IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CIVIL APPEAL NO. 29 OF 2016

M/S GEORGES CENTRE LIMITED ..... APPELLANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

M/S. TANZANIA NATIONAL ROAD AGENCY ..... 2ND REPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)

(Mugasha, J.)

Dated the 27th day of June, 2014
in
Land Case No. 27 of 2010

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JUDGMENT OF THE COURT

22nd & 28th July, 2016

KILEO, J. A.:

This appeal is predicated on a procedural issue that was raised *suo motu* by the Court at the hearing of the appeal. For this reason there will be no need for us to go into a consideration of the grounds of appeal that were filed by Mr. Elvaison Maro learned advocate, on behalf of the appellant and the written submissions of both sides that were filed subsequent thereto.

Upon our perusal of the record of appeal we noted, at page 195 of the record, that Mugasha, J. as she then was, assumed the trial of the case beginning with the reception of the testimony of defence witness number 4 (DW4) and proceeded to write and deliver the judgment, the subject of this appeal. Nyerere, J. handled the matter from its beginning and had taken down the testimonies of all witnesses for the plaintiffs as well that of three defence witnesses.

In view of the above circumstances we called upon both Mr. Maro for the appellant and Mr. Innocent Njau, Senior State Attorney who was assisted by Ms Elizabeth Swai, learned State Attorney and Saddy Rashid, learned advocate for the respondents to address us on the implications of the takeover of the trial by Mugasha J. in the light of the provisions of Order XVIII rule 10 of the Civil Procedure Code, Cap 33 R.E.2002 (CPC).

Mr. Maro was of the firm view that the takeover by Mugasha, J. of the case which was partly tried by Nyerere J. without the assignment of any reasons was irregular and was not in accordance with spirit of the provision of law covering the situation. Mr. Maro went on further to submit that it is important that a case be brought to completion by a judge or magistrate who started it as she/he is the one who has the benefit of

having assessed the credibility of witnesses. Moreover, it would be contrary to the individual calendar system that is emphasized under the provisions of Order VIII of the CPC. Mr. Maro opined that indiscriminate change of trial magistrates or judges in the trial of a case compromises transparency in judicial proceedings which is an essential element in the administration of justice. He advised us in the circumstances to nullify the whole proceedings conducted by Mugasha J. as well as the judgment and decree that flowed therefrom.

Mr. Njau agreed with Mr. Maro and also advised that the Court should exercise its powers of revision to nullify the irregular proceedings.

Oder XVIII rule 10 of the CPC provides:

> **"10. Power to deal with evidence taken before another judge or magistrate**
>
> **(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 has 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".

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.

We have had opportunity on a number of occasions to deal with similar situations in the criminal justice arena. Our line of reasoning in those occasions applies to the matter at hand. Section 214 (1) of the

Criminal Procedure Act caters for takeover of trial by a successor magistrate where one magistrate is unable for some reason to bring the proceedings to completion. Our settled position is that the reasons for the takeover have to be put on record. In **Priscus Kimaro v. Republic**, Criminal Appea no. 301 of 2013 (unreported) the Court observed:

> *"...where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded. If that is not done it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with to the detriment of justice. This must not be allowed"*

In another case, Criminal Appeal No. 116 of 2015 **Abdi Masoud @ Iboma and Others versus the Republic** the Court went further and held that in the absence, on record, of any reason for the taking over, by a different magistrate of the trial of a case that is partly heard, the successor magistrate lacks jurisdiction to proceed with the trial and consequently all proceedings pertaining to the takeover of the partly heard matter becomes a nullity. Likewise, Mugasha, J. as she then was, without any reasons on

record, in this case lacked jurisdiction to take over the matter that was partly heard by Nyerere, J.

The learned judge's statement appearing at page 245-246 of the judgment caught our eye and re-enforced the need for reasons to be put on record. Because of the very nature of the statement we take exception to address ourselves to it. The following is what the learned judge stated:

> *"After a careful perusal of the pleadings, evidence on record and submission of counsel; initially; I wish to remark on untold conduct of the counsel for the defendants who after closing of their case and after this Court had allowed parties to make a final address, they raised an aspect of having in May 2012 written to the Court to make a visit to the locus in quo. Exactly; this is a rat and cat sort of game though dangerous as such. This Court thus enjoins all who knock the doors of Courts of law to avoid this uncalled behavior which is against the interests and ends of justice. This is because; the file came in my hands as successor judge in May, 2013 and parties ought to have briefed this Court on such status that the Court could have visited the locus in quo. Possibly visiting the locus in quo*

could have some impacts but the defendants acted irresponsibly and cannot avoid shouldering the blame having slept over their rights in that regard."

We wish to observe here that the duty of a trial court is to ensure that justice is done to both parties in the end. Even if the need to visit the locus in quo was brought to the attention of the learned judge after the parties had been allowed to make their final addresses the judge was not barred (for the ends of justice), from acceding to the request to visit the locus in quo at that stage. She admitted herself, and indeed correctly so, considering that this is a land matter that visiting the locus in quo could have some impacts. May be if the trial had been completed by the first judge she would have properly appreciated the need for the visit to the locus in quo.

So much for that.

We need not belabor ourselves more on this matter. Having discussed it as above we find that all the proceedings that were conducted by Mugasha J. as from 17/3/2014 including the judgment and decree were a nullity. In the exercise of our powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R. E. 2002 we quash and set aside those

proceedings. We remit the matter to the High Court for continuation of the trial in accordance with the law.

Given the circumstances of the case, and considering the stage the trial had reached before the takeover by the subsequent judge, we advise that the judge who had started it bring it to completion unless there is some serious and good cause why that judge cannot do so.

We order accordingly.

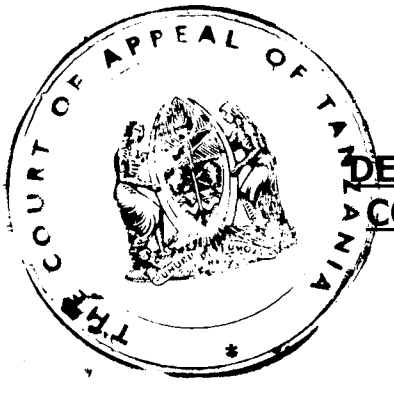
Dated at **Arusha** this 25th day of July 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL