

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CIVIL APPEAL NO. 153 OF 2016

KAJOKA MASANGA.....APPELLANT

VERSUS

- | | | |
|---|---|-------------------------|
| 1. THE ATTORNEY GENERAL | } |RESPONDENTS |
| 2. PRINCIPAL SECRETARY ESTABLISHMENT | | |

**(Appeal from the decision of the High Court of Tanzania
at Mwanza)**

(Mwangesi, J.)

dated the 16th day of October, 2014

in

Misc. Civil Cause No. 1 of 2004

JUDGMENT OF THE COURT

25th & 28th October, 2016

MASSATI, J.A.:

The appellant, KAJOKA MASANGA was employed by the Government of the United Republic of Tanzania, as a Medical Attendant since 1/7/1971 up to 31/3/1999 when he was retrenched. According to his own account he was never paid his retrenchment package until 6/6/2003. The package included 20 months' ex-gratia payments at Tshs. 50,190 per month; amount of wages of 43 months at Tshs. 56,000/= per month, subsistence expenses between 31/3/1999 to

6/9/2003 at Tshs. 3,500/= per day, and lastly expenses incurred in following up his claims. His total claims worked up to Tshs. 5,484,657/=.

Believing that he was entitled to that relief, the appellant instituted a suit in the High Court of Tanzania at Mwanza, which was christened Misc. Civil Cause No. 1 of 2004; against the respondents. The respondents resisted the claim. So the suit had to go into a trial. The appellant himself testified as PW1, first before Rwakibarila, J (the predecessor judge) on 24/4/2010, who did not complete it for reasons which are not necessary to go into in this judgment. The hearing was thus adjourned to another date, to be precise, to 10/8/2010. That was in vain. The matter was then adjourned several times before several judicial officers, before it landed on the desk of Mwangesi, J on 9/5/2014 (the successor judge). On that date, the appellant/plaintiff continued to testify and closed his case. The successor judge proceeded to take the defence case and composed the judgment, which he delivered on the 16/10/2014. On the 28/10/2014 the appellant lodged a notice of appeal to this Court to challenge that judgment and its resulting decree; hence the present appeal.

At the hearing of this appeal, Mr. Obadia Kajungu, learned Senior State Attorney appeared for the respondents, but the appellant appeared in person. He had earlier on filed a memorandum of appeal comprising four (4) grounds namely: -

MEMORANDUM OF APPEAL

- "1. *That the learned trial judge erred in law to decide that there is no sufficiency evidence to the appellant party to establish his claim against respondent for the balance of payment.*
2. *That the learned trial judge was really wrong when he refused to assess the right payment and was not the proper one.*
3. *That the learned trial judge erred in law and misdirected himself in law when he omitted to consider and determine issue of the change of scale of salary.*
4. *That the learned trial judge erred in law for not considering the Appellant claim entitled to be paid according to salary slip."*

However, before, we allowed the parties to address us on the grounds of appeal, we probed them to first address us on whether the appeal itself was competent. After taking them through the record of appeal, they both agreed that the decree was not signed by the judge or properly signed by the Deputy Registrar as required by law; and that the successor judge took over the hearing of the suit without recording any reasons. On account of those defects, they both agreed that the appeal was incompetent and liable to be struck out.

The powers of judges to take over and deal with evidence taken by other judges in civil matters is generally governed by Order XVIII r. 10 (1) of the Civil Procedure Code 1966 Cap. 33 R.E. 2002 (the CPC), which also applies to proceedings against the Government (as in the present case) by virtue of the Government Proceedings (Procedure) Rules (1968) GN. 376 of 1968. Rule 10(1) of Order XVIII of the CPC provides as follows: -

"10(1). Where a Judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any

evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."

In its recent decision, in **MS. GEORGES CENTRE LIMITED v. THE HONOURABLE ATTORNEY GENERAL AND MS. TANZANIA NATIONAL ROAD AGENCY**, Civil Appeal No. 29 of 2016 (unreported) this Court considered the scope of this rule and said:

"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not

practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."

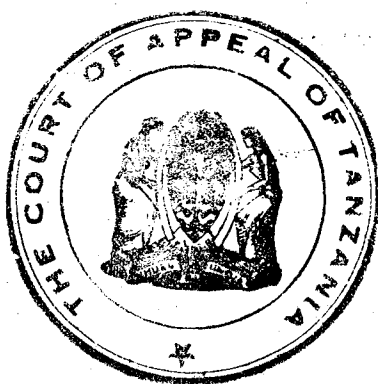
After due consideration, the Court in that appeal vitiated all the proceedings conducted by the successor judge, including the judgment and decree, and remitted the proceedings to the High Court for continuation of the trial in accordance with the law.

In the present case, the successor judge also took over the continuation of the trial by continuing to receive the evidence of PW1, without recording any reasons why the case landed on his lap. We find this irregular and as we noted in **Ms. GEORGES CENTRE's** case this was highly prejudicial. Those proceedings by the successor judge cannot be spared.

Accordingly, we exercise our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002, and upon taking judicial notice that the predecessor judge Rwakibarila, J is now late, we quash all the proceedings, judgment and decree, and order that it be placed before another judge of competent jurisdiction for the trial to begin afresh. We make no order as to costs.

Order accordingly.

DATED at MWANZA this 28th day of October, 2016.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL