IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUANDA, J.A., MMILLA, J.A., And MKUYE, J.A.)

CIVIL APPEAL NO. 186 OF 2017

TRYPHONE ELIAS @ RYPHONE ELIAS..... 1ST APPELLANT
PRISCA ELIAS.....2ND APPELLANT

VERSUS

MAJALIWA DAUDI MAYAYA. .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania (Commercial Division) at Mwanza)

(Songoro, J.)

Dated the 26th day of October, 2016
in
Commercial Division Case No. 7 of 2013

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RULING OF THE COURT

1st & 8th December, 2017

MMILLA, J. A.:

The appellants, Tryphone Elias @ Ryphone Elias and Prisca Elias filed this appeal challenging the judgment and decree of the High Court of Tanzania (Commercial Division) at Mwanza in Commercial Case No. 7 of 2013. In that case, justice triumphed in favour of the respondent, Majaliwa Daudi Mayaya, who was the plaintiff in that court.

The appeal was slated for hearing before us on 30.11.2017, and the advocates for the parties were in attendance. Mr. Anthony Nasimire, assisted by Mr. Mathias Rweyemamu, learned advocates, represented the appellants, whereas the respondent enjoyed the services of Mr. Deocles Rutahindurwa, learned advocate.

At the commencement of hearing, the Court wished to satisfy itself as to the competence or otherwise of the appeal before it. It focused on the issue whether or not the Record of Appeal was complete, and cited two aspects. In the first place, there is a chamber summons at page 15 of the Record of Appeal vide which the appellants applied for leave to defend the suit, the affidavit whereof is at page 17. In that regard, there was a notice of preliminary objection at page 27 of the Record of Appeal, but the ruling which resulted from that preliminary objection is missing. Secondly, there is a ruling at page 30 of the Record of Appeal through which the appellant was granted leave to defend the suit, but again the drawn order thereof is missing.

While conceding that those documents were conspicuously missing from the Record of Appeal, Mr. Nasimire attempted to argue that the omission was minor on account of the proviso to Rule 96 (1) of the

Tanzania Court of Appeal Rules, 2009 (the Rules). However, after being referred to the provisions of Rule 96 (3) of the Rules, he conceded that the omission was fatal, the consequence of which would be to strike out the appeal. Nonetheless, he implored the Court to desist from striking out the appeal but proceed to revise part of these proceedings and the judgment which is the subject of the appeal for being tainted with an illegality.

Mr. Nasimire submitted that he discovered late while in Court that the trial of this case was handled by three different judges without assigning reasons for the respective successions, an aspect which he said, constitutes an illegality. He pointed out that while the trial was commenced by Nchimbi, J who recorded the evidence of PW1 Majaliwa Daudi Mayaya as reflected at pages 92 to 103 of the Record of Appeal, it was later on taken over by Mansoor, J who, as shown at page 106 of the Record of Appeal, extended the life span of the case, but likewise she did not assign any reasons for the takeover. He further observed that the trial of the case was subsequently taken over by Songoro, J who, as it were, conducted the defence and consequently composed the judgment appearing at pages 123 to 140 of the Record of Appeal, but did not as well give reasons for the takeover. Mr. Nasimire maintained that the learned judges, Mansoor and

Songoro, JJ, had no jurisdiction to try that case in terms of Order XVIII Rule 10 (1) of the Civil Procedure Code Cap. 33 of the Revised Edition, 2002 (the Code) under which they were required to give reasons to account for those successions. In the circumstances, he urged the Court to invoke the revisionary powers under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), with a view to nullify the proceedings and the judgment from the stage at which Nchimbi, J ceased the conduct of the case until its completion, with a direction for the trial to re-commence before another judge who will be duty bound to comply with the provisions of Order XVIII Rule 10 (1) of the Code.

In response, Mr. Rutahindurwa submitted that upon the concession by his learned friend Mr. Nasimire that the Record of Appeal is incomplete, correctly so in his view, for that incompetence the only appropriate consequence is for the Court to strike out the appeal. While succumbing that the illegality pointed out by Mr. Nasimire is real, he opposed his learned friend's suggestion that the Court should address that illegality, notwithstanding the potentially good reasons. Mr. Rutahindurwa cited the case of **Shaban Fundi v. Leonard Clement**, Civil Appeal No. 38 of 2017,

CAT (unreported) in which, like in the present case, the Record of Appeal was found to be incomplete. Mr. Rutahindurwa asserted that the appellant's advocate conceded to the preliminary objection which was raised in that regard, but invited the Court to invoke its revisionary powers under section 4 (2) of the AJA. The Court declined to cloth itself with revisional powers under section 4 (2) of the AJA in order to address the illegality. In tandem with that decision, Mr. Rutahindurwa pressed the Court to decline the invitation extended to us by Mr. Nasimire.

In a brief rejoinder, Mr. Nasimire submitted that the case of **Shaban Fundi v. Leonard Clement** (supra) is distinguishable to the present one because in that case there was raised a preliminary point of law, which is not the case in the present case. He asserted that the question of incompleteness of the Record of Appeal in the instant matter has been raised by the Court *suo motto*. He pressed that the Court, being the highest one in the jurisdiction, and a fountain of justice, cannot close its eyes on a vivid illegality he has cited and which goes to jurisdiction of the trial court. He reiterated his request that the Court addresses it by invoking its revisionary powers with the view to quash that part of the proceedings and the judgment which resulted.

It is imperative at this juncture to point out in passing that whether a legal point is raised by a party by way of a notice of preliminary objection, or by the Court *suo motto*, the weight to be attached to any such matter is the same. Thus, we have reservations on Mr. Nasimire's argument that **Shaban Fundi's** case (supra) may be distinguished on that fact alone.

Nevertheless, we share the views of both learned counsel for the parties that the absence of the ruling resulting from the preliminary objection which was raised in respect of the application for leave to defend, and the drawn order in respect of the ruling appearing at page 30 of the Record of Appeal, violates the provisions of Rule 96 (1) (d) and (h) of the Rules, and renders the appeal incompetent, liable to be struck out. Under normal circumstances, we would have struck it out and ended there. However, on the basis of the ground raised by Mr. Nasimire, and for reasons we endeavour to assign, we have felt it imperative to take an exceptional course.

Before we may assign the reasons, we wish to expound that the illegality which is the subject of discussion in this case resulted from the takeover of trial by one judge from another without assigning reasons. In that case, trial began before Hon. Nchimbi, J. He recorded the evidence of

PW1 who was the only witness and the plaintiff closed his case. Unfortunately, he did not continue with the trial, he was succeeded by Hon. Mansoor J. However, the latter learned judge did not give reasons for the takeover. Unfortunately, that judge too was succeeded by Hon. Songoro, J, who likewise did not give reasons why he took over from Mansoor, J. We think the respective judges ought to have assigned reasons for the takeover as envisaged by the provisions of Order XVIII Rule 10 (1) of the Code. That provision stipulates that:-

> *"(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 emphasis is ours].

There are numerous cases in which the Court interpreted this provision as requiring the giving of reasons for the takeover by another magistrate or judge, among which are those of **Ms Georges Centre Ltd v. The Attorney General & Another**, Civil Appeal No. 29 of 2016, CAT

and **Kajoka Masanga v. The Attorney General and Another,** Civil Appeal No. 153 of 2016, CAT (both unreported). It was held in the former case of **Ms Georges Centre Ltd v. The Attorney General & Another** (supra) that:-

> *"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."*

In both these cases, the Court found that it was a fatal irregularity because the subsequent judges tried the case without jurisdiction, and that it constituted an illegality. Parts of the respective proceedings in those cases from the stage of takeover by the respective subsequent judges to the completion of the cases were declared a nullity, quashed, and judgments set aside.

We now turn to give reasons why we think we should take an exceptional course.

To begin with, we wish to point out that, as submitted by Mr. Nasimire, the Court cannot normally justifiably close its eyes on a glaring illegality in any particular case because it has duty of ensuring proper application of the laws by the subordinate courts – See the case of **Marwa Mahende v. Republic** [1998] T.L.R. 249.

In **Marwa Mahende's** case (*supra*), the appellant was tried, convicted and sentenced in absentia. Upon apprehension, the appellant was taken straight to prison to start serving his sentence. He was aggrieved and appealed to the Court.

It turned out that arguments centered on the provisions of section 226 (2) of the Criminal Procedure Act No. 85 of 1985. That section was silent on the procedure on how to handle an accused person who was arrested following his conviction in *absentia.* On the face of it, sub section (2) of that section was capable of being understood to mean that upon his arrest, the accused person was to be taken to prison straight away. The Court construed the subsection to mean that an accused person who was arrested following his conviction and sentence in absentia should be sent before the trial court in order to show cause. Following the doubt which was expressed regarding the propriety of that move by the Court, it held that:-

> *"We think, however, that there is nothing improper about this. The duty of the Court is to apply and interpret the laws of the country.* ***The superior courts have the additional duty of ensuring proper application of the laws by the courts below.***"
> [The emphasis is ours]

Seeking an inspiration from that decision, we are firm that for the interests of justice, the Court has a duty to address a vivid illegality and that it cannot justifiably close its eyes thereof.

