

TANZANIA / JUDGMENT

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., . IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM {CORAM: MSOFFE. J.A. • KIMARO. J.A . • And MASSATI, J.A.) CIVIL APPEAL NO. 48 OF 2006

1. ROBERT EDWARD HAWKINS }

2. PRICEWATER COOPERS CONSULTANTS LTD. APPLICANTS VERSUS PATRICE P. MWAIGOMOLE!..... RESPONDENT {Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam} {Ihema, J.) dated the 25th day of February, 2005 in I Civil Case No. 56 of 2000 RULING OF THE COURT rd 23 November, & 3 rd December, 2009 MASSATI, J.A.: In so far as the present ruling is concerned, the material facts are that, after a full trial before (Ihema, J. as he then was) the High Court of Tanzania at Dar es Salaam entered judgment for the th Respondent on 25 February, 2005. Against that judgment the I Appellants have filed a Notice of Appeal to challenge it and the ensuing decree in this Court on the 28 th February, I

2005. The 2 th Appellants filed their record and memorandum of appeal on 20 June, 2006. On being served with the aforesaid record and memorandum of appeal, Mr. Tadeo Hyera, learned counsel for the Respondent lodged in this Court, on 8th February, 2008, a notice of preliminary objection on a point of law to the effect that: "--- the record of appeal --- is incomplete as the decree bears a different date from the date the judgment was pronounced." When the appeal came up for hearing Mr. Hyera, reiterated his preliminary objection and prayed that the appeal be struck out with costs. Mr. Lugano Mwandambo, ! learned counsel for the Appellants readily conceded to the preliminary objection, but pleaded that costs be waived. But he went on to raise another point. He submitted that the decree was defective, not only for bearing a date different from that on which judgment was pronounced; but also that the judgment itself was delivered in chambers, instead of "in open court" 3 as dictated by O XX r. 1 of the CivU Procedure Code (Cap 33 - RE

2002) C'the Code"). He drew inspiration from a recent decision of this Court in DR. MAUA ABEID DAFTARI vs FATMA SALMIN SAID, Civil Appeal No. 88 of 2008 where it was held that under O XX

r. 1 and 3 of the Code, the judgment must not only be signed and dated but also pronounced by the judge. Mr. Mwandambo therefore urged us to find that in similar vein, the judgment must also be pronounced in open court, failing which the judgment would be invalid and not capable of backing up a valid decree. In response, Mr. Hyera, submitted that although the judgment was delivered by the judge in "chambers" the public was not denied access, and therefore the irregularity was not fatal. He prayed for the dismissal of this line of argument and for his preliminary objection to be sustained, and the appeal struck out with costs. We shall start with the obvious; because on it, the law is settled. Under Rule 89 (1) (h) of the Court of Appeal Rules, 1979 (the Rules) a copy of the decree or order sought to be appealed against is an essential document in the record of appeal. Lack of such document renders the record of appeal defective, and the appeal itself incompetent (See JUMA IBRAHIM MTALE v K.G. KARMAI)

(1983) TLR 50 (CA). By numerous decisions of this court, for such a copy of the decree to be valid it must in form and substance comply with Order XX r. 7 of the Code. If it does not, the decree is defective. A defective decree is as good as no decree (See TANZANIA MOTOR SERVICES LTD. v TANTRACK AGENCIES LTD. Civil Appeal No. 61 of 2007 and the numerous decisions cited therein. In the present case it need not be gainsaid that the decree in the record of appeal bears a different date from that on which the judgment was pronounced. As conceded by the parties, the judgment was delivered on 25th February, 2005, but the decree was signed and sealed on the 21st day of July 2005; whereas Order XX rule 7 of the Code provides: 5 "The decree shall bear the date of the day on which the judgment was pronounced-----" Variance in the dates makes the decree fatally defective (See KAPINGA & Co. ADVOCATES v NATIONAL BANK OF COMMERCE Civil Appeal No. 42 of 2007. ' So, on the premises, the preliminary objection raised by Mr. Hyera, must be sustained as we hereby do. The next question for determination provoked by Mr. Mwandambo is the effect of delivering a judgment in "chambers" as the record clearly indicates, as opposed to "in open Court" as Order XX rule 1 of the Code, demands. The controversy rotates around the wording of Order XX rule 1 which provides as follows: 6 XX (1) The Court after the case has been heard shall pronounce judgment in open court either at once or on some future day of which due notice shall be given to the parties or their advocates" Under the Code the requirements to conduct trials in open courts begins with the hearing of the witnesses. Under Order XV11 rule 4 it is provided:

(4) The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge or magistrate." But those requirements are not only peculiar to civil proceedings. They also apply in criminal proceedings. Thus under s. 186 (1) of the Criminal Procedure Act (Cap 20 - R~ 2002 ("the Act") it is dictated that: 7 186 (1) The place of inquiry in which any Court is held for the purposes of inquiring into or trying any offence shall unless the contrary is expressly provided in any written law, be deemed an open court to which the public generally may have access in so far as the same may conveniently contain them Then section 311 of the Act provides:- 311 (1) The judgment in every trial in any criminal court shall be pronounced

in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their advocates The requirement to conduct trials and pronounce judgments in open court is not merely cosmetic. It has its roots in the need to bolster public confidence in the administration of justice. As the House of Lords once observed in *SCOTT v SCOTT* (1913) AC 477 through Lord Shaw of Dunfermline: "In the darkness of secrecy, ... interest and evil in every shape have full swing. Only in proportion of publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the soul of justice. It is the keen spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial. The security of securities is publicity. But amongst historians, ----- HALLAM ----- ranks: the publicity of judicial proceedings even higher than the rights of parliament as a guarantee of public security. Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws, truly interpreted and fair construction of evidence, and the right of parliament without let or hindrance, to inquire into, and obtain redress of public grievances. Of them the first is by far the most indispensable; nor can the subject of any state be reckoned to enjoy a real freedom where this condition is not found both in its judicial institutions and in their constant exercise. As to the consequences of non compliance with the rules, there are several decisions to the effect that the omission is fatal, both in criminal and civil proceedings. We will revisit a few of them. In *WILLY JOHN v REGINA* (1956) 23 EACA 509, the Court of Appeal for Eastern African considered the effect of not complying with section 149 (1) of the Seychelles Criminal Procedure Code which provided, among other things, that a judgment be pronounced, signed and dated "in open Court." The Court said: "The failure to date and sign the judgment is a mere irregularity which can be cured: But the failure to comply with the other requirements of the section is fatal to the conviction ----" J 10 In *KERISA THURI v R* (1958) EA 8, the Court of Appeal for Eastern Africa, considered the effect of holding a preliminary inquiry in the office of a magistrate; and had this to say: "Section 233 (4) of the Criminal Procedure Code (Kenya) was not complied with. We will assume in favour of the Crown that the court was open and that the public was not denied access to it. If they were, the proceedings were illegal. Even if they were not actually denied access, members of the public would not think that they could freely enter the office of the third class magistrate. The procedure of holding the preliminary inquiry in his office was unfortunate. We think that the circumstances surrounding the holding of the preliminary inquiry in this case were unsatisfactory and that substantial prejudice was caused to the appellant in the conduct of his defence." 11 The effect of not reading a judgment (in a civil case) in open court was first dealt with by the Court of Appeal for Eastern African in a few cases arising from Kenya. The provisions of Order XX rule 1 of the Kenyan Civil Procedure Ordinance is similar to that of the Tanzanian Civil Procedure Code. Thus, in *RAMJIBHAI vs RATTAN SINGH s/o NAGINA SINGH* (1953) 20 EACA 71 at p. 72, the Court said: "Under the Order the manner of pronouncing judgment is clearly set out The judge must pronounce judgment in open court. He must also sign and date the judgment in open court at the time he pronounces it." Later, in *B.G. SAINT v KEVIN HOGAN* (1953) 20 EACA 85, the Court held:

"Reasons prepared subsequent to a judgment and not delivered in open court are not part of the judgment." in Art 12, III, i. Finally in GILLANI's MODERN BAKERY vs F.J.: KUNTHER

(1954) 21 EACA 123 in which, the trial judge, after hearing the parties, gave oral judgment in chambers immediately, but not in open court. A decree was drawn and approved by the parties' 11 advocates, but was not issued. An application for stay of execution 'II' was refused. On appeal against the order of refusal, to stay, the Court categorically declared: "In all previous cases, however, particularly in the two civil appeals above cited, the trial judge had written, signed, dated and delivered in open court, a note of his decision which was sufficient to enable this court to treat it as a judgment on the issues although defective, for lack of: the reasons for the decision. The instant case goes one step further, and in my view, it is a stage which must prove fatal to the validity of the so-called judgment. Whatever opinion may be held as to the necessity to their meticulous procedure, 13 described in Order 1 to 5, it is the function of this Court to apply the law as it stands and I have no doubt that the whole object and intention of the legislature ---- might be defeated if this Court were to regard what was done in this case as being at all a sufficient compliance with the rules. In truth and in fact there has been ---- nothing which can properly be regarded as a judgment in law in the suit. What then is the consequence?: It can only be that the appeal itself is incompetent and premature for there is no judgment, to appeal from nor has any decree come into existence." From the above analysis, we have no doubts in our minds that it is a sound principle in the administration of justice to hold trials in public because transparency and publicity are the very soul of justice. Delivering judgment in open courts is certainly one of the treasured tenets of that principle. But what has taxed our minds considerably is what constitutes "an open court". This is the more so, as none of the cases we have reviewed above has approached the question from this angle. Unlike in criminal trials, where Section 186 (1) of the Act clearly sets out the criteria of what could be deemed to be an "open court" Orders XVII rule 4 and XX rule 1 of the Code, are mute. So, there is more room in Sections 186 (1) and 311 of the Act, to determine what constitutes an open court in the circumstances of any particular case, than there is in the Code. That is why in THURI's case (supra) the Court of Appeal for Eastern Africa, was prepared to assume that the preliminary hearing, conducted in the office of the magistrate was an "open court", if the public were not denied access to it, and even if not denied; members of the public would think that they could freely enter that office. In the absence of clear guidelines and definition of what constitutes an "open court" or "chambers" under the Civil Procedure Code, we have first to resort to the dictionary meanings of those terms. According to BLACK'S LAW DICTIONARY (8 edition) the term "open court" is defined on p. 1123 to mean: "(1) A court that is in session presided over by a judge, attended by the parties and their attorneys, and engaged in judicial business. The term is distinguished from a court that is hearing evidence in camera, or from a judge that is exercising merely magisterial powers.

(2) A court session that the public is free to attend. We think that, the term "open court" in O XX rule 1 of the Code is used to connote a place where the public is free to attend. I On the other hand, the term "chambers" is defined on page 245 to mean, among others:

- d 16 "(1) The private room or office of a judge.

(2) Any place a judge transacts official business when not holding a session of the court." We think that the second definition of the term "chambers" is used in contradistinction to the second definition of the term "open court" as seen above. The link between the two definitions is the presence or absence of access to the public. If the public has access and know that they have the freedom to attend the session, that in our judgment, is "an open court". If, on the other hand, the public have no access or do not know that they have freedom to attend a session, that business is said to be held in "chambers". In our considered view therefore whether a place is an "open court" or otherwise has to be determined not by the designation of a building or a room in the court house, but by whether or not the public has access to it, and know that they have that freedom. For that matter, if a judge hears or delivers a judgment in "chambers" to the public which the public have access, and they know so, that is as good as an "open court". ; We do not have the advantage of knowing the conditions prevailing in Kenya in 1953 when GILLAN's case (supra) was decided, and as observed in any case the Court in that case did not deal with what constitutes an "open court". However we take judicial notice that in this country, there are many magistrates and judges than properly constructed court rooms, and that in many stations, proceedings are held in chambers, not out of choice but of necessity. We are also satisfied that this practice is so widespread and long standing that the public must be taken to be aware that the chambers are also. used as open courts, and that they have access thereto; such that; the term "open court" is . not necessarily synonymous with the term "open court room". In the circumstances we cannot agree that every judgment delivered in chambers in this country, is done in contravention of O XX rule 1 of the Code. It is a question of fact in each case, which can only be meaningfully discussed if there was evidence that the public were denied access thereto. In the present case, it is true that according to the record, the judgment was delivered in "chambers" but we have no hard evidence to show that the public were denied access to the said judge's office. We have only the word of the learned counsel from the bar; and we cannot act on their present form of bare assertions. In the result, we cannot agree with Mr. Mwandambo in whole. We agree that in the wording of O XX r. 1 of the Code, a judgment must be delivered in open court. But to us, "open court" is not necessarily "an open court room". An "open court" is constituted where and when the public has access; and are aware of it. If therefore there is evidence that during the delivery of a judgment, the public were denied access either expressly or by implication, the validity of the judgment may be put in question. But if the public had access to the place or room, and had knowledge about it the place or room must be deemed to be an "open court" and the judgment delivered therein, must be taken to be valid for all purposes and intents. Since in the present case the Appellants have not produced any evidence that the public at large were denied access either expressly or impliedly, they cannot be heard to

complain that the judgment in this case although delivered "in chambers", in the absence of any evidence to the contrary, must be presumed to have been delivered in open court, and was valid and could give birth to a valid decree. That said, however we must caution that this decision should not be taken as a license to abandon the practice of using court rooms whenever they are available. So the only defect in the present appeal is the defective decree on account of it bearing a different date from the one on which the judgment was delivered. As both counsel concede, we also agree that the appeal is incompetent. It is accordingly struck out. We order that each party should bear his own costs. It is ordered accordingly. 20

- 11th DATED at DAR ES SALAAM this 30th day of November, 2009. JUDGE H. MSOFFE JUSTICE OF APPEAL, N.P. KIMARO JUSTICE OF APPEAL, S.A. MASSATI JUSTICE OF APPEAL I Certify that this is a true copy of the Original. [Signature], SENIOR DEPUTY REGISTRAR, Dar es Salaam.

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