

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MTWARA)**  
**AT MTWARA**

**PROBATE APPEAL NO.36 OF 2020**

*(Arising from the District Court of Mtwara in Civil Application No. 3 of 2020)*

**PAUL CHARLES MHERE..... APPELLANT**

**VERSUS**

**FELISTAS JAMES MWINGWA.....RESPONDENT**

**RULING**

*Hearing date on: 23/4/2021*

*Ruling date on: 27/4/2021*

**NGWEMBE, J:**


The appellant, Paul Charles Mhere, preferred an appeal in this court following the decision of the trial court in Misc. Civil Application No. 3 of 2020 before the District Court of Mtwara. At trial he made two prayers namely; **first**, the court be pleased to revoke the grant of the letter of administration to Felista James Mwingwa as administratrix of the estate of the late Robert Charles Ntaro who died interstate. The court proceeded to appoint the respondent herein on 21<sup>st</sup> day of February, 2020. **Second**, the respondent be condemned to pay costs.



The District Court determined the application and entered judgment in favour of the respondent. The appellant was aggrieved with that decision hence, preferred this appeal armed with three (3) grounds of appeal. However, before hearing of this appeal, it was encountered by a preliminary objection on point of law to wit; *"The appeal is incompetent for failure to attach the drawn order"*.

It is settled in our jurisdiction that once there is a preliminary objection, that objection must first be determined before hearing the appeal on merits. As such the hearing of preliminary objection was blessed by learned counsels. While the Appellant was represented by Anisa Mziray, learned Advocate, the respondent was represented by learned advocate Husein Mtembwa.

The objector through Mr. Mtembwa strongly argued that the appeal is emanating from grant of letters of Administration from a District Court. Its appeal from the District Court is governed by provisions of Civil Procedure Code Cap 33 R.E. 2019 specifically under Order XXXIX Rule 1 of the Code. It is mandatory that an appeal from the District Court shall be presented in a form of Memorandum of appeal accompanied with a copy of decree appealed against. Likewise, appeals on orders under Order XL Rule 1 and 2 refer its procedure as provided for under Order XXXIX. It means an appeal from Orders under Order XL rule 1 and 2 apply *mutatis mutandis* with procedures provided for under Order XXXIX.



Submitted further that, it is procedural requirement which must be complied with a memorandum of appeal on orders, like appeal from original decree, is mandatory to accompany with a drawn decree or drawn order.

More so, Mr. Mtembwa submitted that the memorandum of appeal herein is only attached with a copy of a ruling without attaching a drawn order. To support his argument, he referred this court to the cases of **Juma Ibrahim Mtale Vs. K.G Kalimali [1983] T.L.R 50** and **Fortunatus Masha Vs. William Shija [1997] TLR 4**.

Furthermore, the learned counsel distinguished the meaning of ruling and drawn order. That once a judgment or ruling is prepared and signed by a judge or magistrate, what follows is preparation of a drawn decree or drawn order. Therefore, a decree and judgment are different documents, likewise ruling and drawn order are different documents. Failure to attach drawn order or decree is fatal, its reward is to strike it out with costs.

Upon taking the floor to reply to the preliminary objection, advocate Anisa Mziray, argued vehemently that, the appeal is born from the failure of the District court to revoke letters of administration, thus section 72 of the Probate & Administration of Estates Act is not applicable.

Further argued that, Order XXXIX Rule 1, provide that the appeal must be by way of Memorandum attached with a decree. However, Ms. Mziray was of the view that the rule does not apply on appeals from Orders. She insisted that, this appeal is not on the original order, but it is from a second



order to refuse to appoint another administrator, thus Order XXXIX is not applicable.

Furthermore, she argued that section 43 (3) of the Magistrate Court Act is applicable, and it does not provide for mandatory requirement to attach drawn orders as per Order XL Rule 2. The attached ruling is satisfactory because the ruling has an order in it. To support her argument she cited the case of **Scania (T) Ltd Vs. Evaristo Kinyunyu**, Civil Appeal No. 111 of 2007 (unreported).

In addition, Ms. Mziray submitted that, in the absence of the drawn order does not prejudice any of the disputants. Thus, she was of the view that, even the Preliminary Objection itself has no element of legal effects or valid issues as per the case of **Mukisa Biscut**. She concluded therefore, the Preliminary Objection be dismissed with costs.

In rejoinder, Mr. Mtembwa, reiterated to the submission in chief.

Having carefully considered the rival arguments advanced by the learned Counsels, the issue for consideration and determination in this objection is just one, that is, whether the appeal is valid upon failure of the memorandum of appeal to attach drawn order?

It is a settled law that, any party who is aggrieved by the judgment, decisions or any other orders from the lower courts or any tribunals may appeal against it to the superior courts. But to appeal successfully, one must comply with certain procedural requirements. Some of procedural



rules are mandatory must be complied with, while others may be overlooked. Justice Samatta (as he then was) in the case of **Civil Application No. 47 of 1996, between VIP Engineering & Marketing LTD Vs. Said Salim Bakhressa LTD**, gave breath to the application of certain procedural rules which must be complied with. He guided the court as quoted hereunder:-

*"There can be no rational dispute over the fact that procedural rules are enacted to be complied with, usually there is a legal principle behind every procedural rule, but those rules differ in importance. Some are vital and go to the root of the matter these cannot be broken, others are not of that character and can, therefore be over looked provided there is a substantial compliance with the rules read as a whole and provided no prejudice is occasioned".*

In this appeal the dispute is arising from the appointment and revocation of the administrator of the estate of the deceased Robert Charles Ntaro. Therefore, the documents necessary to accompany with Memorandum of appeal is a drawn order as provided for in the Civil Procedure Code specifically, Order XXXIX Rule (1) which is quoted hereunder:-

Order XXXIX Rule 1 of Civil Procedure Code provide that:-

*"Every appeal shall be preferred by Memorandum which shall be accompanied with a copy of decree appealed against".*

At the same time, Order XL Rule 1 of the CPC is quoted hereunder:-

*"The rules of order XXXIX, shall apply, so as far as may be, to appeals from orders".*



These two rules, simple means an aggrieved party against court Ruling must file in court Memorandum of Appeal accompanied with drawn order because a drawn order is extracted from a court ruling. To attach drawn order in any appeal against order is mandatory as rightly provided for in the rule itself. The term used is shall which means mandatory. According to section 53 (2) of the **Interpretation of Laws Act Cap 1 R.E. 2019** provide that:-

*"where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function conferred must be performed".*

It means this court has no discretionary powers to depart from. Likewise, in the case of **Kotak Ltd Vs. Kooverji [1967] 1 EA 348**, in an appeal to the High Court from an order made in the District Court, a preliminary objection was taken by the respondents that no certified copy of the order was accompanied with the memorandum of appeal, although a certified copy of the ruling was attached. The appeal was dismissed based on the mandatory nature of Order XXXIX Rule 1 (I) read together with Order XL Rule 2 of CPC.

Above all the court dismissed the argument that the order appealed against was part of the ruling as rightly argued by the learned counsel Anisa Mziray for the appellant. But the answer was simple that the two documents are different in nature form and in contents. Drawn Order is born from a court ruling, the document cannot exist without existence of a court ruling.



This position is similar to the Kenyan position as was so decided in the case of **Munshiram and Co. Vs. Star Soda Water Factory [1934] KLR 50** in which the Kenyan Supreme Court held that Order XXXIX rule 1 is mandatory in requiring every memorandum of appeal to be accompanied by a copy of the decree or order appealed from, and that where an appellant has failed to comply with this provision, the appeal is not properly before the court and must be dismissed.

In the same vein Judge Maina, J: in **H.J. Stanley Ltd Vs. A. Ramadhani [1988] T.L.R 250, at page 252** adopted the same position that where a memorandum of appeal is not accompanied with a drawn decree or order, there is no legal presentation of the appeal at all and so, the appeal is incompetent and should be dismissed forthwith.

The question, here is whether an incompetent appeal is capable of being dismissed or strike out. There are conflicting decisions apparent on many precedents. While others dismiss it, others end up striking it out. I think the best option is to strike out an incompetent appeal than to dismiss it.

I find no need to labour much on this legal position which is well developed and settled in our jurisdiction. There is no other remedy to the appellant who fail to comply with that mandatory requirement of Orders cited above. Such failure cannot be cured by the Overriding Objective because it goes to the validity of the appeal itself. It is therefore, no valid appeal before this court capable of being determined by a competent court of law.

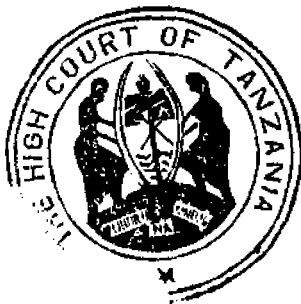


As I approach to the conclusion of this ruling, I find important to state that when a party is in a wrong road to the ends of justice, the best option is to retreat and go back to where he went wrong, with a view to find the right road to the ends of justice. In this appeal the appellant is in a wrong road based on failure to properly observe the governing mandatory procedural rules in presenting his appeal, the best option may be to retreat and look for the better road to the ends of justice. Consequently, the present appeal is caught in the web of procedural irregularities which nullifies its validity.

Having so said and for the reasons so stated, the objection is meritorious same is sustained, consequently I proceed to strike out the appeal with costs.

**I accordingly Order.**

Dated at Mtwara in chambers this 27<sup>th</sup> day of April, 2021.



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**P.J. NGWEMBE**

**JUDGE**

**27/4/2021**



**Court:** Ruling delivered at Mtwara in Chambers on this 27 day of April, 2021 in the presence of Mr.Songea, Advocate for the appellant and Mr. Hussein Mtembwa, Advocate for the Respondent.

**Right to appeal to the Court of Appeal explained.**



A handwritten signature in black ink, appearing to be "P.J. Ngwembe".

**P.J. NGWEMBE**

**JUDGE**

**27/4/2021**