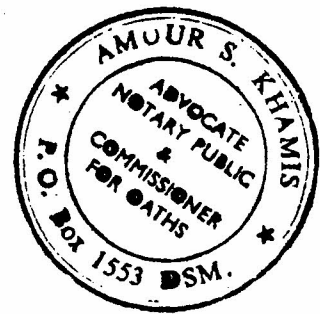


IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM



(CORAM: MUNUO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CIVIL APPEAL NO. 37 OF 2001

BETWEEN

TANGANYIKA CHEAP STORE APPELLANT

AND

NATIONAL INSURANCE CORPORATION (T) LTD. RESPONDENT

(Appeal from the Judgment and Decree of the
High Court of Tanzania at Dar es Salaam)

(Kileo, J.)

dated the 9th day of February, 2001

in

Civil Case No. 272 of 1996

REASONS FOR RULING

NSEKELA, J.A.:

When the appeal was called for hearing, the Court invited, *suo motu*, the learned advocate for the appellant, Mr. Mnyele, to address the Court on the validity or otherwise of the decree on page 130 of the record of appeal which had been signed by the Deputy Registrar of the High Court, Mr. F.S.K. Mutungi. The concern of the Court was to the effect that the decree, on the face of it, appeared to be incompetent since it was signed by the Deputy Registrar instead of a judge who adjudicated upon the suit.

Parties should not be condemned for wrongs done by the Court

Mr. Mnyele conceded that the decree was signed by the Deputy Registrar instead of a judge. However, he prayed that the Court permit him to rectify the error, since, in his view, the lower court was also to blame. On his part, Mr. Kilindu, learned advocate for the respondent, submitted that since the decree was defective, the appeal before the Court was incompetent and was liable to be struck out.

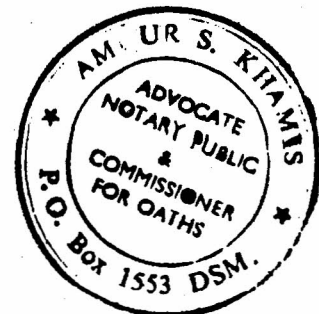
The issue to be resolved which was raised by the Court, *suo motu*, is whether or not the Deputy Registrar had competence to sign the decree. The starting point is Order XLIII rule 1 of the Civil Procedure Code, 1966 (CPC). It provides as follows –

- “(1) Subject to any general or special direction of the Chief Justice, the following powers may be exercised by the Registrar or any Deputy Registrar of the High Court in any proceedings before the High Court –
- (a)
 - (b)
 - (c)
 - (d) to sign decrees under Order XX rule 7;”

Order XX rule 7 provides –

“(7) The decree shall bear date 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.”
(emphasis added)

Order XLIII rule 1 of the CPC vests certain powers which may be exercised by the Registrar or any Deputy Registrar or District Registrar of the High Court in any proceeding before the High Court, including the power to sign decrees under Order XX rule 7. However, under Order XX rule 7 a decree shall be signed by a Judge or magistrate after satisfying himself that the decree has been drawn up in accordance with the judgment. Under section 3 of the CPC, judgment means the statement given by the Judge or the magistrate of the grounds of a decree or order. It is this statement which has to be signed by the Judge or magistrate. There is no definition of who is a Judge or magistrate under the CPC. However, there is a definition in the Interpretation of Laws and General Clauses Act, 1972 which provides as under –



"Judge" means a Judge of the High Court, and includes an acting Judge;

"Magistrate" in any written law enacted or made on or after the day appointed for the commencement of the Magistrates' Courts Act, 1963, means a resident magistrate, a district magistrate and a primary court magistrate;

We are of the settled view that the Deputy Registrar had no competence to sign the decree under Order XX rule 7. A Deputy Registrar is not a Judge for if he was one, he would obviously have signed the decree as Judge and not as Deputy Registrar of the High Court. The use of the word "shall" in Order XX rule 7 indicates that there is no room for any other person to sign the decree. Order XX rule 7 has specifically designated Judges and magistrates to sign decrees as appropriate. We do not read anything in Order XLIII rule 1 (d) as abrogating the specific power of a Judge to sign a decree after satisfying himself that the decree has been drawn up in accordance with the judgment.

In Civil Appeal No. 2 of 1990 between **Robert John Mugo** (Administrator of the Estates of the late John Mugo Maina) and **Adam Mollel** (unreported) the Court had occasion to deal with a defective decree which had not been signed by the Judge who adjudicated the case in the High Court where it came on first appeal from a subordinate court. A question arose as to whether or not the decree which was signed by the District Registrar was a valid one either under Order XXXIX rule 35 (4) of the CPC or any other law. This Court stated, inter alia, as follows –

“We also agree that a decree in appeal which is not signed by a judge as required by Order 39 Rule 35 (4) invalidates the purported decree. This is because such signature by a judge is mandatorily required and it authenticates the decree.” (emphasis added)

In Civil Appeal No. 68 of 1998 between **Ndwaty Philemon Ole Saibull** and **Solomon Ole Saibull** (unreported), the decree was also signed by the Registrar and not the judge who decided the appeal. The decree was found to be invalid and the appeal was incompetent and struck out for that reason. We should point out

here that in **Mugo's** case, the decree was under Order XXXIX rule 35 (4), it was a first appeal whereas in **Saibull's** case, it was a second appeal originating from a decision of a Primary Court. In **Saibull's** case the Court stated thus –

"The requirement that a decree must be signed by the judge who made the decision is rooted in sound reason, namely, that the judge who decided the case or appeal is in the best position to ensure that the decree has been drawn in accordance with the judgment."

With respect, the same reasoning applies to decrees under Order XX rule 7. As explained before, we are of the firm view that since Order XX rule 7 specifically authorizes a Judge to sign a decree, the Deputy Registrar was not competent to sign the decree herein. We construe Order XX rule 7 as being mandatory. In case the Judge concerned was not available, then Order XX rule 8 would come into play and such decree will be signed by a successor judge. Our inevitable conclusion therefore is that the decree on page 130 of the record of appeal is invalid. It is for these reasons that we ordered that the appeal be struck out with costs.



In both (CAT) Civil Appeal No. 2 of 1990 and Civil Appeal No. 68 of 1998, the Court struck out the respective appeals but permitted the appellants, if they so desired, to re-institute the appeals to this Court. The rationale for so doing is perhaps best captured in the following passage in Civil Appeal No. 2 of 1990 which reads as under

—

“But bearing in mind the fact that practically all the judges of the High Court have consistently omitted to comply with the requirements of Order 39 Rule 35 (4), and that the Court of Appeal has also consistently until now failed to notice this omission since it was established over ten years ago, thereby encouraging members of the legal profession to believe that all was in order with the decree in appeal, we think justice demands that the appellant be put in a position to re-institute his appeal easily in this Court should he so wish.”

We respectfully subscribe to these reasons. **Mugo's** case was a wake-up call. We wish to remind all concerned that decrees should be signed according to law. In the result, we direct that the

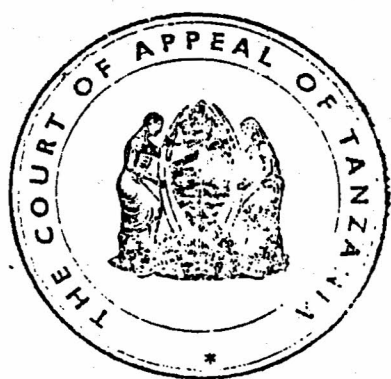
appellant be put in a position whereby he can easily re-institute his appeal in this Court if he so desires within fourteen days from the date of obtaining the decree from the High Court. We order accordingly.

DATED at DAR ES SALAAM this 27th day of January, 2005.

E. N. MUNUO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL



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


(S. M. RUMANYIKA)
DEPUTY REGISTRAR