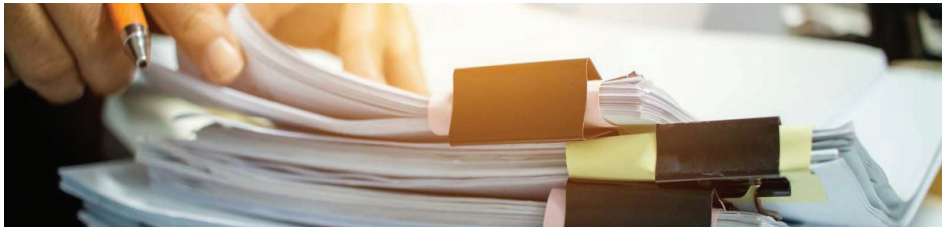


5 September 2019



Inconsistent application of overriding principles at Court of Appeal

- Principle of just, expeditious, proportionate and affordable resolution of disputes introduced in laws
- Meant to reduce red tape on procedural laws in Court
- Interpretation evolving but inconsistent application

Tanzanian Courts have long been known for striking out cases including appeals and applications for minor omissions like mistakes in the name of Judges, wrong or non-citation of a provision of the law, mistakes in decrees, small typos in names of parties in appeals, slight defect in jurat, missing pages of non-critical documents in records, numbering mistakes in records, mistake by registrar in certificate of delay and the list goes on and on and on. Counsels were equally obsessed with such Preliminary Objections (POs) to the extent that clerks would ask counsels why no POs had been filed. It was the dawn of the PO era.

Before recent amendments, when appearing at the Court of Appeal, it would not be unusual for POs to be raised at every stage in the proceedings, so much so, it would come as a surprise if none were raised. This practice not only delayed dispensation of substantive justice but also resulted in huge backlogs of cases, as the appeals or applications would invariably be refiled after fighting out the extension of time applications and thereby wasting the Court's and parties invaluable resources and time. The famous Mukisa principle on POs, a case which was heard in 1969 when there were neither computers nor the internet, was not only being misapplied but also excessively overused to throw out cases.

In September 2018, having observed the PO tsunami, the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018, Act No. 8 of 2018 amended several key civil procedure statutes used in the handling of civil cases filed in Courts. This Act amended the Appellate Jurisdiction Act (Cap 141), the Civil Procedure Code (Cap 33), the Land Disputes Courts Act (Cap 216) and the Magistrates Courts Act (Cap 11). The amending Act did not delete, substitute or alter the laws. It left all provisions existing in the civil statutes intact but only introduced what it called the overriding objective of all civil litigation, which it stated to be just, expeditious, proportionate and affordable resolution of civil disputes. The Act required all Courts, advocates and parties involved in a litigation to promote these objectives. It was clear that the Court was not going to entertain POs that were being raised on all occasions.

Now, for the past one year, since September 2018 when this Act became operational, the Court of Appeal has been busy trying to interpret where to invoke the overriding objective principle. The pertinent issue which an inquisitive analyst faces during this span of time has been one of finding a place where to draw a line separating the applicability and inapplicability of the principle.

The overriding objective principle, or oxygen principle, as it has come to be commonly known, was first put to test on October 10, 2018, just 3 weeks after the effective date of the amendments. In the case of Yakobo Magoiga Gichere v. Peninah Yusuph (Civil Appeal No. 55 of 2017) where the Court of Appeal at Mwanza was called upon to decide on what the Appellant had perceived to be a blatant contravention of Section 4 of the Ward Tribunals Act, Cap 206 which stipulates:

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"4 (1) Every Tribunal shall consist of:

(a) not less than 4 nor more than 8 other members elected by the Ward Committee...

(b) a Chairman of the Tribunal appointed by the appropriate authority from among the members elected under paragraph (a)."

The contention of the Appellant was that on several occasions, neither the chairman nor any person appointed to preside, presided over the proceedings of the Tribunal. On that account, the Appellant called upon the Court of Appeal to quash the Ward Tribunal proceedings for want of a composition jurisdiction. Turning down the call, the Court of Appeal (Juma, CJ, Ndika, JA and Mwarija, JA) observed at pgs 13-14 of its judgment:

"With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [Act No. 8 of 2018] which now requires the Courts to deal with cases justly, and to have regard to substantive justice; section 45 of the Land Disputes Courts Act (which prohibits reversing decisions on account of errors which do not occasion failure of justice), should be given more prominence to cut back on over-reliance on procedural technicalities.... Failure to identify the member who presided over the proceedings of the Ward Tribunal when the Chairman was absent, did not occasion any failure of justice to the appellant... The final order of the Court is that this Appeal is dismissed in its entirety....."

However, in [SGS Societe Generale de Surveillance SA and another v. VIP Engineering & Marketing Ltd and another \(Civil Appeal No. 124 of 2017\)](#) (Dar), the Court turned down the Appellants' invitation to invoke the overriding principle to dismiss one of the objections raised by the Respondent that had urged the Court to strike out the appeal for failure of the Registrar to endorse the Memorandum of Appeal with which the appeal had been instituted. In upholding the PO, the Court (Mwarija, J.A, Wambali, J.A and Mkuye, J.A) stated at pg 23 of the judgment that the amendment by Act No. 8 of 2018 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.'

In [Gaspar Peter v. Mtwara Urban Water Supply Authority \(MTUWASA\) \(Civil Appeal No. 35 of 2017\)](#) (at Mtwara), a call to the Court to apply the oxygen principle to save an appeal which had been objected to for having missing documents was this time accepted. The Respondent had asked the Court to rely on a string of decisions delivered before the coming into force of the amendment to strike out the appeal on this omission. In a welcome decision, the Court (Juma, C.J, Mwarija, J.A and Wambali, J.A) stated that the missing documents were not necessary for disposal of the legal issues raised in the appeal; hence their absence is excusable under the oxygen principle.

As opposed to the MTUWASA case (supra), a prayer to apply the oxygen principle in [Mondorosi Village Council and 2 Others v. TBL and 4 Others in Civil Appeal No. 66 of 2017](#) (at Arusha) failed. This time the Appellant had asked the Court to invoke the principle to bless the appeal whose record only missed a letter applying for copies of the proceedings in the subordinate Courts. The Court of Appeal (Mwarija, J.A, Lila, J.A and Kwariko, J.A) refused, saying that such a letter is 'a necessary document to enable the Court to determine whether the appeal is within the prescribed time.'

The Court maintained the same position in [Martin Kumaliya & 117 Others v. Iron and Steel Ltd \(Civil Application No. 70/18 of 2018\)](#) (at Dar), a case in which the procedural error committed by the Respondent was the same as that committed by the Appellant in the Mondorosi case (supra). On the Respondent's advocate's prayer to the Court to apply the oxygen principle to save this appeal, the Court (Mugasha, J.A, Ndika, J.A and Kwariko, J.A) at pg 9 of the ruling remarked:

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LEGAL UPDATE

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"While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court. We are loath to accept Mr. Seka's prayer because doing so would bless the Respondent's inaction and render superfluous the rules of the Court that the respondent thrashed so brazenly."

In both the previous appeals where a one-page document was missing, the Court of Appeal, in the interests of substantive justice, could have ordered the party time to amend the record of appeal, as it did in [Civil Appeal No 78 of 2018, Tanzania Revenue Authority v ARMZ](#). In this tax case, the Court (Mussa, J.A, Mugasha, J.A and Lila, J.A) ruled that whilst the Tribunal submissions were missing in the records, the Appellant (TRA), be given time to amend its record of appeal and the appeal was not struck out. This tax case is a welcome decision in which the maximum flexibility has been applied by the Court to allow parties to rectify omissions in records.

In general, the recently introduced overriding objective principle is new and still under test. The cases above reflect the unpredictability of when the Court will allow this principle to be invoked and when it will not. Decisions such as in the case of *Yakobo Magoiga Gichere, MTUWASA and TRA* (supra) are reflective of the Court's spirit of incorporating the oxygen principle. It is for the Court of Appeal to choose the direction it intends to take in dispensing substantive justice, which will consequently pave the way for other junior Courts, and it has started quite well, although some of the decisions as discussed above are unwelcome and inconsistent. Only time will tell.

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