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. 78 OF 2016

MIRAGE LITE LTD. ..... APPELLANT

VERSUS

BEST TIGRA INDUSTRIES LTD. .....RESPONDENT

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

(Feleshi, J.)

dated the 4th day of September, 2015
in
Civil Case No. 86 of 2004
.....

RULING OF THE COURT

16th August, & 20th September, 2019

MUSSA, J.A.:

On the 2nd day of July, 2004, the appellant instituted Civil Case No. 86 of 2004 against the respondent in the High Court of Tanzania, at the Dar es Salaam District Registry. As it were, the suit was for breach of contract with respect to electrical installations which were allegedly done by the appellant at the

respondent's edible oil factory on Plot No. 56, Mbagala industrial area, within the city of Dar es Salaam.

Thus, upon detailed facts which were constituted in the plaint, the appellant claimed that on the 5th day of March, 1997 the respondent awarded her a tender for the installations at a fixed price of Tshs. 392,516,929/10; that she duly completed the installations on the 8th day of July, 1998 and handed over the project to the respondent; and that by that time, the final payment balance which was due to her stood at a sum of US$ 126,262.00. In the upshot, the appellant prayed for judgment and decree against the respondent for:-

"(a) Payment of the sum of US$ 126,262.00 as balance on the contract price.

(b) Interest on the above sum as pleaded under paragraph 10 above making a total sum of US$ 151,514.00.

(c) Liquidated damages in the sum of US$ 417,857.00 as pleaded under paragraph 11 above.

(d) Costs of the suit.

(e) Interest on the total sum due under (a), (b) and (c) above at a commercial bank rate of 20% from the date of filing the suit until the date of judgment.

(f) Interest on the decretal sum at the court rate of 12% from the date of judgment until payment in full.

(g) Any other or further reliefs the court may deem fit."

Having filed the plaint, the suit was assigned and placed before Massati, J., as he then was, who, on the 26th day of July, 2004, summoned the parties and deferred the hearing of the matter to the 24th day of August, 2004. On the scheduled day, by a consensus reached by both parties, the respondent was ordered to file her Written Statement of Defence (WSD) by 14th day of September, 2004 and, indeed, she duly filed the WSD on that date.

If we may briefly reflect on the WSD, therein, the respondent refuted each and every material allegation contained in the plaint to which he put the appellant to strict proof thereof. More particularly, the respondent did not quite refute the appellant's detail about winning a tender for the electrical

installations at her factory. Nevertheless, she countered that the appellant won the tender on account of a false representation to the effect that she (appellant) had a professional licence from the Electrical Licencing Board (the ELB) and , as such, she was duly registered by the Contractors Registration Board (CRB), which was not true.

In addition, the respondent enjoined a counter claim through which she refuted the appellant's claim relating to handing over the project. In reality, she countered, the appellant did not hand over the project to her, rather, she abandoned it, following which the respondent had to fetch other electrical works personnel to finish the project. In sum, the respondent prayed for the dismissal of the appellant's suit and judgment in favour of the respondent with respect to the counter claim as hereunder:-

> *"(a) General damages for the stress and inconveniences suffered by the defendant due to the plaintiff's abandonment of the project at the rate to be assessed by the court.*

(b) Interest on (a) above at the ruling commercial Banks' lending rate from the due date to the date of judgment.

(c) Interest on the decretal amount at the court rate from the date of judgment to the date of final full settlement.

(d) Costs.

(e) Any other relief that the Honorable court may deem just and equitable to grant."

Quite apart from the WSD, the respondent also instituted an ancillary application for security for costs under Order XXV of the rules as set out in the first schedule of the Civil Procedure Code, Chapter 33 of the Laws. We shall henceforth refer to the rules as "rules of the Code". The application for costs was deliberated upon lengthy submissions either in support or in opposition but, at the height of the contending arguments, on the 23rd day of February, 2005 Massati, J., granted the application in the sum of US$ 40,000.00. The said sum was ordered to be paid into the court within 21 days from the date thereof. A little later,

on the 31st day of March, 2005 Mr. Rutabingwa, learned Advocate, who had the conduct of the case for the appellant (the plaintiff there) informed the presiding Judge that they have filed an application for a review of the February 23rd decision, whereupon its hearing was slotted for 18th day of July, 2005.

On the scheduled date, the matter changed hands and for some obscure cause, the case was placed before Kalegeya, J., as he then was. Incidentally, the application for review was met by preliminary points of objection which were upheld and on the 21st day of July, 2005 the same was rejected. Next, the suit travelled through a failed mediation attempt and, a good deal later, on the 4th day of November, 2005 Kalegeya, J., made the following order:-

"**COURT**

(i) Mediation is hereby deemed to have failed.

(ii) Matter is hereby re-assigned to Justice Mandia for continuation under O. 8 B CPC.

(iii) Defendants condemned in todays' costs."

It is noteworthy that although the court used the word *"re-assigned"* in the foregoing excerpt, but, in as far as the record of proceedings are concerned, Mandia, J., as he then was, had not, actually, presided over the suit prior to the order. Be what may have transpired, the record indicates that Mandia, J.,presided over the matter for the first time on the 28th February, 2006 following which he ordered the notification of the parties for a hearing. At the hearing which came about the 11th day of September, 2007 the following issues were framed for the court's determination:-

> *"(1) was there a contract between the plaintiff and the defendant for electrical installations at Mbagala factory or not?*
>
> *(2) was there default on the contract terms or not?*
>
> *(3) what are the parties entitled to?*
>
> *(4) Any other relief?"*

Thereafter, on the same day, the appellant featured Harbhajan Singh (PW1) as her first witness in support of the

claim. For a reason which will come to light at a later stage of our Ruling, we need not delve into the details of PW1's testimony. Suffice it to mention that the witness told the trial court that he is the Chairman and Managing Director of the appellant, a company registered and based in Nairobi, the Republic of Kenya. PW1 also reiterated his claims and prayers as pleaded in the plaint and adduced into evidence several documents in support of his case. At the end of his testimony, the hearing of the suit was deferred to the 30th day of October, 2007.

From the record of proceedings, it is deducible that the appellant intended to feature another witness in support of her claim but could not do so at the resumed hearing on account of a change of the respondent's representation from Messrs Nguluma to Kalolo – Bundala, both learned Advocates. As it turned out, the later was not properly versed with the matter due to impromptu instructions and, on the score, he requested for an adjournment which was granted.

Thereafter, the suit travelled through a wave of court mentions up until the 1st day of March, 2010 when it was called on for hearing before Mwarija, J., as he then was. It is, again, noteworthy that, for some unexplained cause, the suit was called before another presiding Judge. The successor Judge took time to grapple with an application, by the respondent, to have PW1 re-called to the witness box which he, however, dismissed in a Ruling handed down on the 21st September, 2012. There then followed several adjournments to enable the appellant procure her last intended witness but, the high – watermark was reached on the 28 day of August, 2014 when the presiding Judge refused a further adjournment and ordered the appellant to close her case and invited the respondent to present his case for defence.

After several adjournments, the suit was eventually called on for hearing on the 15th April, 2015. Nonetheless and, again, for some obscure cause, the hearing of the suit had been shifted to Feleshi, J., as he then was. As it were, the new successor Judge recorded the testimony of Januj Raja (DW1) who happened to be the sole witness for the respondent.

Briefly stated, DW1 introduced himself as one of the Directors of the respondent, a registered limited company which operates the business of edible oil refining at Mbagala, within the city of Dar es Salaam. Again, we refrain from going to the details of his testimonial account, save for the remark that DW1 just as well reiterated his reply, counter-claim and prayer which are comprised in the WSD. At the end of his testimony, he rested the case for the respondent.

On the totality of the evidence, the learned Judge answered the first issue in the affirmative. As he approached the second issue the Judge delved into and accepted the respondent's claim that the contract was obtained through a false representation by the appellant. In the upshot, he drew the following conclusion:-

> *"...it is obvious that the contract between the defendant and the plaintiff is* ***void ab initio****. Therefore, the same was and is incapable of being breached. The second issue is thus disposed accordingly.*
>
> *In view of the foregoing, there is no how a party who misrepresented himself*

or misrepresented vital information can be entitled to the reliefs couched in the plaint. I therefore, dismiss the suit. On the other hand, the party whose consent or acceptance and award (sic) were obtained but by reason of misrepresentation is entitled to general damages.

Despite the fact that no pleading and prayers made in relation to the established misrepresentation by the plaintiff company, bearing in mind the cumulative effect of the mischief done to the Defendant, the Plaintiff shall pay Tshs. ten million (Tshs. 10,000,000/=) to the Defendant being general damages for the inconvenience she suffered from voidable fixed price contract. The plaintiff shall also pay the costs."

The resultant decree was couched as followed:-

"DECREE

WHEREAS *the plaintiff prays for the Judgment and decree for the following orders, that:*

a) *Payment of the US $ 126,262.00 as balance on the contract price*
b) *Interest on the above sum of US $ 126,262.00 as pleaded under paragraph 10 above making a total sum of US $ 151,514.00.*
c) *Liquidated damages in the sum of US $ 417,857.00 as pleaded under paragraph 11 above*
d) *Cost of the suit.*
e) *Interest on the decretal sum at the court rate of 12% from the date of judgment until payment in full.*
f) *Any other and/or further reliefs the court may deem fit.*

AND WHEREAS *the Defendant had in Counter Claim prayed for the dismissal of the Plaintiff's suit and judgment in respect of the counter claim as follows:*

a) *General damages for the stress and inconveniences suffered by the Defendant*

due to the Plaintiff's abandonment of the Project at the rate to be assessed by the Court;

b) *Interest on (a) above at the ruling commercial Bank's leading rate from due date to the date of judgment;*

c) *Interest on the decretal sum at the Court rate from date of Judgment to the date of final and full settlement;*

d) *Costs;*

e) *Any other relief that this Honourable Court may deem just and equitable to grant.*

AND UPON *this Suit and Counter Claim coming for judgment this 4th day of September, 2015 before Hon. E.M. Feleshi, Judge in the presence of Mr. Neema Kayuni, Advocate for the Plaintiff and holding brief of Mr. Bethuel Advocate for the Defendant:*

THIS COURT DOTH HEREBY ORDER THAT

1. *By reason of a misrepresentation by the Plaintiff the Plaintiff's suit is dismissed.*

2. *Save for the award of ten million (Tshs. 10,000,000/=) to the Defendant Company being general damages for the inconvenience she suffered from the voidable fixed price contract the rest players in the Defendant's Counter Claim are dismissed.*
3. *The Plaintiff shall pay the costs.*

BY THE COURT

Given under my hand and the seal of the Court this 4th Day of September, 2015.

E.M. Feleshi
JUDGE

Extracte 2nd day of Oct 2015"

The appellant is aggrieved by the judgment and decree of the High Court and is presently seeking to impugn it upon a memorandum of appeal which comprises four points of grievances, namely:-

"MEMORANDUM OF APPEAL

(Made under Rule 93 (1) of the Tanzania Court of Appeal Rules, 2009)

MIRAGE LITE LIMITED *the above named appellant, appeals to the Court of Appeal of Tanzania against the whole of the above mentioned decision on the following grounds, namely:-*

1. *The learned trial Judge erred in law and on evidence by holding that there was evidence by DW1 Tanuj Raja faulting the competence of the plaintiff company (now appellant) which was not disproved by the plaintiff, while there was ample evidence to prove that the company was competent, that is the evidence of PW1 Harbhajan Singh, right from the submission of tender, evaluation of tender and awarding of the tender, while on the other side there was no independent evidence to support the allegations of DW1 on the alleged incompetence.*
2. *The learned trial Judge erred in law and on evidence by wrongly construing the provisions of* ***sections 11(2) and 19(1) of The Law of Contract Act cap. 345 R.E 2002*** *as to competence and misrepresentation, to imply professional*

competence whereas the company was and is duly registered in Kenya with capacity to contract which is the competence envisaged under the CONTRACT ACT and there was no misrepresentation in the legal sense.

3. *That the learned trial Judge erred in law by awarding defendant (now respondent). The sum of shillings Ten Million as general damages on the misrepresentation alleged, whereas that claim was never pleaded and the court cannot award what is not asked for.*
4. *The learned trial Judge erred in law and on evidence by dismissing the plaintiff's (now appellant's) claim on the basis of the alleged misrepresentation whereas there was sufficient evidence to prove the claim.*

It is proposed to ask the court for an order that the appeal be allowed and the prayers prayed for at the High Court be granted with costs.

Dated this 7th day of June 2016.

.....

J. I. Rutabingwa
Advocate for the Appellant."

When the appeal was placed before us for hearing, the appellant was represented by Mr. Joseph Rutabingwa, learned Advocate, whereas the respondent had the services of Mr. Julius Kalolo – Bundala, also learned Advocate.

As counsel from either side were about to take the floor to argue the appeal, we raised a preliminary issue pertaining to whether or not the decree correctly stated what was actually decided by the trial court in its judgment. As is palpably clear, in the decree the trial court partly stated thus:-

> *"save for the award of ten million (Tshs. 10,000,000/=) to the Defendant company being general damages for the inconvenience she suffered from the voidable fixed price contract, the rest prayers in the Defendant's counter claim are dismissed."*

Seemingly, in the relevant portion of the judgment which we have extracted hereinabove, there is no allusion to the counter claim. Our concern was whether or not the decree had been drawn in accordance with the judgment so as to be in conformity with Order XX Rule 7 of the rules of the Code which goes thus:-

> *"The decree shall bear the date of the day on which the judgment was pronounced and when the Judge or magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree."*

On this query, both Messrs Rutabingwa and Kalolo – Bundala took the stance that although not expressly stated, it is implicit from a portion of the judgment (which we have extracted) that the counter claim was partly sustained with the grant of general damages.

