

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUSSA, J.A., WAMBALI, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 109 OF 2016

**MARIAM SAMBURO (Legal Personal
Representative of Late Ramadhani Abas)..... APPELLANT**

VERSUS

MASOUD MOHAMED JOSHI1ST RESPONDENT

DHERMESH HARMESH JOSHI.....2ND RESPONDENT

**SHARAD BWAGWAJI VAGHELA (Representative
of the Estate of Late B. G. Vaghela).....3RD RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of
Tanzania (Land Division) at Dar es Salaam)**

(Mjemmas, J.)

dated the 18th day of December, 2015

in

Land Case No. 36 of 2009

RULING OF THE COURT

29th August & 11th September , 2019

LEVIRA, J.A.:

The appellant, Mariam Samburo (Legal Personal Representative of Late Ramadhani Abas) was a losing party in Land Case No. 36 of 2009 which she had instituted in the High Court of Tanzania, Land Division at Dar es Salaam. In the said suit, the appellant being the administratrix of the estate of the late Ramadhani Abas (her then husband) who passed away on 3/1/1983 claimed against the defendants (the respondents

herein and one Mohamed Jessa who is not a party to this appeal) for the declaration that she is the owner of the land in dispute (five acres piece of land situated at Mgogoni–Mjimwema), damages amounting to Tshs. 20,000,000/=, costs of the suit and any other reliefs as the court could deem fit. At the end of the trial, the High Court dismissed the plaintiff's suit for lack of sufficient evidence. Aggrieved, the appellant instituted the current appeal through a memorandum of appeal predicated upon five grounds. For reasons that will shortly become apparent, we are not going to reproduce the said grounds herein.

In the cause of preparing for the hearing of this appeal, upon perusal of the record of the High Court, we observed that, at that level, from the trial to the conclusion of the suit, the same was presided over by three different judges. However, there were no reasons assigned by the successor judges during the said change. It is evident from the record of appeal that, on 1/4/2009 the trial started before Mziray, J, (as he then was). On 21/11/2011 the said judge ordered mediation to be attempted. After unsuccessful mediation before Nchimbi, J., on 4/9/2013 Mziray, J. commenced trial. On the said date, he partly heard the evidence of PW1 (the appellant) and ordered the District Registrar Dar es Salaam Zone to submit the record of Kariakoo Primary Court in

respect of Probate Cause No.3 of 1985 in which the appellant was appointed the administratrix of the estate of her late husband.

For some reasons not apparent on the record of appeal, on 24/4/2015 Mjemmas, J. took over and continued the trial. He acknowledged seeing the last order of the court (Mziray, J.) however, he decided to vacate it. Having vacated the said order the learned judge gave the advocate for the plaintiff an option if he so wished, to apply direct to Kariakoo Primary Court for the said record. Thereafter, Mjemmas, J. proceeded with the hearing of the matter from PW2 to PW4 and later defence case till the end of the trial. Hearing was then adjourned to 30/6/2015.

Nothing on the record of appeal is indicating what took place in between but on 20/7/2015 Mrango, J. took over the matter and PW1 was recalled and she gave evidence as indicated from pages 144-145 of the record of appeal. When he took over, Mrango, J. did not record any reason of so doing but proceeded and recorded the evidence of PW1 whose evidence was deferred as alluded above. Having completed recording the evidence of PW1, the plaintiff's case was closed and the court ordered defence hearing to take place on 8 /9/ 2015. However, defence hearing did not take place as scheduled until on 14/9/2015

when parties appeared again before Mjemmas, J. who took over the trial and recorded the defence evidence to the conclusion. Just like Mrango, J., Mjemmas, J. also did not assign any reason for his resumption to hear that suit and at the end of the trial, on 18/12/2015 he delivered the judgment subject to this appeal.

At the hearing of this appeal, the appellant was represented by Mr. Hashim Mtanga, learned advocate whereas, the first and second respondents were represented by Dr. Masumbuko Lamwai, learned advocate and the third respondent enjoyed the services of Mr. Sylvester Shayo, also learned advocate.

Following the above narrated sequence of events during trial, we tasked counsel for parties to address us on the propriety of the succession of the presiding judges at the High Court without assigning reasons in the light of Order XVIII Rule 10(1) of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC).

Dr. Lamwai was the first counsel to address us. He submitted to the effect that, in practice when a judge takes over the trial of a matter from another judge, there must be reasons for such change. While making general reference to case law, Dr. Lamwai stated that, failure to record such reasons vitiates the proceedings. However, he argued that,

currently there is an introduction of overriding objective principle and therefore the position has changed. He said, the proceedings cannot be nullified only by the reason that the successor judge did not record reasons for taking over the suit. According to him, the provisions of Order XVIII Rule 10(1) of the CPC do not intend to make the requirement of recording reasons to be a jurisdictional issue. He added that, in his view, parties to this appeal do not have any complaint about the change of judges and it is not one of the grounds of appeal. He thus urged us to rule out that, the said requirement is not a jurisdictional issue and basing on overriding objective principle we should proceed with the hearing of this appeal on merit.

The line of argument taken by Dr. Lamwai was opposed by other counsel for the parties. On his part, Mr. Shayo was of the view that, it is a mandatory requirement that reasons which prevented the judge from proceeding with the trial of a suit to conclusion must be recorded in the proceedings. He insisted that, recording of reasons is a jurisdictional issue as it goes to the power of the judge in dealing with a specific matter. He urged us to quash the proceedings of the High Court and order hearing of the suit to start afresh.

Mr. Mtanga supported Mr. Shayo's submission. In addition, he said, since the requirement that a successor judge must record reasons for taking over is a jurisdictional issue, it cannot be cured by the overriding objective principle as suggested by Dr. Lamwai.

From the above submissions, we wish to state at the outset that, the law is settled in regard to the succession of judges and magistrates. It gives them power to deal with the evidence taken before another judge or magistrate where the predecessor judge or magistrate is prevented by reason of death, transfer or other cause from concluding the trial of a suit. For clarity, Order XVIII rule 10(1) of the CPC provides 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." [Emphasis added].*

It is in this regard that, in **National Microfinance Bank v. Augustino Wesaka Gidimara T/A Builders Paints & General Enterprises**, Civil Appeal No. 74 of 2016 (unreported) the Court quoted with approval its decision in **M/S Georges Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported) at pages 5-6; where it was held as follows with regard to the above provision:

*"The general premise that can be 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 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.***

[Emphasis added].

See also **Fahari Bottlers Ltd and Another v. the Registrar of Companies and Another**, Civil Revision No.1 of 1999 and **Kajoka Masanga v. Attorney General and Another**, Civil Appeal No. 153 of 2016 (both unreported).

The above quoted extract provides for a clear interpretation and the rationale behind existence of Order XVIII Rule 10(1) of the CPC in the effect that, recording of reasons for taking over the trial of a suit by a judge is a mandatory requirement as it promotes accountability on the part of successor judge. This means failure to do so amounts to procedural irregularity which in our respective views and as rightly stated by Mr. Shayo and Mr. Mtanga, cannot be cured by the overriding objective principle as suggested by Dr. Lamwai. The reason behind being that, the overriding objective principle does not implore or require the Court to disregard jurisdictional matters which go to the root of the

trial of the suit. For it is upon assignment when a judge or magistrate is clothed with authority to entertain a particular matter.

We therefore respectfully differ with the view expressed by Dr. Lamwai that the overriding objective principle contained in section 3A (1) and (2) and 3B (1)(a) of the Appellate Jurisdiction Act, Cap 141 as amended by the Written Laws (Miscellaneous Amendments)(No.3) Act, No.8 of 2018 (the AJA) that the same can rescue the irregularity to the effect that the appeal should proceed to hearing. We wish to emphasise that as stated by the Court in **Mondorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others**, Civil Appeal No. 66 of 2017 (unreported), the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case. (See also **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (unreported).

We think that in the circumstances of the change of successor judges in the Land Case No. 36 of 2009, reasons for the reassignment and take over were most important to be indicated. This is so because even one of the trial judges who took over for the first time, later presided over and concluded the trial after he had left and his

successor took over. We note that, the peculiar circumstances of the appeal at hand go beyond common procedural irregularities addressed in all the cases we referred in this decision because in those cases, there were no take over by the same judge in the same suit twice as demonstrated herein.

Therefore, in the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reasons for the succession advanced on record of appeal. We think that in the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity.

Thus, since the appeal before us is incompetent as it emanated from nullity proceedings and judgment, in exercise of our powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141, RE 2002, we hereby quash the entire proceedings conducted at the trial High Court and set aside the judgment and decree dated 18/12/2015. We remit the

file in respect of **Land Case No. 36 of 2009** to the High Court, Land Division for a fresh trial before another judge in accordance with the law. In the circumstances of this appeal, we make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 7th day of September, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 11th day of September, 2019 in the presence of Mr. Hamza Hashim Mtanga, Counsel for the Appellant, who also holds brief for Dr. Masumbuko Lamwai and Sylvester Shayo, Counsels for the Respondents, is hereby certified as a true copy of the Original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL