IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPEAL NO. 124 OF 2017

1. **SGS SOCIETE GENERALE DE SURVEILLANCE SA**
2. **SGS TANZANIA SUPERINTENDANCE COMPANY LIMITED** **.....APPELLANTS**

VERSUS

1. **VIP ENGINEERING & MARKETING LIMITED**
2. **TANZANIA REVENUE AUTHORITY** **.....RESPONDENTS**

(Appeal from the decision of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)

(Kimaro, Mwambegele, JJ)

dated the 15th day of July, 2016
in
Commercial Case No. 16 of 2000

RULING OF THE COURT

20th March & 24th June, 2019

MKUYE, J.A.:

The appellants, SGS SOCIETE GENERALE SURVEILLANCE SA and SGS TANZANIA SUPERITENDANCE COMPANY LIMITED (the 1st and 2nd appellants) filed this appeal challenging the judgment and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam in Commercial Case No. 16 of 2000 which was delivered on 15/7/2016. The

facts giving rise to this appeal are that; on 15/5/2000 the first respondent VIP ENGINEERING & MARKETING LIMITED instituted a suit against the appellants herein and TANZANIA REVENUE AUTHORITY, the 2nd respondent herein. The suit originated from a breach of contract in which sometimes in January, 1998, the 1st respondent ordered for purchase 3000 metric tonnes of rice for USD 267.50 per metric tonne worth a total of USD 802,500. At the time the sale agreement was negotiated, the 1st respondent was in Dar es Salaam, the seller in Singapore and the rice was in possession of a third party one M/S MAHMOOD PLC in Karachi Pakistan. On the basis of this understanding, the seller one M/S ORCO INTERNATIONAL(s) Pte LTD did, on or about February, 1998 cause a representative sample of rice which bore a seal of the 1st appellant to be sent to the 1st respondent who accepted it and continued with other importation processes. The appellants and the 2nd respondent came into the scene for the pre-shipment inspection of the rice.

However, in or about March 1998 when rice was being discharged at the Port of Dar es Salaam, the 1st respondent noted the discrepancy in the quality and quantity. She requested the appellants to carry outpost shipment inspection and re-survey of the same in order to confirm the

difference in its quality and quantity but they refused. On refusal the 1st respondent sued them and claimed for reliefs some of which are specific damages, general damages, interests, declaratory orders against the appellants and costs as they appear from pages 29 to 30 of the record of appeal (the record). On 15/7/2016 the High Court (Commercial Division) entered judgment in favour of the 1st respondent whereby the 1st and 2nd appellants together with the 2nd respondent were ordered to pay the 1st respondent, such reliefs as can be summarized as follows:

> *"(a). Specific damages of USD 650,359.08.*
>
> *(b). General damages of USD 6,000,000.00.*
>
> *(c). Court fees Tshs. 22,000,000/=.*
>
> *(d). Interest on (a), (b) and (c) above at 20% p.a. from 15/5/1999 till the date of judgment. Thereafter the interest on the decretal amount at 7% p.a. till payment in full.*
>
> *(e). Costs of the suit.*
>
> *(f). USD monetary reliefs granted to be paid to 1st respondent in Tanzania Shillings based on the Twiga Bancorp Ltd's spot selling rate of*

USD ruling on the date the appellants make payment to the 1st respondent."

The appellants were dissatisfied with the decision of the trial court. They lodged an appeal on 41 grounds of complaint. Upon being served with the appeal, the 1st respondent filed three different sets of Notices of preliminary objection, the first one on 12/6/2017, the second one on 11/4/2018 and the third one on 25/2/2019 with a total of 16 grounds of objection.

As it is usually the practice of this Court where a notice of preliminary objection is lodged, we allowed the parties to argue the preliminary objection before going into the merit of appeal.

At the hearing of the grounds of preliminary objection, the appellants were represented by Mr. Seni Malimi, Mr. Audax Kahendaguza Vedasto, Mr. Gaudiosus Ishengoma and Mr. Fayaz Bhojan, learned counsel; the 1st respondent was represented by Mr. Cuthbert Tenga and Mr. Michael Ngalo learned counsel and the 2nd respondent enjoyed the services of Mr. Juma Salim Beleko also learned counsel.

