

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

CIVIL APPEAL NO. 07 OF 2022

(Arising from District Court of Bukoba at Bukoba in Civil Case No. 25 of 2017)

KARAGWE DISTRICT COOPERATIVE UNION

LIMITED.....APPELLANT

VERSUS

MUGISHA C. KATO.....RESPONDENT

RULING

Date of Ruling: 26.08.2022

A.Y. Mwenda, J.

This ruling is in respect of the Preliminary points of objection which were raised by the learned counsel for the respondent. The Preliminary Objections reads as follows to wit;

- I. The purported Appeal is defective, misconceived and bad in law for being accompanied with judgment and decree from the Resident Magistrate's Court of Bukoba while Memorandum of Appeal shows that the appeal is arising from the District Court of Bukoba.
- II. This purported Appeal is incurably defective for being accompanied with a defective decree which does not reflect and conform to the judgment.

III. This appeal is incompetent for being put into motion with a defective Memorandum of Appeal for want of specific relief(s).

It is trite law that once the Preliminary Objection is raised, it must be determined first before the hearing of the main case commences. When the matter was called on for hearing, the appellant was represented by Mr. Anesius Stewart, learned counsel while the respondent was represented by Ms. Pilly Hussein, learned counsel.

Submitting in support of the Preliminary points of objections, Ms. Pilly Hussein begun with the third (3rd) Preliminary point. The learned counsel submitted that it is the legal requirement for the petition of appeal to bear specific reliefs, the purpose of which is to satisfy the court if it has jurisdiction to grant or refuse the reliefs sought. She said in the present appeal, the appellant failed to show reliefs he is seeking the court to grant and for that matter the present appeal is incompetent and as such should be struck out. To support this argument the learned counsel cited the case of ANASTAZIA KAPONGO, LAND APPEAL NO. 60 OF 2009 (unreported) and ANANIA KAMALA VS. TRYPHONE KAIJUNGA, MISC. LAND APPEAL NO. 61 OF 2021 at page 8.

With regard to the second (2nd) Preliminary point of objection on the defective decree, the learned counsel for the respondent submitted that a decree must agree with the judgment as it is a summary of judgment as provided for under Order XX Rule 6(1) of the Civil Procedure Code, [Cap 33 RE 2019]. The learned counsel said

this provision is coached in a mandatory terms by the use of the word "shall". She said, vide section 53(2) of the Interpretations of Laws Act, [Cap 1 RE 2019], the use of the word "shall" entail that particular provision is mandatory. She added in that in the present appeal, the names of the parties are MUGISHA KATO as the plaintiff and KARAGWE DISTRICT COOPERATIVE UNION LTD as the respondent however in the decree the plaintiff appears to be MUGISHA C. KATO and the respondent appears to be KARAGWE DISTRICT COOPERATIVE UNION LTD which are two different names. To support this point she cited the case of MOHAMED BANTURA VS. HAMAD MUSSA, LAND APPEAL NO. 46 OF 2021 HC, (unreported) at page 6 where the court stated that a defective decree renders an appeal incompetent.

The learned counsel further submitted that in a copy of judgment, relief No. 4 on payment of 9% as a decretal sum from the judgment until the final payment, does not appear in the decree. She said this issued was determined by the court as it granted 7% and for that matter it was to be reflected in the decree.

With regard to the first (1st) Preliminary point of objections, the learned counsel for the respondent submitted that under Order XLI Rule 1 (1) of the Civil Procedure Code [Cap 33 RE 2019], a memorandum of appeal must be accompanied by a judgment and a decree. She said the present appeal emanates from Civil Case No. 25 of 2017 at District Court of Bukoba. However, she said, the decree and the judgment appear to be in respect of the Resident Magistrate Court's Civil Case No.

25 of 2017 and for that matter the memorandum of appeal is as good as not accompanied by a copy of judgment and decree thereby making it incompetent.

The learned counsel concluded her submissions with a prayer that the Preliminary points of objection be sustained.

Responding to the submissions by the learned counsel for respondent Mr. Anesius Stewart, learned counsel informed the court that he was going to combine the first (i) and second (ii) points of objection while the (iii) would be discussed separately. Begging with the first (i) and second (ii) Preliminary points of objection he submitted that the present appeal is competent. He said although the names of the parties appearing in decree to those in the judgment are different, striking out the present appeal will be punishing the appellant and for that matter he prayed this court to allow amendment of the appeal. In support to this point he cited the case of ANTHONY JOSEPH @ KABULA VS. HAMIS MGUNYA, CIVIL APPEAL NO. 150 OF 2020 (unreported).

With regard to submissions by the learned counsel for the respondent that the memorandum of appeal lacks reliefs Mr. Stewart was of the view that there is no specific law governing the same and as such the same should not be the ground for striking out the present appeal as the court may invoke the principle of overriding objectives. In support to this point he cited the case of ANTHONY JOSEPH @ KABULA VS. HAMIS MGUNYA (supra).

The learned counsel for appellant concluded his submission in that the present Preliminary objections have no substance and as such they should be overruled.

In her rejoinder, Ms. Pilly Hussein stated that the argument by the learned counsel for the appellant that there is no specific law governing specifying reliefs is not correct as there are case laws which are currently in place. She said in the case of ANANIA KAMALA (Supra), the court stated clearly that since the rules regarding specific reliefs are not yet out, the courts are guided by the case laws.

Regarding the argument by the learned counsel for that appellant that the court may invoke the principle of overriding objectives and forego the anomalies raised in the Preliminary objection, the learned counsel for the respondent said the principle of overriding objectives cannot be applied blindly as the anomalies go to the root of the matter. She made reference to the case of MOHAMED BANTURA (Supra) at page 8. In regard to the case of ANTHONY JOSEPHAT @ KABULA cited by the counsel for the appellant, the learned counsel for the respondent submitted that the same is distinguishable as in the said case the anomaly was only in regard to the different dates while in the present appeal the anomaly is in respect of the reliefs and names which to her, goes to the root of matter and as such the principle of overriding objective cannot apply.

With regard to the argument by the learned counsel for the appellant that the anomaly raised by the learned counsel for respondent are caused by the trial court, Ms. Pilly Hussein stated that the present appeal was drawn and filed by the learned

counsel who is conversant with the current legal positions. She said, he was required to satisfy himself on the correctness of the documents relied on.

With regard to a suggestion/submission by Mr. Stewart that the court may allow the appellant to amend his appeal, Ms. Pilly Hussein submitted that it is not possible to amend something which is incompetent. She thus concluded her rejoinder with her previous prayer that the preliminary objection be sustained.

Having examined the entire records and heard the submissions of the parties, the issue is whether or not the Preliminary objection raised by the counsel for the respondent are meritorious.

In a bid to provide answers to the issue herein above, this court is going to deal with the preliminary objections in line of the flow adopted by the learned counsel for the respondent.

With regard to the third (iii) preliminary point of objections regarding failure of the memorandum of appeal to bear reliefs, it is clear that the appellant's memorandum of appeal is lacking the same. What is envisaged in the memorandum is a prayer for this court to allow this appeal with costs. The same is coached in the following words and I quote;

*"WHEREFORE, the appellant pray this Honourable court
to allow this appeal with costs."*

The aim of putting reliefs sought in the memorandum of appeal was stated in the case of ANASTAZIA KAPONGO VS. ZABINA SAID KANYOWA (supra) where this court (Utamwa J,) held inter alia that;

"My settled views are that, when an aggrieved party prefers an appeal to this court, it is his duty not only to disclose his grievances against the decision appealed against as the appellant did in the appeal at hand, but also to put in a conspicuous terms the reliefs which he seeks from this court as an appellate court, and those reliefs must be shown into the petition of appeal which operates as the base of the appeal itself and not otherwise."

The court went further to stating that;

"An appellant to this court should not therefore, be allowed to put the court into fishing expedition speculating on which order the appellant seeks from it. It is must be noted that, it is the orders sought by the appellant into the petition of appeal which assist the court to know whether or not it has powers to grant the reliefs sought."

In the present appeal, both parties are in agreement that such anomaly exist, however they differ in respect of consequences that should follow. While Ms. Pilly Hussein, the learned counsel for the respondent is of the view that the anomaly renders the present appeal incompetent which should thus be struck out, Mr. Anesius Stewart was of the view that striking the same would be punishing the appellant and as such he beseeched this court, invoking the principle of overriding objectives to afford the appellant opportunity to amend the memorandum of appeal. He pegged his argument relying on the decision of the court in the case of ANTHONY JOSEPH @ KABILA VS. HAMIS MAGANGA (supra). I have considered this point and the authority cited by Mr. Stewart and formed an opinion that the authority cited is distinguishable to the circumstances of this court. This is so because in the said authority the anomaly was different in dates appearing in the judgment and decree. In the said authority, while the decree of the High Court is dated 21.08.2019, the judgment was dated 19.08.2019, and by applying the principle of overriding objectives, the court gave room to the appellant to correct the said anomaly. In the present case (3rd point of objection) the appellant did not specify reliefs he is seeking this court to grant and for that matter the case of ANTHONY JOSEPH cannot apply in the circumstances of this case.

Mr. Anesius Stewart beseeched this court to invoke the principle of overriding. I have considered his prayer but as it was rightly submitted by Ms. Pilly Hussein, the said principle cannot be applied blindly where there are mandatory requirements

of the law. In the case of AMI (Tanzania) LIMITED VS. OTTU ON BEHALF OF P.L. ASSENGA AND 100 OTHERS, CIVIL APPEAL APPLICATION NO. 76 OF 2002 CAT, the court while discussing Article 107(2) (e) in a bid to observe substantial justice, the court held;

"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."

Faced with similar scenario the court in the case of ANDREA MUSHONGI VS. CHARLES GABAGAMBI, LAND APPEAL NO. 65 OF 2018 (unreported) held;

"In the present appeal, as Mr. Kweyamba did not specify the reliefs in his prayer, and the practice of this court requires that such appeal be struck out for want of completion of the prayers and competence..."[emphasis added].

Again in the case of ANANIA KAMALA VS. TRYPHONE KAIJUNGA, MISC. LAND APPEAL NO. 61 OF 2021, this court (Ngigwana J,) held;

"I am also alive that the principle of overriding objective introduced in 2018 vide the written laws (Miscellaneous Amendment) (No. 3) Act No. 8 of 2018 was aimed to facilitate the just, expeditious, proportionate and affordable resolution of disputes without due regard to

technicalities as opposed to substantive justice but I am also alive that the principle does not help a party to circumvent the mandatory procedure...” [emphasis added].

Since the need to specify reliefs in a memorandum of appeal is couched in a mandatory terms, then this courts finds merits in the (iii) preliminary objection and it is thus sustained.

From the foregoing analysis, this court sustains the third Preliminary Objection. This appeal is therefore struck out with costs. Having reached this conclusion, there is no need to discuss and determine the remaining points of objections.

It is so ordered.

 
A.Y. Mwenda
Judge
26.08.2022

Ruling delivered in chamber under the seal of this court in the presence of Mr. Anesius Stewart, learned counsel for the Appellant and in the presence of Ms. Pilly Hussein, learned counsel for the Respondent.

 
A.Y. Mwenda
Judge
26.08.2022