THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL APPEAL NO.46 OF 1997

CORAM: HON. MR. JUSTICE J.P. BERKO, J.A.,
HON. MR. JUSTICE S.G. ENGWAU, J.A. &
HON. MR. JUSTICE A. TWINOMUJUNI, J.A.

KIBUUKA MUSOKE WILLIAM & ANOTHER……. APPELLANTS

VERSUS

DR. APPOLLO KAGGWA……. RESPONDENT

RULING OF THE COURT

The appeal is from the judgment, Decree and orders of the High Court given on the 15th January 1996 in a High C.C.S No. 714/1992.

- Dr. Apollo Kaggwa, (the respondent), had sued W. Kibuuka – Musoke and S. Muwemba (the appellants) in the High Court claiming general and special damages for the appellant's failure to repair, or restore the respondent's water pipes at Mawanga, Buziga. The complaint of the respondent was that the appellants disconnected his water pipes when they were constructing sewerage septic water tanks in the backyard of their compound where his water pipes passed. The claim was in respect of expenses incurred in repairing the water pipes and for getting alternative source of water until the repairs were completed.

  After trial, judgment was entered in favor of the respondent. The court awarded him Shs. 4.5million as general damages and Shs. 1.5 millions special damages and costs. Hence the appeal.

When the matter came up for hearing, Learned Counsel for the respondent, Mr. James Matsiko, raised a preliminary objection that there was no appeal on the ground that the record of

appeal did not contain the Decree extracted from the Judgment appealed against. Reliance was placed on the case of **The Commissioner of Transport v The Attorney General of Uganda and Anor *(1959)* E.A. 329** and Rule 33 of the Court of Appeal Rules. Reliance on Rule 33 of the Court of Appeal Rules was later abandoned when it was pointed out to Counsel that that rule applied to decisions of this court. He prayed that appeal be dismissed.

Mr. Bwanika learned Counsel for the appellant, on the other hand, had contended that the preliminary objection was misconceived. He conceded that under former Court of Appeal for Africa Rules, 1972, the decree was one of the essential documents to be included in a record of appeal. But the law has been changed since the 28th day of October, 1996 when the Court of Appeal Rules Directions, 1996 came into force.

We think there is no doubt that under the former Court of Appeal for East Africa Rules, 1972, appeal was incompetent until the decree was extracted. Under rule *85(l)(h)* of those rules a "decree or order" was one of the documents which the law required to be included in the record of appeal. There are series of decisions relating to the necessity to extract a formal "decree or Order" before an appeal would lie.

The relevant cases are **Ribeiro v Siquera e Facho [1936] AC 300; Mohammedbhai & Co. Ltd v Ghani *(1952)* 19 E A C A 38; Mansion House Ltd. v Williamson (1954) 10 E A C A 98; Farrals Incorporated v Official Receiver and Provisional Lighsdator (1959) E A. *5*, and N.A.S. Airport Services Ltd v Attorney General of Kenyata *(1959)* E A. 53.**

These decisions were under the Kenya Civil Procedure Ordinance. In the case of the **Commission of Transport VS The Attorney General and Anor. (1959*)* E A, 329** the Court said that the principle applies equally in Uganda under The Civil Procedure Ordinance. (Cap 6)

Before the 28th October, 1996 the position of the law, therefore, was that no appeal was competent until a formal decree or order embodying the decision complained of had come into existence. The matter was not merely procedural and that the defect could not be cured under Rule 72 of The Court of Appeal rules. That was the legal position when the Commissioner of Transport case was decided.

Under Rule 82(1) of the Court of Appeal Rules, 1996, an appeal is instituted in this court by

lodging in the Registry……

(a) a memorandum of appeal;

(b) the record of the appeal;

(c) the prescribed fee; and

(d) Security for the costs of the appeal.

Rule 86 sets out a list of documents that are required to be included in the record of appeal. For the purpose of an appeal from the High Court in its original jurisdiction, the record of appeal shall contain copies of the following documents: -

86(1) (a) an index of all the documents in the record with the number of the pages at which they appear.

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent……

(c) the pleadings;

(d) the trial Judge's notes at the hearing;

(e) the transcript of any short-hand notes taken or any other notes recorded at the trial;

(f) the affidavits read and all documents put in evidence at the hearing or if those documents are not in the English Language, certified translations…

(g) the judgment or reasoned order;

(h) the order, if any, giving leave to appeal;

(i) the Notice of appeal; and

(j) any other documents, necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant.

86(3) For the purpose of an appeal from the High Court in its appellate jurisdiction, the record of

appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and shall contain also the following documents relating to the appeal to the first appellate court.

(a) the order, if any ,giving leave to appeal;

(b) the memorandum of appeal;

(c) the record of proceedings;

(d) the judgment or order;

(e) the notice of appeal;

(f) in case of a third appeal to the court, the corresponding documents in relation to the second appeal to the high court and the certificate of the high court that a point of law of general public importance is involved

It is clear from the above provisions that the extraction of a formal decree embodying the decision complained of is no longer a legal requirement in the institution of an appeal. An appeal by its very nature is against the judgment or a reasoned order and not the decree extracted from the judgment or the reasoned order. The extraction of a decree was therefore a mere technicality which the old municipal law put in the way of intending appellants and which at times prevented them from having their cases heard on merits. Such a law cannot co-exist in the context of the provisions of the 1995 Constitution Art 126 (2) (e) where the courts are enjoined to administer "Substantive justice without undue regard to technicalities."

Kenya had similar law but they amended their Civil Procedure Ordinance as far back as 1935 by the addition of the following proviso to the definition of a "decree". "Provided that for the purposes of appeal the word "decree" shall include judgment and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up". This amendment did away with necessity of extracting

a formal decree before an appeal would lie.

The only instance where a decree forms part of the record of appeal is specifically provided for in sub-rule (10) of Rule 86 of Court of Appeal Rules which provides:

"86(10) The decree shall only form part of the record of appeal, where the date of any decree is disputed, or the terms of the decree are disputed as being at variance with the judgment upon which the decree is drawn, or where the terms of the decree form a ground of appeal, unless the court otherwise directs".

The appeal in this case is not disputing the date of the decree. It is not saying that the terms of the decree are at variance with the judgment upon which the decree was drawn. The terms of the decree do not form a ground of appeal. The decree therefore cannot form part of the record of appeal.

In our view the instant appeal is in conformity with the requirement of the law. The preliminary objection has no merit and it is accordingly rejected with costs in favor of the appellants.

Dated at Kampala this 23rd day of March 1998.

J.P.BERKO

JUSTICE OF APPEAL.

S.G. ENGWAU

JUSTICE OF APPEAL

A.TWINOMUJUNI

JUSTICE OF APPEAL