THE REPUBLIC OF UGANDA

IN THE HIGH COURTT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. DR. MFP. 5/89

(Oigina1Civil Appeal No. MFP 66/87)

(Original Butiiti Civil Suit No. MFP 16/86)

ROBERT BIISO::APPELLANT

VERSUS

MARY TIBAMWENDA:::RESPONDENT

BEFORE: THE HONOURABLE JUSTICE I. MUKANZA

RULING

When his appeal was called for hearing the learned counsel appearing for the respondent/plaintiff raised a preliminary objection to the appeal and hence this ruling.

Mr. Nyakabwa submitted that there was no proper appeal before the court because the decision being appealed against the Chief Magistrate's decision had not been reduced to the requirement of section 232 (1) (c) of the Magistrates Courts Acts 1970 which states:-

> *"An appeal shall lie from decrees and orders passed or made in appeal by a Chief Magistrates with the leave of the Chief Magistrate or the High Court to the High Court."*

The learned counsel contended that the appeal did not conform with the requirement of that section. An appeal lies against decrees and not mere judgments or rulings to the High Court. It

must be an appeal against a decree or order. That the decree must first be extracted and then an appeal could properly lie before this court.

The learned counsel referred me to a number of authorities among which were the following:-

(a) In Allibhai v Raichura 1953 20 EACA P. 24 (Civil *Appeal)* Digest ACA 1898—1956 where it was held that an appeal does not lie from order where a formal expression of it has not been filed.

(b) Kiwege vs Nathwani 1952 19 EACA (Civil appeals Digest EACA 1898-1956) where, it was held that;

"Decree is the formal expression of adjudication. If there is no "decree" but only the judges reasons for his judgment an appeal there from is incompetent."

Armed with the above authorities Mr. Nyakabwa prayed the court to strikeout the appeal with costs as being incompetent and as not conforming the requirement of section 232 (1) (c) of the Magistrates Courts Act 197O

In his submission to the preliminary objection to the appeal Mr. Kagaba who appeared for the appellant/defendant was of the view that the appeal was properly before court. He argued that though the appeal was filed under the provision of the Magistrates Court Act 1970 and then under subsection 9 of the same section it was nevertheless at the same time governed by the provisions of the Civil Procedure Act Section 1(2) which states:-

"This act shall extend to proceeding in the High Court and in all subordinate to Courts and Magistrates courts."

The learned counsel therefore contended that the proceedings of the High Court and that of the Magistrates Courts become governed by the Civil Procedure Act in that the appeal was properly filed in compliance with order 39 rules 1 & 2.

The learned counsel then laboured to explain what amounted to a decree under that CPA, CPR and MCA 1970 and the definition of decree as explained by Mosley Witlay Law Dictionary 7th

Edition. He then referred me to order 18 rules 6 & 7. He argued that in the above rule it was the successful party that extracts the decree. He contended that since he was not the successful party it was not his duty to prepare the decree.

And on the prayer by the learned counsel for the respondent that the appeal be struck out he submitted that the prayer would serve only one thing to dismiss the appeal. He prayed that leave should not be granted, because once the appeal was struck out there would be no reverse gear since the appeal was coining to this court by leave of another court and one thrown out they would not go back to the Chief Magistrate to obtain another leave to appeal to the High Court. He referred me to the case of Nasanga vs Nanyonga 1977 HCB P. 319 where in one of the holdings it was held that:-

"Rules of Civil Procedure are a guide to the orderly disposal of a suit and a means of achieving justice between the parties. They should never be used to deny justice to a party entitled to a remedy."

He submitted that the appeal should not be struck out simply because of the procedural irregularities but rather should be allowed to file in papers and rectify procedural errors. .

The learned, counsel further referred me to sections 101 and *103* of the Civil Procedure Act Cap 65 which empowers this court to use its inherent powers to allow the correction of any error before, the court in order to meet the ends of justice. He referred me to the case of Iron and Steel wares Ltd vs. Martyr 1956, 23 EACA P. 175 (Civil Appeals Digest EACA 1898-1956 P.2 where it was held that,

> *"The High Court has a discretion to waive the strict application of the rule and has a duty to ensure that each party is given a fair opportunity to its case and to answer the case made against it when new cases are quoted in reply, the party will be allowed to address the court on such new cases and points not argued before the court previously."*

The learned counsel finally submitted that the preliminary objection be overruled with costs and that the appeal be proceeded with on it merits.

I have given anxious consideration to the forceful submissions by the learned counsels for both parties and have come to inevitable conclusions that there are a wealthy of authorities both from this court and the defunct East African Court of appeal that an appeal to the High Court must be against a decree which must de extracted and filed See **Mukasa vs Ochote 1968 EA P.89 Gudidu s/o Dididu v, Abdalla Mugamba CA MM 6 of 1981.**

In the defunct court of appeal for East African in the case of ***Sa*rrab Incorporated vs the official Receiver and provisional liquidator 1959** EA P.5. It was held that failure to extract a formal decree before filling the appeal was a defect going to the jurisdiction of the court and could not be waived and that rendered the appeal incompetent. See also **Gillen vs Kunlner 1954 21 EACA P.123 (Civil Appeals Digest EACA 1898-1956 P.96, Old East African Trading Company Ltd vs Jatha 1956 23 EACA Page 264. In Sesirya Nakanwagi vs Kyagwe Motors 1964 EACA P.4.**

Also a decision of the then East African Court of appeal the appeal was said to be incompetent and was struck out because no formal order giving effect to the decision of the district Court hadever been drawn up.

