IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

CIVIL APPEAL NO. 110 OF 2005

M/S MAJEMBE AUCTION MART ..... APPELLANT
VERSUS
CHARLES KABERUKA ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 14th day of December, 2004
in
Misc. Civil Application No. 8 of 2002

RULING OF THE COURT

7 & 23 February 2007

LUBUVA, J.A.:

When the appeal was called on for hearing, Mr. Galati, learned counsel for Charles Kaberuka, the respondent, submitted on the preliminary objection, notice of which had duly been given in terms of the provisions of rule 100 of the Court Rules, 1979 (hereinafter the rules). From the two grounds filed in support of the preliminary objection, Mr. Galati opted to address the Court on the following ground:

> That the appeal is incompetent as the record of appeal does not confirm (sic) with Rule 89 (1) of the Court of Appeal Rules.

In elaboration the essence of Mr. Galati's submission was briefly as follows: That rule 89 (1) of the rules provides for the documents which shall be contained in a record of appeal. Among such documents is provided under sub-rule (1) (h) of rule 89, namely the decree or order, subject of the appeal. In this case, as the record does not contain the extracted order there is no proper appeal before the Court. The purported appeal before the Court is incompetent, it should be struck out. That it is now settled law that a record of appeal which does not contain the extracted order or decree renders the appeal incompetent resulting in the purported appeal being struck out.

Although Mr. Galati stated that there are many decisions of this Court on this point, he was however not in a position to refer to the Court any specific case. He urged the Court to strike out the purported appeal with costs. Finally he regretted the fact that the appellant had been served with the notice of preliminary objection on the morning of the hearing date, which was a short notice.

For the appellant, Mr. R. B. Msirikale, learned counsel, appeared. He expressed very strongly his misgivings on the fact that he had been served with the notice of preliminary objection at a very short notice a few hours before the commencement of hearing of the appeal. This, he urged, was not only unfair to him as counsel for the appellant but also it does not conform with rule 100 which requires the notice of preliminary objection to be served to the Court and the other parties within reasonable time. In that situation Mr. Msirikale said he was taken by surprise.

At this juncture, we wish to observe at once that there is merit in Mr. Msirikale's misgivings that he was served with the notice of preliminary objection at a very short notice. As correctly observed by Mr. Msirikale, the provisions of rule 100 of the Court Rules, are unambiguously clear. It provides:-

> Where a respondent intends to take a preliminary objection to any appeal or any part of it, he shall, as soon as practicable before the hearing begins, <u>give reasonable notice</u> to the Court and to the other parties to the appeal of that objection, and if that notice is not given the Court may adjourn the

> hearing and make such order as to costs as it may deem just. (Emphasis supplied).

From the provisions of this rule it is clear that reasonable notice of the preliminary objection is to be given to the other parties including the appellant as in this case. The logic behind this provision hardly needs to be overemphasized. With the notice given within reasonable time, the other parties to the appeal would not be taken by surprise. In that situation the parties would be in a position to respond in advance to the issues raised in the preliminary objection It is to be emphasized that in fairness to the parties and in the interest of justice, counsel intending to raise preliminary objection are enjoined as far as possible to serve the notice of preliminary objection within reasonable time. However, in this case, since Mr. Galati, learned counsel for the respondent, conceded on this point and correctly so in our view, we need not belabour it.

Despite the short notice, Mr. Msirikale, learned counsel who should be commended was nonetheless prepared to respond to the submissions by Mr. Galati on the preliminary objection. First, he conceded that there is no extracted order in the record of appeal. However, he was quick to point out that this was not due to any fault

on his part. It was the fault of the Court which supplied him with a copy of the proceedings without the extracted order, he argued. Counsel also conceded that as a matter of law, if the record of appeal does not contain the extracted order or decree, subject of the appeal, the appeal is rendered incompetent. The consequence of an incompetent appeal is to have it struck out, Mr. Msirikale further conceded. Because he had been served with the notice of preliminary objection at such a short notice, Mr. Msirikale urged the Court not to award any costs.

Both counsel for the parties are at one with each other that the record of appeal in this appeal does not contain the extracted order, subject of the appeal. Therefore it would follow that there is no valid appeal before this Court. This is because as Mr. Galati, learned counsel, submitted the record of appeal does not conform with the provisions of rule 89 (1) (h) of the rules.

That this is the legal position regarding non-inclusion of an extracted decree or order can be gleaned from a number of decided cases by this Court and the erstwhile Court of Appeal for East Africa.

For instance, in the case of **Fortunatus Masha v. William Shija and Another** (1997) TLR 41, the Court *inter alia* held:

> That rule 89 (1) (h) and (2) of the Court of Appeal rendered incompetent an appeal where there had been failure to extract the decree or order.

In **Zephania Letashu v. Moruo Ndelamia,** Civil Appeal No. 31 of 1998 (unreported) the Court *inter alia* stated:

> … We are satisfied that sufficient explanation has not been furnished for the absence of the decree. A decree is a vital and central component of the record of appeal since the appeal is grounded on it, hence its absence is fatal to the whole exercise.

The Court held the same view in **Juma Ibrahim Mtale v. K.C. Karmali** (1983) TLR 50 in which the record of appeal did not contain an extracted decree. In part, the Court observed:

> … Unless this Court holds that the absence of the decree in the record is immaterial, the Court is bound to strike out the appeal leaving the appellant with the option to make subsequent appropriate application seeking to

> bring back to this Court a proper appeal in the case.

The erstwhile Court of Appeal for East Africa had also underscored the legal position relating to the central and vital role of the decree in an appeal. That the non-inclusion of extracted decree renders the appeal incompetent. See for instance, **Commissioner of Transport v. A.G. of Uganda and Another** (1959) E.A. 329 and **Haining and Others v. Republic,** (1971) E.A. 421.

In more recent cases, namely, **Rev. Fr. Vincent Ushaki v. Right Rev. Bishop of the Roman Catholic Diocese of Tanga,** Civil Appeal No. 37 of 2004, and **Frank Kibanga v. ACU Limited,** Civil Appeal No. 24 of 2003 (both unreported) in which the record of appeal did not contain an extracted decree which was being appealed against, the Court struck out the appeals which were held to be incompetent.

In similar vein, we are of the settled view that the instant appeal is incompetent on account of the fact that an extracted order, subject of the appeal was not included in the record. The fact that the Court registry supplied to the counsel for the appellant

proceedings without the extracted order is of no avail to the appellant. The legal requirement under the provisions of rule 89 (1) (h) remains unchanged so long as it is shown that there was non-compliance with the rule for whatever reason. At any rate, even if Mr. Msirikale's submission is accepted that he was supplied with a copy of the proceedings without the extracted order, that would not exonerate counsel for the appellant from his responsibility of ensuring that he furnishes a complete record with all the essential documents including the extracted order. For this reason, the submission by Mr. Msirikale that he should not be condemned in costs because he was supplied from the Court with a copy of the proceedings without the extracted order would not hold.

In the event, and for the foregoing reasons, the preliminary objection raised is sustained. Consequently the purported appeal is struck out with costs.

DATED at MWANZA this 23rd day of February, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR