IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

LAND APPEAL No. 4/2020

(Originating from application No. 50 of 2017 from District Land and Housing Tribunal of Rukwa at Sumbawanga)

PIETA SONGOLOKA ..... APPELLANT

Versus

BELGA FUNGAMEZA .....1ST RESPONDENT

ALBINA KAPANDILA ..... 2ND RESPONDENT

RULING

W.R. MASHAURI, J.
13/08/2020 & 11/09/2020

On 17th January, 2020 appellant lodged appeal after being dissatisfied with the decision of District land and Housing Tribunal of Rukwa at Sumbawanga, petition of appeal has six grounds of appeal and prayed her appeal be allowed. Upon being served to appear before the court, respondents while represented by learned brother Peter Kamyalile (Advocate) on 06th may, 2020 raised and filed one preliminary objection that *"that this appeal is incompetent for failure to attach the decree contrary to order XXXIX Rule 1 of the Civil Procedure Code, Cap 33 R:E 2019"*

It was Thursday, 7th May, 2020 interparty court order to dispose of preliminary objection by way of written submission was granted and court schedule were on 14th May, 2020 respondent to file his written submission and applicant to reply on/before 28th May, 2020 and rejoinder if any to be filed on 03rd June, 2020. 4th June, 2020 was schedule for necessary orders.

On the fateful date of 14th May, 2020 counsel for respondents filed his written submission in supporting the preliminary objection while appellant nothing filed as to his fateful date. Respondents submitted that under order XXXIX Rule 1 of the Civil Procedure Code. Cap 33 R:E 2019 every appeal to the high court from the decision of District Land and Housing tribunal in exercising its original jurisdiction shall be made by memorandum of appeal and shall be accompany with a copy of decree. Failure to attach a copy of decree renders the appeal incompetent and out to be dismissed. Respondents refers authorities to give legitimacy to arguments cited article 107A(2)(e) of the Constitution of United Republic of Tanzania as well as the case of NEMES MWANISENGA Vs SIZALA MWANANDENJE Civil Appeal 11 of 2017 HC Sumbawanga (unreported) page 10-11. Respondents closed his submission.

In the side of Appellant nothing filed to defend the position, its just the failure to appeal with no reasons.

Stepping into preliminary objection of the respondents, the question is whether the preliminary objection has merit?

As to record, it is true that the petition of appeal is not accompany with the decree it have only judgment. Fine! But Land Disputes Court Act Cap 216 R.E 2019 Part VI Section 41 state that *"**Subject to the provisions of any law** for the time being in force,"* (**emphasis is mine**) that in appealing to High Court other provision of law may be subject to, this make to invoke Civil Procedure Code Cap 33 R.E 2019 on whether the decree is mandatory in appeal? Yes! The answer is in the affirmative, nothing repudiate it, memorandum shall be accompanied by a copy of the decree appealed against and (unless the Court dispenses therewith) of the judgment on which it is founded. (Order XXXIX Rule 1 of Cap 33, **supra**) it's trite legal principles under the law that the word 'shall' makes the act to be must (**see, Cap 1 R.E 2019**, **section 53**) without hesitation the decree is mandatory in appeal. As was held in the case of **Rose Mbwambo vs Tanzania Tourist Board** Civil Appeal No. 95 of 2010 CAT (unreported) *"it is mandatory that a record of appeal must contain, among other documents, a copy of a decree"* (**see also** –

Bahadurali Shamji & another vs The Treasury Registrar Ministry of Finance Tanzania & others Civil Appeal No. 04 of 2003)

The omission of decree in appeal renders the record of appeal defective and appeal itself incompetent, as it was held in the case of **James Mosha vs Shose Jared Mkonyi** Civil Appeal No. 40/2012 CAT (unreported) *"in the absence of the decree, the appeal was incompetent"* (**see also – M/S Majembe Auction Mart vs Charles Kaberuka** Civil Appeal No. 110 of 2005 CAT at Mwanza, February 2007 (unreported))

As to that position of law, no way makes this appeal healthful. In the event, and for the foregoing reasons, the preliminary objection raised is sustained. Consequently the purported appeal is struck out with costs.

THE HIGH COURT OF TANZANIA
MWANZA

W.R. Mashauri
Judge
11/09/2020