy of the decree appealed from goes to the root of the appeal. It "*is not a procedural defect but goes to jurisdiction and renders the appeal incompetent*" (NGONI-MATENGO case, (supra)). Likewise, in the KENYA POSTS & TELECOMMUNICATIONS case (supra), after the Court had found the defect or omission to be "a serious and fundamental one" making the "appeal incurably incompetent", went on to hold thus:-

"Our decision in the present appeal might have been different if we were not dealing with an issue of jurisdiction, but with merely one that involved a deviation from form...."

This position was re-affirmed with great emphasis by this Court in the case of **AMI TANZANIA LIMITED v OTTU** on Behalf of **P. L. ASSENGA & 106 OTHERS**, Civil Appeal No. 76 of 2002 (unreported).

The Court held:-

"The complaint herein is that the appeal is incompetent because of a defective decree in the manner explained earlier on in this ruling. Article 107A 2(e) of the Constitution does not in anyway command that procedural rules should be done away with in order to advance substantial justice. Each case will be considered on its own peculiar facts and circumstances (see: Civil Application No. 100 of 2004 **Zuberi Mussa v. Shinyanga Town Council** (unreported); Civil Reference No. 22 of

2005, **China Henani International Co-operation Group v. Salvand K. A. Rwegasira** (unreported). A decree is a vital document in an appeal in terms of **Rule 89 (20 (v) of the Court Rules, for without a decree there is no appeal. Such non-compliance is fundamental and goes to the root of the matter and in our humble view, Article 107A (2) (e) cannot resurrect a non-existent appeal.**" [Emphasis is ours]

If Article 107 A (2) (e) "cannot resurrect a non-existent appeal" it goes without saying that Rule 2 of the Rules which, for all intents and purposes, is subordinate to Article 107A (2) (e), cannot resurrect this purported appeal which never existed. See also, **FORTUNATUS MASHA V. WILLIAM SHIJA** (supra) **A.I.C.C. v. DAMAS KAVISHE**, Civil Appeal No. 34 of 1988, **KAPINGA & COMPANY ADVOCATES V. N.B.C.**, Civil Appeal No. 42 of 2007, **THE ATTORNEY GENERAL v. CHRISTOPHER MTIKILA**, Civil Appeal No. 20 of 2007 (all unreported) etc.

In view of this glaring sea of authorities, we take it as settled jurisprudence that there can never be a civil appeal instituted in this Court unless the record of appeal contains a copy of valid decree appealed from **[ROYAL INSURANCE TANZANIA LIMITED V. KIWENGWA STRAND HOTEL LIMITED]**, Civil Application No. 128 of 2008 (unreported).

Was the appellant's appeal then, which they attempted to institute on 10th April, 2007, "resurrected" by the supplementary record of appeal lodged on 8th January, 2008? An impeccable answer to this very pertinent question is provided by the decision of the erstwhile Court of Appeal for East Africa in the case of **KIBORO V. POSTS & TELECOMMUNICATIONS CORPORATION** [1974] E.A. 165. The Court held thus:-

"If a basic document, like a copy of the decree, is omitted from the original record of appeal, that cannot be introduced into the record by filling a supplementary record of appeal, when the prescribed time has expired. In this case the appellant could only file the omitted decree out of time with leave...."