As we retired to deliberate on the issue, it crossed our minds that there is another preliminary and pertinent issue

relating to the fact that the suit giving rise to this appeal was presided over by several Judges at various stages of the proceedings. Moreover, as we have endevoured to demonstrate, no reasons were posted on the record to explain the change of Judges. We, thus, re-summoned the learned counsel from either side to address us on the apparent misnomer.

In response, Mr. Rutabingwa submitted that the failure to post upon record the reasons for the change of Judges was a departure from Order XVIII Rule 10 (1) of the rules of the Code. The learned counsel for the appellant, nevertheless, took the position that the misnomer will only invalidate the proceedings presided over by Feleshi, J. who heard and recorded the evidence of DW1 upon taking over. To him, Rule 10 (1) only restricts a successor Judge or magistrate to *"deal with any evidence or memorandum taken down"* without assigning reasons. In the premises, he said, whereas the proceedings held by Feleshi, J., were vitiated, the proceedings presided by Mandia, J. were in order and should not be invalidated.

On his part, Mr. Kalolo – Bundala went along with the submission that failure to give reasons to account for a change of a Judge or Magistrate is fatal. He however, differed with his collegue on the way forward. The learned counsel for the respondent reminded us that, at the outset, the suit was actually presided over by Massati, J. and there is no explanation whatsoever to account for the various subsequent changes of presiding Judges. Mr. Kalolo – Bundala urged that the justice of the case demands that, the entire proceedings be nullified in revision with an order to commence the suit afresh.

We have dispassionately considered the learned submissions on both issues of our concern. We propose to first address the issue relating to the change of presiding Judges at various stages of the proceedings. To begin with, we deem it instructive to extract Order XVIII Rule 10(1) in full:-

> *"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 out or made by him under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."

We should, however, caution from the very outset that the foregoing extracted rule is not the only consideration to be taken into account when it comes to dealing with the question of change of Judges or Magistrates. There is, in this regard, also the Chief Justice's Circular No. 3 of 1993 on the Abolition of the general calendar of cases and the adoption of the individual judge/magistrate calendar of cases. In the case of **Fahari Bottlers Limited and Another v. Registrar of Companies and Another [2000] TLR 102,** the Court summarised what entails in the individual calendar system in the following words:-

"... the individual calendar system requires that once a case is assigned to an individual judge or magistrate, it has to continue before that particular judge or

magistrate to its final conclusion, 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. The unexplained failure to observe this procedure in this case is very irregular, to say the least. Such irregularities and the accompanying confusion, in our view are not amenable to the appellate process for remedy. They are amenable to the revisional process."

The foregoing pronouncement was fully subscribed in the unreported Civil Appeal No. 173 of 2017 – **Oysterbay Villas Limited v. Kinondoni Municipal council** and, in that case, on account of an unexplained transfer between two judges, the proceedings were quashed under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws (AJA).

In the instant matter the parties are agreed and we fully subscribe that the succession of presiding judicial officers by several judges in a row was irregular and unexplained. In our

view the combined import of Rule 10(1) of Order XVII of the rules of the Code as well as the individual calendar system is to impose a requirement that once the trial of a case has begun before a judge or magistrate, that judicial officer has to preside over it to its completion unless, for some reason to be posted upon record, the judge or magistrate is prevented from concluding the case.

The succession was, so to speak, irregular and fatal and, it only remains to be determined as to which portions of the proceedings were vitiated by the irregular transfer. Mr. Rutabingwa has suggested that the proceedings held by Mandia, J. were in order and should, thus, be spared of nullification. With respect, as we have hinted upon, it was, in the first place, unexplained as to how and why Mandia, J. took over from Massati, J. who had the original conduct of the case. In the circumstances, we think that the only viable option will be to nullify the entire proceedings under the provisions of section 4(2) of AJA. It is further ordered that the matter be remitted back to the High Court for it to place the suit before a different judge for hearing.

Much as our findings and order will dispose of the appeal, we need not venture on the other point of our concern as well as the appellant's grounds of appeal. What is more, since the nullification of the proceedings below was prompted by the Court, *suo motu* we give no order as to costs. Orders accordingly.

DATED at **DAR ES SALAAM** this 11th 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 20th day of September 2019 in the presence of Ms. Ida Rugakingira Counsel for the Appellant and Mr. Aly Ismail, Counsel for the Respondent is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL