**Haji and others v Abdalla and others**

[2004] 2 EA 69 (CAT)

**Division:** Court of Appeal of Tanzania at Zanzibar

**Date of Judgment:** 6 November 2003

**Case Number:** 71/01

**Before:** Lubuva, Munuo and Nsekela JJA

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Appeal – Record of appeal – Decree – Incorporation of a wrongly dated decree in record of appeal*

*– Whether appeal incompetent and to be struck out.*

*[2] Civil procedure – Appeal – Appeal record incomplete – Whether appeal should be struck out.*

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**Editor’s Summary**

The appellants had filed a suit in the District Court at Vuga, Zanzibar against the respondents claiming

ownership of a house which they claimed to have purchased from one Mgeni Ali. According to the

appellants, the respondents had only been allowed to stay in the house as tenants. For the respondents, it

was claimed that they had inherited the suit house from their grandmother. The trial District Court

decided in favour of the appellants holding that they were the rightful owners of the house.

The respondents were dissatisfied and appealed to the Regional Court at Vuga. The Regional

Magistrate allowed the appeal and set aside the decision of the District Court. The appellants thereafter

appealed to the High Court Zanzibar which disallowed the appeal. They further appealed to the Court of

Appeal of Tanzania.

The High Court Judge had signed the judgment on 12 November 1998 but delivered the same on 23

November 1998. The decree attached to the record of appeal bore the date 12 November 1998.

**Held** – The non-incorporation in the record of appeal of the extracted decree rendered the appeal

incompetent. As a wrongly extracted decree of 12 November 1998 was incorporated in the record, the

appeal was incompetent and would be struck out. *National Bank of Commerce v Magongo* [1996] TLR

394; *Salim v Mahmoud* civil appeal number 4 of 1992 and *Euroconsul (Africa) BV v French and*

*Hastings* civil appeal number 20 of 1996 (UR) followed.

**Cases referred to in judgment:**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Euroconsul (Africa) BV v Frech and Hastings* CAT civil appeal number 20 of 1996 (UR) – **F**

*National Bank of Commercial v Methusela Magongo* [1996] TLR 394 – **F**

*Salim v Mahmoud*, CAT civil appeal number 4 of 1992 (UR) – **F**

**Judgment**

**LUBUVA, MUNUO AND NSEKELA JJA:** This is a straight forward case. However the way in which

it was dealt with on appeal before the High Court Zanzibar, is not free from difficulty. This is apparent

from a brief outline of the facts giving rise to the appeal.

In the District Court at Vuga, Zanzibar, the Appellants, Juma Steni Haji, Haji Steni Haji, Makame

Haji Steni, Habiba Juma Steni, Khadija Hamza Steni and Pili Khamis Mwadini, filed a suit against the

respondents claiming ownership of a house which they claimed to have purchased from one Mgeni Ali.

According to the appellants, the respondents had only been allowed to stay in the house as tenants. For

the respondents, it was claimed that they had inherited the suit house from their grandmother. The trial

District Court decided in favour of the appellants holding that they were the rightful owners or inheritors

of the house.

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The respondents were dissatisfied by the appealed to the Regional Court at Vuga. Allowing the appeal

and setting aside the decision of the District Court, the Regional Magistrate held that the respondents

were entitled to the disputed house. The appellants unsuccessfully appealed to the High Court, Zanzibar.

Hence this appeal.

On 2 May 2002, when the matter was called on for hearing, it transpired that the first appellant, Juma

Steni Haji and Haji Steni Haji, the second appellant, had died. It was also brought to the attention of the

Court that the third appellant, Makame Haji Steni had not signed the memorandum of appeal which the

appellants, four, five and six had duly signed. Adjourning the hearing of the appeal, the Court made the

following order:

(i) To await a full bench decision in another matter touching on the status of the present appeal;

( ii) For legal representatives to be appointed for appellants 1 and 2 reported to be dead; and

(iii) For Makame Haji Steni to take necessary steps to join the others as appellants.

In this session of the Court, on 3 November 2003, when again the matter cameup for hearing, the

situation had not changed much. The executive secretary to the Wakf and Trust commission had been

appointed administrator of the estate of the first and second deceased appellants. In that regard, Mr

*Abdulhakhim Ameir*, Learned State Attorney, appeared for the Wakf and Trust Commission. The third

appellant, Makame Haji Steni had not yet been formally placed on the record, he had neither signed the

memorandum of appeal which the other appellants had signed nor filed any memorandum of appeal.

On the other hand, Mr *Abdulhakhim Ameir*, Learned State Attorney, indicated that he was facing

difficulties in representing the first and second deceased appellants in court. He said that the central issue

of controversy between the appellants and the respondents was the suit house in respect of which the

matter had been taken to court resulting in the appeal in this Court. In the circumstances, it was his view

that whichever position he took in the matter on appeal in the Court, he would be taken to have taken

sides. For that reason, he prayed to withdraw from representing the first and second appellants in this

appeal. According to him, it is better that he remains as the administrator of the estate only.

For his part, Makame Haji Steni, said that because the appellants are family members, he prayed to

withdraw from this appeal in order to avoid any further delay in the hearing of the appeal.

In the event, the Court granted Mr *Abdulhakhim Ameir*, Learned State Attorney’s application to

withdraw from further legal representation in court on behalf of Wakf and Trust Commission for the first

and second appellants. Consequently, as no appeal had been instituted since the notice of appeal was

filed on 30 November 1998, in terms of the provisions of rule 84(*a*) of the Court Rules 1979 the notice of

appeal in respect of the first, second and third appellants, was deemed to have been withdrawn.

Therefore, the ultimate position was that until the time of hearing the appeal, only the appeal in

respect of the fourth, fifth and sixth appellants had dully been instituted. As the fourth, fifth and sixth

appellants, namely Habiba Juma Steni Hadji Hamza Steni and Pili Hamis Mwadini respectively, together

with

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Makame Haji Steni on one hand and Mr *Ussi Khamis Haji*, learned counsel for the respondents agreed,

hearing of the appeal proceeded in respect of these appellants.

As already indicated, the fourth, fifth and sixth appellants were without the service of counsel. They had

nothing substantial to add to their memorandum of appeal. However, differently stated, the essence of

their brief statements was to the effect that they left it for the Court to consider their appeal in the light of

the law and circumstances of the case. It was their view that the matter had been pending in court for too

long without finalisation.

Mr *Ussi Khamis Haji*, learned counsel for the respondents, after considerable prevarication, observed

that there were a number of irregularities in the judgment of the High Court. For instance, he said the

way in which the judgment of the High Court had been written left much to be desired. According to him,

the Learned Judge merely dismissed the appeal without giving reasons for the decision. Secondly,

because of glaring irregularities pertaining to the High Court judgment which, it is not clear when it was

delivered, Mr *Ussi* took the view that the whole proceedings in the High Court was null and void. He

invited the Court to declare the same null and void with direction to remit the matter to the High Court

for hearing the appeal by another Judge.

With respect, we think there is merit in the submission by Mr *Ussi Khamis Haji*. From our scrutiny of

the record, it is apparent that this, otherwise straightforward case was messed up on appeal in the High

Court in a number of aspects which, we think is unnecessary to go into the details at this stage. The

pertinent issue at this stage is the competence of the appeal before this Court. It is common knowledge

that under the provisions of rule 89(1) of the Court Rules, it is mandatory for the record of appeal to have

attached the documents listed therein. On such document is the extract of the decree. In this case, is there

a proper extract of the decree attached? As Mr *Ussi* correctly in our view observed, the judgment, as

borne out from the record of appeal, at page 67 is problematic. First, it is not clear when it was delivered

because at the end of it, it is shown:

“Dated the 12 November 1998.

Signed W Dourado,”

Judge.

Then curiously, the following is recorded:

Mr Lusiano,

Judgment will be read on Monday 23 November 1998 at 8:30am

Signed: W. Dourado,

Judge.

Read in the presence of the appellants and Mr Ussi for respondents.

Signed W Dourado,”

Judge.

From this, it is not clear whether the judgment was delivered on 12 November 1998, when the Learned

Judge signed the judgment or on 23 November 1998, at 8:30am as apparently directed to Mr Lusiano.

In an effort to satisfy ourselves when the judgment was delivered, we have had occasion to peruse the

original record. It is clearly indicated that the judgment was delivered on 23 November 1998. It was also

duly signed by the

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Learned Judge. So, we take it that the judgment was delivered on 23 November 1998.

With regard to the decree, the notice of appeal and the memorandum of appeal, the date shown are

equally confusing. While both the memorandum of appeal and the decree which was signed by the

Learned Judge show 12 November 1998 as the date when the judgment, subject of the appeal, was

delivered, the notice of appeal shows 23 November 1998. We take it that the decree showing 12

November 1998 which was signed by the Learned Judge is authentic. In that case, it goes without saying

that the record of appeal pertaining to the judgment of 23 November 1998, has a wrong attachment of the

decree. Namely, it is attached to a decree of 12 November 1998 and not of 23 November 1998.

It is now settled that non-incorporation in the record of appeal of the extracted decree renders the

appeal incompetent. In *National Bank of Commercial v Methusela Magongo* [1996] TLR 394, the Court

held the appeal incompetent. In part, the Court stated:

Under rule 89(1)(*h*) of the Court of Appeal Rules of 1979, it is mandatory for the record of appeal to contain

copies of the documents listed therein which is the order appealed against.

The Court held similar a view in *Salim v Mahmoud*, CAT civil appeal number 4 of 1992 (UR) and

*Euroconsul (Africa) BV v Frech and Hastings* CAT, civil appeal number 20 of 1996 (UR).

In the instant case, as a wrong extracted decree of 12 November 1998, was incorporated in the record,

the appeal before us is incompetent. It is accordingly struck out. No order as to costs.

For the appellants:

*Abdulhakhim Ameir*

For the respondents:

*Ussi Khamis Haji*