With Regard to decisions of this court over the same issueSee Civil appeal No. 48/82 kolibo vs Seyadu High Court Sitting at Sonoti decision of Karokora J. and to fortify all this section 232 (1) (c) states that appeals to the High Court shall lie from decree and orders passed or made in appeal by the Chief Magistrate with leave of the Chief Magistrate pr of the High Court to the high Court.

In he instant case no decree was extracted from the judgment of the learned Chief Magistrate and as such there was no appeal competent before this court. The learned counsel appearing for the appellant argued that the appeal was properly filed in compliance with order 39 rules 1 & 2.

"Rule 1(1) of order 39 of the civil procedure rules states. That every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the court or to such officer as it shall appoint in that behalf and Rule 1(2) says,

The memorandum shall set forth, concisely and under district heads the grounds of objection to the decree appealed from without any argument or narrative and such grounds shall be numbered consecutively."

It is true that the memorandum of appeal was duly filed and signed by the advocate appearing for the appellant in fulfillment of the requirements of the provisions of rule 1(1) of order *39* Supra and the same was handed over to the Civil Registry. It is also true that the procedures laid down in rule 1(2) of the order was complied with when drafting the memorandum but the decree the it was appealed against was not extracted as required by the same rule (1) (2). I do not agree with the learned counsel for the appellant that the filing of the memo alone without extracting the decree was in itself enough as that tantamounted to a direct contravention of the provisions of order 39. I am of the view that the memorandum of appeal has to be accompanied with the decree that was being appealed against. Moreover the two have to be read together where an act creates an obligation and enforces the performance in specified manner as a general rule performance cannot be enforced in any other manner **Lord Tinterden in Doe V Bridges 1831 AB & AD 847 r 859** quoted with approval in Seruwano Kulubya vs Mistry Singh 1961 E*A P.*157 at P.162 (d).

Since S. 232 (1) (c) of the Magistrates Court Act 1970 lays down that an appeal shall lie to this court from decrees and orders passed by a Chief Magistrate the appellant has got no choice but to comply with the provisions of the Law by extracting a decree. Non compliance would in the circumstances render the appeal incompetent and there was nothing being appealed against in the instant case.

With regard to the contention by the learned counsel for the appellant that since he was not the successful party he was not obliged to extract the decree as per order 18 r 6 & 7. It is true that under order 18 rule 7 (2) it was the duty of the party who is successful in the High Court to prepare without delay to draft decree and submit it for the approval of the other parties to the suit & extra.

Order 18 r 7 (2) envisages a situation where the matter and or decision has been made by the High Court and a decree has a be extracted by the successful party, but here we are dealing with

a situation where the appellant has not complied with the provisions of 232 (1) (c) the Magistrates Courts act 1970 in that he failed to extract the decree from the judgment/decision of the Chief Magistrates court which decree would have been the subject of appeal to this court. I am of the view that order 18 *r* 7 (2) and section 232 (1) (c) of the MCA 1970 deal with two different situations one deals with decrees to be extracted after judgment has been made in the High Court and the other deals with the extraction of decrees in the Chief Magistrates court to be appealed against to the High Court. I find that there was no judgment of the Chief Magistrates court to be appealed against to the High Court and since no decree has come into existence this appeal was incompetent and premature.

The learned counsel for the appellant was of the view that the failure of the appellant to extract a decree was mere irregularities and that the appellant should be allowed to rectify the errors by filing in other papers. He referred me to Nasanga's case Supra. I have already pointed out the principle in Nasanga's case. That case was distinguishable from the instant case. In Nasanga's case the matter was concerned with award of dowries whether it was Kiganda or Kinyankole customary law which had to be applied to parties who were Banyankole and Resident in Buganda. That case had nothing to do with failure by the appellant to extract a decree from the Chief Magistrates court. The facts there were peculiar to that particular situation.

Similarly in Iron & Steel wares Supra the principles of which has already been given (supra); There the matter was concerned with the statement and production of evidence as given under order *16* r 2 of the Civil Procedure rules. There the plaintiff's advocate started to address the court on the law and the facts and the defendant's advocate objected quoting the rule. It is the considered opinion of this court that Iron & Steel wares case was not an authority to the instant case.

As regards the counsel's prayer that I should invoke provisions of S. 101 & 103 of the CPA and allow the appeal to proceed despite the errors. I think this was an opportune moment to state the provisions of sections 101 & 103 be fore commenting on the same.
S. 101 of the CPA Cap *65* states,

"Nothing in this act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court and section 103 says that

"The court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceedings.

I must point out that the court could not avail itself the provisions of S. 103 to amend the appeal in order to determine the real question raised in the proceedings. S. 232 1 (c) of the MCA 1970 required the appellant to draft the decree to be appealed against which the letter never did. The court could not amend the defect or error because to do so would tantamount exonerating the appellant from complying with the provisions of S.232 (1) (c) of the MCA 1970. The court could not therefore make use of S. 103 under the circumstances.

As regards the prayer by the learned counsel for the appellant that the court uses its inherent powers and permit the appeal to proceed. The law as I understand it is that the courts inherent jurisdiction should not be invoked when there is specific statutory provision which would meet the necessities of the case Hamani .V. National Bank 1937 4 EACA P.55 (Civil appeal Digest EACA 1898-1956).

In the instant case S. 232 (1) (c) of the MCA requires an appellant to the High Court to extract a decree from the Chief Magistrates Court. The appellant had to comply with the provisions of the law. If he failed to do so he could not expect the court to use its inherent jurisdiction and assist him because there was a specific statutory provision laid down under S.232 of the Magistrates Court Act.

Well the sum total of all this is that the preliminary objection to this appeal is upheld. The appeal is struck out with costs to the respondent as being incompetent. It is up to the appellant to find ways of resurrecting the application.

I. MUKANZA

JUDGE

16/3/90