**IN THE COURT OF APPEAL OF TANZANIA**
**AT ZANZIBAR**

**(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)**

**CIVIL APPEAL NO. 85 OF 2019**

**YUSUF NYABUNYA NYATURURYA.....APPELLANT**

**VERSUS**
**MEGA SPEED LINER LTD.....1ST RESPONDENT**
**SEPIDEH IN REM.....2ND RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Zanzibar at Vuga)**

**(Sepetu, J.)**

**Dated the 07th Day of September, 2018**
**in**
**Civil Case No. 53 of 2013**

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## RULING OF THE COURT

*26th & 29th November, 2019*

**KEREFU, J.A.:**

This ruling is in respect of a preliminary objection raised by the respondents against the appeal lodged in this Court by the appellant on 19th November, 2018 to challenge the judgment and decree of the High Court of Zanzibar sitting at Vuga (Sepetu, J) dated 10th August, 2018 in Civil Case No. 53 of 2013.

The brief facts leading to the said suit as obtained from the record of appeal are that, way back in 2008 the appellant and the first respondent entered into an employment contract, whereby the appellant was employed as a captain of the first respondent's boat from 17th November, 2008 to 31st December, 2008 with a monthly salary of US$ 4,000. The boat's routes were Zanzibar, Pemba, Mombasa and Tanga. Prior to the expiry of the said employment contract, it was extended for a six months' period from 01st January, 2009 to 30th June, 2009. Again, at the expiry of that second employment contract, the appellant's employment was extended for another period of six months from 1st July, 2009 to 4th January, 2010. Apart from the agreed monthly salary, the appellant was also entitled to a monthly social security funds' contributions at 20% of the monthly salary and three days leave after every completed month of service.

The first respondent defaulted in paying the appellant's salaries for the months of October, November and December, 2009. As a result, the salary arrears accumulated to a total sum of US$ 8,650.00, the monthly social security funds contributions US$ 11,040.00 and leave payment for

thirty six days at the tune of US$ 4,800.00, among others. The High Court, after hearing the parties, determined the suit in favour of the appellant by ordering the first respondent to pay the appellant a total sum of US$ 14,817.00, issue certificate of service and costs of the case. Aggrieved, the appellant lodged this appeal.

In objecting the appeal, the respondents have raised a preliminary objection consisting of two grounds that:-

*(a) The appeal is incompetent for want of proper judgment and decree, hence the same contravened Rule 96 (1) (g) and (h) of the Court of Appeal Rules, 2009 as amended; and*

*(b) The appellant's appeal is incompetent for want of proper certificate of delay.*

At the hearing of the appeal, the appellant had the services of Mr. Mashaka Ngole, learned counsel, whereas the respondents were under the services of Mr. Rajab A. Rajab, also a learned counsel.

As it has been the cherished practice of the Court, we had to deal with the preliminary objection first, before we could embark on the

determination of the appeal. As such, we invited the learned counsel for the parties to address us on the preliminary objection.

Upon taking the floor to expound on the points of preliminary objection, Mr. Rajab sought leave, which we granted for him to abandon the second point of preliminary objection. Amplifying on the first ground, Mr. Rajab submitted that, the appeal is incompetent for want of judgment and decree that are properly signed and dated by the presiding judge of the High Court. He elaborated that, the judgment and decree appearing from pages 78 – 87 and 88 – 89 of the record of appeal, respectively, were not signed and dated by the presiding judge on the date of pronouncement as required by the law. He argued further that, the trial was presided over by Sepetu, J who signed the judgment on 10th August, 2018, but it was pronounced and delivered to the parties by Salum H. Bakar, the Deputy Registrar on 7th September, 2018 contrary to Order XXIII rule 3 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD). He contended that, in terms of those provisions of the law, the judgment of the High Court is required to be signed and dated by the presiding judge at the time of pronouncement and not otherwise.

