

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA
DC CIVIL APPEAL NO. 25 OF 2018**

*(Arising from the Judgment and Decree of the District Court of
Urambo in Civil Case No. 5 of 2018, B. K Kashusha – RM
dated 01/08/2018)*

PILI MABIRIKA.....APPELLANT

VERSUS

MABIRIKA KAFINA.....RESPONDENT

Date of Last Order: 11/02/2021

Date of Delivery: 26/02/2021

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JUDGMENT

.....

AMOUR S. KHAMIS, J

Pili Mabirika sued her biological father, Mabirika Kafina, in the District Court of Urambo for declaration that the father was in breach of an agreement signed between them on 28th September 2012 which entitled her to receive twenty five cows worth Tshs. 12,500,000.

It was her averment that according to their clan's traditions, a father must give part of his wealth to his children upon attaining the age of majority.

She further averred that in line with the tradition, on 1st October 2012, parties agreed before a magistrate in Kaliua Primary Court on the father giving 25 herds of cow to the daughter allegedly because she contributed to the availability of wealth in the family.

She claimed that upon execution of the agreement, she attempted to enforce it to no avail, hence filing of the suit.

Pili Mabirika asserted that her father's conduct and failure to honour the agreement subjected her to unspeakable embarrassment, economic loss and physical distress.

In a written Statement of Defence, Mabirika Kafina disputed his daughter's claims and stated that the alleged agreement was illegally obtained.

He added that it has never happened for a child to claim inheritance from a living person.

The suit proceed to trial where parties were the only witnesses for their respective sides.

In his six paged Judgment that dismissed the suit with costs, the trial magistrate concluded that there was no agreement between parties and that the daughter's allegations were fabricated.

The decree extracted from the Judgment was to the effect that: “the case is dismissed and parties are advised to file their case on land and house tribunal”.

Aggrieved by the whole Judgment and Decree of the trial Court, Pili Mabirika filed the present appeal premised on three grounds, to wit:

1. That the trial magistrate took a wrong approach in holding that there is no contract between the parties while the respondent promised to pay in a Police Station in order to settle the matter for his seductive act.
2. That the trial magistrate erred in law and in fact for he accorded no weight that the respondent seduced the appellant moreover there is no direct evidence that the respondent was forced or signed the document under undue influence.
3. That the trial magistrate erred in law and fact by departing from the proper issue hence he made a wrong decision.

At the hearing of the appeal, the appellant appeared in person while the respondent was absent.

On account of the continued absence of the respondent without notice, the appeal proceeded *ex parte* in terms of Order XXXIX, Rule 17(2) of the Civil Procedure Code, Cap 33 R.E 2019.

In the written submissions filed per the Order of this Court, the appellant reiterated her claims in the trial Court and contended that before the agreement was executed, the father was caught having sex with her and that the agreement was meant to clear the wrongful act.

She relied on Section 21(1) of the Law of Contract Act, Cap 345, R.E 2019 to assert that she had a lawful agreement.

In the second ground of appeal, she faulted the trial magistrate for failure to give weight to an allegation that the appellant was sexually harassed.

The appellant asserted that it was questionable for the trial magistrate to hold that the claims were fabricated while there was no evidence to show that the respondent was forced to sign the agreement before the primary court magistrate who attested it.

On the last ground of appeal, the appellant contended that the trial magistrate misdirected himself on applying the issue of whether under sukuma customary law, a father was obliged to give inheritance to his children before his death.

Expounding the ground of appeal, Pili Mabirika asserted that the proper issue was whether there was a valid contract between the parties.

Before I tackle the grounds of appeal, I find it prudent to address competency of this appeal.

It is trite law that every memorandum of appeal must be accompanied by a copy of the decree or the order appealed from, if

not the appeal is not properly before the Court and must be dismissed.

This requirement is well stated in Order XXXIX Rule 1(1) of **THE CIVIL PROCEDURE CODE**, CAP 33, R.E 2019.

Order XX Rule 6 (1) of **THE CIVIL PROCEDURE CODE** (supra) provides that the decree shall agree with the judgment and shall contain the number of the suit, the names and descriptions of the parties, the particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

In **TANZANIA PORTS AUTHORITY V PEMBE FLOUR MILLS LTD, CIVIL APPEAL NO. 97 OF 2017 (2011) 1 EA 443**, the Court of Appeal of Tanzania held that the decree drawn up did not correctly present the Judgment as pronounced. The decree had not specified the relief granted.

The Court of Appeal noted that there was no mention at all of the relief granted and in consequence thereof, restated the law, thus:

*“Where a decree is inconsistent with the Judgment, it must be amended accordingly to agree with the judgment (**BADRUDIN HASHAM LACHANI AND ANOTHER V PYARALI HASHAM LAKHANI (1978) LRT No. 26** followed). Preliminary objection sustained...”*


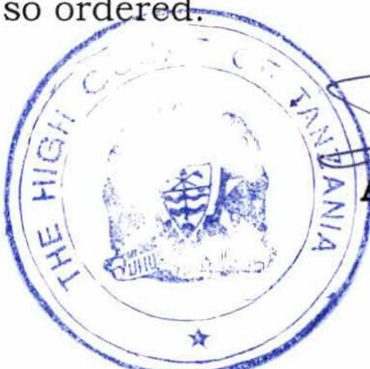
In the present case, the decree drawn is inconsistent with the trial Court’s judgment in terms of the reliefs granted.

In the present case, the decree drawn is inconsistent with the trial Court's judgment in terms of the reliefs granted.

Whereas the impugned Judgment dismissed the suit with costs after holding that there was no agreement between parties and that there was no seductive act against the appellant, the decree advised parties to file a dispute in the District Land and Housing Tribunal which was not a relief granted by the trial magistrate in the Judgment.

In the circumstances, the decree accompanying the memorandum of appeal is defective and thus rendering the appeal to be incompetent.

Consequently, the appeal is struck out with no order for costs. It is so ordered.

AMOUR S. KHAMIS
JUDGE
26/02/2021

Judgment delivered in the absence of both parties in the open Court.




G.P. NGAJE
AG. DEPUTY REGISTRAR
26/02/2021