

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CIVIL APPEAL NO. 173 OF 2017

OYSTERBAY VILLAS LIMITED -----APPELLANT

VERSUS

KINONDONI MUNICIPAL COUNCIL ----- RESPONDENT

(Appeal from the judgment and Decree OF THE High Court
of Tanzania (Commercial Division)

at Dar es Salaam.

(Nchimbi, J.)

Dated the 11th March, 2014

In

Commercial Case No. 88 of 2011

RULING OF THE COURT

13th Feb & 27th Mar. 2018

MWANGESI, J.A.:

The appellant herein was the plaintiff in Commercial Case No. 88 of 2011, which she instituted against the respondent claiming for among other reliefs a declaration that, the respondent/defendant was in breach of the terms of contract entered between them and that, she was asking to be paid compensation for the damages suffered and other costs.

The brief facts of the case are to the effect that, on the 13th day of December, 2007, the plaintiff/appellant and the defendant/respondent

simultaneously entered into two agreements each termed agreement for joint venture development and joint ownership in respect of the properties known as Plot No. 322 situated along Ruvu Road Oysterbay Area within Kinondoni Municipal in Dar Es Salaam Region with certificate of Title No. 10392, and Plot No. 277 situated along Mawenzi Road within Kinondoni Municipality in the Region of Dar es Salaam with certificate of Title No. 10383. It was contended by the respondent in the High Court that, the defendant/respondent failed to honour the terms of the agreement and thereby, occasioned loss to the plaintiff/appellant.

In the judgment that was handed down by the High Court on the 11th March, 2014, it was held that, the defendant/respondent was not in any breach of the terms of the contract as contended by the appellant/plaintiff. However, the Court order the respondent to fulfil her obligations of processing certificate of title in the names of the parties in accordance with the agreed ratio of shares that is, 75 percent for the plaintiff/appellant and 25 percent for the defendant/respondent. Additionally, each party was ordered to bear its own costs.

The decision of the trial Court aggrieved the appellant, who preferred an appeal to this Court challenging it. The appeal was however greeted

with a notice of preliminary objection that was lodged by the respondent on the 8th February 2018, in terms of Rule 107 (1) of the Rules, contending that, the appeal was time barred. When the appeal was called on for hearing before us on the 13th February, 2018, the appellant was represented by Mr. Gasper Nyika learned counsel, whereas, the respondent had the services of Mr. Hussein Ughulum, learned Municipal solicitor.

At the very outset, the learned counsel for the respondent rose to inform the Court that, he was abandoning the preliminary objection which he had earlier on lodged, a prayer which was not resisted by his learned friend, Mr. Nyika. And upon marking the preliminary objection withdrawn, the Court did *suo motu* inquire from the learned counsel from either side, if the proceedings of the High Court were proper. The quest was attributed by the fact that this matter was handled by more than one Judge. Nevertheless, the proceedings appeared to suggest that, the procedure pertaining to exchange of a case file among the Judges was not observed.

On revisiting the proceedings of the High Court, the learned counsel for the appellant was of the view that, the proceedings were not properly conducted in view of the individual calendar system. This was from the fact

that, the case file did change hands into about three learned Judges, but there were no reasons advanced as to why there were such changes. In terms of the requirement under the individual calendar system, the omission to record the reasons as to why the case file was transferred from one Judge to another, was a fatal irregularity, which inevitably rendered the proceedings a nullity. In the circumstances, the learned counsel invited us to invoke the revisional powers conferred on us under the provisions of the Appellate Jurisdiction Act, to nullify the proceedings of the High Court from when the first transfer was made, and direct for a hearing *de novo*.

On his part, Mr. Ughulum, was in agreement with his learned friend and added that, the fact that, the anomaly had been pointed out by the Court, he could not press for costs. In light of what has been submitted by the learned counsel from either side above, the only issue that stands for our deliberation and determination is whether the proceedings of the High Court were properly conducted.

Much as the records in the case file could divulge, Commercial Case No. 88 of 2011 was assigned to Honourable Nyangarika, Judge by the Judge In-charge on the 3rd November, 2011. There afterwards, upon failure by the parties to mediate before Nyangarika, J., on the 14th May,

2012 as could be reflected at page 124 of the record of appeal, the case file was placed before the Judge In-charge for re-assignment to a trial Judge. Indeed, on the same date, the case file was re-assigned to learned Bukuku, J. for trial, and the hearing of the case commenced on the 30th July, 2012.

Nonetheless, on the 26th day of July, 2013, when the case was called on for defence after the plaintiff had closed its case (page 140), for no apparent reasons, the case file was placed before learned Judge Mr. Nchimbi, who proceeded to hear the defence evidence, final submissions of the learned counsel for either side and finally, composed the judgment which is the subject of the current appeal. The failure to indicate the reasons that caused the case file to be transferred from learned Judge Ms Bukuku to learned Judge Mr. Nchimbi was a procedural irregularity, which infringed the individual calendar system.

The procedure pertaining to the individual calendar system as practiced in our jurisdiction is that, once a case file has been assigned to a Judge or magistrate, the said Judge or magistrate has to handle it to its conclusion. In case the circumstances necessitate for the transfer of the

case file from one Judge/magistrate to another, then the reasons for such transfer have to be given and reflected in the proceedings of the case file. The reasons for compliance with the system are numerous, but the crucial ones were summarized by the Court in the case of **Fahari Bottlers Limited and Another Vs Registrar of Companies and Another** [2000] TLR 102, to be:

"The individual calendar system requires that once a case is assigned to a Judge or magistrate, it has to continue before that Judge or magistrate unless there are good reasons for doing otherwise. The system is meant not only to facilitate case management by trial Judges or magistrates, but also to promote accountability on their part. Failure to follow this procedure was certainly irregular and was amenable to the revisional process."

In line with the foregoing holding, since in the instant matter, there were no reasons advanced as to why the case file was transferred from learned Judge Bukuku, to learned Judge Nchimbi, the omission occasioned was fatal and did vitiate the proceeding and thereby, subjecting it to revision. In terms of the provisions of section 4 (2) of the Appellate

Jurisdiction Act, Cap 141 R.E 2002 (**AJA**), we hereby quash the proceedings before learned judge Nchimbi and direct that, the case file be placed before another Judge for continuation from where the anomaly was occasioned. This being an old case, we direct that it be given preference.

And, the fact that the anomaly to the proceedings have been pointed out by the Court, we make no order as to costs and therefore, each party will bear its own.

Order accordingly.

DATED at DAR ES SALAAM this 21st day of March, 2018.

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL