

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

(CORAM: MUGASHA, J.A., WAMBALI, J.A., and KEREFU, J.A.)

CIVIL APPEAL NO. 16 OF 2011

M/S SDV TRANSAMI (TANZANIA) LIMITED.....APPELLANT

VERSUS

M/S STE DATCO.....RESPONDENT

**(Appeal from the Judgment and Decree of the High Court,
Commercial Division) At Dar es Salaam**

(Bwana, J)

dated the 25th day of May, 2004

in

Commercial Case No. 46 of 2003

RULING OF THE COURT

4th & 18th June ,2019

KEREFU, J.A.:

The appellant, M/S SDV TRANSAMI (Tanzania) Limited lodged this appeal on 4th February 2011 challenging the judgement and decree of the High Court, Commercial Division, (*the High Court*), (Bwana, J) dated 25th May 2004 in *Commercial Case No. 46 of 2003*.

The brief facts leading to this appeal as found in the trial court's record may be briefly summarized that, the respondent, who was the plaintiff before the High Court sued the appellant for breach of agreement entered between them in 2002. Pursuant to the said agreement, the

appellant, who carries on business of freight and cargo handling services including clearing and forwarding in Tanzania, was engaged by the respondent, (who is based in Bukavu - the Democratic Republic of Congo), as its agent in Tanzania to handle clearing and forwarding of the respondent's cargo in transit, from the port of Dar es Salaam for local market or on transit to other destinations. In September 2002, the respondent instructed the appellant to handle and release from the port of Dar es Salaam and transport a consignment of goods in three containers to Bukavu. In the process of executing the respondent's instructions the appellant sub-contracted an agent, Home Base Limited to deal with handling, releasing and delivery of the said goods. The containers were transported by Tanzania Railways Corporation as arranged by the appellant. However, upon being delivered to the respondent, the said three containers were found empty. Thus, the respondent claimed for payment of total sum of US\$ 372,274 being compensation for the value of undelivered consignment of goods, loss of profit, damages and expenses incurred by the respondent in pursuing and tracing the undelivered goods.

The appellant admitted that the respondent had engaged her as its agent to arrange for customs clearance of goods from the port of Dar es

Salaam to Bukavu, but denied any liability on the loss of the goods, as she said her responsibility was clearance by way of documentation only, because there was no means to warrant verification and physical opening of the containers to ascertain the contents therein. After a full trial the judgement was delivered in favour of the respondent. Aggrieved, the appellant preferred this appeal. In the Memorandum of Appeal the appellant has preferred eleven grounds. However, for reason to be apparent shortly, we shall not reproduce the said grounds herein.

At the hearing of the appeal, the appellant was represented by Mr. Sinare Zaharan, learned counsel, while the respondent had the services of Ms. Anneth Kireth, also learned counsel.

Before proceeding with the hearing of the appeal on merit, we requested the counsel for the parties to address us on the propriety of exhibits, P1 – P7 indicated at pages 71, 72, 74 and 76 of the record of appeal that were heavily relied upon by the parties and the trial court to determine the suit. To be specific, the precise question we posed is *whether or not exhibits P1-P7 were admitted at the trial in accordance with the provisions of Order XIII Rule 4(1) and 7(1) of the Civil Procedure Code, Cap 33 R.E 2002, ('the CPC').*

Mr. Sinare submitted that, the purported exhibits P1 – P7 were not properly admitted and endorsed by the trial Judge as required by Order XIII Rule 4 (1) of the CPC. He said, he had since perused the entire trial court's proceedings and noted that there is no indication or order of the trial court to indicate that the said exhibits were tendered and admitted as evidence to form part of the record of the suit. To verify his assertion, Mr. Sinare referred to pages 71, 72, 74 and 76 of the record of appeal and argued that, though, the said exhibits are indicated in the proceedings and named as exhibits P1 – P7, there is no evidence on the procedure used to name them as such. He submitted that, it is even not clear, as to who exactly tendered the said exhibits before the trial court.

As for the remedy and consequences of failure by the trial court to properly admit and duly endorse the documentary exhibits Mr. Sinare came up with three positions that have been overtime developed and adopted by the Court. **First**, is the position pronounced in **Kunduchi Beach Hotel & Resort v. Mint Master Security Tanzania Limited**, Civil Appeal No. 67 of 2014 (unreported) where an appeal was declared incompetent and struck out for failure by the trial court to properly admit and endorse exhibits as per the requirements of Order XIII Rule 4 (1) and 7 (1) of the

CPC. **Second**, he cited **Standard Chartered Bank Tanzania Limited v. National Oil Tanzania Limited & Another**, Civil Appeal No. 98 of 2008 (unreported), where the Court considered the issue of documentary exhibits that were properly tendered and admitted in court, but not duly endorsed by the trial Judge as required by Order XIII Rule 4 (1) of the CPC. The Court ruled that, the omission to endorse the exhibits was inadvertent and does not affect the evidence or renders the record of the suit defective. In addition, the Court emphasized that, trial courts must fully comply with Order XIII Rule 4 (1) of the CPC.

Third, Mr. Sinare referred to the position enunciated in **Ismail Rashid v. Mariam Msati**, Civil Appeal No. 75 of 2015 (unreported), where the modality of receiving additional evidence in civil appeal was considered. Specifically, the Court considered a certificate of title which was unprocedurally produced as additional evidence before the first appellate court and not properly admitted as an exhibit. The Court also noted that, the trial court admitted annexures attached to the pleadings without endorsing them, as the purported exhibits in that case did not bear the number and the title of the suit, the name of the person who produced such documents, the date when the documents were produced and initials

of the trial Magistrate, contrary to Order XIII Rule 4 (1) of the CPC. Mr. Sinare said, due to the pointed out omissions and mishandling of documentary evidence by both the trial court and the first appellate court, the Court noted that the same was fatal and had occasioned miscarriage of justice, hence invoked its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2002], (*the AJA*) nullified and quashed the entire proceedings and judgments of the trial court and the first appellate court.

Following the above authorities, Mr. Sinare urged us to also invoke the revisional powers under section 4 (2) of the AJA (*supra*) and nullify the entire proceedings of the trial court and quash its decision because it is nothing, but a nullity for relying on documentary exhibits that were not properly produced, tendered and admitted before the High Court to form part of the suit. He further prayed for the appellant to be exempted from costs, because, he said, the omission was done by the High Court and there was no way the appellant could have rectified the same.

In response, Ms. Kireth, while noted the submission by Mr. Sinare, she referred to page 76 of the record of the appeal and argued that, though other exhibits were not properly admitted, but exhibit P6, which was

initially objected to by the counsel for the appellant, was properly admitted. According to her, exhibits P1 – P5 and P7 were not objected to by the appellant and that is why the trial court's proceedings are silent on how they were admitted. She further submitted that, though the said exhibits were not admitted and endorsed by the trial Judge, but were all endorsed by the Deputy Registrar that they were received by the trial court. It was her further view that, since all exhibits were attached to the pleadings as annexures and were relied upon by the parties in their evidence without any objection or disputing their authenticity or genuineness there was no prejudice or injustices suffered by the parties. As such, Ms. Kireth subscribed to the authority in **Standard Chartered Bank Tanzania Limited** (supra) cited by Mr. Sinare and urged us to follow the same reasoning. In the alternative, she urged us not to nullify the entire proceedings or order for the retrial, but only to strike out the appeal for being incompetent.

In rejoinder submission, Mr. Sinare reiterated what he submitted in chief on the mishandling of the documentary exhibits by the High Court. He also emphasized that, the High Court is a court of record with a statutory duty to properly record every detail of the proceedings. On the claim by

Ms. Kireth that the said exhibits were endorsed by the Deputy Registrar, Mr. Sinare said, it is not certain if the referred signature is of the Court Registrar or someone else because there are no other particulars indicated to show the witness who tendered such exhibits and the date when a particular document was tendered. He then noted that, since it is not disputed that all exhibits except exhibit P6 were not properly admitted, this is a fit case for the Court to exercise revisional powers to nullify the proceedings and quash the decision of the trial court.

On our part, after having examined the record of the appeal and considered the submission made by the counsel for the parties, we are satisfied that there was a gross mishandling of the documentary evidence by the trial court. In order to appreciate our reasons and the position we are going to take, we find it appropriate to reproduce the contents of the provisions of Order XIII Rule 4 (1) of the CPC which provides that:-

"Subject to the provisions of the 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; and*
- (d) *a statement of its having been so admitted, and the endorsement shall be signed or initialed by the judge or magistrate."*

In addition, Rule 7 (1) and (2) of the same Order clearly stipulate a legal condition for a document to form part of the record of the suit that, it shall be admitted in evidence. Specifically, the said Rule provides that:-

"7 (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

7(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them". [Emphasis added].

From the above cited provisions, it is mandatory that for a document to form part of the record of the suit it must first be admitted in evidence. Therefore, the proper procedure is that, the document must first be cleared for admission before it is used in the evidence. In the case of **Robinson Mwanjisi and 3 Others v. Republic** [2003] TLR 218 at page

226, the Court observed with respect to the document used by the trial Judge without being properly admitted in evidence that:-

“Where it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted...” [Emphasis added].

Now, in the case at hand, as alluded by both counsel, the documentary evidence was annexed to the pleadings as annexures and during the trial, when PW1 and PW2 were testifying, they directly named the said annexures as exhibits without first producing and tendering them for admission in evidence. We have thoroughly perused the proceedings of the trial court and the same is silent on the modality used to admit and name the said annexures as exhibits. In the entire proceedings, the trial court has not indicated names of the witnesses who produced and tendered the said documents and the date when they were admitted in court to form part of the record of the suit as required by the law. (See pages 71, 72 and 74 of the record of appeal, where exhibits P1 – P5 and P7 are indicated). We do therefore associate ourselves with the authority cited by Mr. Sinare in the case of **Ismail Rashid**, (supra) where the Court, while considering

the applicability of Order XIII Rule 7 (2) quoted with approval the decision in **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited** [2006] TLR 343 and emphasized that:-

"This Court cannot relax the application of Order XIII Rule 7(1) that a document which is not admitted in evidence cannot be treated as forming part of the record of the suit". [Emphasis added].

Likewise, in the case at hand all exhibits (P1 – P7) which were not admitted in evidence cannot form part of the suit and it was therefore wrong for the trial court to rely upon them to determine the dispute before it. Following the said omission by the trial court, we subscribe to the decision in **Kunduchi Beach Hotel and Resort** (supra), where the Court, emphasized that, judgement of any court must be grounded on the evidence properly adduced, tendered and admitted in evidence during the trial. Given the circumstances obtained in this appeal, we are settled that the appeal before us is incompetent as there was gross mishandling of documentary exhibits by the trial Judge and as such, the decision of the

trial court is grounded on improper evidence, hence the same is nothing, but a nullity.

On the other hand and before we make our final order, we wish to state that, we are mindful of the fact that though Ms. Kireth admitted that there was mishandling of documentary exhibits, but she noted that exhibit P6 was properly admitted. With due respect, it is on record that, the said exhibit was admitted with reservations on the promise by the trial Judge that reasons for its admissibility will be given in the judgement. We had the opportunity to perused the trial court's judgement and there is no scintilla of evidence that the said reasons were given. It therefore goes without saying that, in the absence of the promised reasons the admissibility and authenticity of exhibit P6 is still wanting. In the same reasoning we find the case of **Standard Chartered Bank Tanzania Limited** (supra) relied upon by Ms. Kireth to be distinguishable from the facts of the case at hand and the same is not applicable, because in that case documents were properly produced, tendered and admitted, but were not endorsed by the trial Judge, while in this case there is no indication that the documents were properly produced, tendered and admitted as exhibits to form part of the suit.

We are also aware that in her submission Ms. Kireth had also argued that the purported exhibits though not endorsed by the trial Judge were endorsed by the Registrar. With respect we find this argument to be misconceived. Pursuant to Order XIII Rule 4(1) and 7(1) of the CPC, having a document admitted in court as an exhibit is a process, which starts with production and tendering of a particular document by a witness to be admitted by the court and the adverse party being given an opportunity to raise objection on the said document or not. After being cleared and admitted as an exhibit then, the said exhibit is finally endorsed. Therefore, a concern on endorsement or non endorsement of an exhibit can only be raised after the said exhibit has been properly admitted in court. In the case at hand, we are satisfied that, since the purported exhibits were not admitted in evidence, then the question of endorsing them is a *non-stata*. We therefore see no need of discussing the issue of endorsement, as in this case the exhibits were not properly admitted by the trial court and as such, there was nothing to be endorsed.

In the premises, we hereby invoke the revisional powers under section 4 (2) of the AJA and proceed to nullify and quash the entire proceedings and judgement of the trial court in *Commercial Case No. 46 of*

2003. In the final event, the appeal is hereby struck out for being incompetent and we order for the immediate retrial of the said suit before a different Judge. We make no order as to costs since the issue was raised by the Court *suo moto*. It is so ordered.

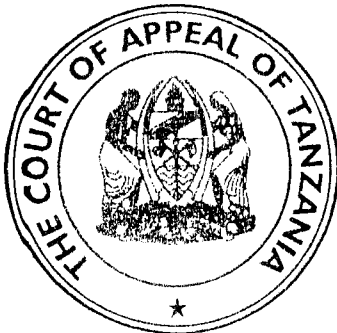
DATED at DAR ES SALAAM this 13th day of June, 2019.

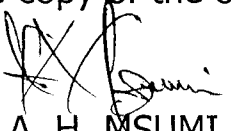
S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

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




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL