

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., LILA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 60 OF 2015

TUMAINI JOHN MARK..... APPELLANT

VERSUS

1. OBED JOHN MARK.....1ST RESPONDENT

2. BUZO MACHENJA.....2ND RESPONDENT

**(Appeal from the judgment and decree of the High Court of
Tanzania at Dar es Salaam)**

(Bongole, J.)

dated the 9th day of May, 2014

in

Probate and Administration Cause No. 6 of 2010

RULING OF THE COURT

8th & 25th October, 2018

MBAROUK, J.A.:

The appellant, **TUMAINI JOHN MARK** instituted a petition against the respondents in the High Court of Tanzania in Probate and Administration Cause No. 6 of 2010. The petition was to determine which law was applicable and how many beneficiaries the deceased left. The deceased was one Zakayo John Mark Ibambangulu, who died intestate on the 14th day of October, 2007. The High Court dismissed the petition on ground

of lack of merit; aggrieved, the appellant has preferred this appeal.

In this appeal, Mr. Gabriel Simon Mnyele, learned advocate appeared for the appellant. The 1st respondent had the service of Mr. Mluge Karoli Fabian, learned advocate, while the 2nd respondent was represented by Mr. Francis Stolla, learned advocate.

At the hearing of the appeal, the Court *suo mottu* raised some issues to satisfy itself as to **one**, whether, the exhibits found in the record of appeal were properly endorsed in compliance with the mandatory provisions of Order XIII Rule 4 (1) of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC). **Two**, whether, the record of appeal was complete in compliance with Rule 96 (1) (k) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for reason that exhibits D3 and DE3 were missing. **Three**, as to what was the legal effect for the successor judge to take over the case file from the predecessor judge, without assigning reasons.

In his response to the first question raised by the Court, Mr. Mnyele who appeared for the appellant submitted that the exhibits were admitted according to the law. He submitted that he wrote a letter to the Registrar requesting among other things, to be supplied with the exhibits admitted. The Registrar informed them that the exhibits were ready for collection and their client went and collected them. They then discovered that some of the exhibits were not endorsed, hence they wrote another letter to the Registrar concerning that issue but no response was given. Mr. Mnyele insisted that, they paid and collected the exhibits, meaning that they were endorsed and certified. He further submitted that, as long as the exhibits were admitted and were in the record, failure to endorse is not a fatal defect hence, the respondents were not prejudiced.

Replying the second issue, Mr. Mnyele submitted that, all exhibits were in the record except that they were haphazardly arranged. He referred the Court to exhibit DP3 on record that the document was the same as exhibit DE3 though it was wrongly marked. He submitted however that, it was not his fault for failure to mark them.

In relation to the third issue, Mr. Mnyele, counsel for the appellant, submitted that, when the case file was transferred from Judge Chinguwile to Judge Bongole, no reason was given as required by Order XVIII Rule 10 (1) of the CPC. However he said that, the provisions of Order XVIII Rule 10 of the CPC were not violated as the provision is only for directive purposes. He submitted further that, the defect is not fatal as no party was prejudiced since this is a matter of practice not of law.

He then urged the Court to invoke Rule 2 of the Rules and Article 107A of the Constitution of the United Republic of Tanzania, 1977 for the interest of justice. He further urged us to find that, the shortcomings are very small, hence they should be disregarded and the Court should proceed to hear the appeal on merit.

On his part, Mr. Fabian, counsel for the first respondent, on the first issue submitted that, Rule 96 (1) (k) of the Rules, has been contravened as the record of appeal is incomplete since the exhibits were not endorsed. He said, Order XIII Rule 4 (1) of the CPC mandatorily requires that exhibits have to be endorsed by the court. He relied upon the decision of this Court in the case of

Tengeru Flowers Limited v. Dal Forwarding (T) Limited & 2 Others, Civil Appeal No. 12 of 2011 (unreported). He urged the Court to expunge the exhibits which were not endorsed.

In relation to the second issue, Mr. Fabian submitted that, Exhibits D3 and ~~DE3~~, were not endorsed that is why they are not found as such on the record of appeal. He stated that there is no reason for the Court to depart from its earlier decisions where it has been stated that, the effect of such a defect is to strike out the appeal as the same is incompetent following the incompleteness of the record.

With regard to the third issue, Mr. Fabian submitted that, under Order XVIII Rule 10 of the CPC, reasons as to why the case file shifted from Judge Chinguwile to Judge Bongole were to be stated but no reason was given. For that reason, Mr. Fabian submitted that, the defect was prejudicial since the successor Judge took over the file without disclosing any reason. He further added that, the proceedings were null and void from where Judge Bongole took over, hence urged the Court to order a retrial from where Judge Bongole took over and conducted the matter.

Mr. Stolla, counsel for the second respondent, joined hands with his learned friend, counsel for the first respondent on the first two aspects. He thereafter urged us that, the High Court proceedings from where Bongole, J. took over the conduct of the case, be found null and void and further urged the Court to invoke Section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) to revise the High Court proceedings and order for retrial starting from where Bongole, J. took over the conduct of the case.

In his rejoinder submission Mr. Mnyele submitted that, the counsel for the respondents tended to confuse the import of Order XIII Rule 4 of the CPC and Rule 96 of the Rules. He submitted that, it is wrong to interrelate the two as they serve different purposes. He further added that the records are impeccable, and if the exhibits were to be found not endorsed, there was no alternative remedy other than to expunge them from the record. To support his submission he referred us to the cited case of **Tengeru Flowers Limited** (supra). He said, after expunging those exhibits, the remaining documents suffice to determine the appeal. Mr. Mnyele submitted further that, the

learned counsel for the first respondent gave imaginary views on the third aspect. He then reiterated what he had submitted earlier that no one was prejudiced whatsoever.

We have dispassionately considered the rival submissions by the parties on the issues raised by the Court, we have opted to begin with the third issue raised by the Court concerning the failure of the successor judge to give reason as to why he took over the matter from his predecessor. The import envisaged under Order XVIII Rule 10 (1) of CPC stipulates circumstances under which the successor judge or magistrate may take over the conduct of the case if the predecessor fails to conclude a trial or suit. The provision read as follows:-

"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 provision provides for the situation under which the predecessor judge may fail to proceed with the conduct of the matter. It is our view that, any of these reasons are supposed to be given by the successor judge or magistrate before taking over and proceed with the matter. Failure of which, to our view, renders the proceedings presided by the successor judge or magistrate, a nullity.

In this present matter, all counsel are not disputing about the change of the presiding judges at the trial under scrutiny. However, learned counsel locked horns on the consequences of non-compliance with Order XVIII Rule 10 (1) of the CPC. While the appellant's counsel argued that the omission is not fatal as no party was prejudiced since this is a matter of practice not of law, the learned counsel for the first respondent challenged such stance and submitted that, the omission was fatal and prejudicial since the successor judge took over the case file with no apparent reason stated. Hence he said, that renders the

proceedings null and void and urged the Court to order retrial from where Judge Bongole took over and conducted the matter. This stance was supported by the counsel for the second respondent who submitted that, the High Court proceedings be found null and void from where Bongole, J. took over and urged the Court to invoke Section 4 (2) of the AJA to revise the High Court proceedings and order for retrial starting from where Bongole J, took over the conduct of the case.

The judicial pronouncements to that effect are monumental, but we need only cite a few decisions where it was held so and these are for example **Kajoka Masanga v. The Attorney and Principal Secretary Establishment**, Civil Appeal No. 153 of 2016 (unreported) in which we held that:-

"The successor judge 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. This was irregular and those proceedings by the successor judge cannot be spared."

This Court has similar position in the case of **National Microfinance Bank v. Augustino Wesaka Gidimira t/a Builders Paints & General Enterprises**, Civil Appeal No. 74 of 2016 (unreported) in which we held that:-

"...Bongole J., had no jurisdiction to take over, continue and bring the trial High Court Proceedings to completion in the absence of duly recorded reasons explaining his predecessor's inability to complete the trial. Both the proceedings taken without jurisdiction and the resultant judgment are, inarguably, a nullity."

See also: **M/S Georges Centre Limited v. The Honourable Attorney General & Another**, Civil appeal No. 29 of 2016 and **Joseph Wasonga Otieno v. Assumpter Nshunju Mshama**, Civil Appeal No. 97 of 2016 (both unreported).

In the present matter, failure by the successor judge to give reasons for change from his predecessor judge prevented the parties from knowing why there was such change. In this regard, in the light of what we have endeavored to explain, we do not think that it is prudent to depart from our previous decisions which in our considered view is still good law.

On account of the successor judge taking over the continuation of the trial without recording reasons as to why the case was before him, we find this in the present matter irregular and highly prejudicial. Therefore, the proceedings by the successor judge including the judgment and the decree cannot be salvaged.

We are of the considered opinion that without going to examine the other issues raised by the Court, this point alone can dispose of the appeal. Dealing with those other issues will be just an academic exercise.

In the circumstances, we accordingly exercise our revisional jurisdiction under section 4(2) of the AJA and quash the proceedings conducted by Bongole, J. judgment and the decree. We further order the case file to be placed before

another Judge with competent jurisdiction for the expedited trial from where the predecessor judge ended. We make no order as to costs as we raised the matter *suo motu*. It is so ordered.


DATED at **DAR ES SALAAM** this 22nd day of October, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL