THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 17 OF 2020

(From the District Land and Housing Tribunal for Mbeya, at Mbeya, in Land Application No. 146 of 2016).

RICHARD OSIA MWANDEMELE..... APPLICANT

VERSUS

LWITIKO OSIA MWANDEMELE.....RESPONDENT

JUDGMENT

3/9 & 25/11/2020.

Utamwa, J.

In this appeal, the appellant RICHARD OSIA MWANDEMELE challenged the judgment (henceforth the impugned judgment) of the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT) in Land Application No. 146 of 2016.

The back ground of this matter has its geneses in 2016, when the appellant filed an application in the DLHT for Mbeya in Land Application No. 146 of 2016 against the respondent. The dispute between the parties was over the land, identified as Plot No. 1030 situated at Isyesye area-Mbeya (the disputed land). The appellant prayed for, among other prayers,

an order for vacant possession of the disputed land. After a full trial, the DLHT pronounced judgment in favour of the respondent on 19/6/2017. The appellant was dissatisfied with the decision, he appealed to this court via Land Appeal No. 36 of 2017. The appeal was heard and determined by Dr. M.C. Levira, J. (as she then was) through the judgment dated 05/09/2017. In that judgment, the case was remitted to the DLHT for it to call an additional witness from the office of the Registrar of Titles or commissioner for lands to assist on the lawful owner of the disputed land. The additional witness from the office of the registrar of titles was accordingly called. She testified in favour of the appellant. However, the DLHT decided against the appellant on the reasons that, the Title Deed tendered by the appellant was fraudulently obtained. The appellant was again, discontented by that decision, hence this appeal.

The appellant preferred a total of 5 grounds of appeal as shown below:

1. That, the Honourable trial Chairman, erred in law and in fact in dismissing the applicant's application without considering that the disputed land belongs to the appellant.
2. That, the learned trial chairman erred in law and fact to dismiss the application basing on doubtful, controversial and contradiction testimonies of the respondent and his key witness.
3. That, the trial chairman erred in law and fact to impeach the appellant's certificate of title/ title deed without proof of fraudulent obtaining of the same.

4. That, the chairman erred in law and fact to ignore documentary evidence tendered by the officer of the registry of titles who was an independent witness.
5. That, the honourable chairman erred in law and fact by been bias and wrongly evaluated the evidence before him hence reaching to a wrong conclusion.

The appellant thus, prayed for this court to allow the appeal, quash and set aside the decision and decree of the DLHT and declare him a lawful owner.

The respondent objected the appeal which was heard by way of written submissions. The appellant was represented by Ms. Rose Kayumbo, learned counsel. The respondent enjoyed the services of Mr. Sospeter Tyeah, also learned counsel.

When submitting on the grounds of appeal, the appellant's counsel started with two legal issues which were not part of the grounds of appeal. She did so with the view that, legal issues can be raised at any time before judgment either by a party or by the court *suo mottu*, so long as the parties are accorded the opportunity to address the court on the same. She supported this contention by citing the case of **Fatuma Said v. Juma Abnala and Another, Misc. Civil Application No. 17 of 2019, High Court of Tanzania at Mbeya** (unreported). The legal issues were these; **one**, that, the DLHT was not properly constituted as required by the provisions of sections 22 and 23 (1) of the Land Disputes Courts Act, Cap. 216 R.E. 2019. Two; the DLHT's chairman did not obey and respect the order of this court.

Regarding the first issue, the appellant's counsel contended that, when the matter was remitted to the DLHT for it to call an independent witness, the chairman seated with one assessor which is contrary to the provisions of sections 22 and 23 (1) of Cap. 216. She further submitted that, these provisions require the DLHT to be composed of a chairman and not less than two assessors. She thus, urged this court to nullify and set aside the decision of DLHT with costs.

Regarding the second issue, the learned counsel for the appellant submitted that, when this court (Dr. Levira, J., as she then was) remitted the matter to the DLHT, it ordered for the DLHT to call an independent witness to testify before the tribunal on the ownership of the disputed land. Despite the fact that the witness was called and testified in favour of the appellant, the chairman decided otherwise. For this regard she argued, the tribunal disrespected the order of this court.

On the other side, when responding to these issues, the learned counsel for the respondent also raised the attention of this court on an irregularity concerning this appeal. He submitted that, this appeal is incompetent because, the decree annexed to the memorandum of appeal is not in conformity with the judgment. He submitted further that, the said irregularity contradicts the provision of Order XX rule 6 (1) of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC). He also argued that, the appeal at hand does not thus, exist. He substantiated his contention by a decision in the case of **Puma Energy Tanzania Ltd v. Ruby Roadways (T) Ltd, Civil Appeal No. 3 of 2018**, **Court of Appeal of Tanzania**

(CAT) at Dar es Salaam (unreported). He thus, prayed for this court to strike out the appeal at hand for being incompetent.

On her part, the appellant's counsel through her rejoinder submissions conceded that, the decree is irregular. However, she argued that, the said irregularity was not caused by the appellant. She thus, prayed for this court to invoke the oxygen principle by making an order that, the proper decree be brought and proceed to determine the appeal on its merit. To substantiate her argument of applying oxygen principle, she cited the case of **Yusuph Nyabunya Nyatururya v. MEGA Speed Liner Ltd and Another, Civil Appeal No. 85 of 2019 CAT at Zanzibar** (unreported).

In my view, it is of paramount importance to firstly test the issue related to the competence of this appeal. This is because, it has a flavour of a preliminary objection (PO) against the appeal. In law a PO must firstly be determined by the court before the actual matter is considered. Now, there are two following issues to be determined before me;

1) Whether or not the appeal is competent.
2) If the answer in the first issue is in negative, then what is the legal remedy.

Regarding the first issue, I totally agree with both parties that, the decree attached to the memorandum of appeal does not tally with the judgment of DLHT in Land Application No. 146 of 2016. I see it necessary to quote a part of the said decree for a quick reference. It reads as follows:

> "**WHEREAS:-** This matter is coming for judgment this **13TH day of May, 2020** before Honorable **T. Munzerere, Chairman**, of the District land and Housing Tribunal in the presence of both parties.

THIS TRIBUNAL DOTH HEREBY ORDER THAT

i. The application has no merits.
ii. The suit land belonged to Rahel Lwenje a mother to both applicants and 1st respondent.
iii. Both applicants and 1st respondent have right to share the suit land equally.
iv. The 1st respondent to be given unbuilt part of the suit land as earlier ordered by primary court.
v. Costs be paid by applicant"

In our law, a decree is supposed to contain particulars provided under Order XX Rule 6 (1) of the CPC. A has to *inter alia,* specify clearly the reliefs granted. Nevertheless, in the matter at hand the decree contains the reliefs which have never been the subject of the application before the DLHT. It also granted reliefs to a person who was not party to this case at all. Furthermore, it talks of "both applicants and first respondent," but in the matter under consideration, there were only one applicant and one respondent before the DLHT. This court even wonders if, real, the decree was extracted from the judgment at issue.

In that regard, it is clear that, the decree annexed to the memorandum of appeal in this matter is a distinct decree from the would be decree appealed against. This is so despite the fact that, its title mentions the names of the right parties. The decree was thus, incurably defective. Now, what is the status of the appeal which is accompanied by such incurably defective decree? In my view, the answer is available under Order XXXIX Rule 1 (1) of the CPC. These provisions require among other things that, every appeal shall be preferred in the form of a memorandum which shall be accompanied by a copy of the decree appealed from.

In the light of the above cited provisions, accompanying a copy of decree to the memorandum of appeal is a mandatory requirement. It thus, goes without saying that, accompanying an incurably defective decree to the memorandum of appeal renders the appeal a non-existing creature; see the case of **Puma Energy Tanzania Ltd** (supra). This is more so because, according to the provisions of Order XXXIX Rule 1 (1) of the CPC an appeal is always against the decree. In the absence of a proper decree, therefore, no appeal can have limbs to stand on.

The prayer by the appellant's counsel for this court to invoke the oxygen principle (or the principle of overriding objective) as it was done in the **Yusuph case** (supra) is not tenable. This is because, in that case, the discrepancy was related only to the signature and date in the judgment and decree which actually did not prejudice the parties. The situation in the **Yusuph case** (supra) was thus, quite different from the matter at hand. In this matter, the contents of the decree are absolutely distinct from what was decided before the DLHT. This inconsistency may actually lead to a serious confusion and injustice in this appeal.

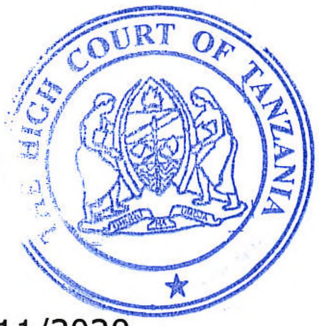
Indeed, I appreciate that, the principle of overriding objective to which the appellant's counsel took refuge, is a useful principle in justice administration. It essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice; see section 6 of the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 that amended the CPC. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

Nonetheless, the principle of overriding objective cannot apply to non-existing matters like the present appeal. One cannot in fact, add oxygen to a dead creature. The principle was not meant to absolve each and every blunder committed by parties in court proceedings. Had it been so, then all rules of procedure would have been rendered nugatory. The principle does not thus, create a shelter for each and every breach of the law on procedure. This is the envisaging that was recently underlined by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure.

In the matter at hand thus, it was, and it is still, the duty of the appellant, to go back to the DLHT and apply for the rectification of the defective decree. Upon him obtaining it, he may pursue his appeal if he will still be wishing to do so. Indeed it is surprising that, the learned counsel for the appellant was that much blind to the extent of failing to detect such an obvious and serious discrepancy between the decree at issue and the impugned judgment. That obvious error ought to have been rectified before the appeal was filed before this court.

Under such circumstances, I answer the first issue negatively that, the appeal is incompetent. The second issue should not detain me. This is because, the only legal remedy for an incompetent matter is none- other than striking it out.

The findings I have just made above make it unnecessary to consider other grounds of appeal and the rest of the arguments by the parties. This is because, the findings are capable enough to dispose of the entire appeal without examining other grounds. I therefore, strike out the appeal for being incompetent. Each party shall bear his own costs since the DLHT contributed much to the blunder discussed above. It is so ordered.



J.H.K. Utamwa

JUDGE

25/11/2020

25/11/2020.

CORAM; Hon. JHK. Utamwa, J.

For appellant: present and Mr. Kelvin Kuboja Gamba, advocate.

For the respondent: present and Mr. Elisha Serikali, learned counsel.

BC; Mr. Patrick, RMA.

Court: Judgment delivered in the presence of the parties, Mr. Kelvin Kuboja Gamba, learned advocate for the appellant and Mr. Elisha Serikali, learned counsel for the respondent, in court this this 25th November, 2020.

JHK. UTAMWA.
JUDGE

25/11/2020.