

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUNUO, J.A., BWANA, J.A. And OTHMAN, J.A.)

CIVIL APPEAL NO. 19 OF 2005

RAMADHANI A. KIDAGAA.....APPELLANT

VERSUS

MAYASA ABDALLAH.....1ST RESPONDENT

ASIA ABDALLAH.....2ND RESPONDENT

**(Appeal from the decision of the High Court of Tanzania, at
Dar es Salaam)**

(Mwaikasu, J.)

dated the 8th day of July, 1994

in

Probate and Administration Cause No. 21 of 1992

RULING OF THE COURT

6 February & 26 March, 2009

MUNUO, J.A.:

The appellant, Ramadhani Kidagaa, lodged the present appeal on the 14th July, 1994, to challenge the decision of the High Court, before Mwaikasu, J., on the 8th July, 1994 in Probate and Administration Cause No. 21 of 1992. During the pendency of the appeal, the co-respondents learned advocate, Mr. Msemwa, filed a preliminary objection under the provisions of Rule 100 of the Tanzania Court of Appeal Rules, 1979. Later, the respondents'

counsel filed an additional preliminary objection under the same provision.

The grounds of the preliminary objection are 4. In ground 1 the respondent's counsel contended that the record of appeal is defective in that the copy of the ruling appealed against was not signed at all. However, at hearing, counsel for the respondent dropped this ground for the learned judge had indeed signed the material ruling on the 8th July, 1994.

The other grounds of the preliminary objection are: -

- a) *the Drawn Order is wrongly dated the 20th December, 2004 instead of reflecting the date of the Ruling, that is the 8th July, 1994. Thence the Drawn Order contravenes the provisions of Order XX Rule 7 of the Civil Procedure Act, 1966, Cap 33 R.E. 2002.*
- b) *The Drawn Order is also wrongly signed by the District Registrar instead*

of being signed by the learned judge or his successor in office.

- c) The appeal is incompetent for being preferred against the respondents who were neither parties in the High Court Probate and Administration Cause No. 21 of 1992 nor caveators.*

The parties submitted in writing. In his written submission, counsel for the respondents contended that the proceedings in the record show that that caveator was one Hawa Said. The present respondents were neither caveators nor parties to the cause. Thence the appeal is incompetent because it was preferred against the wrong parties, counsel for the respondents maintained.

As for the wrongly dated and signed Drawn Order, counsel for respondents' contended that the said defects contravened the mandatory provisions of Order XX Rule 7 of the Civil Procedure Act, Cap 33 R.E. 2002 the effect of which is to render the appeal incompetent. Order XX Rule 7 states, *inter-alia*:

7. *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.*

Contending that Decrees and Drawn Orders are synonymous, Mr. Msemwa cited the case of **Olam Uganda Ltd. (suing through its attorney United Youth Shipping Ltd.) versus Tanzania Harbours Authority, Civil Appeal No. 95 of 2000 (unreported)**, wherein the Court observed that –

.....Order XXXIX which is referred to in Order XL Rule 2 relates to appeals in original decrees. That would include a decree under Order 20 to be dated as of the date when the judgment was pronounced. We think, therefore, that on the same parity of reasoning an extracted order of the High Court in original jurisdiction is required, under the authority

of Order XL Rule 2 of the Act, to bear the date when ruling from which the order was extracted was pronounced. We are of the view that that should be the case because it could not have been the intention of the legislature to require a decree to bear the date when the judgment was pronounced but leave it open to an extracted order to bear any date regardless of when the ruling appealed against was pronounced.

The wrongly dated and wrongly signed Drawn Order in the present appeal renders the same incompetent, counsel for the respondents contended. He referred us to the provisions of Order XXXIX Rule 35 (4) which provides *inter-alia*:

(4) The decree shall be signed and dated by the judge or judges who passed it.....

Counsel for the respondent further found support in the cases of **the Managing Director National Insurance Corporation versus Joseph Maswe, Civil Appeal No. 23/2003 (CA) (unreported),**

Esmail Choka versus National Transport Corporation and Others, Civil Application No. 75 of 2005 (CA) (unreported); and Fazel and Company Ltd. versus Barclays Bank Tanzania Ltd. Civil Application No. 112 of 2004 (CA) (unreported)

which decisions stressed the requirement of decrees and drawn orders being correctly dated and signed by the learned trial judge or magistrate or his successor in office. Counsel for the respondents prayed that the incompetent appeal be struck out with costs.

Mr. Taslima, learned advocate for the appellant, conceded that the drawn order is wrongly dated and signed. He contended, however, that the said omissions are not material defects. If the incompetent appeal is struck out, Mr. Taslima further contended, the appellant should be allowed to reinstitute the appeal. Counsel for the appellant cited the case of **NBC Holding Corporation versus Mazige Mauya & Another Civil Appeal No. 36 of 2004 (CA) (unreported)** wherein the Court held that –

For the reasons stated above, we strike out the incompetent appeal. We order that the appellant if he so deems fit, re-institutes the appeal within 14 days.

Counsel for the appellant contended, furthermore, that the defective drawn order was issued by the trial court so the appellant should not be held liable for the errors of the court. He found support in the case of **Esmail Choka versus National Transport Corporation & 2 Others Civil Application No. 75 of 2005 (CA) (unreported)** in which the Court refused to penalize the applicant for the omissions of the trial court by holding:

This omission is unfortunate. In any case the omission to endorse is of the court not the Respondent and under the authority of the 21st Century (case) I am of the opinion that I should not penalize the respondent for that.....

Contending that the Court should determine the rights of the parties substantively and in that way avoid technicalities relating Decrees and Drawn Orders, Mr. Taslima cited the case of **Esaji versus**

Solanki (1968) E.A. 218 at Page 224 wherein Georges C.J. held that –

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

Underscoring the above, counsel for the appellant referred us to the provisions of Article 107A(2) which impose on the courts, an obligation to determine disputes substantially rather on technicalities.

Mr. Taslima urged us to allow him to refile the appeal upon striking out the incompetent appeal.

The issues of defective Decrees and Drawn Orders were laid to rest in the cases of **Tanzania Revenue Authority versus Njake Enterprises Ltd. Civil Appeal No. 122 of 2004 (CA) (unreported)**; and in **Haruna Mpangaos and 902 Others versus Tanzania Portland Cement Co. Ltd. Civil Appeal No. 10**

of 2007 (CA) (unreported). In the **Njake Enterprises case** cited supra, the Court stated, and we quote:

*.....That the copy of the decree incorporated in the record of appeal is incurably defective is not a bone of contention. The law to the effect that a wrongly dated decree is incurably defective was first conclusively stated by this Court in its ruling in the case of **Abdallah Rashid Abdallah versus Sulubu Kidogo Amour & Another Civil Appeal No. 94 of 2006 (CA) (unreported)**. The law was restated in the case of **Jovin Mtagwaba & 85 Others versus Geita Gold Mining Company Ltd. Civil Appeal No. 109 of 2005 (CA) (unreported)** [and also **Haruna Mpangaos & 902 Others versus Tanzania Portland Cement Company Ltd. Civil Appeal No. 110 of 2007 (CA) (unreported)**]*

It is now settled law. In view of the above, we do not have cause to reopen the issue of defective decree and drawn orders. this, in our humble view, is not a situation where the principle of

each case being determined on its own merits and circumstances, could save the day.

We are satisfied, and Mr. Taslima has indeed conceded, that the appeal is incompetent for lack of properly dated and signed drawn order. We accordingly sustain grounds (a) and (b) of the preliminary objection.

In the result, we strike out the incompetent appeal with costs.

DATED at DAR ES SALAAM this 20th day of March, 2009.

E. N. MUNUO
JUSTICE OF APPEAL

DR. S. J. BWANA
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(P. B. KHADAY)
DEPUTY REGISTRAR