THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CIVIL APPEAL NO. 13 OF 2020.
(From the Court of Resident Magistrate of Mbeya, at Mbeya, in Civil Case No. 15 of 2015).

ERASTO KAMALA MWAMBUSYE..... APPLICANT

VERSUS

1. JUBILEE INSURANCE CO. TZ LTD.....1ST RESPONDENT
2. CABLE TELEVISION NETWORK.....2ND RESPONDENT

RULING

24/9 & 14/12/2020.
Utamwa, J.

The appellant in this appeal, ERASTO KAMALA MWAMBUSYE challenges the judgment (impugned judgment) and decree of the Court of Resident Magistrate of Mbeya, at Mbeya (trial court), in Civil Case No. 15 of 2015. The trial court had decided in favour of the two respondents, JUBILEE INSURANCE CO. TZ LTD and CABLE TELEVISION NETWORK. The appellant preferred seven grounds of appeal.

However, the two respondents, through Dr. Frank Mchomvu, learned counsel, lodged a preliminary objection (the PO) against the appeal. The same was based on a single limb that, the appeal is incompetent and bad in law for being supported by a defective decree which contravened Order XX rule 7 of the Civil Procedure Code, Cap. 33 R. E. 2019 (Henceforth the CPC).

The preliminary objection was argued by written submissions. The appellant was represented by Mr. John Elia Kayange, learned counsel. The respondent enjoyed the services of their learned counsel mentioned above.

In supporting the PO, the learned counsel for the respondents argued that, the impugned judgment in this matter was pronounced on 27/03/2020. However, the copy of the decree accompanying the memorandum of appeal was dated 5/5/2020. This discrepancy offended the mandatory provisions of order XX rule 7 of the CPC. These provisions require the decree to bear the date of pronouncing the judgment. The effect is that, the decree becomes fatally defective and the appeal is rendered incompetent and non-existent. He supported the contention by a recent decision of the Court of Appeal of Tanzania (CAT) in the case of **Puma Energy Tanzania Limited and Ruby Roadways (T) limited, Civil Appeal No. 3 of 2018, CAT at Dar es Salaam** (unreported ruling dated 15/4/2020).

The learned counsel further submitted that, the irregularity mentioned above is so serious and cannot be saved by the principle of overriding objective as guided in the **Puma case** (supra). He thus, urged this court to strike out the appeal at hand with costs.

In his replying submissions, the learned counsel for the respondent did not concede to the PO. Nonetheless, he did not make serious arguments against it. He only challenged the Notice of the PO for not showing what he called the "Registry Number of the High Court of Tanzania District Registry of Mbeya." He did not however, expound this averment. He further argued that, the PO (notice of PO) did not show

"where Civil Appeal No. 13 of 2020 now before this honourable High Court Originated." It thus, contradicted order VI rule 2 of the CPC. He did not also clarify more on this point. He also contended that, the **Puma case** (cited supra by the respondents' counsel) is irrelevant to this matter because, the circumstances in these two matters are different. As usual, he did not go further to show how did such circumstances differ.

I have considered the record, the arguments by both sides and the law. In my view, it is in fact, clear from the record, and it is also not disputed by the parties that, the date of pronouncing the impugned judgment on one hand and the date shown in the copy of the decree accompanying the memorandum of appeal on the other, are at discrepancy as rightly contended by the respondents' counsel. Admittedly, the replying submissions by the learned counsel for the respondent did not assist this court much as I hinted before. They mostly challenged the format of the notice of the PO and distinguished the precedent cited by the learned counsel for the respondents without giving details. I will not thus, give much weight to such submissions.

However, it must be born in mind that, it has been our firm and trite judicial principle that, courts of law are enjoined to decide cases according to law and the constitution. This is indeed the very spirit underscored under article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution). It was also underscored in the case of **John Magendo V. N.E. Govan (1973) LRT n. 60.** It follows therefore that, even where a part to court proceedings does not effectively advance his/her arguments in addressing and issue before the court, the

court will still be obliged to decide the issue according to the law, and not according to the weakness of the arguments advanced by the party. I will thus, observe this principle in deciding the controversy between the parties irrespective of the weaknesses in the replying submissions made by the learned counsel for the respondents demonstrated above.

The major issue before me is thus, reduced to *what is the legal effect of the discrepancy of the dates between the one for pronouncing the impugned judgment and the one appearing in the copy of the decree accompanying the memorandum of appeal under consideration*. In the first place, it is clear that our law guides *inter alia*, that, every appeal shall be preferred in the form of a memorandum of appeal accompanied by a copy of the decree appealed from; see Order XXXIX rule 1(1) of the CPC. The law further guides, as correctly contended by the learned counsel for the respondents that, a decree shall bear the date of the day on which the judgment was pronounced; see Order XX rule 7 of the same CPC.

In my concerted view however, despite all these provisions of the CPC just cited above, the circumstances of the case at hand do not make the decree at issue incurably defective and the appeal at hand incompetent as contended by the respondents' counsel. This is so for the following grounds; in the first place, the learned counsel for the respondents put much reliance on the **Puma case** (supra). However, I find the circumstances in that case distinct from the circumstances of the matter at hand. This is so because, in reaching into the decision in that case, the CAT had considered various matters which do not tally with matters before this court. In the first place, though the CAT in that case considered the

provisions of Order XX rule 7 of the CPC, it did so in relation to an appeal before it against a decision of this court. The CAT thus, among other things, rejected the prayer made by the appellant's counsel for it to amend the dates in the copy of the decree as mere clerical errors under section 96 of the CPC. It found that, it could not do so since it was not the High Court and it could not step into the shoes of the High Court and correct the errors; see at page 6-7 of the printed version of the **Puma case** decision.

Furthermore, the CAT in the **Puma Case** (supra), held that, the appellant had already been permitted to amend the record of appeal. Rule 96 (8) of the Court of Appeal Rules, 2009 (the CAT Rules) thus, precluded it (the CAT) from entertaining a further application for rectification of the incomplete record of appeal once the appellant had been granted leave to do so under rule 96 (7) of the same CAT Rules; see at page 7-8 of the printed ruling of the case.

In the matter at hand, however, the appeal is before this court and is against a decision of the trial court (which is a subordinate court). Section 96 of the CPC mentioned above permits correction of clerical or arithmetical mistakes in judgments, decrees or orders at any time, by the court either of its own motion or on the application of any of the parties. The term "court" under these provisions means the High Court, a court of a resident magistrate or a district court presided over by a civil magistrate. This meaning under the CPC does not include the CAT. The obvious reason for this arrangement is that, as a general rule, the CPC does not apply to the CAT, but applies to this court and the trial court. The CAT in the **Puma case** (supra) was thus, justified to reject the above mentioned prayer by

the appellant for amending the decree at that appellate stage under section 96 of the CPC. However, that course is permissible in the case at hand for the reasons just shown above.

Moreover, in the matter at hand, the appellant has not made any prior effort to amend any record as it was in the **Puma case** before the CAT. Again, in the matter at hand, there are no applicable rules corresponding to the CAT Rules which preclude this court from permitting an appellant to make a prayer for amending a decree or any record related to this appeal. In fact, the CAT Rules do not apply to appeals before this court.

Owing to the reasons shown above, I hold that, the **Puma case** is distinguishable from the matter before me. It cannot thus, apply in this case against the appellant.

In fact, I am aware of other decisions of the same CAT which considered defects in decrees of this same nature under discussion, and accordingly invoked the principle of overriding objective to save the respective decrees. One of such decisions is the case of **Yusuph Nyabunya Nyatururya v. MEGA Speed Liner Ltd and Another, Civil Appeal No. 85 of 2019 CAT at Zanzibar** (unreported). In that case the CAT considered the effect of some irregularities in a decree of the High Court of Zanzibar (the HCZ) to the appeal before it (CAT). The defects included the discrepancy of dates between the one on which the judgment of the HCZ was pronounced and the one appearing in a copy of the decree accompanying the memorandum of appeal. Another discrepancy was that, the judgment made by a judge of the HCZ was pronounced by a Deputy

Registrar of that court against the provisions of Order XXIII rule 3 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD).

Upon the CAT considering the above mentioned discrepancies in the **Yusuph case** (supra in relation to the principle of overriding objective, it held at page 12-13 of the typed version of the ruling thus, and I quote the relevant passage for a readymade reference;

> "...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..."

It must be noted however, that, in making the holding quoted above, the CAT considered the provisions of the CPD cited above. However, the CAT also made reference to the provisions of Order XX rule 3 of our CPC which is a corresponding provision with the above cited Order XXIII rule 3 of the CPD (of Zanzibar). All these provisions require a judgment to be signed and dated by a judge of magistrate as of the date which it was pronounced. Again, the requirement that a decree shall bear the date of pronouncing the judgment considered by the CAT in the **Yusuph case** is set under

Order XXIII rule 7 of the CPD. These provisions are, in fact, similar to the provisions of Order XX rule 7 of our CPC. It follows thus, that, by parity of the reasons just quoted herein above, and owing to the similarity of the provisions just cited above, the guidance made by the CAT in the **Yusuph case** also applies to the case under consideration. This is more so since it is trite principle that, in common law jurisdictions statutes which are in *pari materia* are interpreted similarly; see the guidance by the CAT in case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Company SA [1997] TLR 165.**

Another decision by the CAT which invoked the doctrine of overriding objective in relation to defects in a decree was in the case of **Mohamed Ali Mohamed v. Ajuza Shaban Mzee (Administratrix of the late Fatuma Kibwana), Civil Appeal no. 188 of 2016, CAT at Dar es Salaam** (Unreported ruling dated 25th day of June, 2020). In that case, the CAT considered an appeal in which the date of the decree of this court (the HCT) did not tally with the date when the judgment was pronounced. Another irregularity was that, the judgment of the HCT did not bear the date when it was pronounced. All these discrepancies offended the provisions of the CPC cited earlier. The other abnormality in the **Mohamed case** (supra) was a violation of the CAT Rules related to a certificate of delay which is irrelevant in the matter at hand.

Despite multi-irregularities in the **Mohamed case** (supra), the CAT invoked the principle of overriding objective (or oxygen principle) and held that, the discrepancies were not fatal to vitiate the appeal before it. It then gave time to the appellant to go back to the HCT to rectify the errors. In

making this decision, the CAT also considered the fact that, the appellant before it was not to blame for the abnormalities since he did not cause the errors. It also distinguished the **Puma case** (cited supra by the respondent's counsel in the case at hand) on the ground that, in that case (the **Puma case**) the appellant had been granted chance to rectify the record of appeal, the CAT was thus, precluded from giving her another chance. Indeed, this is one of the reasons I offered earlier in distinguishing the **Puma case** from the matter at hand.

The CAT ultimately made a firm statement (in that **Mohamed case**) cherishing the principle of overriding objective. It observed that, owing to the existence of the oxygen principle, it (the CAT) is in most of the times very loath to terminate an appeal or application without determining it on its merits. The CAT also remarked that, it is its tendency to allow parties to rectify errors so as to give oxygen to cases in view of determining them on merits and it (the CAT) has done so in a number of cases; see at page 8 of the typed version of the ruling in the **Mohamed case** (supra).

An overview of the principle of overriding objective considered herein above is as follows; it has been recently underlined in our law by amending some statutes. The statutes included the Appellate Jurisdiction Act, Cap. 141 (the AJA) and the CPC. The AJA applies to the CAT while the CPC applies to this court and subordinate courts like the trial court in the matter at hand. The amendments of these legislation were effected through the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018. The amending Act added new sections 3A and 3B to the CPC for the purposes.

The principle of overriding objective thus, essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice. It was also underlined by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported Judgment dated 10 October, 2018). It must however, be born in mind that, the elements of the principle of Overriding Objective existed even before the amendments of the law cited above. Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 (the Constitution) for example, underscored the need for courts to decide matters on substantial justice without being overwhelmed by procedural technicalities even before the amendments mentioned above were performed.

Nonetheless, the principle of overriding objective was not meant to absolve each and every blunder committed by parties in court proceedings. Had it been so, all the rules of procedure would be rendered nugatory. The principle does not thus, create a shelter for each and every breach of the law on procedure. This is the envisaging that was recently underlined by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure.

In my concerted view therefore, where there is an issue of on any violation of a procedural rule, the court must firstly consider and determine whether or not it should invoke the principle of overriding objective. Before

determining this issue, the court has to determine a sub-issue of whether or not the violation was incurably fatal to the proceedings being discussed. In assessing the fatality of the violation, the court may ask itself some pertinent questions depending to the circumstances prevailing in each case. The relevant questions may include, but, not limited to the following; did the violation prejudice or cause any injustice to the adverse party? Will the invoking of the principle of overriding objective occasion injustice to any party? Does the law provide for any specific remedy to the violation at issue? Did it go to the root of the matter? Did it affect the jurisdiction of the court? Did it offend the law on time limitation? Was the violation caused by the party presenting the matter before the court or does he or she bear any blameworthiness for the violation? Will the non-invoking of the principle of overriding objective amount to overreliance on procedural technicalities prohibited under Article 107A (2) (e) of the Constitution?

Indeed, the term "injustice" mentioned above is not defined by Tanzanian written laws. It however, means "Failure of Justice" or "Miscarriage of Justice", or "wrongful conviction", or "serious failure in the judicial process" or "failure of the trial process." See the English case of **R (on the application of Mullen) v. Secretary of State for the Home Department (2004) UKHL 18 [2004] 3 All ER 65, p. 71-96.** The term injustice under the provisions of section 3A and 3B of the CPC, may also include unnecessary delay of cases and causing unnecessary costs to parties.

Owing to the discussion made above, the relevant sub-issue before me is *whether justice in the matter at hand demands the invoking of the*

principle of overriding objective. In my firm opinion, the circumstances of this case attracts answering the sub-issue affirmatively on the following grounds: in the first place, the **Puma case** (supra) relied upon by the learned counsel for the respondent is distinguishable from the matter at hand on the reasons I offered earlier. On the other hand, the **Yusuph case** (supra) and the **Mohamed case** (supra) decided on issues and circumstances similar to these in the matter at hand. The two precedents held that under such circumstances it is unavoidable to invoke the principle of overriding objective as I observed previously. It must be born in mind that, these two precedents are decisions made by the CAT. Such decisions bind courts and tribunals subordinate to it, including this court. This position of the law is by virtue of the doctrine of *stare decisis*; see also the decision by the CAT in **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146.** I must therefore, follow the holdings in the **Yusuph case** (supra) and the **Mohamed case** (supra). I will not thus, follow the **Puma case** on the reasons shown above.

Indeed, as demonstrate previously, in the **Yusuph case** (supra) and the **Mohamed case** (supra) the respective decrees suffered from more than one defects including the discrepancies between the dates of the respective judgments and the corresponding decrees. Yet, the CAT in such two precedents invoked the principle of overriding objective. This court cannot thus, avoid invoking this principle following a single defect in the decree under consideration.

Admittedly, I refrained from invoking the principle of overriding objective in a decision I recently made. This was in the case of **Richard Osia Mwandemele v. Lwitiko Osia Mwandemele, Land Appeal No. 17 of 2020, HCT, at Mbeya** (unreported Judgment dated 25/11/2020). I followed that course because, the contents of the decree were entirely deferent from the contents of the judgment. The decree did not thus, carry the substance of the judgement in any way. This is however, not the case in the matter at hand, hence the **Richard case** (supra) is also distinguishable to the case under consideration.

Another reason in favour of deciding the sub-issue posed above affirmatively is that, the circumstances of the case at hand meet the criteria for invoking the principle of overriding objective suggested above. It is common ground for example that, decrees of this court are extracted and issue by the court and not by the parties. This is so because, the law guides that, a decree shall be signed by the presiding Judge or magistrate, upon him/her satisfying himself/herself that it has been drawn up in accordance with the judgment. In case he/she has vacated office, his/her successor, a Registrar, a Deputy Registrar or a District Registrar signs the same; see Order XX rule 7 and 8 of the CPC. The appellant in the matter at hand does not thus, bear any blameworthiness for the defects in the decree. Moreover, it cannot be said that the respondent in the case at hand was prejudiced by the discrepancy of the dates under consideration. In fact, even the learned counsel for the respondents neither alleged that his clients were prejudiced by the abnormality nor explained as to how they were prejudiced.

Furthermore, the decree under consideration had all the important ingredients of a decree save for the discrepancy of the dates. Order XX rule 6 (1) of the CPC provides that, a decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit. All these particulars are contained in the decree at issue. It thus, contained the substance of the judgment of the trial court. This fact is, in fact, not disputed by the parties. Besides, the first page of the decree indicates clearly that the same was pronounced on the 27th day of March, 2020. The relevant paragraph reads thus, and I quote it for a handy reference;

> "And Upon the suit coming for final disposal on 27th day of March, 2020 before Hon. P. D. Ntumo, Principal Resident in the presence of the plaintiff..."

The discrepancy of the dates manifests itself only at the second page the last paragraph which is endorsed thus;

> "Given under my hand and seal of the court this 5th day of May, 2020."

It follows thus that, the discrepancy of the dates at issue was a result of a mere slip or clerical error. It is also the law, as I hinted earlier, that, clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or on the application of any of the parties; see section 96 of the CPA. Courts of this land have also underscored the position that, such errors can be rectified at any time; see

the case of **Jewels & Antiques (T) Ltd v. National Shipping Agencies Co. Ltd [1994] TLR 107** followed in **Jobos & Co. Ltd v. Serengeti Breweries Ltd, Misc. Civil Application No. 658 of 2017, HCT, at Dar es Salaam** (unreported, by Mwandambo, J. as he then was). It is thus, common ground that, our law provides for a specific remedy in case of any clerical errors like the discrepancy of the dates between a judgment and decree.

It is also notable that, the provisions of section 3A and 3B of the CPC which embody the principle of overriding objectives and those of section 96 which permit rectification of clerical errors in decrees were placed in the principle Act (i. e. the CPC). Provisions under this part are therefore, enacted by the legislature. Such provisions were not placed under the rules which are under the First Schedule to the CPC. This First Schedule is essentially a mere subsidiary legislation made under section 81 of the CPC by the Chief Justice, with the consent of the Minister responsible for legal affairs as per section. On the other hand, the requirement for the date in the decree to tally with the date of judgment is set under Order XX rule 7 of the CPC which is in the First Schedule to the MCA, hence a subsidiary legislation.

It is our legal requirement that, a subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and it shall be void to the extent of any such inconsistency; see section 36 (1) of the Interpretation of Law Act, Cap. 1 R. E. 2019. It follows thus, that, Order XX rule 7 (being provisions of a subsidiary legislation) cannot be construed as being inconsistent with sections 3A, 3B

and 96 of the CPA which underscore the principle of overriding objective and the option set by the law for correcting clerical errors in decrees.

Due to the reasons shown above, I am of the view that, invoking the principle of overriding objective in the matter at hand will not occasion injustice to any party, and failure to invoke it will amount to overreliance on procedural technicalities which said course is prohibited under Article 107A (2) (e) of the Constitution?

Again, I have considered the wording of Order XX rule 7 of the CPC offended by the decree under consideration. It is in fact, seemingly couched in a mandatory form by using the word "shall." Nonetheless, this is not a good reason for not invoking the principle of overriding objective. This is because, it has been held by the CAT that, the term "shall" implies an obligation, unless an injustice is likely to be caused by such an interpretation; see ssection 53 (2) of Cap. 1 as construed by the CAT in the cases of **Bahati Makeja v. Republic Criminal Appeal No. 118 of 2006, Court of Appeal of Tanzania at Dar es Salaam** (unreported), **Herman Henjewele v. Republic Criminal Appeal No. 164 of 2005, Court of Appeal of Tanzania at Mbeya** (unreported) and **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, Court of Appeal of Tanzania at Mbeya** (unreported), following **Fortunatus Masha v. William Shija and another, [1997] TLR 41.** Owing to the reasons shown above, I am of the view that, under the circumstances of the case at hand, injustice will be occasioned if the term "shall" as used under Order XX rule 7 of the CPC will be construed as implying an

obligation. I will not thus, interpret it so, hence the necessity to invoke the principle of overriding objective.

On the strength of the reasons shown above, I answer the sub-issue posed above affirmatively that, *justice in the matter at hand demands invoking of the principle of overriding objective*. I therefore, apply this principle and add oxygen to the appeal at hand. I consequently answer the major issue posed above thus; that, the *legal effect of the discrepancy of the dates between the one for pronouncing the impugned judgment and the one appearing in the copy of the decree accompanying the memorandum of appeal under consideration* is not fatal to the appeal. I accordingly overrule the PO in that I will not strike out the appeal at hand as prayed by the learned counsel for the respondent.

I therefore, make the following orders; that, the appellant is directed to approach the trial court for purposes of rectifying the decree as per section 96 of the CPC or any other relevant law in view of complying with Order XX rule 7 of the same law. By this order the trial court is also directed to rectify the decree according to the law immediately in not later than a month from the date hereof. Upon the rectification of the defects in the decree the appellant shall present the proper decree before this court for it to accompany the appeal. The rectified decree shall, as well be served to the respondent. The hearing of the appeal shall proceed upon the rectification of the decree. It is so ordered.

JHK. UTAMWA.
JUDGE

14/12/2020.

14/12/2020.
CORAM; J. H. K. Utamwa, Judge.
Appellant: present.
Respondents: absent.
BC; Mr. Patrick, RMA.

Court: ruling delivered in the presence of the appellant, in court, this 14th December, 2020. Respondent be notified of the ruling.

J. H. K. UTAMWA
JUDGE
14/12/2020.