

<p>Civil Appeal No 4 of 2003 in the court of Appeal of Tanzania at Dar es Salaam</p>	<p>DAHABURALI E. SHAMJI TADEMA OVERSEAS LIMITED Vs.</p> <p>1. The Treasury Registrar Ministry of Finance Tanzania.</p> <p>2. The Attorney General of the United Republic of Tanzania.</p> <p>3. Holiday and Resort Investment Limited</p> <p>4. Alnoor Jamal</p> <p>5. Shabir Abji</p> <p>Appeal from the decision of the High Court of Tanzania at Dar es Salaam by Nsekela, J. In Misc Commercial case No.14 of 2001.</p>	<ul style="list-style-type: none"> - Mandatory requirement to annex properly signed decree in the memorandum of Appeal (order xx Rule 7 of the CPC) - Requirement to comply with order xxx19 Rule 35 (1) of the CPC – properly date of the decree. - Requirement under rule 86(3) of the Court of Appeal Rules, which requires the memorandum of appeal to be signed by the Registrar. - Filing of supplementary record intended to defeat preliminary objection case of DAMAS NDAWEKA Vs. Ally Said Mtera, Civil Appeal No.5/99 (unreported)
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**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CORAM: (MSOFFE, J. A., KAJI, J. A., And KIMARO J. A.)

CIVIL APPEAL NO. 4 OF 2003

BAHADURALI E.SHAMJI.....1ST APPELLANT
TADEMA OVERSEAS LIMITED.....2ND APPELLANT

VERSUS

**THE TREASURY REGISTRAR
 MINISTRY OF FINANCE TANZANIA1ST RESPONDENT
 THE ATTORNEY GENERAL OF THE UNITED
 REPUBLIC OF TANZANI.....2ND RESPONDENT
 HOLIDAY AND RESORT INVESTMENTS LTD.....3RD RESPONDENT
 ALNOOR JAMAL.....4TH RESPONDENT
 SHABIR ABJI..... 5TH RESPONDENT**

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

(Nsekela, J.)

**dated the 19th day of September, 2002
 in
 Misc. Commercial Case No. 14 of 2001
**

7 & 17 December, 2007

RULING OF THE COURT**MSOFFE, J.A.:**

This appeal arises from the Ruling of the High Court (Commercial Division) dated 19/9/2002 dismissing Misc. Commercial Case No. 14 of 2001. Mr. Tom Nyanduga, learned counsel, is advocating for the appellants. Ms. Monica Otaru, learned Senior State Attorney, appears for the first and second respondents. The third, fourth and fifth respondents are represented by Ms. Victoria Makani, learned advocate.

On 23/5/2007 the first and second respondents filed a notice of preliminary objection under Rule 100 of the Court Rules, 1979. The substance of the preliminary objection is that the appeal is incompetent for want of a properly signed decree in contravention of the mandatory provisions of **Order XX Rule 7** of **The Civil Procedure Code** (Cap 33 R. E. 2002)

On 30/4/2007 the third, fourth and fifth respondents filed a notice of preliminary objection to the above same effect. On 21/6/2007 these respondents filed a supplementary notice of preliminary objection containing two points. **One**, the decree is not properly dated thereby contravening the mandatory provisions of **Order XXXIX Rule 35 (1)** of the Civil Procedure Code. **Two**, the memorandum of appeal is not in conformity with Rule 86 (3), specifically that it was not signed by the Registrar.

On 7/12/2007 the appeal was called on for hearing. On this day it transpired that the appellants had invoked the provisions of Rule 92 (3) and filed a supplementary record of appeal containing a properly signed

decree just the previous day, that is on 6/12/2007. Consequently, Ms. Monica Otaru argued that this was done in order to defeat the preliminary objection. She invited us to ignore the supplementary record of appeal and proceed to determine the preliminary objection on merit.

In reply, Mr. Tom Nyanduga pointed out that the supplementary record of appeal was not filed in order to defeat the preliminary objection. Rather, this was done pursuant to, or to keep in line with, the directions given by this Court in **NBC Holding Corporation v 1. Mazige Mauya (2) Mwanahamisi Mr. Bilali**, Civil Appeal No. 36 of 2004, thus:-

*"With regard to pending appeals **not yet scheduled for hearing**, parties would be well advised to resort to Rule 92 (3) of the Court of Appeal Rules, 1979, to rectify defects and regularize the same in conformity with the law."*

(Emphasis supplied)

With respect, we do not agree with Mr. Tom Nyanduga for reasons which will be apparent hereunder.

Mauya's case (supra) was relevant in pending appeals "not yet scheduled for hearing." As it happened, this appeal had already been scheduled for hearing when the supplementary record was filed on 6/12/2007.

A more or less similar situation arose in the case of **Damas Ndaweka v Ally Saidi Mtera**, Civil Appeal No. 5 of 1999(unreported). In that case, a notice of preliminary objection was filed. Consequently, the appellant's advocate lodged a supplementary record of appeal which contained, among other documents, Exhibit DA. The respondent's advocate objected and argued that this was done to defeat the objection. In resolving the issue this Court observed:-

*"On the second objection, we agree in principle with Mr. Chadha that a party cannot be permitted to defeat a preliminary objection notice of which has already been lodged. There are decisions of this Court to that effect, including **Mtale v Kermali** (1983) TLR 50 where it was held that a notice of motion seeking extension of time to file a supplementary record of appeal is no answer to an objection regarding the competency of the appeal.*

The position is that once a notice of preliminary objection is lodged, the time to remedy the deficiency complained of lapses and Rule 92 (3) cannot be called in aid.”

With respect, the reasoning in **Ndaweka** applies to this case. Once the notice of preliminary objection was lodged it was no longer open to the appellants to remedy the deficiency complained of by filing a supplementary record of appeal. We wish to add that although the provisions of **Rule 92 (3)** permits an appellant to lodge a supplementary record of appeal “at any time”, the **sub – rule** should be construed to harmonise with, rather than defeat, the provisions of Rule 100 which permits preliminary objections.

That said, we wish to observe that there is no dispute that the decree in this appeal was signed by the Registrar. It was not signed by the Judge who passed it. This contravenes the mandatory provisions of **Order XX Rule 7** of the Civil Procedure Code to the effect that a decree must be signed by the Judge or Magistrate who passed it. In the case of **Ndwaty Philemon Ole Saibul v Solomon Ole Saibul**, Civil Appeal No. 86 of 1998 (unreported), this Court underscored the significance of the

requirement that a decree be signed by the judge who passed it. The Court stated:-

"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."

Indeed, such signature is mandatorily required because it "authenticates the decree" – See **Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) v Adam Molled**, Civil Appeal No. 2 of 1990 (unreported).

It follows that this appeal lacks a valid decree. Thence it suffers from non – compliance with the mandatory provisions of **Order XX Rule 7** of the Civil Procedure Code, read together with **Rule 89 (1) (h)** of the Court Rules in which a decree is listed as an essential document in a record of appeal. The appeal is therefore, incompetent. Ms. Monica Otaru, Ms. Victoria Makani and Mr. Tom Nyanduga agree that much. Mr. Tom Nyanduga has however, invited us to extend time so that the incompetent appeal, once struck out, may be re – instituted in line with

this Court's decisions in **Mauya** and **Tanzania Sisal Authority v Andrew Wilson Nkuzi**, Civil Appeal No. 34 of 2004(unreported).

With respect, we are not inclined to accede to the invitation to extend time to re – institute the incompetent appeal once it is struck out. The decisions in **Mauya** and **Nkuzi** were given on 3/6/2005. Yet two years, or so, later the appellants did nothing to conform with the advice given in **Mauya** for parties "to rectify defects and regularize the same in conformity with the law." If the appellants were serious we think in the light of this Court's decision in **Ndaweka** they could have rectified the defect before notice of the first preliminary objection was lodged on 30/4/2007. Rectification after that date would amount to pre- empting the objection.

We also note that the appeal was lodged on 20/1/2003. The appellants had ample time from that date to 30/4/2007 to rectify the defect if they had wished. It is now too late in the day to ask for the Court's indulgence.

It seems to us that the appellants do not appear to have taken seriously this Court's decisions in **Mauya, Nkuzi** (supra), **Tanganyika Cheap Store v National Insurance Corporation**, Civil Appeal No. 37 of 2001 (unreported), **The Managing Director, Tanga Cement Company Ltd. v Jumanne Masangwa and Another**, Civil Appeal No. 62 of 2003 (unreported), **Anjum Vicar Saleem Abdi v Naseem Akhtar Zangie**, Civil Appeal No. 73 of 2003 (unreported), and many others, on the importance of a valid decree in an appeal.

The above cases, and many others of their time, were "wake up calls," so to speak. The Court has since then taken a firm stand that it will not extend time for the re-institution of appeals accompanied by invalid decrees - See for instance **Morogoro Polyester Textile Limited and Another v M/S Technical Trading Services Company Limited**, Civil Appeal No. 81 of 2003 (unreported) and **The Treasury Registrar and Others v Abdallah Kipanga and Others**, Civil Appeal No. 33 of 2006 (unreported).

At this juncture, we wish to address, briefly, the preliminary objection taken at the instance of the third, fourth and fifth respondents that the decree is not properly dated and that this contravenes the mandatory provisions of **Order XXXIX Rule 35 (1)** of the Civil Procedure Code. Ms. Victoria Makani submitted that the Ruling the subject of this appeal was pronounced on 19/9/2002, yet the decree is dated 20/11/2002. This, she contended, contravenes the above provisions. A decree which is not properly dated is invalid, she further submitted, and urged us to strike out the appeal in line with this Court's decision in **Ami (Tanzania) Limited Vs OTTU on behalf of P.L Assenga and 106 Others**, Civil Application No. 76 of 2002 (unreported) and the more recent decision in **Uniafrico Limited and Others Vs Exim Bank (T) Limited**, Civil Appeal No.30 of 2006 (unreported). With respect, this objection need not detain us. The decree in this appeal was passed by the High Court (Commercial Division) in the exercise of its original jurisdiction. It was not a decree in appeal for which, in an ideal case, the provisions of **Order XXXIX Rule 35(1)** of the Civil Procedure Code could have been invoked. It follows that the objection is not properly grounded, and we need not say anything further.

In the upshot, the appeal, being incompetent for want of a valid decree, is hereby struck out with costs.

Having reached the above conclusion there is no need for us to discuss and determine the objection on non-conformity of the memorandum of appeal with the provisions of Rule 86(3).

DATED at DAR ES SALAAM this 12th day of December, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

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

I.P. KITUSI
DEPUTY REGISTRAR