

Civil Application No.59 of 2001 – Court of Appeal of Tanzania at Dar es Salaam – Mroso, J.A, Nsekela, J.A and Kaji, J. A	The Registered Trustees of NBC Club VS. NBC Holding Corporation (Appeal from the High Court of Tanzania at Dar es Salaam – Civil Case No. 241 of 1999 – Manento, J.)	- If the order is of dismissal of the suit/plant yet in actual fact condusively determine the rights of the parties, that the impugned decision amount to a decree and appellat will have right to appeal as of right under S. 5(1)(a)* see also definition of Decree in CPC 1966. That means it will not require leave of the Court as under S.5(1)c of the *Appellate Jurisdiction Act, 1979. *Appellate Jurisdiction Act.
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**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MROSO, J.A, NSEKELA, J. A; And KAJI, J. A.)**

**CIVIL APPLICATION NO. 59 OF 2001**

**THE REGISTERED TRUSTEES OF NBC CLUB.....APPLICANT**

**VERSUS**

**NBC HOLDING CORPORATION.....RESPONDENT**

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

**(Manento,J.)**

**Dated the 20<sup>th</sup> day of March, 2000**

**in**

**Civil Case No. 241 of 1999**

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**R U L I N G OF THE COURT**

**22<sup>nd</sup> May & 19<sup>th</sup> September, 2006**

**KAJI, J. A. :**

In this appeal the appellants, the Registered Trustees of NBC Club, are appealing against the ruling of the High Court at Dar es Salaam (Manento J, as he then was) dated 20/3/2000, in civil case No. 241 of 1999.

In that case the appellants were the plaintiffs and the respondent NBC Holding Corporation was the defendant.

In the written statement of defence the respondent / defendant raised a preliminary objection on a point of law that the plaint did not disclose cause of action, apparently in contravention of Order VII Rule 1 (e) of the Civil Procedure Code, 1966. The objection was sustained and the plaint was dismissed. The learned trial judge did not cite the provision under which he dismissed the plaint. But it would appear he probably had in mind Order VII Rule 11 (a) of the Civil Procedure Code, 1966 which provides for the consequences of a plaint lacking a cause of action. The appellants were dissatisfied with the decision; hence this appeal.

When the appeal was called on for hearing, the Court, suo motu, noted that no leave was granted to the appellants by either the High Court or this Court to lodge the appeal. We asked learned counsel of both parties to address us on whether the appellants could

properly lodge this appeal which is against a ruling on a preliminary matter, as of right, under section 5 (1) (a) of the Appellate Jurisdiction Act, 1979 (hereinafter to be referred to as the Act), or could only do so with leave of either the High Court or of this Court under Section 5(1) (c) of the Act.

Mr. Mhango, learned counsel for the appellants, was of the view that by dismissing the plaint, the High Court conclusively determined the rights of the appellants, especially that the learned trial judge strayed into the merits of the case. In that respect, the learned counsel was of the view that the decision amounted to a decree, and the appellants could properly appeal as of right under Section 5 (1) (a) of the Act. On the other hand Mr. Rweyongeza, learned counsel for the respondent, was of the view that the decision did not amount to a decree, and so it was necessary for the appellant to have leave by either the High Court or this Court before lodging the appeal.

It is common ground that the decision being appealed against is a ruling on a preliminary point of objection. The respondent / defendant raised a preliminary objection that the plaint did not disclose a cause of action. The learned trial judge sustained the objection and dismissed the plaint. Whether it was proper to dismiss the plaint instead of rejecting it under order VII Rule 11 (a) of the civil procedure code, 1966 will be determined in the course of

hearing the appeal in the event the current issue is resolved in favour of the appellants, because that is one of the grounds of appeal.

At this stage, and particularly for the purpose of this case, we think, the crucial issue for determination is whether in the circumstances of the case the appellants could properly lodge the appeal as of right under section 5 (1) (a) of the Act or could only do so with leave of either the High Court or of this Court under Section 5 (1) (c) of the Act. The right of appeal under section 5 (1) (a) is provided as follows:-

5(1): In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal:-

(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the civil procedure code, 1966, in the exercise of its original jurisdiction."

The word "decree" as defined under section 3 of the civil procedure code, 1996 has the following meaning:-

“Decree” means the formal expression of an adjudication which, so far as regards the court expressing it conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint.....”

In the instant case we had the opportunity to peruse the impugned ruling. We have noted with some concern that, instead of confining himself to the preliminary objection raised, the learned trial judge went further and made some findings on the merit of the case, presumably by perusing the pleadings and written submissions by learned counsel of both parties. Thus, although on the face of it the order appears to be a dismissal of the plaint, yet in actual fact the learned trial judge conclusively determined the rights of the parties. In that respect we agree with Mr. Mhango, learned counsel for the appellants, that the impugned decision amounted to a decree, and that the appellants had a right of appeal as of right under section 5(1) (a) of the Act.

For that reason, it is our holding that the appeal is properly before the court. Since the current sessions are coming to an end, this appeal will be heard in the next sessions.

DATED at DAR ES SALAAM this 19<sup>th</sup> day of September, 2006.

J. A. MROSO  
JUSTICE OF APPEAL

H. R. NSEKELA  
JUSTICE OF APPEAL

S. N. KAJI  
JUSTICE OF APPEAL

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

N. P. Z. CHOCHA  
**Ag, DEPUTY REGISTRAR**