Before hearing of the said points of preliminary objection, Mr. Ngalo who was the lead counsel for the 1st respondent sought and leave was granted to abandon the notice of preliminary objection filed on 12/6/2017. He also dropped all grounds in the notice of preliminary objection filed on 11/4/2018 except the 1st ground. He further dropped grounds nos. 3, 5 and 6 in the notice of preliminary objection filed on 25/2/2019 and thus remained with four grounds of preliminary objection as follows:

> *"(1). That the Record of Appeal ('the Record') is incompetent for want of properly and duly endorsed exhibits that were tendered and received in evidence.*
>
> *(2). The record is incompetent or incomplete for omission or non inclusion therein, the issues that were framed for determination of the suit.*
>
> *(3). That a copy of the Memorandum of Appeal served on the 1st respondent as appearing at pages 1993 to 1999 is neither endorsed by the Registrar or any other Court Official nor*

does it indicate the date on which it was lodged in Court."

As to the remaining point in the notice of preliminary objection filed on 11/4/2018 it reads:

> *"1. That in breach of Rule 96 (1) (h) of the Tanzania Court of Appeal Rules, 2009 the appellants **ADMIT** in paragraph 31.4 (d) at page 55 of their written submission lodged in the Court of Appeal of Tanzania at Dar es Salaam on 31st July, 2007 that despite having delayed for more than one year to certify it under Rule 96 (5) of the Tanzania Court of Appeal Rules, the Record of Appeal they have filed has no Judgment bearing its pronouncement date of 15th July, 2016 as mandatorily required by Order XX rule 3 of the Civil Procedure Code, Cap. 33."*

Submitting in support of the ground relating to unendorsed exhibit, Mr. Ngalo contended that the exhibits contained at pages 858 to 982 Vol. III of the record are not endorsed. This, he said, contravened the provisions of Order XIII rule 4 of the Civil Procedure Code, Cap 33 R. E. 2002 (the CPC). While relying on the case of **Tengeru Flowers Limited**

v. Dal Forwarding (T) Limited a.k.a. Kuehne and 3 Others, Civil Appeal No. 12 of 2011 (unreported), he argued that failure to include endorsed exhibits in the record rendered the appeal incompetent liable to be struck out.

In relation to the 2nd point relating to non-inclusion of the issues which were framed and decided by the trial court, Mr. Ngalo argued that though at pages 720 to 723 of the record it implies that issues for determination were framed, the said issues are not incorporated in the record. He said, failure to include them in the record rendered the record incomplete liable to be struck out. He referred us to the case of **Tengeru Flowers Limited** (supra).

Regarding the 3rd ground on the unsigned memorandum of appeal, the learned counsel contended that the memorandum of appeal appearing at pages 1993 to 1999 of the record was not signed by the Registrar or a Court Official. He added that, failure to endorse it contravened Rule 93 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which requires the same to be substantially in Form D set out in the First Schedule to the Rules. He said, Form D contains the place for

the signature of the appellant and the Registrar adding that since the same had no endorsement, there is no appeal before the Court. In addition, he challenged the manner the memorandum of appeal was placed at the end of the record as being improper under Rule 97 (1) of the Rules requiring the same to be filed separately.

As regards the ground relating to the judgment, Mr. Ngalo argued that, the judgment appearing from pages 1906 to 1940 of the record has not been endorsed by either the Judge who authored (predecessor) or the successor Judge who pronounced it. He added, though the judgment was pronounced by a successor Judge under Order XX rule 2 of the CPC, the appellants ought to apply for the same to be signed by the successor Judge. Since the unsigned judgment was included in the record, it contravened Rule 96 of the Rules which requires the same to be included and hence it rendered the record incomplete.

To cull it up, Mr. Ngalo submitted that the incompleteness of the record rendered the appeal incompetent and urged the Court to strike it out with costs.

On his part, Mr. Beleko associated himself to what was argued by Mr. Ngalo without more.

In reply, Mr. Malimi who took the lead, in the first place conceded that the exhibits were not endorsed. In elaboration he contended that after filing the notice of appeal they applied to be furnished with among others the endorsed exhibits and made several follow-ups. In the end the Deputy Registrar as shown at pages 1977 – 1983 supplied them with unendorsed Exhibits which implies that there are no endorsed Exhibits. In this regard, while relying on the case of **A.A.R. Insurance (T) Ltd. v. Beatus Kisusi** (CAT), Civil Appeal No. 67 of 2015 (unreported), he urged the Court to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and quash the judgment. To support his argument he also cited to us the case of **Ismail Rashid v. Marian Msati**, Civil Appeal No. 75 of 2015 (unreported) where the Court invoked its revisionary powers and quashed the entire proceedings and judgment under section 4 (2) of the AJA since the documentary evidence was relied upon without having been tendered and admitted in court in terms of Order XIII rule 4 of the CPC.

Mr. Malimi also conceded to ground 2 relating to non-inclusion of the issues in the record. He contended that though page 720 of the record shows that the issues were framed and were reflected in the Judgment at page 1914, they were not included in the record. He, however, urged the Court to refrain from striking out the appeal as the respondent was not prejudiced. He contended that doing so would amount to penalizing the appellant for the wrong she did not commit.

Relating to ground no. 3 on the unsigned memorandum of appeal, the learned counsel did not heed to it on account that the memorandum of appeal contained in their record was signed and stamped by the Deputy Registrar. He said, on their part they did what was required of them to do but failure to endorse it was a shortfall on the part of the Court. At any rate, he said, the record contains a stamp showing the date when the appeal was lodged. For that matter, he urged the Court to invoke the overriding objective principle to find that the anomaly is curable as the respondent was not prejudiced.

As to the issue of judgment, he equally conceded that the same was not signed. He said, failure to endorse the judgment rendered the

record to have no judgment and hence incomplete. While citing the case of **Chama cha Walimu Tanzania v. Attorney General,** Civil Appeal No. 151 of 2008 (unreported) he urged the Court to invoke its revisionary powers and cure the situation.

When given an opportunity for more elaboration, Mr. Bhojan was of the view that despite those anomalies the Court should invoke the overriding objective principles to cure the situation as to him they were curable.

On his part, Mr. Vedasto stressed that since the judgment is incomplete for having not been signed by Kimaro, J. (as she then was) who was its author, it renders the appeal incompetent. In relation to the issue of an un-endorsed memorandum of appeal, he said, it was a matter of fact which cannot fall within the meaning of preliminary objection as per the case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors Limited** [1969] EA 696.

In rejoinder, Mr. Ngalo argued that revisional powers under section 4 (2) of the AJA cannot be invoked when hearing a preliminary objection, adding that it is only applied when hearing an appeal. In support of his

argument, he referred us to the case of **SGS Societe Generalle Surveillance SA and Another v. VIP Engineering and Marketing Ltd,** Civil Application No. 107 of 2006 (unreported). As to the invocation of overriding objective principle he argued that these being matters of law, the same is inapplicable. The cases of **Martin D. Kumalija & 117 Others v. Iron and Steel Ltd,** Civil Application No 70/18 of 2018 and **Mondorosi Village Council and 2 Others v. Tanzania Breweries Ltd and 4 Others,** Civil Appeal No 66 of 2017 (both unreported) were cited in support of his argument.

In dealing with the 1st point of preliminary objection, we wish to preface it with Rule 4 (1) of Order XIII of the CPC requiring every document which is admitted in evidence to form part of the record to be endorsed by the trial judge or magistrate. The importance of this requirement is, in our view, geared towards avoiding tempering with documents tendered in court. The said rule provides as follows:

> *"4 (1) Subject to the provisions of sub-rule (2),* ***there shall be endorsed on every document which has been admitted in evidence*** *in the suit the following particulars, namely:-*

(a) the number and title of the suit;

(b) the name of the person producing the document;

(c) the date on which it was produced;

(d) a statement of its having been admitted,

and the endorsement shall be signed or initialed

by the judge or magistrate."

[Emphasis added]

As regards the issue of unendorsed exhibits in this case, all the parties are agreeing that they were not endorsed. Indeed, Exhibits P1 to P22 at pages 858 to 905 and Exhibits D1 to D6 at pages 906 t0 982 of the record are not endorsed. Clearly, this contravened the provisions of rule 4 (1) of Order XIII of the CPC. The issue here is what will be the effect of un-endorsed Exhibits. While Mr. Ngalo submitted that the defect has the effect of expunging the exhibits, Mr. Malimi and Mr. Bhojan submitted that the Court should expunge those exhibits and in terms of section 4 (2) of AJA, quash the whole proceedings and judgment of trial court.

In the case of **Tengeru Flowers** Limited (page 7) (supra) cited by Mr. Ngalo, the Court after having heard the appeal expunged the exhibits

which were not endorsed and struck out the appeal for being incomplete. In so doing it stated as follows:

> *"There is no doubt that, the provision cited above is couched in mandatory terms. In the instant case, none of the exhibits were endorsed in compliance with Order XIII rule 4(1) of the CPC. The effect of such non-compliance is to expunge all the exhibits tendered at the trial court.*

Yet, in the case of **A.A.R. Insurance (T) Limited** (supra) which was cited by the appellants' counsel, when the Court was faced with a situation where the purported exhibits were not admitted nor endorsed, the Court expunged such exhibits. In addition, it invoked section 4 (2) of the AJA and quashed the High Court's proceedings from the mediation stage and ordered a retrial as shown hereunder:-

> *"In exercising our revisional powers as provided under s. 4 (2) of the Appellate Jurisdiction Act, Cap 141 we quash the High Court proceedings commencing after mediation and set aside the decree. We order for a retrial before another judge. We award no costs."*

But again, in the case of **Standard Chartered Bank (Tanzania) Ltd v. National Oil Tanzania Ltd and Another,** Civil Appeal No 98 of 2008, the Court after considering the exceptional circumstances of the case held that the High Court's omission to endorse the exhibits was inadvertence as it did not affect the parties in evidence or render the record defective. The factors which were considered were the documents being annexed to the plaint and the written statement of defence; the tendering of such documents in court by the relevant witnesses who explained them; their admission in court with no objection from either party; lack of challenge on their authenticity; and that none was prejudiced or suffered injustice.

In this case, with respect to learned counsel for both parties, after having gone through the cases of **Tengeru Flowers Limited, Ismail Rashid** and **A.A.R Insurance (T) Ltd** (supra), we found them distinguishable to the case at hand. We say so because in all the cited cases there were no special circumstances pertaining to the un-endorsed exhibits. On top of that, in those cases there was mishandling in their admission to the extent of been relied upon by the court without being tendered or admitted in evidence.

On our part we are inclined to the case of **Standard Chartered Bank's (Tanzania) Ltd** case (supra) which, in our view, has almost similar circumstances with the case at hand. In this case, like in **Standard Chartered Bank's (Tanzania) Ltd** case, the documents were annexed to the pleadings from either side. The record shows that they were tendered in the trial court by the respective witnesses who explained them and admitted in court without any objection from the other party. Additionally, there is no material before us suggesting that their authenticity were questionable. In those circumstances, we think, neither party was prejudiced by such a shortcoming. Thus, looking at the totality of the circumstances, we are settled in our mind that failure by the trial judge to endorse them was a mere advertence on the part of the trial Judge. Hence, we find that the omission does not render the record defective to warrant expunging of the exhibits or invocation of section 4 (2) of the AJA as argued by Mr. Malimi. We agree with Mr. Bhojan that the omission is curable.

As to the point of non-inclusion of the framed issues in the record, both parties are in agreement that they were not included. As was argued by both counsel, pages 720 to 723 of the record, give an impression that

issues were framed. Also the said issues are referred to in the written submissions by the 1st and 2nd defendants at page 984 of the record and are reflected in the judgment at page 1914 of the record. Perhaps it is worthy to note that in terms of Order XIV rule 1(5) it is a mandatory requirement for a trial court to frame issues. Also, Rule 96 (1) (g) of the Rules requires the record of appeal to include among others the proceedings (the issues inclusive).

In the case of **Tengeru Flowers Limited** (supra) in dealing with similar situation, the Court struck out the appeal for being incomplete following non-inclusion of the framed issues and in so doing it stated as follows:

> *"Admittedly, indeed, the record of proceedings and a copy of judgment are two distinct parts of the record of appeal. We think, it is not enough for the framed issues to be reflected in the judgment or written submissions as themselves distinctly were supposed to be part of the record of appeal. Taking into account that Rules of procedure must be followed by the parties and as far as framed issues were not included in the record of appeal that renders it to be incomplete.*

For being incomplete, we find the appeal incompetent and therefore constrained to strike out the appeal..."

Guide by the above authority, it is our settled view that since the framed issues ought to be included in the proceedings in terms of Rule 96 (1) (g) of the Rules, their being reflected in the written submissions and judgment was not a substitute for them to be excluded in the proceedings. We agree with Mr. Ngalo that failure to include them rendered the record of appeal incomplete with the effect of being struck out. In addition, this being a point of law, we do not agree with Mr. Malimi that the respondent was not prejudiced. Hence, we find merit on this point of objection and sustain it.

As to the 3rd point regarding unsigned memorandum of appeal, Mr. Malimi resisted it on account that the memorandum of appeal contained in their record of appeal was signed and stamped by the Registrar. He, in a way, shifted the blame to the Court for having not signed the memorandum of appeal contained in other copies of the record of appeal. When we asked Mr. Beleko, he also confirmed to have unsigned memorandum of appeal in the record of appeal he had.

In the first place, we wish to point out here that, we do not agree with Mr. Vedasto that this is not a ground of objection within the meaning of preliminary objection as defined in **Mukisa Biscuits Manufacturing Company Limited** case (supra). We say so because, in our view, the question of endorsement of the memorandum of appeal is a matter of law and not a matter of fact as will be shown shortly.

In this case, indeed, the copies of memorandum of appeal contained in the record for the use of the Court and the 2nd respondent as shown at pages 1993-2000 are not signed by the Registrar or any other court official. Neither are they stamped or dated by the Registrar. Unfortunately, no reason was given as to why the appellants' record contains an endorsed memorandum of appeal. As was rightly submitted by Mr. Ngalo, since the record for the use of the Court lacked such signed memorandum of appeal it contravened the provisions of Rule 93 (3) of the Rules which requires the memorandum of appeal to comply substantially with Form F in the First Schedule to the Rules. Form F referred to above, reserves spaces for signature by the appellant and the Registrar. We think, since it was the appellants who lodged the record of appeal they ought to have sought the same to be signed by the Registrar

as required by the law. We say so having in mind the requirement set out in Rule 90(1) of the Rules which provides for the manner the appeal is to be instituted. Under the said provision, the appeal is instituted by lodging three distinct and independent items which are memorandum of appeal; record of appeal; and the guarantee for security for costs of the appeal.

We also agree with Mr. Ngalo that, placing it at the end of the record would be contravening the provisions of Rule 97 which specifically requires the memorandum of appeal and the record of appeal to be served to the respondent. This connotes that the memorandum of appeal is a distinct document from the record of appeal. It also implies that, if the memorandum of appeal is lodged as a separate document, the Registrar would have been required to endorse it and show the date when it was lodged in compliance with Rule 18 of the Rules which provides as follows:

> *"Whenever any document is lodged in the Registry, sub registry of the Court, or in the registry of the High Court, or tribunal under or in accordance with these Rules, the Registrar, or Deputy Registrar or the Registrar of the High Court or any other officer of the Court appointed*

for that purpose, as the case may be, ***shall forthwith cause it to be endorsed, showing the date and time when it was lodged.***"

[Emphasis added]

For that matter, the memorandum of appeal cannot be deemed to have been endorsed by the Registrar for reason that the record of appeal has been endorsed and dated as was submitted by Mr. Malimi. In this case, therefore, since the memorandum of appeal which is among the vital documents for the institution of appeal is not signed and endorsed by the Registrar, it renders the appeal incompetent. It is as if there is no appeal filed in this Court. Hence, we find merit in this point of objection and we sustain it.

Regarding the 4th point of objection on the unsigned and dated judgment both parties are in agreement. Indeed, the judgment appearing at pages 1906 to 1940 is not signed. As was alluded to earlier on, the judgment was composed by Kimaro, J. (as she then was) on 19/12/2005. It was pronounced on 15/7/2016 by Mwambegele, J. (as he then was). However, as the record of appeal can bear it, neither the predecessor judge nor the successor judge signed it. We are aware that, as was

rightly submitted by Mr. Ngalo, according to Order XX rule 2 of the CPC the judge or magistrate can pronounce a judgment authored but not pronounced by his/her predecessor. The same is to be dated on the date when it was pronounced. The practice, however, has been that the author of the judgment would sign it without dating and the successor who pronounces it would sign on the date when it is delivered. That was not done. There is no doubt that this was a fatal irregularity.

In this case, since the appellants included in the record of appeal unsigned and undated judgment, there was no judgment in terms of Order XX rule 3 of the CPC which in mandatory terms requires among others things to be dated and signed by the presiding judge or magistrate as of the date on which it is pronounced. In effect, this rendered the record of appeal incomplete with the effect of rendering the appeal incompetent before the Court.

With these anomalies, Mr. Malimi and co-counsel urged the Court to invoke its revisionary powers under section 4 (2) of the AJA and revise it. On his part, Mr. Ngalo argued that such provision cannot be invoked at the hearing of the preliminary objection. We have considered the

submissions from both side together with the cases of **Chama cha Walimu Tanzania** and **SGS Societe Generale De Surveillance SA and Another** (supra) on the issue and we find them to be distinguishable to this case. In **Chama cha Walimu's Tanzania** case (supra) the Court refrained from striking out an incompetent application and proceeded to revise the proceedings which were a nullity. That is not the position in the case at hand. Also in the case of **SGS Societe Generale De Surveillance SA and Another** (supra), the Court refused to exercise its revisional jurisdiction under section 4 (2) of the AJA in the cause of hearing the application on account that the same is exercisable when hearing and determining the appeal which is as well not the case in the matter at hand. We also find that the overriding objective principle does not and cannot apply in the circumstances of this case since its introduction in the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2017 (Act No. 8 of 2017) was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case. [See **Martin D. Kumalija & 117 Others** and **Mondorosi Village Council and 2 others** (supra)].

All said and done, we, sustain the preliminary objection to the extent we have demonstrated and strike out the appeal. We further order that, given the circumstances of the case the counsel for the 1st and 2nd respondents are awarded their costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 20th day of June, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I justify that this is a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL