

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOB A

LAND CASE APPEAL NO. 59 OF 2021

*(Arising from Application No. 34 of 2017 of District Land and Housing Tribunal
for Kagera at Bukoba)*

FROLENTINA PHILBERT..... APPELLANT

VERSUS

VERDIANA PROTACE MUJWAHUZI.....RESPONDENT

RULING

10/03/2022 & 28/03/2022

NGIGWANA, J.

This appeal emanates from the ruling and order of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba by R. E. Assey (chairman) in Land Application No. 34 of 2017 handed down on 21/09/2017 in favor of the respondent.

Dissatisfied, the appellant filed a memorandum of appeal consisting six grounds of appeal seeking to fault the decision of the DLHT. Before the appeal could be heard on merit, the respondent through her advocate Mr. Zedy Ally raised a preliminary objection on point of law to the effect that; the **purported appeal is misconceived and bad in law for being accompanied by a defective drawn order.**

As a matter of practice, when the objection is raised, it must be disposed of first before going into the merits of the case.

On 14/02/2022 when the matter came for hearing, the appellant appeared in person and unrepresented while the respondent was represented by Mr. Zedy Ally. Since the appellant was not represented, parties agreed to argue the PO by way of written submissions so as to afford the appellant an opportunity to seek for legal assistance. The filing scheduling order was duly complied with whereas the respondent's written submissions were drawn and filed by Mr. Zedy Ally, learned advocate while those of the appellant were drawn in gratis by Ms. Maria George Lupindo from Mamas Hope Organization for Legal assistance (MHOLA), Bukoba.

In support of the preliminary objection Mr. Zedy submitted that Order XXXIX rule 3 of the Civil Procedure Code Cap. 33 R: E 2019 makes it mandatory that Memorandum of Appeal must be accompanied by a decree/drawn order appealed from and judgment/ruling on which it is founded. He went on submitting that pursuant to order XX Rule 6(1) of the Civil Procedure Code, the decree must agree with the judgment, and must contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the reliefs granted or other determination of the suit. That on the same vein Order XL rule 1 of the Civil Procedure Code read together with Order XXXIX of the Civil Procedure Code show that drawn order must agree and reflect the ruling. Mr. Zedy further submitted that the drawn order contained four prayers but the said prayers are not reflected in the ruling of the tribunal, and that once the drawn order is defective, then the appeal is automatically incompetent.

The learned counsel made reference to the case of **Mohamed Bantura versus Hemed Musa**, Land Appeal No. 46 of 2021 (unreported) where

the decree was found defective because its contents were not in alignment with the judgment as it contained particulars of claims which do not feature in the judgment. Mr. Zedy ended his submissions by urging the court to strike out the appeal with costs for being incompetent.

On the other side of the coin, the appellant conceded to the PO raised. She submitted that it is not disputed that from the records, it is a necked truth that the ruling and the drawn order sought to be challenged are at variance, and that it is not disputed that the differences on the two documents were caused by the DLHT Chairman who passed and signed them while at variance. As to whether the DLHT has any room to rectify the documents, the appellant submitted that, it cannot do so for being **functus officio**. She further submitted that with the advent of the Principle of Overriding Objective commonly known as **Oxygen Principle**, the defect is curable. It is the appellants' further submission that if this court finds that the DLHT is capable of correcting the anomaly, the honorable court may be pleased to grant leave to the appellant to go back to the DLHT to bring a correct drawn order because striking out this appeal will lead to backlog of cases and it will be as good as punishing the appellant unnecessarily. She further urged the court to seek the guidance and wisdom in the case of **Essaji versus Sollant** [1998] E.A 220 at Page 224 where the court held that;

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapse should not necessarily debar a litigant from the pursuit of his rights".

She ended her submissions praying that the objection raised be overruled, and if the court is satisfied on the meritoriousness of the objection, the appellant should not be condemned to pay costs because the anomaly was caused by the DLHT.

With that end the issue before me for determination is whether the objection raised is meritorious.

Having considered the submissions by both parties, Memorandum of Appeal, the ruling and the drawn order sought to be challenged in this court, it is apparent as correctly stated by both parties that the drawn order is at variance with the ruling. The drawn order at page 1 was coached as follows;

"The applicant in this application prays this tribunal the following orders;

- (i) Allow our suit with costs.*
- (ii) Declare the 1st respondent as an invitee per excellence.*
- (iii) Order the first respondent to vacate the suit premises.*
- (iv) Grant a permanent injunction to the 1st respondent restraining her or her proxies to ingress".*

All these above prayers are not reflected in the ruling of the court. It is trite that a decree or drawn order always follows a judgment/ruling, thus the decree/drawn order should not be at variance with the judgment/ruling. In other words, a decree is a summary of the judgment, equally a drawn order is a summary of the ruling, thus the decree must agree with the judgment likewise the drawn order, must agree with the ruling.

Order XX Rule 6 (1) of the Civil procedure Code provides that;

"The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit"

I am aware that the above provision refers to a **"decree"** while in the matter at hand, the document which is at variance with the ruling is the **drawn order**. The answer to that query is provided for under Order XL Rule 2 of the CPC which Provides;

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

Order XXXIX relates to appeals from original decrees. It therefore includes a decree under Oder XX Rule 6(1) of the CPC which required to agree with the judgment. As such, drawn order should be in agreement with the ruling in which it is extracted from. It follows therefore that, where there is variance between the judgment/ruling and the decree / drawn order, the appeal is incompetent.

However, where the same is found to be incompetent, there are two positions of the Court of Appeal of Tanzania. The first position is to the effect that; where the judgment/ruling is at variance with the decree/drawn order, the appeal is incompetent and must be struck out. See **Bank M (Tanzania) Limited versus Enock Mwakyusa**, Civil Appeal No. 109 of 2012, **Dhow Mercantile (EA) Ltd versus Abdirizza K.S. Tuke**, Civil Appeal No. 93 of 2002, **Jovin Mjutagwaba & 85 Others versus Geita Gold Mining**, Civil Appeal No. 109 of 2005 and **Uniafrico Ltd and Other versus Exim Bank (T) Ltd**, Civil Appeal No. 30 of 2006 CAT (All unreported

The second position is that, where a decree/ drawn order does not agree with the judgment/ruling, it is defective, although it may be amended and refilled. The Court of Appeal in **Nassoro Abdubakar Khamis and Another versus Wakf and Trust Commission Zanzibar and Another**, Civil Appeal No. 245 of 2020 CAT and **Tanzania Ports Authority versus Pembe Flour Mills Ltd**, Civil Appeal No. 97 of 2007 (both unreported) held that if a decree does not agree with the judgment, it is defective, although it may be amended and refilled. In the case of **Nassoro Abdubakar Khamis and Another (supra)** the appellants were granted leave to approach the High court of Zanzibar to obtain an amended decree which will be in conformity with the judgment.

However, in the matter at hand, the appellant in her submissions, relied on the principle of **functus officio** that the DLHT has no room to amend its own drawn order so as to confirm with the ruling because. With due respect to the appellant, I disagree to that thought because the position of the law is very clear that correction of this nature can be affected upon application before the court or tribunal which issued the decree/ drawn order. In the case of **Abdulkhakim Abdul Makbel versus Zubeda Jan Mohamed and Another**, Land Appeal No. 28 of 2018 CAT (unreported) the Court of Appeal had this to say;

"Since the defect goes to the root of this matte, it cannot be cured by the principle of overriding objective. This is so when it is considered that the mandate to correct the judgment and decree is vested in the trial court on review".

In relation to this application, the mandate to correct the drawn order to conform with the ruling is vested in the trial tribunal to wit; DLHT for Kagera at Bukoba.

Another argument was that, the defect can be cured by the principle of overriding objective. I am alive that the principle of overriding objective introduced in 2018 vide the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 was aimed to facilitate the just, expeditious, proportionate and affordable resolution of disputes with due regard to technicalities but I am also alive that the principle does not help a party to circumvent the mandatory procedures. **See Martin Kumaliya & 117 Others versus Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 CAT (unreported). The court of appeal in the case of **Juma Busiya versus Zonal Manager, South Tanzania Post Corporation**, Civil Appeal No. 273 of 2020 CAT (unreported) had this to say;

"The principle of overriding objective is not the ancient Greek goddess Universal remedy called panacea, such that its objective is to fix every kind of defects and omissions by the parties in court".

The defect which goes to the root of the matter cannot be cured by the principle of Overriding Objective. The defect existed in the matter at hand has affected the validity of the appeal therefore, the same is incompetent. In the event, the appeal is hereby struck out for being incompetent. For the interest of justice, the appellant is **given 14 days** within which to file a proper appeal **after obtaining the proper drawn order**.

It is so ordered.

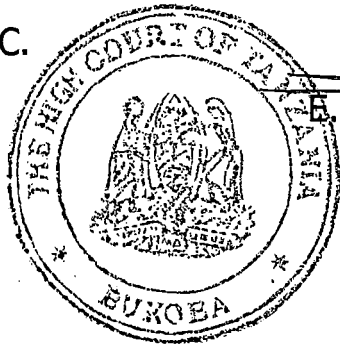


E.L. NGIGWANA

JUDGE

28/03/2022

Ruling delivered this 28th day of March 2022 in the presence of the Appellant in person, Ms. Gisera Maruka, learned advocate for the respondent, Mr. E.M. Kamaleki, Judges 'Law Assistant and Ms. Tumaini Hamidu B/C.



E.L. NGIGWANA

JUDGE

28/03/2022