

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPEAL NO.88 OF 2008**

**(CORAM: NSEKELA, J.A., KIMARO, J.A., And OTHMAN, J.A.)**

**DR. MAUA ABED DAFTARI ..... APPELLANT  
VERSUS  
FATMA SALMIN SAID .....RESPONDENT**

**(Appeal from the Judgment and Decree of the  
High Court of Tanzania at Dar es Salaam)**

**(Kalegeya, J.)**

**dated 14<sup>th</sup> day of November 2007**

**in**

**Civil Case No.21 of 1999**

.....

**RULING OF THE COURT**

6<sup>th</sup> July, 2009 & 17<sup>th</sup> August, 2009

**OTHMAN, J.A.:**

The respondent, Fatma Salmin Said, by way of a preliminary objection filed with prior notice on 17.02.2009 and under Rule 100 of the Court of Appeal Rules, Cap.141 Subsidiary Legislation, R.E.2002 raised a point of law to the effect that:

*"the record of Appeal is invalid for having an undated judgment of the Honourable Mr. Justice Kalegeya (as he then was) at page 442 of the Record of the Court of Appeal filed on 14.08.2008."*

At the hearing of the preliminary objection on 18.02.2009, Mr. Peter Swai and Mr. Karoli Tarimo, learned Counsel, represented the appellant, Dr. Maua Abed Daftari. Mr. Dominic Kashumbugu and Mr. Mark Lebba, learned Counsel, represented the respondent, Fatma Salmin Said.

Mr. Kashumbugu, succinctly submitted that the record of appeal filed by the appellant on 14.08.2008 contains an undated judgment against which it is desired to appeal, contrary to the mandatory requirements of Order XX Rule 3 of the Civil Procedure Code, Cap.33 RE.2002. That although it was signed by the learned Judge who determined the suit, the fact that it was undated rendered it no judgment according to the law. It was invalid, he maintained, in terms of the requirements of Rule 89(1) (g) of the Court of Appeal Rules, 1979 governing the record of appeal.

On his part, Mr. Swai forcefully submitted that under the Civil Procedure Code, there were no prescribed forms for judgments. The law did not require a judgment to be dated immediately under the

signature of the learned judge who wrote it. Order XX Rule 3 required a judgment to be signed, which is what the learned judge correctly did. One can own a judgment but not a date. The non-appearance of the date on the written judgment and its recording elsewhere in the trial record was sufficient to satisfy the requirements of Order XX Rule 3. Referring to page 443 of the record of appeal, he argued that as required under Order XX Rules 1 and 3 the judgment being appealed against was dated 14.11.2007 by the "Court", which term defined in section 3 of the Civil Procedure Code, meant, *inter alia*, the High Court.

That said, it transpired to the Court in the course of determining the preliminary objection that its true scope required further examination of a number of issues arising out of a combined reading of Order XX Rules 1 and 3 and the record of appeal.

In consequence, at a resumed hearing, on 6.07.2009, the Court asked learned Counsel to address it on the following matters:

- (i) *Whether or not the judgment being appealed against appearing at pages 314 and 443 of the record of appeal is dated the 14.11.2007.*

- (ii) *Whether or not the judgment was pronounced and dated the date on which it was delivered in open Court.*
- (iii) *Whether or not the Judicial Officer who pronounced and dated the judgment was competent under Order XX Rule 3 or any other written law to act as such.*
- (iv) *Whether or not the consequences arising out of the acts of the learned judge and the Judicial Officer are fatal or minor and curable under the law.*

Mr. Kashumbugu submitted that Order XX Rule 3 provides the yardstick by which the validity of the High Court judgment delivered by the Senior Deputy Registrar on 14.11.2007 and appearing at pages 314 and 443 of the record of appeal is to be considered. That although the judgment in terms of Order XX Rule 3 was written under the superintendence of the learned judge, the date it beared is invalid.

Furthermore, he submitted that contrary to Order XX Rules 1 and 3, the judgment was not pronounced by the learned judge, but by the Senior Deputy Registrar, which power he did not

posses, under Order XLIII Rule 1(a) to (l). As he did not have any power to pronounce or date the judgment, it was fatal. He was of the view that under Order XX Rule 3, the dating, signing and pronouncement of the judgment have to be done at the same time. The omission of any one of them rendered the judgment fatally defective. That accordingly, the record of appeal does not contain a valid judgment against which it is desired to appeal. He invited the Court to strike out the record of appeal.

With the benefit of reflection, Mr. Swai readily conceded that the judgment was not pronounced as required under Order XX Rule 3 read together with section 3 of the Civil Procedure Code. The Senior Deputy Registrar had no power thereunder to pronounce the judgment written by the learned judge. That as long as what was pronounced by the Senior Deputy Registrar on 14.11.2007 was not a "*statement*" made by the learned judge, it did not meet the definition of a judgment under section 3. That the error fatal, warranted the striking out of the record of appeal. He invited the Court to adopt the position of the law in **Malaki Maboga v. Pentecoste Church of Sengerema**, Mwanza Civil Appeal No.6 of 2007 (CA) (Unreported).

Having scrutinized the record of appeal and bearing in mind the lucid submissions by learned Counsel, in our respectful view, the short but important point that emerges out of the preliminary

objection is whether or not the judgment being appealed against offends Order XX Rules 1 and 3 and renders the record of appeal in terms of the mandatory requirements of Rule 89(1) (g), incurably defective. We are aware that the crucial question raised is likely to stir up a real hornet's nest, but then, being a preliminary point of law, we are compelled to answer it.

The pertinent parts of Order XX read:

***"Order XX***

***JUDGEMENT AND DECREE***

- 1. The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or at some future day, of which due notice shall be given to the parties or their advocates.***
- 2. A Judge or Magistrate may pronounce a judgment written but not pronounced by his predecessor.***
- 3. The judgment shall be written by or reduced to writing under the personal direction and the superintendence **the*****

***presiding judge in the language of the Court and shall be dated and signed by the presiding judge or magistrate as of the date on which it is pronounced in open Court and, once signed, shall not afterwards be altered or added to, save as provided by section 96 or on review"***  
*[Emphasis added]*

Relevant to the reading of Order XX are sections 3 and 28 of the Civil Procedure Code. They provide:

*"3. "judgment" means the statement given by a judge or a magistrate of the grounds for a decree or order".*

*"28. The Court, after the case has been heard shall pronounce judgment, and on with judgment a decree shall follow."*

It is common ground that the judgment in High Court Civil Case No.21 of 1999 was written and signed by the learned judge who presided over the trial of the suit. However, it was pronounced and dated in open Court by the Senior Deputy Registrar of the High

Court on 14.11.2007. We let the record (Pages.314 and 413) speak for itself:

*"14/11/2007*

*Coram: G. K. Rwakibalira, SDR/HC*

*For the Plaintiff: Mr. Adelord for Mr.Mbuya for  
plaintiff*

*Plaintiff: Present and represented*

*Defendant: Absent but represented*

***Court: Judgment delivered at Dar es  
Salaam this 14<sup>th</sup> day of November, 2007  
and right of appeal to the Court of Appeal has  
been explained thoroughly.***

***G.K. Rwakibalira,***

***SENIOR DEPUTY REGISTRAR***

***14/11/2007." (Emphasis added)***

Having regard to the above and the requirements of Order XX Rules 1 and 3, we would agree with learned Counsel that, first, in so far as the judgment was not formally pronounced in open Court by the learned presiding Judge as is expressly required under Order XX Rules 1 and 3 read together, but was so delivered by the Senior Deputy Registrar which power he does not possess under



Order XLIII Rules 1(a) to (l) or any other law, there was in law no validly pronounced judgment. Second, the date the judgment beared, i.e. 14.11.2007 could not have derived any legitimacy therefrom. Third, it would appear from the record (p.442) that the learned judge signed the judgment out of Court.

We wish to lay emphasis on the pronouncement of a judgment as a judicial act. In our considered view this is well explained in **Surendra Singh and Others v. State of Uttar Pradesh**, AIR 1954 S.C 194, where the Supreme Court of India, *inter alia* held:

***"A judgment is the final decision of the Court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in open Court. It is a judicial act which must be performed in a judicial way. The decision which is so pronounced or intended must be a declaration of the mind of the Court as it is at the time of pronouncement.***

***This is the first judicial act touching the judgment which the Court performs after the hearing. Everything else then is done out of Court and is not intended to be the operation act which sets all the***

***consequences which follow on the judgment in motion. The final operative act is that which is formally declared in open Court with the intention of making it the operative decision of the Court. That is what constitutes the judgment".***  
*[Emphasis added].*

That clarified, restrictive or impractical it may turn out to be, as the law now stands, the combined reading of Order XX Rules 1 and 3 and Order XLIII Rules 1(a) to (l) is to the effect that a Senior Deputy Registrar cannot validly pronounce a judgment on behalf of the presiding judge who wrote it. With respect, he is not saddled with that competence under the Civil Procedure Code or to our knowledge, any other applicable law. With the judgment being appealed against incompetently pronounced and dated, there is therefore no valid "statement given by a judge of the grounds for a decree" (see, section 3, Civil Procedure Code). What was intimated to the parties by the Senior Deputy Registrar High Court on 14.11.2007 is inoperative in law as an effective and valid judgment. Accordingly, the record of appeal, containing an invalid judgment is incurably defective for non compliance with Rule 89(1) (g) of the Court of Appeal Rules, 1979.

Almost a similar situation arose in **Madaka Maboga v Pentecoste Church of Sengerema**, MZA Civil Application No.6 of 2007 (CA) (unreported), but in relation to a judgment in appeal written and signed by the learned judge of the High Court on 27.02.2007. It was incompetently pronounced, signed and dated by the District Registrar on 13.03.2007, contrary to Order XXXIX Rule 31 read together and Order XLIII, Rule 1. The Court held that the District Registrar was incompetent to pronounce the judgment, which rendered it invalid. While in the instant situation, the judgment is one in a suit governed by Order XX Rules 1 and 3, we would agree with Mr. Swai that by parity of reasoning the incompetency in the later case renders **Malaka Maboga's case** applicable.

Having determined the above, we hasten to add, as indeed we must, one more point. Contrary to the current position in Tanzania mainland, in Zanzibar under Order LI Rule 1(1) of the Civil Procedure Decree, Cap 9, Laws of Zanzibar, a Registrar of the High Court may pronounce a judgment written by a judge by virtue of express powers conferred upon him there under.

Order LI Rule 1 provides:

*"ORDER LI*

*POWERS OF A REGISTRAR AND DISTRICT REGISTRARS*

*1- (1) A Registrar may exercise the powers and duties of a Judge or of a magistrate and may pronounce judgments, and sign decrees and make orders and transact the business of the High Court or the Court of a magistrate in the cases referred to in the following Orders and Rules:-"*

*(Emphasis added).*

Mindful of Order XLIII Rule 1 of the Civil Procedure Code and the situation as pertinently exposed by the preliminary objection, we are of the respectful view that Order LI Rule 1 (1) of the Civil Procedure Decree of Zanzibar offers to Tanzania mainland a leaf that can be borrowed in terms of vesting with the Registrar of the High Court similar powers, including that of pronouncing a judgment on behalf of the Judge.

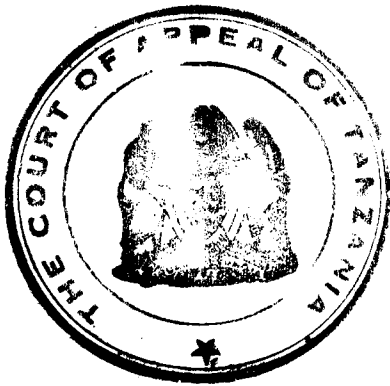
In the result and for the foregoing reasons, we uphold the preliminary objection. The purported appeal, incompetent, is hereby strike out with costs. It is so ordered.

DATED at DAR ES SALAAM this 11<sup>th</sup> day of August, 2009.

H.R. NSEKELA  
**JUSTICE OF APPEAL**

N.P. KIMARO  
**JUSTICE OF APPEAL**

M. C. OTHMAN  
**JUSTICE OF APPEAL**



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

  
(J. S. MGETTA)

**DEPUTY REGISTRAR**