

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

(CORAM: MUNUO, J.A., KILEO, J.A. And LUANDA, J.A.)

CIVIL APPEAL NO 98 OF 2006

BETWEEN

IMELDA OMARI & 18 OTHERS.....APPELLANTS

AND

TANZANIA PORTS CORPORATION.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Dar es salaam District Registry at Dar es Salaam (Hon. Mr. Justice Ihema) dated the 22nd day of September, 2003 in Civil Revision No.166 of 2002)

RULING OF THE COURT

3rd December, 2008 &

KILEO, J.A.:

On 22nd September 2003, in the High Court of Tanzania, at Dar es salaam, a ruling revising proceedings in Employment Civil Cause No 137 of 1996 of the Resident Magistrate's Court of Dar es salaam at Kisutu was delivered. The ruling was prepared by Ihema, J. who heard the revision proceedings. It was delivered by the District Registrar. A Drawn Order was extracted from the ruling and it was one of the documents which form part of the record of appeal filed by the appellants Imelda Omari & 18 others.

A Notice of Preliminary Objection against the appeal was filed in Court under Rule 100 of the Court of Appeal Rules. The preliminary objection filed on behalf of the respondent by Rweikiza & Co. Advocates, contains two grounds; namely:

1) That the appeal is incompetent for containing a Drawn Order which is not properly dated and signed.

2) That the appeal is incompetent as it was not instituted within 60 days period prescribed under Rule 83(1) and the appellants cannot rely on the "Certificate of Delay" issued by the Registrar of the High Court as there is failure by the appellant to comply with Rule 83(2) of the Court of Appeal Rules, 1979.

On the first ground, Mr. Muganyizi, learned advocate who argued the preliminary objection on behalf of the respondent submitted that the Drawn Order violated the provisions of Order XX rule 7 of the Civil Procedure Code (CPC) as the date of the Order was not consistent with the date of the delivery of the Ruling. He submitted that on that account the appeal was not properly before the Court and ought to be struck out.

On the second ground of preliminary objection the learned counsel submitted that the letter appearing on page 290 of the record of appeal, of which they were served, did not apply to the subject of appeal. He argued that the appeal was time barred in the

circumstances as the appellants could not rely on the exception provided under rule 83(2) of the Court Rules.

Responding on behalf of the appellants, Mr. Magafu, learned advocate argued that there is no provision in the CPC which states that a Drawn Order must be signed on the same date that the ruling is delivered. He went on to point out that whereas Order XX rule 7 of the CPC provides for the signing and dating of decrees, the law was silent as regards drawn orders. He further argued that 3rd December 2003 appearing on the Drawn Order was the date that the decree was extracted. He asked us to dismiss the first point of preliminary objection for lack of merit.

On the second point of preliminary objection, Mr. Magafu submitted that the letter applying for copies of proceedings, ruling and drawn order was served on the respondent's advocates on 29.09.2003 a copy of which appears on page 240 of the record of appeal. He showed to the Court a copy of the letter which was signed by someone from the office of the respondent's counsel. He was also of the view that what is important is the service of the letter upon the other party and that the non-inclusion of the same in the record of appeal does not make the appeal incompetent. The learned counsel was however apologetic about the apparent discrepancy between the index and the actual record.

Starting with the second point of preliminary objection, it is true that the letter appearing at page 240 of the record of appeal, which is the letter relevant to the matter before us does not bear the signature of an officer from the offices of the respondent's counsel. However, as already indicated above, the Court was shown a copy of the letter that was signed by someone from the office of the respondent's advocates. Mr. Muganyizi argued that proof of service of the letter upon them ought to have appeared in the record of appeal. Whereas we agree that the way the record of appeal is presented leaves much to be desired, nevertheless we do not consider that the lack, in the record, of the letter containing the signature of the other party to be fatal to the appeal. We are of the settled view that what the law strictly requires under rule 83(2) of the Court Rules is that the other party be served with the letter asking for the documents mentioned. In this case, the other party was served. Ideally, a copy of the letter bearing the signature of the person upon whom it was served ought to be in the record of appeal. However, in so far as the respondent's counsel was served with the letter in question, and in so far as the letter is not one of the essential documents to be included in a record of appeal in terms of Rule 89 (1) of the Court Rules, we find the second ground of preliminary objection to lack merit.

Regarding the first ground of objection, there is no doubt that the Drawn Order contains a date that is inconsistent to the date that the Ruling was delivered. The Drawn Order states in part as follows:

"This application coming before S.A. Lila District Registrar for delivery of Ruling prepared by Hon. Ihema, Judge this 22nd Day of September, 2003 in the presence of Malegesi learned counsel for the Respondent and in the absence of applicant.

THIS COURT DOETH HEREBY ORDER THAT

The application be and is hereby granted. The proceedings in employment cause no. 137/96 are declared a nullity. They are quashed with costs.

The Respondent will have to return to the applicant the sum of Tshs 114, 6000, 000/= obtained in execution of the nullified proceedings.

BY THE COURT

Given under my hand and the seal of the Court this 3rd day of December 2003.

DISTRICT REGISTRAR."

Reading through the Drawn Order it appears that the ruling was given on the 3rd of December 2003. The record of the High Court however, shows that the ruling, which was not dated by the trial judge, was delivered to the parties on 22nd September 2003. This is the date that ought to have been shown on the Drawn Order. Mr. Magafu's contention that 3rd December is the date that the Drawn Order was extracted is not sustainable because the record does not bear him out.

Mr. Magafu urged us to find that disparity in dates does not affect the competency of the appeal as, unlike with decrees, the law is silent on Drawn Orders regarding the dates which they are to bear. This Court has, on a number of occasions had an opportunity to deal with a similar situation. One such occasion is in the case between **Mkama Pastory and Tanzania Revenue Authority** (Civil Appeal No. 95 of 2006) unreported. The Court in that case made reference to comments in **Mulla** on the Code of Civil Procedure (fifteenth edition at page 1524) with regards to dating and signing of decrees. The author, referring to Order XX rule 7 of the Indian Civil Procedure Code, which is similar to Order XX rule 7 of our own Civil Procedure Code stated:

"Under this rule, the decree comes into existence on the date of the judgment, though it is signed later. Decree comes into existence as soon as the judgment is pronounced and not on the day it is signed and sealed later. For the purpose of appeal, time runs from the date of pronouncement of the judgment."

This Court in the **Mkama** case (supra) referring to the above statement went on to say:

"We think that is the correct position in law. We also think that, again, on a parity of reasoning, the same should be the case with extracted orders mutatis mutandis.

The date of a decree, and by extension of an order, is important not in reckoning the time for appeal but also for

purposes of period of limitation in the case of an application to set aside an ex parte order. Furthermore, the right to execute a decree or order accrues from the date it is pronounced, not on the day it is signed. We are therefore, firmly of the view that an order which does not bear the date when the judgment or ruling was pronounced is not valid. It follows that an appeal to this Court which does not contain a correctly dated decree or order will not have complied with the requirements of Rule 89 (1) (h) of the Court Rules, 1979.”

Other cases where appeals were found to be incompetent on account of wrongly dated decrees include **Abdallah Rashid Abdallah v. Sulibu Kidogo Amour & Said Issa Said**, Civil Appeal N. 94 of 2006, (unreported) and **Haruna Mpangaos & 902 others v. Tanzania Portland Cement Ltd.**, Civil Appeal No.10 of 2007 (unreported).

The position as it stood in **Mkama Pastory** case (supra) has not yet changed.

In the circumstances we sustain the first ground of preliminary objection raised. We find the appeal to be incompetent for want of a correctly dated drawn order and we accordingly strike it out with costs.

DATED At DAR ES SALAAM this Day of

E. N MUNUO
JUTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL