IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 164 OF 2018

KARORI CHOGORO .... APPELLANT

VERSUS

WAITIHACHE MERENGO .... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)
(Gwae, J.)

dated the 6th day of September, 2017
in
Land Appeal No. 70 of 2016

....

RULING OF THE COURT

29th June & 05th July, 2021

NDIKA, J.A.:

The appellant, Karori Chogoro, lost in an action instituted against him by the respondent, Waitihache Merengo, in the District Land and Housing Tribunal for Mara at Musoma for ownership of a piece of land located at Baranga Centre in Baranga village in Butiama District. His first appeal to the High Court of Tanzania at Mwanza vide Land Appeal 70 of 2016 was barren of fruit. Still dissatisfied, he has appealed to this Court on five grounds of grievance.

the points. On the first point, he argued that while the appellant lodged the memorandum and record of appeal on 11th September, 2018, he served the documents on the respondent on 22nd September, 2018, which was four days after the seven days period prescribed by rule 97 (1) of the Rules had expired. He further contended that the appellant had no excuse for not complying with the law because the respondent duly served him notice of his address for service, which is part of the record of appeal at pages 47 and 48. It was his contention that rule 97 (1) of the Rules is couched in mandatory terms, hence its non-compliance is fatal, rendering the appeal incompetent and liable to be struck out. Nonetheless, he did not cite any authority to back up his proposition.

As regards the defect in the decree, shown at page 43 of the record, Dr. Murungu submitted that while the judgment upon which the decree is founded is correctly dated 6th September, 2017, the decree is dated 21st September, 2017, which was the date on which it was signed by the presiding judge and the seal of the court embossed on it. This variance, he added, rendered the decree defective and therefore it was a contravention of rule 96 (1) (h) of the Rules citing the decree appealed from as one of the core documents to be included in the record of appeal.

When queried by the Court whether, with the advent of the Overriding Objective Principle in terms of sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 R.E. 141 ("the AJA") the inclusion of an invalid decree in the record of appeal could be rectified by the appellant being allowed to file a supplementary record of appeal containing a valid decree, the learned counsel replied agreeably confirming the Court's discretion to authorize such a course of action.

In rebuttal, the appellant, who was self-represented, argued that he attempted to effect service of the memorandum and record of appeal on Dr. Murungu as the respondent's advocate in time in line with the filed address of service but the learned counsel rebuffed the effort. As a result, he resorted to looking for the respondent to serve him personally and that the said effort bore fruit rather belatedly on 22nd September, 2018, four days after the prescribed period had elapsed. He unrelentingly blamed his travails on the respondent's advocate and urged us to ignore the blemish in issue. As regards the defect in the decree, the appellant, after initial hesitation, conceded to the defect but implored us to allow him to perfect the record by lodging a supplementary record of appeal containing a valid decree.

In a brief rejoinder, Dr. Murungu denied flat out to have refused receipt of the memorandum and record of appeal. He implored us to strike out the appeal upon the appellant's concession that he served the memorandum and record of appeal on the respondent out of time without any leave of the Court.

We have duly considered the arguments of the parties and examined the record of appeal. Beginning with the contention that the appellant served the memorandum and record of appeal out of time, we would, at first, confirm that in terms of rule 97 (1) of the Rules the appellant had the duty to serve the documents, before or within seven days after filing them, on every respondent who had complied with the requirement of rule 86. For clarity, we extract the said rule thus:

> *"97.-(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of Rule 86."*

Under rule 86 referred to in the above rule, each respondent served with a notice of appeal is required within fourteen days of that service to lodge in the appropriate registry and serve on the intended appellant

notice of a full and sufficient address of service. In the instant case, it is on record, at pages 47 and 48 of the record of appeal, that the respondent duly lodged in the Mwanza sub-registry and served his notice of address of service on 12th October, 2017 after the notice of appeal was served on him on 2nd October, 2017, as shown at page 45 of the record of appeal. That the respondent complied with the aforesaid requirement under rule 86 and, hence, he was entitled to service of the memorandum and record of appeal in terms of rule 97 (1) is well beyond question.

It is on record that the appellant lodged his memorandum and record of appeal on 11th September, 2018. Accordingly, in terms of rule 97 (1) of the Rules, the appellant had to serve the documents on the respondent by 18th September, 2018. It is, however, significant that the date on which the said documents were served on the respondent is not indicated anywhere on the record. Although the appellant conceded that he served them on 22nd September, 2018, which was four days late, he cast the blame on the respondent's advocate, Dr. Murungu, who refused to receive the documents despite the respondent's notice instructing that service be effected through *"Dr. Chacha Bhoke Murungu, Murungu Law Chambers, NIC Life House, 5th Floor, Sokoine Drive/Ohio Street, P.O. Box 14599, Dar*

es Salaam, Phone. 0687763427." The alleged rejection of service, it is claimed, constrained the appellant to look for the respondent to serve him personally with the documents but that effort succeeded rather belatedly. Given these circumstances, our view of the matter is that the date of service of the documents on the respondent is unascertained. We cannot act on the appellant's ambivalent concession on the date of service given his allegation that Dr. Murungu had declined being served with the documents when they were presented to him in time. On the other hand, Dr. Murungu denied that claim flat out. These factual contentions, therefore, ought to be established by evidence through affidavit or oral evidence. Proof could have been had if the respondent had sought recourse to relief by way of a notice of motion predicated on rule 89 (2) of the Rules.

In the premises, we are settled in our mind that the first point of the preliminary objection does not raise a pure point of law. The Court took the same view in **Gaspar Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017 and **Charles Chama and Two Others v. The Regional Manager (TRA) and Three Others**, Civil Appeal No. 224 of 2018 (both unreported) when it dealt with a similar

point of preliminary objection. In the former case, which was cited in the latter case, it became apparent at the hearing that the date on which the memorandum and record of appeal were served on the respondent was not ascertained on the record. Relying on the principle in the celebrated case of **Mukisa Biscuit Manufacturers Ltd. v. West End Distributors** [1969] EA 696, the Court held:

> *"In the present case, the parties were at issue as to whether or not the documents referred to in the 1st and 3rd grounds of the preliminary objection were served on the respondent. Since therefore determination of this issue requires evidence, the two grounds do not raise pure points of law."*

We should emphasise that the principle that a preliminary objection must raise a pure point of law is well settled. In **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (unreported), we firmly stated that:

> *"... where a preliminary objection raised contains more than a point of law, say law and facts it must fail (see* ***OTTU and Another v. Idd Simba, Minister for Industries and Trade and Others***

[2002] TLR 88). For, factual issues will require proof, be it by affidavit or oral evidence."

We wish to recapitulate that given that the memorandum and record of appeal before us do not show the date on which they were served on the respondent and that due to the appellant's ambivalent concession the date of service of the documents remains to be ascertained, we find that the first point of preliminary objection raises no pure point of law. For that reason, the point falls by the wayside.

Coming to the alleged defect in the decree, we agree with the parties that decree on record is defective on account of being wrongly dated as being signed and sealed on 21st September, 2017 while the judgment upon which it is founded is dated 6th September, 2017, the day it was delivered. In terms of Order XXXIX, rule 35 (1) of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019), the decree in appeal ought to have borne "the date of the day on which the judgment was pronounced." Thus, there is no gainsaying that the decree is invalid due to that defect – see, for instance, **Tanzania Motor Services Ltd. v. Tantrack Agencies**, Civil Appeal No. 61 of 2007 cited in **Robert Edward Hawkins and Another v. Patrice P. Mwaigomole**, Civil Appeal No. 48 of 2006 and **Kapinga & Co. Advocates v. National Bank of Commerce Ltd.,** Civil Appeal No.

42 of 2007 (all unreported). Moreover, we agree with Dr. Murungu that the absence of a valid decree in the record of appeal is evidently a contravention of rule 96 (1) (h) of the Rules.

However, in the spirit of the Overriding Objective Principle in terms of sections 3A and 3B of the AJA intended to facilitate a just, expeditious, proportionate and affordable resolution of this matter, we are of the view that the appellant should be granted an opportunity to rectify the defect by lodging a supplementary record of appeal in terms of rule 96 (7) of the Rules. We have recently taken that course in a number of our decisions so as to spare the respective appellants the draconian approach of striking out their appeals – see, for instance, **Jommo Kenyatta Traders and Five Others v. National Bank of Commerce Limited**, Civil Appeal No. 48 of 2016 (unreported). On that basis, while we agree with the respondent's contention on the fifth point of the preliminary objection that the decree on record is defective we reject his prayer that the appeal should be struck out for incompetence.

The upshot of the matter is that we overrule the preliminary objection. However, for the sake of perfecting the record of appeal, we order the appellant to lodge a supplementary record of appeal containing a

valid decree in appeal within thirty days from the date of delivery of this ruling. In the meantime, the hearing of the appeal is adjourned to a date to be fixed by the Registrar. In view of the circumstances of this matter, we order that costs shall be in the cause.

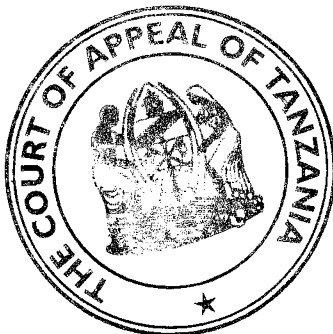
DATED at **MWANZA** this 2nd day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered on this 05th day of July, 2021, in the Presence of the Appellant in person and Respondent in person, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL