

TANZANIA / JUDGMENT

richard emillian njovu vs benedictive fathers ndanda abbey 2016 tzca 2048 4 august 2016

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4 August 2016

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IN THE COURT OF APPEAL OF TANZANIA AT MTWARA (CORAM: OTHMAN, C.J.. KIMARO, J.A.. And KAIJAGE. J.A.^ CIVIL APPEAL NO. 11 OF 2016 RICHARD EMILLIAN NJOVU T/A NJOVU INTERPRISES APPELLANT VERSUS BENEDICTINE FATHERS NDANDA ABBEY..... RESPONDENT (Appeal from the judgement of the High Court of Tanzania at Mtwara) (Twaib, J.) dated the 17th day of June, 2015 in Civil Case No. 4 of 2008 RULING OF THE COURT 2nd & 4th August, 2016 KAIJAGE. J.A.: The respondents were plaintiffs and successful litigants in Civil Case No. 4 of 2008 instituted in the High Court of Tanzania at Mtwara. As against the appellant who was a defendant and a losing party, the High Court decreed as follows:- i "(a) The defendant is ordered to pay the plaintiff the sum o f Tsh. 300,000,000/= being the principal sum and interest up to 27th May, 2008.

- (b) The sum in (a) above shall attract 15% commercial rate interest from 27th May, 2008 to the date of this judgement and at 12% court interest rate from the date o fjudgement to the date o f payment in full.
- (c) The plaintiff shall also have their costs." Dissatisfied with the judgement and decree of the trial High Court, the appellant has now appealed to this Court. Before us, the appellant and the respondents had, respectively, the services of Mr. Steven Tonya and Mr. Hussein Mtembwa, both learned advocates. When the appeal was called on for hearing, we raised, suo motu, a legal issue upon which we tasked the learned counsel representing the parties herein to give their respective comments. Our main concern was the competence or otherwise of the present appeal, a discovery of a patent discrepancy between the date of the decree and the date of the judgement having been made. Whereas the record of appeal depicts the judgment of the trial High Court as having been delivered on 17/6/2015, a decree extracted therefrom is dated 18/6/2015. Addressing the issues we raised, both learned counsel readily and concurrently conceded the shortcoming, stating categorically that the decree in the record of appeal bears a different date from that on which the judgement was delivered. On account of this anomaly, the decree is rendered invalid and the record of appeal defective, they said. It was further their contention that a defective record of appeal

renders the appeal incompetent. Finally, Mr. Mtembwa urged us to strike out the appeal for being incompetent. Realizing, at this stage, that the appeal as instituted was inarguably incompetent, Mr. Tonya, on the other hand, prayed that it be marked as withdrawn. On our part, we propose to commence our brief discussion by examining Order XX Rule 7 of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC) which provides:- "The decree shall bear the date of the day on which the judgment was pronounced..." Under Rule 96(1) (h) of the Tanzania Court of Appeal Rules, 2009 (the Rules), a copy of the decree or order sought to be appealed against is an essential document in the record of appeal. Law is settled that lack of such document renders the record of appeal defective, and the appeal itself incompetent (see; for instance, ROBERT EDWARD HAWKINS AND ANOTHER Vs PATRICE MWAIGOMOLE, Civil Appeal No. 48 of 2006 (unreported). Indeed, for such a copy of the decree to be valid, it must in form and substance comply with Order XX Rule 7 of the CPC. If it does not, the decree is defective. (See, TANZANIA MOTOR SERVICES LTD V's TANTRACK AGENCIES LTD; Civil Appeal No. 61 of 2007 (unreported). Since on the authority of the decision in TANZANIA MOTORS SERVICES' (supra) a defective decree is as good as no decree, it follows that a record of appeal to this Court which contains an invalid decree extracted in violation of Order XX Rule 7 of the CPC will not have complied with the requirements of Rule 96(1) (h) of the Rules which reads:- " 96(1) for purposes of an appeal from the High Court or a tribunal, in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3), contain copies of the following documents:-

- (a) - (g)..... (not relevant) (h) The decree or order;
- (i) - (k)... (not relevant)..." [Emphasis is ours]. We agree, as conceded by the learned counsel, that the appellant in the present purported appeal had sought to appeal against the decree of the High Court dated 17/6/2015, but the decree which is incorporated in the record of appeal is dated 18/6/2015. It is as good as no decree. On account of this glaring discrepancy, we are constrained to find the record of appeal defective and the present appeal incompetent. A finding that an appeal is incompetent has constantly resulted in striking out such appeal. 5 Having made a finding that the present appeal is incompetent, there is, certainly, no appeal which can be withdrawn. We thus decline Mr. Tonya's belated invitation for marking the appeal as withdrawn. Accordingly, we uphold Mr. Mtembwa's prayer and proceed to strike out the appeal, as we hereby do. Since the issue leading to the disposal of this matter was raised by the Court, suo motu, we shall make no order as to costs. DATED at MTWARA this 3rd day of August, 2016. M. C. OTHMAN CHIEF JUSTICE N. P. KIMARO JUSTICE OF APPEAL S. S. KALIAGE JUSTICE OF APPEAL I certify that this is a true copy of the original. PEPUPIT REGISTRAR ^etilJRT OF APPEAL 6

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Prepared on 14 October 2026 · Esheria