In addition, Mr. Rajab argued that, even the decree included in the record of appeal was not signed by the presiding judge, as it bears a different date from the one appearing in the judgment. He, thus argued that, since the judgment included in the record of appeal was not signed and dated by the presiding judge at the time of pronouncement and delivery as mandatorily required by Order XXIII rule 3 of the CPD, it has rendered the record of appeal incomplete and incompetent in terms of Rule 96 (1) (g) and (h) of the Rules. To buttress his position he referred us to the cases of **SGS Societe Generale De Surveillance SA and Another v. VIP Engineering & Marketing Limited and Another,** Civil Appeal No. 124 of 2017 at page 22 and **Francesco Paulo Torregrossa v. Nassor Suleiman Abdalla and Another,** Civil Appeal No. 36 of 2016 (both unreported).

Mr. Rajab argued further that, the Deputy Registrar who pronounced the judgment and dated it on 7th September, 2018 did not have such powers under the law. To bolster his position, he referred us to Order LI rule 1 (1) (k) of the CPD and argued that the powers of the Registrar are specified thereunder and do not extend to Order XXIII rule 1 (1) (k) which

is in relation to pronouncement and signing of judgments of the High Court. He thus urged us to find out that, the incompleteness of the record of appeal has contravened Rule 96 (1) (g) and (h) and rendered the appeal before the Court incompetent. He finally prayed that the appeal be struck out with costs.

In response, Mr. Ngole commenced his submission by blaming Mr. Rajab for basing his arguments on other provisions of the law under the CPD in the course of arguing the preliminary objection, while he initially predicated his objection only on Rule 96 (1) (g) and (h) of the Rules. He then argued that, the judgment and the decree included in the record of appeal are all proper and duly signed. He however contended that, if there is any irregularity as regards the included copies of the judgment and decree, such irregularity is not fatal and cannot render the appeal incompetent.

As for the powers of the Registrar, Mr. Ngole referred us to the same Order of the CPD cited by Mr. Rajab and argued that, the Registrar has wider powers, which include, among others, pronouncement of the High Court's judgments and issuing of decrees. It was therefore his argument

that, the judgment and the decree of the High Court included in the record of appeal were properly signed and dated. Mr. Ngole distinguished the authority cited by Mr. Rajab in **SGS Societe Generale De Surveillance SA and Another** (supra) by stating that the same is inapplicable in this case. He said that, in that case, the judgment was not signed at all, while in this case the judgment is signed by the presiding judge. He finally urged us to overrule the preliminary objection with costs.

In rejoinder submission, Mr. Rajabu reiterated what he had submitted earlier and prayed that, the preliminary objection be sustained.

On our part, having examined the record of appeal and the oral submissions advanced by the counsel for the parties for and against the preliminary objection, the main issue for our determination is whether the judgement and decree of the High Court which has been included in the record of appeal are properly signed and dated.

Pursuant to Order XXIII rule 3 (1) of the CPD cited by Mr. Rajab, the judgment of the High Court is required to be signed and dated by the judge at the time of pronouncing it. For the sake of clarity, the said provision of the law provides that: -

*"In all cases before the High Court, the judgment shall be dated and signed by the judge and shall not thereafter be altered or added to save as provided by section 130 of the Decree or on review."*

The importance of this requirement is, in our view, geared towards avoiding tempering with judgments of the court after pronouncement and delivery. In the case at hand, indeed, the High Court's judgment appearing on pages 78 – 87 of the record of appeal was composed and signed by Sepetu, J on 10th August, 2018 and was pronounced and delivered to the parties on 7th September, 2018 by the Deputy Registrar. It thus contains two different dates. Worse still, the decree appearing on pages 88 – 89 of the record of appeal is dated 7th September, 2018 which is a different date from the one appearing in the judgment. In the previous decision of this Court in **SGS Societe Generale De Surveillance SA and Another** (supra) cited by Mr. Rajab, when faced with the situation where the judgment was not signed as required by Order XX rule 3 of the Civil Procedure Code, [Cap. 33 R.E. 2002] which is a corresponding provision with Order XXIII rule 3 of the CPD, the Court observed that: -

*"...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 which it is pronounced.*** *In effect, this rendered the record of appeal incomplete with the effect of rendering the appeal incompetent before the Court."* [Emphasis added].

Following the above authority, it is clear that, judgment is to be dated, when it is pronounced. With respect, in the case at hand, it was improper for the presiding judge to sign and date the impugned judgement

prior to the date of pronouncement and delivery. We are however in agreement with Mr. Ngole that, the circumstances and facts of the above cited case are different and distinguishable from the case at hand. As, in that case, the judgment was not signed completely by both, the presiding/composer and the successor judge, while in this case the presiding judge composed and signed the said judgment prior to its pronouncement and delivery.

In addition and in the light of the record before us, though in the impugned judgment it is clearly indicated that the judgment was pronounced and delivered by the Deputy Registrar, the decree at page 89 of the record of appeal indicates that, the judgment was delivered by the presiding judge on 7th September, 2018. For the sake of clarity we have reproduced the first paragraph of the second page of the said decree, which is found at page 89 of the record of appeal which reads as follows: -

> *"This cause coming on for final disposal on* ***7th September, 2018*** *before* ***Hon. Mkusa I. Sepetu, J*** *the Judge of this Court in the presence of Mr.* ***Mashaka Ngole,*** *Advocate*

*Plaintiff and* ***Mr. Idrissa Shehe*** *(Defendant), Plaintiff is also present."*

As hinted above, this is at variance with the last paragraph contained in the impugned judgment signed by the presiding judge on 10th August, 2018 which is found at page 86 of the record of appeal. This has again affected the validity of the High Court decree included in the record of appeal.

Furthermore, we had the opportunity to scrutinize the contents of Order LI rule 1 (1) (k) of the CPD and we are in agreement with the submission and interpretation of Mr. Rajab that, the Registrar powers under that provision do not include and extend to Order XXIII rule 3 of the CPD. Therefore, the judgment and decree of the High Court included in the record of appeal herein are not properly signed and dated. Consequently, we fully agree with Mr. Rajab that failure to include in the record of appeal the proper and duly signed judgment and decree of the High Court rendered the record of appeal incomplete, thus incompetent before the Court.

Ordinarily and under normal circumstances, with these irregularities the appeal would have been struck out. However, with the introduction of the principle of overriding objective which is geared towards expeditious and timely resolution of all matters, under section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 (the AJA), as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act, No. 8 of 2018), we are hesitant to do so. This is due to the fact that, in the case at hand, among others, it is obvious that, the pointed out anomaly was not occasioned by the appellant. We are equally settled that, the respondents were not prejudiced by the said anomaly, as the judgment which was pronounced and delivered is the same judgment composed and duly signed by the presiding judge. In this regard and in order to meet the ends of justice, we find this to be an opportune moment to invoke the overriding objective principle and allow the appellant to correct the identified anomaly by filing a supplementary record with the proper and duly signed judgment and decree of the High Court in

accordance with the law, not later than thirty days (30) from the date of delivery of this ruling. Costs shall follow the event in the pending appeal

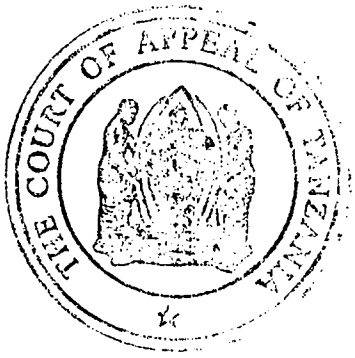
**DATED** at **ZANZIBAR** this 28th day of November, 2019.

A.G. MWARIJA
**JUSTICE OF APPEAL**

G.A.M. NDIKA
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Ruling of the Court delivered this 29th November,2019 in the presence of Mr. Rajab Abdallah Rajab, counsel for the respondent who also hold brief for Mr. Mashaka Ngole, Counsel for the Appellant is hereby certified as a true copy of the original.




A.H. MSUMI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**