There are a couple of cases in which the Court was faced with a situation like which we have here. Apart from the case of **Shaban Fundi v. Leonard Clement** (supra) cited by Mr. Rutahindurwa in which the court declined to address the illegality for reasons which were assigned, there are a range of other cases in which instead of striking out the matter for being incompetent, the Court took the option of addressing the illegality, at the end of which it invoked its revisionary powers under section 4 (3) of the AJA. Those cases include **Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund,** Civil Application No. 10 of 2008, **Chama cha Walimu Tanzania v. The Attorney General,** Civil Application No. 151 of 2008, and **The Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu,** Criminal Application No. 6 of 2012, CAT (all unreported).

In the case of **Shaban Fundi v. Leonard Clement** (supra), while underscoring that such power had been exercised before in some cases before and mentioned **Chama cha Walimu Tanzania v. The Attorney General, Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund,** and **The Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu** (supra), the

Court was satisfied that the case of **Shaban Fundi** (supra) did not fall within the circumstances which obtained in the cases it referred to, which is why it declined to invoke the revisional powers under section 4 (2) of the AJA. It added, however, that **each case must be considered on its own set of facts.**

In the case of **The Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu** (supra), it happened that in the course of hearing the revisional proceedings before it, it transpired that the Court was not properly moved in that the notice of motion cited a wrong provision of the law. Besides, the grounds for relief sought were not stated in the notice of motion. It was held that the application was incompetent.

Having ruled out that the application was incompetent; the Court would have ordinarily proceeded to strike out the application. However, it did not do so owing to the illegality which was apparent on the face of the High Court's record. In refusing to close its eyes on a vivid illegality, the Court said: -

> *"Before we (may) discuss what should be done, we wish to point out that up to now we . . . remain seized with the High Court's record so as to enable us intervene on our own and revise the illegalities*

pointed out by invoking section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002, otherwise the High Court decision will remain intact. This approach is now gaining momentum as per the decisions of the Court in ***Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund*** *Civil Application No. 10 of 2008 (unreported);* ***Chama cha Walimu Tanzania v. The Attorney General*** *Civil Application No. 151 of 2008 (unreported).* ***So, it is the practice now that if it is shown that the Court was not properly moved by non – citation or wrong citation of the law so as the Court to exercise its powers of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 hence the proceedings are incompetent but on the face of the record it shows the same to have been tainted with illegality, the Court will not normally strike out that incompetent application. Instead the Court will be taken to have called the record and proceed to revise the proceedings under Section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002.*** *Adopting the above approach, we take it that the*

record of the High Court to have been called by the Court in terms of section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002."

Consequently, the Court exercised the powers under section 4 (3) of the AJA, it quashed the proceedings of the High Court and set aside all the orders made therein. It direct for the record of the subordinate court be remitted to the Dar es Salaam Resident Magistrate's Court, Kisutu for continuation of committal proceedings.

In the case of **Chama cha Walimu Tanzania v The Attorney General,** Civil Application No. 151 of 2008, CAT (unreported), the Court declined to strike out the application which was found to be incompetent so that it could address the conspicuous illegality. It stated that:-

"Because the proceedings before the Labour Court were a nullity, that's why we felt constrained not to strike out this application. We did so in order to remain seized with the Labour Court's record and so be enabled (us) to intervene **suo motto** *remedy the situation. This Court recently thus acted, in almost similar circumstances, in the case of* **Tanzania Heart Institute v. The Board of Trustees of The National Social security Fund,** *Civil Application No. 109 of*

2008 (unreported)."

In our view, the circumstances in the present case attract us to follow the stand the Court took in the cases of **Chama cha Walimu Tanzania v. The Attorney General, Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund,** and **The Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu** (supra) as against that which was taken in the case of **Shaban Fundi** (supra) because the obtaining circumstances in the instant case are such that we should intervene now, because the illegality pointed out goes to the jurisdiction of the court. That entails that at the end of it all; the decision of the High Court will not escape the wrath of being nullified. Consequently, to tackle the question of illegality at this early opportunity will vouch unnecessary further delays, and also save the parties from unnecessary potential and inescapable expenses.

Having said that the illegality which ensured goes to the jurisdiction of the court, we decline to strike out the appeal in order to address this illegality. In consequence, we invoke our revisionary powers under section 4 (3) of the AJA on the basis of which we quash that part of

the proceedings from the stage where Nchimbi, J. ended up to the completion of trial, and set aside the judgment thereof and the resultant orders. We remit the record to the High Court with the direction that trial continues from the stage at which Nchimbi, J. ended, so that in case another judge may take over, he may first comply with the demands of Order XVIII Rule 10 (1) of the Code.

In the circumstances of this case, we order each party to bear own costs.

DATED at **MWANZA** this 7th day of December, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL