

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: KIMARO, J.A., MUGASHA, J.A., And MZIRAY, J.A.)**

**CIVIL APPEAL NO. 33 OF 2010**

- 1. UNIVERSAL ELECTRONICS AND HARDWARE LIMITED**
- 2. ELISANTE ELIKANA MURO** .....APPELLANTS
- 3. DISMAS PETER LYIMO**

**VERSUS**

**NATIONAL BANK OF COMMERCE LTD..... RESPONDENT**

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

**(Kalegeya, J.)**

**Dated the 10<sup>th</sup> day of December, 2004**

**in**

**Commercial Case No. 198 of 2002**

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**RULING OF THE COURT**

**29<sup>th</sup> June & 22<sup>nd</sup> July, 2016**

**MZIRAY, J.A.:**

In this appeal, the appellants, have come to this Court with a memorandum of appeal containing eight grounds of appeal seeking to challenge the judgment and decree of the High Court, Commercial Division (L.B. Kalegeya J., as he then was) in Commercial Case No. 198 of 2002 dated 10/12/2004. The appeal has been confronted with a notice of preliminary objection on points of law filed on 24/6/2016 by IMMA Advocates for and on behalf of the respondent Bank. The substance of the preliminary objection

is that the appeal is incompetent as the record of appeal has been filed in violation of Rule 96(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). When the appeal came up for hearing, the appellants were represented by two learned Advocates namely Mr. Mwezi Mhango and Professor Mgongo Fimbo, whereas the respondent enjoyed the services of Mr. Gaspar Nyika, learned Advocate. Before proceeding to argue the preliminary objection, the Court *suo motu* wanted to satisfy itself on the validity of the decree of the High Court appearing on page 233 -234 of the record dated 10/12/2005 which is at variance with the date of judgment of the trial Court. The said judgment is dated 10/12/2004.

Mr. Nyika was quick to the point raised *suo moto* by the Court. He submitted that the decree is dated 10/12/2005, a different date from the date when the judgment appealed against was delivered making the appeal incompetent. On top of that, the learned counsel argued that the appellant has not included in the record of appeal the application for extension of time to give notice of appeal, the proceedings and its ruling made by the High Court Commercial Division. He pointed out that the failure to include these documents in appeal is a serious misdirection contravening the provision of

Rule 96(1) of the Rules, rendering the appeal incompetent. To fortify his argument the learned counsel referred the Court to the cases of **Fortunatus Masha vs William Shija and another [1997] TLR 41** and **Azim Seleman Premji v. Attorney General and Dr. Aman Walid Kabourou [1999] TLR 457** in which both cases insisted that Rule 96 must be adhered to and if the record of appeal is incomplete then, the appellant would have a choice to file a supplementary record. On that basis, Mr. Nyika urged the Court to strike out the appeal for being incompetent.

In reply, Mr. Mhango from the outset readily conceded the defect in the decree that the same bears a different date from that of the judgment delivered. However, the learned counsel objected the other grounds of the preliminary objection raised and asked leave of the Court for Professor Fimbo to respond on the same. Professor Fimbo adopted the appellants written submission filed on 28/6/2016 and argued in addition that application for extension of time is not one which can fall under the ambit of Rule 96(1) of the Rules as alleged. Equally, Professor Fimbo attacked the preliminary objection raised stating that the same does not meet the conditions set in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd**

[1969] E.A 696 as the preliminary objection is not based on a pure point of law. He distinguished the cases cited by Mr. Nyika, learned counsel and maintained that the raised points are not *per se* pure points of laws. Professor Fimbo further raised his concern for the need to verify the date of the judgment from the original record.

Having heard the arguments from both counsels, on our part, we wish to start the discussion with the point which the Court raised *suo motu* on the apparent defect in the drawn decree which both parties conceded to and which we think, had the effect of disposing of the appeal.

In this point, we wish to start with the requirement of the law under Order XX Rule 7 of the Civil Procedure Code, Cap. 33 R.E. 2002. It reads,

***"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."***

[Emphasize supplied].

The law therefore requires for the date of the decree to tally with the date of the judgment and if the two dates vary then it renders the decree invalid. To ascertain the exact date of the decision, we took the trouble of going through the original record to verify the date of the decision and upon perusal, we were satisfied that Kalegeya, J. (as he then was) signed the judgement of the High Court on 12/10/2004. This certainly cleared the doubt raised by Professor Fimbo.

As correctly conceded by the learned counsels, it is settled law that a decree which is invalid cannot form part of the record of appeal. (**See Primus Kiiza v. Hassan Anussa**, Civil Appeal No. 26 of 2007). **The Managing Director Shimbiko Bar & Guest House v. Simon Ibrahim**, Civil Appeal No. 5 of 2006 and **Kapinga & Advocates v. National Bank of Commerce**, Civil Appeal No. 42 of 2007 [All unreported].

In the present case it need not be gainsaid that the decree in the record of appeal bears a different date from that on which the judgment was pronounced. As conceded by both Counsels, the judgment was delivered on 10/12/2004 while the decree was signed and sealed on 10/12/2005. The

difference in dates renders the decree to be invalid as it has not complied with Rule 96(1) (h) of the Rules and it also offends the mandatory provisions of Order XX rule 7 of the Civil Procedure Code.

That said, and since this point disposes the matter, we will not labour in entertaining the other grounds of objection. We, as a result, strike out the appeal. As the point was raised *suo muto* by the Court, we make no order as to costs.

**DATED** at **DAR ES SALAAM** this 12<sup>th</sup> day of July, 2016.


N.P. KIMARO  
**JUSTICE OF APPEAL**

S.E. MUGASHA  
**JUSTICE OF APPEAL**

R.E.S. MZIRAY  
**JUSTICE OF APPEAL**

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



  
T. K. SIMBA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**